



**ANTI  
DEATH  
PENALTY  
ASIA  
NETWORK**

# Death Penalty in Asia

## Law and Practice

INTERNATIONAL  
CONFERENCE  
PROCEEDINGS



NHÀ XUẤT BẢN KHOA HỌC XÃ HỘI

**'DEATH PENALTY IN ASIA: LAW AND PRACTICE'  
INTERNATIONAL CONFERENCE PROCEEDINGS**





# **‘DEATH PENALTY IN ASIA: LAW AND PRACTICE’ INTERNATIONAL CONFERENCE PROCEEDINGS**

**SOCIAL SCIENCE PUBLISHING HOUSE**

**Editorial Board/Ban biên tập**

Sarah Biddulph, Sara Kowal

Nguyễn Thị Quế Anh - Vũ Công Giao

Lã Khánh Tùng - Lê Lan Chi

**Selection Committee/Hội đồng thẩm định**

Sarah Biddulph - Sara Kowal - Kathryn - Vũ Công Giao

The conference and the publication of the proceedings were made within the Postgraduate Program on Human Rights Law of the VNU School of Law, which is supported by the Australian Government through Aus4Skills.

Hội thảo và việc xuất bản kỷ yếu này được thực hiện trong khuôn khổ Chương trình đào tạo sau đại học “Pháp luật về Quyền con người” của Khoa Luật, Đại học Quốc gia Hà Nội, do Chính phủ Australia tài trợ thông qua Chương trình Aus4Skills.

# MỤC LỤC

PREFACE .....	9
1. DAWDLING ON CLEMENCY A GROUND FOR COMMUTING DEATH PENALTY IN INDIA Prof. Dr. Shruti Bedi.....	11
2. THE TENDENCY TO REDUCE AND ABOLISH THE DEATH PENALTY IN ASIAN COUNTRIES: A PERSPECTIVE OF HUMAN RIGHTS-BASED APPROACH Dr. Dang Viet Dat, LLB. Nguyen Dang Cam Nhung .....	28
3. DEATH PENALTY IN CANADA AND ITS ABOLITION: THE WAY TO GO FOR ASIAN COUNTRIES? Sébastien Lafrance.....	44
4. CAPITAL PUNISHMENT FOR DRUG-OFFENSES IN ASEAN: FROM THE PERSPECTIVE OF INTERNATIONAL OBLIGATION Thanh Phuong Hoang and Quynh Anh Nguyen .....	55
5. DEATH PENALTY AND STATE OF EMERGENCY: IN SEARCH OF SOME ASIAN COUNTRIES AND VIETNAM Nguyen Dinh Toan.....	73
6. DEATH PENALTY IN CONFUCIAN LEGAL CULTURE IN CHINA AND VIETNAM Lan Chi Le (Ph.D.) .....	81
7. THE RULE OF LAW AND THE DEATH PENALTY IN EASTERN EUROPEAN COUNTRIES AND EXPERIENCES LEARNT FOR ASIA Xuan Loc Dang .....	97
8. DEATH PENALTY IN VIETNAM CRIMINAL LAW Assoc.Prof. Dr. Tran Van Do , M.A Le Thi Diem Hang .....	114
9. MOVING AWAY FROM THE DEATH PENALTY IN VIETNAM: POSSIBILITIES AND CHALLENGES A/Prof. Dr. Vu Cong Giao, Dr. Nguyen Quang Duc .....	127
10. WHY VIETNAM JUSTIFIES THE DEATH PENALTY? A/Prof. Dr. Dang Minh Tuan, Vu Thanh Cu .....	144

11.	“JUSTICE AS JUST PUNISHMENT” DEATH PENALTY PERCEPTION IN VIETNAM Thi Bich Ngoc, Hoang .....	156
12.	OBSTACLES OF VIETNAM TO JOIN THE SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS LLM. Pham Thanh Tung, LLB. Nguyen Thuy Nguyen .....	173
13.	CRIMINAL INJUSTICE IN DEATH PENALTY: REFLECTION FROM DEBATED CASES IN VIETNAM A/Prof. Dr. Vu Cong Giao and Nguyen Thuy Duong.....	196
14.	THE ROLE OF DECRIMINALIZATION AND DEPENALIZATION IN THE ABOLITION OF THE DEATH PENALTY: THE CASE OF VIETNAM IN THE PERIOD 1985 - 2015 Vu Dinh Hoang and Vu Viet Tuong .....	214
15.	DEATH PENALTY IN FEUDAL LAW OF CHINA AND VIETNAM A/Prof. Dr. Do Duc Minh .....	233
16.	DEATH PENALTY IN THE LAW OF FEUDAL DYNASTIES OF VIETNAM Hoang Dinh Duyen .....	254
17.	NOT THERE YET, BUT GETTING THERE DEATH PENALTY FOR DRUG OFFENSES IN INTERNATIONAL AND VIETNAM’S LAWS Tran T. Thu Thuy, Nguyen Tien Duc.....	269
18.	DEATH PENALTY OF DRUG - RELATED CRIMES: CASE STUDY IN CENTRAL PROVINCES IN VIETNAM A/Prof.Dr. Dinh Thi Mai, Ha Thi Hong Tham .....	297
19.	WHAT ARE THE SPECIFIC ACTIONS IF VIETNAM STILL RETAINS THE DEATH PENALTY FOR DRUG-RELATED OFFENCES? Dr. Hai Thanh Luong, Jack Ta LLM.....	319
20.	ABOLITION OF THE DEATH PENALTY FOR DRUG-RELATED CRIMES IN VIETNAM: OPPORTUNITIES AND CHALLENGES Dr. Pham Hong Hanh, Ha Thanh Hoa .....	338
21.	THE RIGHT TO LIFE AND THE DEATH PENALTY: REFLECTION FROM DRUG-RELATED CRIMES IN VIETNAM Dr. Mac Thi Hoai Thuong.....	356
22.	LEGAL FRAMEWORK AND PRACTICE OF THE EXCLUSION OF THE DEATH PENALTY ON PREGNANT WOMEN OR MOTHERS OF YOUNG CHILDREN IN VIETNAM LLM. Hoang Thi Ai Quynh , A/ Prof. Dr. Dang Minh Tuan .....	368

---

23.	DEATH PENALTY AND THE RELATION WITH LIMITATION OF RIGHTS UNDER VIETNAMESE LAW Quynh Mai Le, Thuy Hang Tran .....	380
24.	LEGAL DEFENSE IN DEATH PENALTY CASES IN VIETNAM A/Prof., Dr. Nguyen Ngoc Chi .....	395
25.	WRONGFUL DEATH PENALTY AND THE RIGHT TO COLLECT EVIDENCE: REFLECTION FROM VIETNAMESE CONTEXT Lan Ngoc Nguyen, Diep Thi Le .....	407



## PREFACE

Stemming from its nature of deprivation of the right to life, death penalty is the most severe punishment, considered a necessary retribution on offenders of the most serious crimes. Nonetheless, the retention or abolition of death penalty has been a long-lasting controversial question in terms of various aspects: the right to life and the limitation thereof, even when the penalty is imposed only on the most serious crimes; the penalty's brutality and its substantive effect, and its possibility of separating and impairing social moral values. Capital punishment has been removed in many countries around the world but still present in multiple jurisdictions, especially in Asia. Asia accounts for 60 percent of the world's population and more than 90 percent of the world's executions. Therefore, any change in the death penalty in Asia will affect this matter in the entire world.

In that context, an online conference titled "Death Penalty in Asia: Law and Practice" has been hosted on 18th and 19th February 2021 by:

- Asian Law Centre, Melbourne Law School, The University of Melbourne
- School of Law, Vietnam National University Hanoi
- Anti-Death Penalty Asia Network (ADPAN)
- Graduate Academy of Social Sciences, Vietnam

The objectives of this conference were to provide an open forum for experts from various countries to discuss theoretical and practical aspects of the use of death penalty in Asia; as well as to gather information about legal provisions and practical abolition of this punishment in different Asian jurisdictions. Presentations and ideas discussed in the conference mentioned diversified themes, such as: Challenges relating to the Death Penalty (including wrongful conviction, racial bias); Attitudinal Work relating to the Death Penalty (including public opinion); Social Impact of the Death Penalty (including family, stigma, retribution for victims' families); Drugs and the Death Penalty; Clemency across Asia; Lethal Injection and Diplomacy; Mental Health and the Death Penalty.

There are 25 papers included in this book of conference proceedings. School of Law, Vietnam National University, Hanoi decides to publish the book to disseminate foreign and domestic scholars' expert researches on death penalty and to share knowledge thereof in comparison and connection with other countries in Asia and in the world.

On this occasion, School of Law, Vietnam National University, Hanoi acknowledges the contribution of scholars attending the conference, the Asian Law Centre, Melbourne Law School, the University of Melbourne, Anti-Death Penalty Asia Network (ADPAN), Graduate Academy of Social Sciences, Vietnam – our co-organizers with valuable support. We would like to thank the Selection Committee, the Editorial Board, our distinguished colleagues for their fruitful contribution: Dr. Mai Sato, Mr. Dobby Chew, Ms. Debbie Yu, Professor Julian McMahon AC, Dr. Dinh Thi Mai, Mr. Nguyen Ngoc Toan, Ms. Ngo Minh Huong, as well as Mr. Vu Thanh Cu and other volunteers for their effectively participating in the course of technically editing the proceeding book.

Hanoi, July 2021

**School of Law, Vietnam National University, Hanoi**

# DAWDLING ON CLEMENCY A GROUND FOR COMMUTING DEATH PENALTY IN INDIA

Prof. Dr. Shruti Bedi<sup>1</sup>

**Abstract:** *After being awarded the death penalty, the constitutional framework in India provides that a convict may, after exhausting specific judicial remedies, approach the President or the Governor of a State to exercise their power of clemency to grant pardons and reprieves. The courts in India have chosen to rule in favor of the convicted persons whose mercy petitions have been rejected by the President by commuting their death sentences on the ground that there has been a delay in rejection of their clemency petition. This paper argues that the courts cannot intervene solely on unexplained delay by the intervention must be based on some additional ‘supervening circumstances.’*

**Keywords:** Death penalty, inordinate delay, supervening circumstances, clemency, mercy petition.

*The death penalty differs from all other forms of criminal punishment, not in degree but kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a fundamental purpose of criminal justice. Furthermore, it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.*

*- Justice Potter Stewart of the US Supreme Court in Furman vs. Georgia<sup>2</sup>*

## INDIAN CRIMINAL LAW: ‘LIFE IMPRISONMENT IS THE RULE’

As in other jurisdictions, the criminal law in India attempts a balance between the ‘social interests’ and ‘individual interests.’<sup>3</sup> Consequently, the legislature must walk the tightrope of ensuring respect for human rights and freedoms while criminalizing

---

1 Professor (Dr.) of Law, University Institute of Legal Studies, Panjab University, Chandigarh; Co-ordinator, LL.M. (Distance Education) Course, USOL, Panjab University; Director, Centre for Constitution and Public Policy, UILS, PU; TEDx speaker. She has authored 2 books and co-edited 4 books. Her current area of research includes specific issues of rights under comparative constitutional law. Email id: dr.shrutibedi@gmail.com.

2 *Furman vs Georgia* 408 US 238 (1972).

3 K.I. Vibhute, *PSA Pillai’s Criminal Law* (Lexis Nexis 2014) Ch. 1.

unacceptable human conduct.<sup>1</sup> In India, the Indian Penal Code, 1860<sup>2</sup> (IPC) operates currently as the primary and substantive criminal law source. The death penalty as a punishment for certain grave offenses is retained in India under the IPC and some other statutes. However, life imprisonment is also provided as an alternative means of punishment. Under the Indian criminal law, “life imprisonment is the rule and death penalty the exception.”<sup>3</sup> Under the Indian Code of Criminal Procedure, 1973 (Cr.P.C.), while awarding the death penalty, ‘specific reasons’ have to be mentioned in the judgment. However, on account of the lack of statutory provisions or guidelines, “the death sentence jurisprudence has become ‘judge-centric’ rather than ‘principle-centric.’”<sup>4</sup>

### DEATH PENALTY: LEGISLATIVE FRAMEWORK

The Supreme Court of India in *Bachan Singh v. the State of Punjab*<sup>5</sup>, while relying on the 35<sup>th</sup> Report of the Law Commission of India<sup>6</sup>, upheld the constitutional validity of the death penalty only when applied as an exceptional penalty in the *rarest of rare* cases. The court reiterated a position in a few other cases.<sup>7</sup> However, there is not a single offense under the IPC that is subjected to a mandatory death sentence. There are various provisions under the Indian Penal Code, 1860 which provide for the death penalty as punishment are:

*Aggravated Murder:* Murder is punishable by death under Section 302, IPC.

*Kidnapping not resulting in Death:* Section 364A, IPC punishes the offense of kidnapping or detaining of an individual with death if the kidnapper threatens to kill or harm the victim, in cases where there is a possibility of death or harm to the victim by the conduct of the kidnapper, or if the victim is actually harmed. Further, kidnapping for ransom in which the victim is killed is punishable by the death penalty.<sup>8</sup>

*Murder in the course of committing an Armed Robbery:* Under Section 396, IPC, if any member of a group murders in committing an armed robbery, the death penalty can be awarded to all members of the group.

1 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press 2009) Ch. 3.

2 Act 45 of 1860. It came into force on Jan. 2, 1862. It was drafted by Thomas Babington Macaulay and others-John Macpherson Macleod, George William Anderson and F Millett.

3 K.I. Vibhute, ‘Choice Between ‘Death’ and ‘Life’ for Convicts: Supreme Court of India’s Vacillation Sans Norms’, 59 JILI (2017) 221, 221.

4 *Ibid.*

5 *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

6 Law Commission of India, ‘Mode of Execution of Death Sentence and Incidental Matters’ (Report No. 187, October 2003) <<http://lawcommissionofindia.nic.in/reports/187th%20report.pdf>> accessed 26 Dec. 2020.

7 *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470.

8 Indian Penal Code, 1960, section 364A.

*Rape not Resulting in Death:* Section 376A, IPC, incorporated under the Criminal Law (Amendment) Act, 2013, provides for the death penalty, where a person, who in the course of a sexual assault inflicts the injury that causes the victim to die or to be left in a “persistent vegetative state.” Repeat offenders of gang rape are also punishable by death.<sup>1</sup>

*Treason:* Treason has always been considered to be one of the gravest offenses justifying the imposition of the death penalty. Under Section 121, IPC, waging or attempting to wage war against the government, and under Section 132, IPC, assisting officers, soldiers, or members of the Navy, Army, or Air Forces in committing mutiny punishable by the death penalty.

*Criminal Conspiracy and Attempt to Murder:* Being a party to a criminal conspiracy to commit a capital offense is punishable by death under Section 120B, IPC. Further, an attempt to murder by those sentenced to life imprisonment is punishable by death if the attempt results in harm to the victim.<sup>2</sup>

*Assisting children or disabled to commit suicide:* Assisting individuals under the age of 18, mentally ill, mentally disabled, or intoxicated in committing suicide is punishable by the death penalty under Section 305, IPC.

Besides the IPC, there are various other laws and statutes in India, which also prescribe the death penalty, including the Unlawful Activities (Prevention) Act, 1967 (sections 10 & 16)<sup>3</sup>; organized crimes under various State Acts of Maharashtra, Karnataka, Andhra Pradesh, and Gujarat<sup>4</sup>; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (section 3(2)(i)).

These offenses/provisions vest discretion in the courts to opt for either two sentences, death or life imprisonment. However, the court is required to record ‘special reasons’ for imposing a death sentence, in preference to the sentence of life imprisonment, and getting it confirmed from the high court to which it is subordinate.<sup>5</sup>

---

1 Criminal Law (Amendment) Act, 2013, section 9. The horrific and brutal gang-rape and murder of a 23-year-old woman in Delhi, India, in December 2012, resulted in country wide protests, mooting for harsher punishments for rape. Consequently, the Criminal Law (Amendment) Act, 2013 was enacted which incorporated the new Section 376D, IPC, where punishment for gang rape is rigorous imprisonment of 20 years which may extend to life imprisonment, which is imprisonment for the remainder of natural life of that person.

2 Indian Penal Code, 1960, section 307.

3 See generally Shruti Bedi, *Indian Counter Terrorism Law* (Lexis Nexis 2016). The Unlawful Activities (Prevention) Act, 1967 punishes the offences of unlawful activities and terrorism.

4 Maharashtra Control of Organised Crime Act 1999, section 3(1)(i); Karnataka Control of Organised Crime Act 2000, section 3(1)(i); Andhra Pradesh Control of Organised Crime Act 2001, section 3(1)(i); Gujarat Control of Terrorism and Organised Crime Act, 2015, section 3(1)(i).

5 Vibhute (2014), supra.

## DEATH ROW CASES: THE EXECUTIVE POWER OF CLEMENCY

The President of India and the Governor of a State are vested with the constitutional power to pardon or commute a sentence, including a death sentence, of any convict.<sup>1</sup> This power of clemency bestowed by the Constitution on the President and the Governor of a State is exclusive and absolute. It cannot be curtailed by any statutory provisions of the CrPC (sections 432, 433, 433A), the Prison Acts, or rules. However, this power of the President or Governor is to be exercised *reasonably and on the advice of the respective council of ministers*.<sup>2</sup> Accordingly, “the manner of the exercise of the power and the order rejecting mercy petition of a convict can be challenged, *inter alia*, on the ground that the President/Governor has not applied his mind or not considered all the relevant materials or considered irrelevant materials, influenced by some political or extraneous considerations, or exercised his powers arbitrarily.”<sup>3</sup> However, there is a limited judicial review on the exercise of the constitutional power<sup>4</sup> as the judiciary only intervenes in cases where the exercise of power “lacks due care and diligence or has become whimsical.”<sup>5</sup> Excessive and unwarranted delay in disposal of mercy petition by the President or Governor and the resultant delay in execution of death sentence becomes a relevant factor in commuting death sentence to life imprisonment.<sup>6</sup>

1 The Constitution of India 1950, arts. 72 and 161.

2 See *Maru Ram v. Union of India*, (1981) 1 SCC 107; *State (NCT of Delhi) v. Prem Raj*, (2003) 7 SCC 121; *Ramraj @ Nabho @ Bhinu v. State of Chhattisgarh*, (2010) 1 SCC 573; *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1. [Emphasis mine].

3 Vibhute (2017), *supra*.

4 See *Epuru Sudhakar v. Government of Andhra Pradesh*, (2006) 8 SCC 161; *Narayan Dutt v. State of Punjab*, (2011) 4 SCC 353.

5 *Shatrughan Chauhan* (2014), *supra*.

6 See *Vivian Rodrick v. State of West Bengal*, (1971) 1 SCC 468; *State of Uttar Pradesh v. Paras Nath Singh*, AIR 1973 SC 1973; *N. Sreeramulu v. State of Uttar Pradesh*, (1974) 3 SCC 314; *S. Parthasarathi v. State of Andhra Pradesh*, (1974) 3 SCC 376; *Ragubir Singh v. State of Haryana*, (1975) 3 SCC 37; *Ediga Ananma v. State of Andhra Pradesh*, (1974) 4 SCC 443; *Chawala v. State of Haryana*, (1974) 4 SCC 579; *Joseph Peter v. Goa Daman and Diu*, (1977) 3 SCC 280; *State of Uttar Pradesh v. Sugher Singh*, (1978) 1 SCC 178; *State of Uttar Pradesh v. Lalla Singh*, (1978) 1 SCC 142; *Sadhu Singh v. State of Uttar Pradesh*, (1978) 4 SCC 428; *Bhagwan Bux Singh v. State of Uttar Pradesh*, (1978) 1 SCC 214; *Rajendra Prasad v. State of Uttar Pradesh*, (1979) 3 SCC 646; *State of Uttar Pradesh v. Sahai*, (1981) 3 SCC 635; *T.V. Vatheeswaran v. State of Tamil Nadu*, 1984 Supp SCC 648; *Javed Ahmed v. State of Maharashtra*, (1985) 1 SCC 275; *Triveniben v. State of Gujarat*, (1986) 4 SCC 574. But see, *Rishideo v. State of Uttar Pradesh*, AIR 1955 SC 331; *Bharawnd Mepadnna v. State of Bombay*, AIR 1960 SC 289; *Nachiar Singh v. State of Punjab*, (1975) 3 SCC 266; *Maghar Singh v. State of Punjab*, (1975) 4 SCC 234; *Lajar Mashri v. State of Uttar Pradesh*, (1976) 1 SCC 806; *State of Maharashtra v. Champalal*, (1981) 3 SCC 610; *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253; *Shatrughan Chauhan v. Union of India*, *supra*; *Ajay Kumar Pal v. Union of India*, (2014) 13 SCALE 762.

Delayed execution of death sentence is presumed to be dehumanising in nature [*Shatrughan Chauhan v. Union of India*, *supra*; *V Sriharan @ Murugan v. Union of India*, (2014) 4 SCC 242].

While the matter is pending before the courts for a final decision, the executive process for the commutation of a death sentence can be initiated.<sup>1</sup> Where the Supreme Court finally upholds the death sentence or dismisses the special leave petition, it is the duty of the Superintendent of the jail to inform the convicted prisoner of the same.<sup>2</sup> Thereafter, the convict is allowed a period of seven days to submit a mercy petition to the Governor (in case of a State) or the President (in case of a Union Territory).<sup>3</sup> If the governor rejects the mercy petition, it is forwarded to the Secretary, Ministry of Home Affairs ('MHA'), Government of India.<sup>4</sup>

The President, after examining the case on its merits<sup>5</sup>, gives his decision, which is non-justiciable, even if no reason is given.<sup>6</sup> The power and the procedure to exercise this power are carried out at the discretion of the executive. The Court has refused to spell out any guidelines for the exercise of this power as it has held power under Article 72 to be of the "widest amplitude."<sup>7</sup>

### **DELAY IN EXECUTION OF DEATH PENALTY: VIOLATING HUMAN DIGNITY**

Under Article 21<sup>8</sup> of the Indian Constitution, the procedure established by law, depriving a person's life or personal liberty, has to be fair and just. It cannot be fanciful, capricious, oppressive, or arbitrary.<sup>9</sup> Human dignity, available to all persons in India<sup>10</sup>, has been accorded an extremely high value under article 21, read with articles 14 and 19. This obligates the state not to incarcerate except under law which is fair, just, and reasonable in

---

Delay in execution of death sentence, not caused at the instance of the convict himself, renders the process of execution of death sentence arbitrary, whimsical, capacious and, therefore, becomes inexecutable. See K.I. Vibhute, 'Delay in execution of death sentence as an extenuating factor and the Supreme Court of India: Jurisprudence and jurists' prudence' (1993) 35 *Journal of the Indian Law Institute* 122. In addition to the cases discussed in the cited paper also see, *Jagdish v. State of Madhya Pradesh*, (2009) 9 SCC 495; *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253; *Shatrughan Chauhan supra*; *Ajay Kumar Pal v. Union of India*, (2014) 13 SCALE 762.

1 *In re Maddela Yerra Channugadu*, AIR 1954 Mad 911.

2 *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195, [23].

3 *Ibid.*

4 *Ibid.*

5 *Kehar Singh v. Union of India*, (1989) 1 SCC 20, [11].

6 *G. Krishta Goud v. State of A.P.*, (1976) 1 SCC 157; *Maru Ram v. Union of India*, (1981) 1 SCC 107.

7 *Kehar Singh v. State (Delhi Administration)*, (1988) 3 SCC 609, [11].

8 Constitution of India, 1950, Art. 21 - Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

9 See *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Charan Lai Sahu v. Union of India*, (1990) 1 SCC 613.

10 Shruti Bedi & Sebastien Lafrance, 'The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada' in S. Khurshid, L. Malik & Y.P. Singh (eds.) *The Supreme Court and the Constitution* (Wolters Kluwer 2020) 67.

its procedural essence.<sup>1</sup> Accordingly, the question arises as to whether death-row convicts have the right to be treated as human beings till they are put to gallows. Do they cease to be human beings' *sans* human dignity during incarceration and are thereby justifiably denied freedoms or rights of humanity, or human dignity?<sup>2</sup>

Inordinate delay in the execution of the death penalty has often been a significant cause of concern, especially in well-known cases such as that of Mumbai terror (26/11) attack convict Ajmal Kasab<sup>3</sup>, Parliament blast convict Afzal Guru<sup>4</sup>, and the recent 2012 Delhi gang-rape case<sup>5</sup>. The procedure under Indian law usually results in a considerable lapse of time between the imposition of a death sentence by a session court and the final acceptance or rejection of the mercy petition by the President/Governor. This is based on the requisite confirmation of death sentence by the high court, proper appeals from there to the Supreme Court, and after that mercy petition by the convict to the President/Governor. During this period, the sentence of death vividly hangs on the head of the convict as he undergoes horrific agony and anxiety.

In *T.V. Vatheesmaran v. State of Tamil Nadu*,<sup>6</sup> a Supreme Court division bench of O. Chinnappa Reddy and R.B. Misra JJ. was asked to examine the question as to whether a delay in the execution of death sentence offends the constitutional guarantee recognized in article 21 of the Constitution and thereby entitles a person under death sentence to claim its replacement by the sentence of life imprisonment. The court, while relying on the minority opinion of Lord Scarman and Lord Brightman of the Privy Council, in *Noel Riley v. A.G. of Jamaica*<sup>7</sup>, opined:

It is, of course, true that a period of anguish and suffering is an inevitable consequence of the sentence of death. Nevertheless, a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. Moreover, it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which

1 *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360.

2 K.I. Vibhute, 'Right to Human Dignity of Convict under Shadow of Death and Freedoms Behind the Bars in India: A Reflective Perception' (2016) 58 JILI 15, 23.

3 Sahil Makkar, 'Ajmal Kasab, lone surviving 26/11 terrorist, hanged' (*Mint* 2012) <<https://www.livemint.com/Politics/36o0Bof48lPfJawdp08IqL/Ajmal-Kasab-lone-surviving-2611-terrorist-hanged.html>> accessed 26 Dec. 2020.

4 BJP, 'Afzal Guru should have been executed much earlier' (*The Economic Times* 2013) <<https://economictimes.indiatimes.com/news/politics-and-nation/afzal-guru-should-have-been-executed-much-earlier-bjp/articleshow/18415041.cms?from=mdr>> accessed 27 Dec. 2020.

5 Maneesh Chibber, 'Why it's wrong to question 'delay' in hanging of convicts in 2012 Delhi gangrape-murder case' (*The Print* 2020) <<https://theprint.in/opinion/why-its-wrong-to-question-delay-in-hanging-of-convicts-in-2012-delhi-gangrape-murder-case/352823/>> accessed 27 Dec. 2020.

6 *T.V. Vatheesmaran v. State of Tamil Nadu*, (1983) 2 SCC 68.

7 *Noel Riley v. A.G. of Jamaica*, (1982) 3 W.L.R. 557 (569-70) (P.C.).

makes prolongation inhuman and degrading. The anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual are vividly described in the evidence of the effect of the delay

While awaiting the outcome of the mercy petition, the prisoner on death row is subjected to a “lingering death,” which is something more than the mere extinguishment of life.”<sup>1</sup> Prolonged detention, awaiting execution of death sentence, has a dehumanizing impact on the prisoner.<sup>2</sup> The “brooding horror of hanging”<sup>3</sup> tortures the prisoner, daily. Resultantly, the “dehumanizing factor of prolonged delay in the execution of a sentence of death has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way.”<sup>4</sup> This, in turn, offends the constitutional guarantee under Article 21 of the Indian Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law.<sup>5</sup>

*Vatheeswaran* referred to three cases<sup>6</sup> in which delay in execution of death sentence for two to three and half years was held adequate by the Supreme Court to replace the sentences of death by imprisonment for life and resultantly held that the delay exceeding two years in the execution of the sentence of death is sufficient to quash the sentence of death and to substitute it by imprisonment for life. This case “sets a premise that carrying out a death sentence per se is different from its execution after an inordinate delay.”<sup>7</sup> While the former is a sentence authorized by law, the latter is not.

The law pertaining to death-row convicts currently flows from the Supreme Court’s decisions in *Shatrughan Chauhan v. Union of India*<sup>8</sup> and *Epuru Sudhakar v. Government of AP*<sup>9</sup>. While *Shatrughan Chauhan* lays down guidelines to protect the right to life and personal liberty of death-row prisoners, as enshrined under Article 21 of the Constitution, *Epuru Sudhakar* provides the Supreme Court with limited powers to review mercy petitions rejected by the President.<sup>10</sup>

1 S.B. Sinha, ‘To Kill or Not To Kill: The Unending Conundrum’ (2012) 24(1) *National Law School of India Review*, 24.

2 *Ibid.*

3 *Ediga Anamma v. State of Andhra Pradesh*, (1974) 4 SCC 443.

4 *Vatheeswaran* (1983), *supra*.

5 *Ibid.*

6 *Eidga Anamma* (1974), *supra*; *Bhagwan Bux* (1978), *supra*; and *Sadhu Singh* (1978), *supra*.

7 *Vibhute* (1993), *supra*.

8 *Shatrughan Chauhan* (2014), *supra*.

9 *Epuru Sudhakar* (2006), *supra*.

10 Tanaya Thakur & Amit Kumar, ‘Delay in Execution of Death Penalty: Need for a balance’ (*Bar and Bench* 2020) <<https://www.barandbench.com/columns/delay-in-execution-of-death-penalty-need-for-a-balance>> accessed 27 Dec. 2020.

“The legal basis for treating inordinate or undue delay in disposal of mercy petition by the President/Governor as a ground for commuting the death sentence to life imprisonment is that the pain-mental, physical and emotional, caused by the inordinate delay in disposal of his petition goes against the spirit of Article 21 of the Constitution, which inheres a right in every prisoner till his last breath and puts the higher judiciary under the constitutional obligation to protect the fundamental right to life and personal liberty of a person even when the noose is being tied on his neck.”<sup>1</sup> The voice of justice and fair play under Article 21 stands like a “sentinel over human misery, degradation, and oppression.” This “reverberates through all stages-the trial, the sentence, the incarceration and finally, the execution of the sentence.”<sup>2</sup>

### **DELAY AS A GROUND FOR COMMUTATION: JUDICIAL REVIEW OF CLEMENCY**

A few cases must be analyzed to deal with the question of delay as a ground for the commutation of the death penalty. Justice G.S. Singhvi delivers two decisions of *Devender Pal Singh Bhullar v. State* (NCT of Delhi) and *Mahendra Nath Das v. Union of India* in a division bench reflects consistency in the reasoning.

The petitioner in *Bhullar* had been held responsible for the death of the Senior Superintendent of Police of Chandigarh through the use of remote-controlled bombs. Nine persons had been killed in the attack on the then President of the Youth Congress by employing forty kilograms of RDX. The petitioner was held guilty under Sections 419, 420, 468, and 471, IPC; Sections 2, 3, and 4, Terrorist and Disruptive Activities Act, 1987 (TADA); and Section 12 of the Passports Act, 1967. The review petition had been dismissed by the Supreme Court.

The petitioner in *M.N. Das* was undergoing his sentence of life imprisonment for the murder of one Rajen Das, and while he was out on bail, he killed another person. He was then sentenced to death by the Sessions Court, which the High Court subsequently confirmed. On appeal, the Supreme Court noted the aggravating circumstances of the manner of murder, which were, blows to the body of the victim with a sword, amputating his hand, and beheading him, that too when he had already been sentenced to life imprisonment. These factors left the Court with no choice but to impose the death penalty. Delivered 20 days after *Bhullar*, *M.N. Das* also grappled with the delay of the executive in responding to the petitioners' clemency petitions.

After these two matters, the Chief Justice of India constituted a larger bench in

---

1 *Sher Singh v. State of Punjab*, (1983) 2 SCC 344; *Triveniben v. State of Gujarat*, (1986) 4 SCC 574. Also see Vibhute (2016), *supra*, 32.

2 *Sher Singh* (1983), *supra*, [20].

*Shatrughan Chauhan*<sup>1</sup> to deal with the question of delay as a ground for commutation of the death penalty. This case dealt with twelve different writ petitions. While eleven of the twelve writs petitions dealt with pleas for commutation of death sentences, one petition was a solitary plea by the People's Union for Democratic Rights with a prayer to set guidelines for dealing with similar mercy petitions. There was one plea for commutation solely on the ground of mental illness, one on the grounds of delay in hearing the clemency petition as well as mental illness, one on the grounds of delay and solitary confinement, while the others were solely on the basis of delay by the executive in deciding the mercy petitions.

The contentions in the *Bhullar* case were significantly based on the understanding of 'due process' under the Indian Constitution. Articles 14, 19, and 21 of the Indian Constitution formulate the tripartite 'golden triangle' test, that every executive and a legislative decision must pass, after the *Maneka Gandhi v. Union of India*<sup>2</sup> decision. This test ensures that the State action is just, fair and reasonable, and is in consonance with the standards of liberty, dignity, and freedom guaranteed under Part III of the Constitution. Resultantly, the inordinate delay in the executive's decision to reject the petitioner's mercy petition offended these established principles. In the present matter, the inhumane and degrading treatment of the petitioner, on account of the delay, had left the petitioner mentally ill. Moreover, the petitioner had prayed for commutation on compassionate grounds as circumstances had drastically changed from the time the offense was committed in *M.N. Das*. It was argued that a delay of twelve years was sufficient reason for the court to exercise its powers under Article 136 and to commute the death penalty.

### **The Terror Exception**

In *Devender Pal Singh Bhullar*, the Supreme Court was faced with the question as to whether terrorists, who habitually commit grave crimes, deserve such constitutional protection against undue delayed rejection of their mercy petition by the President/Governor and whether it is obligatory on the part the constitutional courts consider it as a supervening circumstance for commuting their death sentence to life imprisonment. The court ruled that terrorists convicted under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (and other similar statutes) do not deserve any sympathy, and the question of considering the delayed rejection of their mercy petition as a supervening factor, therefore, does not arise. Justice Singhvi speaking for the court, held,

67. We are also of the view that the rule enunciated in *Sher Singh case* [(1983) 2 SCC 344], *Triveniben case* [(1989) 1 SCC 678] and some other judgments that long

---

1 *Shatrughan Chauhan* (2014), supra.

2 *Maneka Gandhi* (1978), supra.

delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for an offense under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes. Paradoxically, the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights.

By far, the *Triveniben* rule is the most definitive judicial dictum on 'delay' matters, although judicial pronouncements subsequently have deviated from this position. The rule, simply put, is that delay must be seen in the light of all circumstances to constitute a ground for commutation of the death sentence. *Bhullar* carved out an exception to the *Triveniben* rule, referred to as the 'terror exception.' It was felt that though the *Triveniben* rule reflected the correct position of law, it did not apply to offenses where a conviction was under the Terrorist and Disruptive Activities (Prevention) Act, 1987 or related statutes, the reason being that in cases of terrorist activities there was a higher threshold of culpability than other offenses.<sup>1</sup> Further, the Court placed an additional burden on the petitioner to show that the physical or mental illness due to detention was of such a degree that it rendered the death sentence as cruel, inhumane, and degrading, and therefore, non-executable.<sup>2</sup>

After that, in *M.N. Das*, the existence of the rule that an inordinate delay will give rise to a cause of action was acknowledged, but it was clarified that the same must be coupled with other circumstances mandating commutation. The court held that the delay of twelve years, coupled with the rejection of the clemency petition by the President being *ultra vires*, jointly constituted grounds for vacating the death sentence.

However, subsequently, in *Shatrughan Chauhan*, a three-judge bench of the Supreme Court, CJI, P. Sathasivam, Ranjan Gogoi, and Shiva Kirti Singh JJ dealt with the *Bhullar* "terror exception." The court felt that the *Bhullar* dictum is *per incuriam*, erroneous. There is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. It held:

---

1 *Bhullar* (2013), supra, [8]. Terrorist offences have a demonstrative effect which has the tendency of dividing large sections of society and also induces the youth to join mindless militant campaigns in the name of religion or other objectives that can result in the death of many.

2 *Bhullar* (2013), supra, [46].

78. Taking guidance from the above principles and in the light of the ratio enunciated in *Triveniben*, we are of the view that unexplained delay is one of the grounds for commutation of the sentence of death into life imprisonment, and the said supervening circumstance applies to all types of cases including the offenses under TADA. The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive. The argument of Mr. Luthra learned ASG that a distinction could be drawn between IPC and non-IPC offenses since the nature of the offense is a relevant factor is liable to be rejected at the outset. Given our conclusion, we cannot share the views expressed in *Devender Pal Singh Bhullar*.

Resultantly, the convict's family filed a curative petition in *Navneet Kaur v. State (NCT of Delhi)* before the Supreme Court on February 19, 2014.<sup>1</sup> The Court ordered a medical examination of Bhullar's health to determine his mental condition. After perusal of the medical report and in light of the dictum in *Shatrughan Chauhan*, the convict's death sentence was commuted to life imprisonment. Additionally, on the same basis, the Supreme Court commuted the death sentences of Rajiv Gandhi's assassins on account of delay.<sup>2</sup>

*Shatrughan Chauhan* listed specific guidelines for the uniform implementation of the existing procedure. Under the more giant umbrella of Article 21, the Court held that solitary confinement prior to the rejection of a mercy petition is unconstitutional; legal aid should be provided as a matter of right, and the rejection of a mercy petition should be intimated to the nearest Legal Aid Clinic, the prisoner and his family members; the self-imposed guidelines of the Union Government should be implemented uniformly without delay; a minimum of fourteen days' notice should be given to the convict before execution; regular mental health evaluation of death row convicts should be undertaken; all documents about the case should be made available to the convict; facilitation of meeting between the convict and family prior to execution should be ensured, and there should be compulsory post-mortem after execution.<sup>3</sup>

### **DELAY AND 'SUPERVENING CIRCUMSTANCES': GROUNDS FOR COMMUTATION**

The question of delay as a ground for commutation of death sentences has arisen in numerous cases. However, on account of the conflicting decisions in *Vatheeswaran*, *Sher Singh v. the State of Punjab*<sup>4</sup> and *Javed Ahmed Abdul Hamid Pawala v. the State of Maharashtra*<sup>5</sup>, the Supreme Court felt that the issue ought to be referred to a constitution

1 *Navneet Kaur v. State (NCT of Delhi)*, (2014) 7 SCC 264.

2 *Union of India v. V. Sriharan*, (2014) 11 SCC 1.

3 *Shatrughan Chauhan* (2014), supra, [240].

4 *Sher Singh* (1983), supra.

5 *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra*, (1985) 1 SCC 275

bench.<sup>1</sup> Consequently, the court's earlier final order in *Triveniben* has been the primary source of law on the issue of delay as a ground for commutation of the death penalty:

An undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32. However, this Court will only examine the nature of delay caused and circumstances that ensued after the sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in light of all circumstances of the case to decide whether the execution of the sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death executable, and to this extent, the decision in *Vatheeswaran* [...] stands overruled.<sup>2</sup>

*Triveniben* might have been misconstrued to suggest that a delay in disposing a clemency petition automatically compels courts to commute the death sentence. However, this is not true as the above *ratio* of the judgment clarifies the position detailing the requisite elements of the power of the courts:

- i) the court may examine the nature of the delay;
- ii) the court may examine the circumstances that ensued after the imposition of the death sentence;
- iii) the court may not reopen the question of the guilt of the accused;
- iv) no fixed period can be prescribed to define the term 'delay';
- v) the court must entertain the question of delay in light of all circumstances of the case.<sup>3</sup>

Apart from delay, *Shatrughan Chauhan* considered four other 'supervening circumstances' as possible grounds for commutation: the convict was suffering from insanity, schizophrenia, or mental illness; the judgments relied on by the Trial Court/High Court for coming to its sentencing decision being declared *per incuriam*; the convict was being kept in solitary confinement; and lapses in procedure.<sup>4</sup>

Further, in the recent case of *Union of India v. Dharam Pal*,<sup>5</sup> the same issue of additional supervening circumstances had arisen. The respondent, in this case, had been convicted for

1 V.N. Shukla, *Constitution of India* (M.P. Singh eds., 4<sup>th</sup> edn., 2008) 406.

2 *Triveniben* (1989), *supra*, [23].

3 Zubin Dash & Shashank Singh, 'A Case Against Delay as a Ground for Commutation of Death Sentences' (2014) 7 NUJS L. Rev. 321, 341.

4 *Shatrughan Chauhan* (2014), *supra*, [24, 78].

5 *Union of India v. Dharam Pal*, (2019) 15 SCC 388.

the offense of rape, and while he was out on bail, he killed five members of the family of the victim, for which he was awarded the death sentence. His mercy petition was dismissed and subsequently by the President after an unexplained and inordinate delay of 13 years and five months in deciding the mercy petition. The attending ‘supervening circumstances’ were a failure to produce the relevant documents regarding the respondent before the President for deciding the mercy petition<sup>1</sup> and that the respondent has undergone 18 years of illegal solitary confinement. After due consideration to the totality of facts and circumstances, the court allowed the commutation of the death sentence to life imprisonment.

Consequently, although delay can give rise to a cause of action, the principle is that it can never be the sole factor to commute death sentences. Delay must necessarily have resulted inconsequential, a fundamental change of circumstances or ‘supervening circumstances’ during the period of consideration of the clemency petition by the executive. Further, the courts should also consider any signs of reform expressed by the convict or whether he shows any such potential to be reformed.<sup>2</sup>

## CONCLUSION

Conclusively it is significant to understand the outcome of the above discussion wherein the courts have endeavored to stress the importance of timely disposal of the mercy petitions by the executive. The power of clemency must be exercised with reasonableness and judiciously and within a reasonable frame of time. The power to grant pardon rests with the executive, and it is ultimately the exercise of the power in a just manner that will determine public approval.

This is not to say that delay will always lead to commutation of the death sentence. The power to commute the death sentence is not codified but, it is in the exercise of the supervening powers of the court to do complete justice under Art. 142. Consequently, only the impact of delay on the prisoner ‘alone’ is not in the interests of justice. The courts have to be aware of their role and functionality under the Indian Constitution and take care not to overstep the designated areas. In their zeal to play a humanitarian role, they cannot usurp the power and role of other organs.<sup>3</sup>

---

1 He had earlier been acquitted for the offence of rape which was not brought to the notice of the President.

2 *Dharam Pal* (2019), supra, [20].

3 To understand the limits of the exercise of the power of judicial review, see Shrutu Bedi, ‘The Power of Judicial Review: Judicial Chutzpah or Judicial Desideratum’ in S. Khurshid, S. Luthra, L. Malik & S. Bedi *Judicial Review: Process, Powers and Problems* (Cambridge University Press, 2020) 285-288.

Delay *simpliciter* cannot be the sole factor in the commutation of the death sentence. It represents a particular category of cases deserving due consideration. However, it must be treated with due caution keeping in mind the *Triveniben* ruling.<sup>1</sup>

## REFERENCES

### Literature

1. Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press 2009) Ch. 3.
2. BJP, 'Afzal Guru should have been executed much earlier (*The Economic Times* 2013) <<https://economictimes.indiatimes.com/news/politics-and-nation/afzal-guru-should-have-been-executed-much-earlier-bjp/articleshow/18415041.cms?from=mdr>>
3. K.I. Vibhute, 'Choice Between 'Death' and 'Life' for Convicts: Supreme Court of India's Vacillation Sans Norms,' 59 JILI (2017) 221.
4. K.I. Vibhute, 'Delay in execution of death sentence as an extenuating factor and the Supreme Court of India: Jurisprudence and jurists' prudence' (1993) 35 *Journal of the Indian Law Institute* 122.
5. K.I. Vibhute, 'Right to Human Dignity of Convict under Shadow of Death and Freedoms Behind the Bars in India: A Reflective Perception' (2016) 58 JILI 15.
6. K.I. Vibhute, *PSA Pillai's Criminal Law* (Lexis Nexis 2014).
7. Law Commission of India, 'Mode of Execution of Death Sentence and Incidental Matters' (Report No. 187, October 2003) <<http://lawcommissionofindia.nic.in/reports/187th%20report.pdf>>
8. Maneesh Chibber, 'Why it is wrong to question 'delay' in hanging of convicts in 2012 Delhi gangrape-murder case' (*The Print* 2020) <<https://theprint.in/opinion/why-its-wrong-to-question-delay-in-hanging-of-convicts-in-2012-delhi-gangrape-murder-case/352823/>>
9. S.B. Sinha, 'To Kill or Not to Kill: The Unending Conundrum' (2012) 24(1) *National Law School of India Review* 24.
10. Sahil Makkar, 'Ajmal Kasab, lone surviving 26/11 terrorist, hanged' (*Mint* 2012) <<https://www.livemint.com/Politics/36o0Bof48IPfJawdp08IqL/Ajmal-Kasab-lone-surviving-2611-terrorist-hanged.html>>

<sup>1</sup> Zubin (2014), *supra*, 348.

11. Shruti Bedi & Sebastien Lafrance, 'The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada' in S. Khurshid, L. Malik & Y.P. Singh (eds.) *The Supreme Court and the Constitution* (Wolters Kluwer 2020).
12. Shruti Bedi, 'The Power of Judicial Review: Judicial Chutzpah or Judicial Desideratum' in S. Khurshid, S. Luthra, L. Malik & S. Bedi *Judicial Review: Process, Powers and Problems* (Cambridge University Press, 2020).
13. Shruti Bedi, *Indian Counter Terrorism Law* (Lexis Nexis 2016).
14. Thakur, Tanaya & Amit Kumar. (2020). "Delay in Execution of Death Penalty: Need for a balance", *Bar and Bench*, <https://www.barandbench.com/columns/delay-in-execution-of-death-penalty-need-for-a-balance>
15. V.N. Shukla, *Constitution of India* (M.P. Singh eds., 4<sup>th</sup> edn., 2008).
16. Zubin Dash & Shashank Singh, 'A Case Against Delay as a Ground for Commutation of Death Sentences' (2014) 7 NUJS L. Rev. 321.

### Statutes

1. Andhra Pradesh Control of Organised Crime Act 2001.
2. Criminal Law (Amendment) Act, 2013.
3. Gujarat Control of Terrorism and Organised Crime Act, 2015.
4. Indian Code of Criminal Procedure, 1973.
5. Indian Penal Code, 1860. (Act 45 of 1860).
6. Karnataka Control of Organised Crime Act 2000.
7. Maharashtra Control of Organised Crime Act 1999.
8. The Constitution of India 1950.
9. Unlawful Activities Prevention Act, 1967.

### Case Law

1. *Ajay Kumar Pal v. Union of India*, (2014) 13 SCALE 762.
2. *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.
3. *Bhagwan Bux Singh v. State of Uttar Pradesh*, (1978) 1 SCC 214.
4. *Bharawnd Mepadnna v. State of Bombay*, AIR 1960 SC 289.
5. *Charan Lai Sahu v. Union of India*, (1990) 1 SCC 613.
6. *Chawala v. State of Haryana*, (1974) 4 SCC 579.

7. *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195, [23].
8. *Ediga Anamma v. State of Andhra Pradesh*, (1974) 4 SCC 443.
9. *Epuru Sudhakar v. Government of Andhra Pradesh*, (2006) 8 SCC 161.
10. *Furman v. Georgia* 408 US 238 (1972).
11. *G. Krishta Goud v. State of A.P.*, (1976) 1 SCC 157.
12. *In re Maddela Yerra Channugadu*, AIR 1954 Mad 911.
13. *Jagdish v. State of Madhya Pradesh*, (2009) 9 SCC 495.
14. *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra*, (1985) 1 SCC 275.
15. *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360.
16. *Joseph Peter v. Goa Daman and Diu*, (1977) 3 SCC 280.
17. *Kehar Singh v. State (Delhi Administration)*, (1988) 3 SCC 609, [11].
18. *Kehar Singh v. Union of India*, (1989) 1 SCC 20, [11].
19. *Lajar Mashi v. State of Uttar Pradesh*, (1976) 1 SCC 806.
20. *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470.
21. *Maghar Singh v. State of Punjab*, (1975) 4 SCC 234.
22. *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253.
23. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.
24. *Maru Ram v. Union of India*, (1981) 1 SCC 107.
25. *N. Sreeramulu v. State of Uttar Pradesh*, (1974) 3 SCC 314.
26. *Nachiar Singh v. State of Punjab*, (1975) 3 SCC 266.
27. *Narayan Dutt v. State of Punjab*, (2011) 4 SCC 353.
28. *Navneet Kaur v. State (NCT of Delhi)*, (2014) 7 SCC 264.
29. *Noel Riley v. A.G. of Jamaica*, (1982) 3 W.L.R. 557 (569-70) (P.C.).
30. *Ragubir Singh v. State of Haryana*, (1975) 3 SCC 37.
31. *Rajendra Prasad v. State of Uttar Pradesh*, (1979) 3 SCC 646.
32. *Ramraj @ Nabhoo @ Bhinu v. State of Chhattisgarh*, (2010) 1 SCC 573.
33. *Rishideo v. State of Uttar Pradesh*, AIR 1955 SC 331.
34. *S. Parthasarathi v. State of Andhra Pradesh*, (1974) 3 SCC 376.

35. *Sadhu Singh v. State of Uttar Pradesh*, (1978) 4 SCC 428.
36. *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1.
37. *Sher Singh v. State of Punjab*, (1983) 2 SCC 344.
38. *State (NCT of Delhi) v. Prem Raj*, (2003) 7 SCC 121.
39. *State of Maharashtra v. Champalal*, (1981) 3 SCC 610.
40. *State of Uttar Pradesh v. Lalla Singh*, (1978) 1 SCC 142.
41. *State of Uttar Pradesh v. Paras Nath Singh*, AIR 1973 SC 1973.
42. *State of Uttar Pradesh v. Sahai*, (1981) 3 SCC 635.
43. *State of Uttar Pradesh v. Sugher Singh*, (1978) 1 SCC 178.
44. *T.V. Vatheesmaran v. State of Tamil Nadu*, (1983) 2 SCC 68.
45. *Triveniben v. State of Gujarat*, (1986) 4 SCC 574.
46. *Union of India v. Dharam Pal*, (2019) 15 SCC 388.
47. *Union of India v. V. Sriharan*, (2014) 11 SCC 1.
48. *Vivian Rodrick v. State of West Bengal*, (1971) 1 SCC 468.

# THE TENDENCY TO REDUCE AND ABOLISH THE DEATH PENALTY IN ASIAN COUNTRIES: A PERSPECTIVE OF HUMAN RIGHTS-BASED APPROACH

Dr. Dang Viet Dat<sup>1</sup>, LLB. Nguyen Dang Cam Nhung<sup>2</sup>

**Abstract:** Protection of everyone's right to life and reduction and abolition of the death penalty has been receiving the attention of the whole world community. The human rights-based approach shows that the reduction and abolition of the death penalty become an inevitable tendency of contemporary society along with socio-economic development, legal improvement, and increasing efficiency of public administration, and raising the legal awareness of citizens. The reduction and abolition of the death penalty in Asian countries in law and practice are not a general trend. This tendency is carefully explained from the perspective of the human rights-based approach.

**Keywords:** Human rights-based approach; death sentence; Asia.

## 1. INTRODUCTION

Human Rights-Based Approach (HRBA) is an important theory in the contemporary theory system of human rights. This theory aims to protect, promote and develop humans; accordingly, human and human rights are always at the center of policies and laws.

Currently, the death penalty is still a controversial issue in politics, morals, and human rights. Clearly, at present, the concept of retaining or abolishing capital punishment still has not finished many debates because arguments given to retain or abolish the death penalty are also different. From the perspective of HRBA, human rights in general and everyone is right to life in particular need to be guaranteed in all aspects, all situations, even for extremely serious offenders. The gradual reduction and the eventual abolition of the death penalty by replacing with another punishment (without depriving of the right to life) needs to be considered carefully and prudently in the process of economic - social development of each nation, but also cannot resist this trend, because of the HRBA

---

1 Academy of Politics Region 4, Can Tho City; Under Ho Chi Minh National Academy of Politics, Vietnam

2 Vinh University, Nghe An Province, Vietnam.

theory, all the efforts of countries and the international community to ensure, promote and develop human, human rights (in which the right to life is the most important, sacred and precious) must be best guaranteed, no matter who is the offender or the victim.

Asia now is still the largest region that executes the death penalty globally; however, governments in Asian countries gradually abolish or reduce the death penalty as the execution of capital punishment has been proven to be ineffective in reducing the number of criminals. Over the past decade, many countries in the region have abolished capital punishment for all crimes, namely, Nepal, Bhutan, Philippines, Cambodia, Mongolia, Timor-Leste; Laos, Myanmar, and Brunei, retain the capital sentence in their law, but they have not executed for ten years; Vietnam, China are countries reducing capital punishment in their legal system and practice. The paper aims to explain the necessary trend of reduction and eventual abolition of the death penalty in Asian countries from a human rights-based approach.

## **2. HUMAN RIGHTS-BASED APPROACH THEORY AND THE DEATH PENALTY**

### **2.1. Human rights-based approach theory**

“The human rights-based approach (HRBA) is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed in order to promote and protect human rights. It seeks to analyze inequalities that lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress and often result in groups of people being left behind”<sup>1</sup>.

Under the HRBA, the plans, policies, and processes of development are attached to a system of rights and corresponding obligations stipulated by international law, including all civil, cultural, economic, political, and social rights and the right to development. According to HRBA, human rights principles (universality, indivisibility, equality, and non-discrimination, participation, accountability) are used to guide United Nations development and cooperation and focus on developing the capacities of both ‘duty-bearers to meet their obligations and ‘rights-holders to claim their rights’<sup>2</sup>. Therefore, HRBA is the approach to put human rights at the center to consider and resolve policy and legal

---

1 “*Universal Values Principle One: Human Rights-Based Approach*” <<https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>> accessed 5 January 2021.

2 “*Universal Values Principle One: Human Rights-Based Approach*” <<https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>> accessed 11 January 2021.

issues<sup>1</sup>, especially this theory has emphasized the State's moral obligation in ensuring and promoting human rights<sup>2</sup>.

In terms of the Human Rights-based Approach (HRBA), everyone's right to life is the most precious and sacred of human being, all actions (even of the State) to deprive any person of life (according to the statutory order) is also contrary to the natural origin of everyone's right to life. Therefore, if the individual violates the law of the most serious offenses (such as drug offenses or murder - intentional crimes causing lethal or other serious consequences<sup>3</sup>), the harshest punishment is that isolating that individual from the community and taking educational measures, and converting that individual into the repentant and kind person, not depriving of his or her right to life; because a perpetrator (extremely serious offender)'s right to life or victim's right to life is equally sacred and precious. Thus, the execution of the death penalty on the offender cannot immediately restore the rights they have lost from that offense and improve the legal order better after that. For this reason, in many countries of the world, including Asian countries, the number of the death penalty in the total number of penalties in law in these countries tends to decrease. In contrast, the figure of countries abolishing the death penalty in law and practice continues to increase.

## 2.2. The death penalty

The death penalty is understood that deprives a person of life under a sentence issued by a lawfully established court to punish the person committing the most serious crime<sup>4</sup>. In history, the death penalty is widely used in countries worldwide to maintain their dominant power over society. Each country, at each stage of development, will impose this penalty for different crimes. However, along with the development of humanity, the death penalty tends to decrease gradually<sup>5</sup>. In 1982, the Office of the United Nations High Commissioner for Human Rights issued the 6th general comment on the right to life (provided in Article 6 of the 1966 International Covenant on Civil and Political Rights)

---

1 Dau Cong Hiep, "Concept and connotation of the human rights-based approach", in Vu Cong Giao and Ngo Minh Huong (Co-eds), *Human rights-based approach: Theory and practice* (Hanoi National University Press 2016) 18.

2 OHCHR, *Frequently asked questions on a human rights-based approach to development cooperation* <<https://www.ohchr.org/documents/publications/faqs.pdf>> (accessed 3 January 2021), 3-4.

3 Dao Tri Uc and Vu Cong Giao, "The right to life under international law and Vietnamese law", in Dao Tri Uc, Vu Cong Giao and Truong Thi Hong Ha, *Right to life and the death penalty* (Vietnam National Political Publishing House, Hanoi 2015) 22.

4 Vietnam Lawyers Association, *The death penalty in international law* (Hong Duc Publishing House, Hanoi 2008) 13.

5 Vietnam Lawyers Association, *The death penalty in international law* (Hong Duc Publishing House, Hanoi 2008) 22.

that “States parties are not obliged to abolish the death penalty they are obliged to limit its use and, in particular, to abolish it for other than the “most serious crimes.” Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the imposition of the death penalty to the “most serious crimes.”

For this reason, the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty 1989, stated that “abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights.” Because everyone’s right to life is an inherent, sacred, and inalienable right of human being, UN General Assembly resolution 32/61 of 8 December 1977 indicated “the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offenses for which the death penalty may be imposed with a view to the desirability of abolishing this punishment.” Therefore, many countries today gradually reduce the death penalty to lead it eventually to abolish capital punishment (in the future).

### **2.3. Explaining the problem of retaining or abolishing the death penalty from human rights-based approach theory**

The issue of protecting everyone’s right to life has always been paid special attention by scholars, legal experts, and human rights activists because this is the original right, the most sacred and precious right of a human being. However, international human rights law does not consider that the right to life is absolute: the 1948 Universal Declaration of Human Rights (UDHR) stipulated “Everyone has the right to life, liberty and security of person” (Article 3)<sup>1</sup> or International Covenant on Civil and Political Rights (ICCPR) stipulated, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life” (Clause 1 of Article 6)<sup>2</sup>. With that provision, international human rights law still leaves open (open regulation) applying legal measures to deprive people of the right to live according to strict medical and legal order and procedures, including the death penalty. Therefore, the retention or abolition of the death penalty in law and practice in countries is still a heated debate, including a group of views in favor of abolishing the death penalty, a group of views in favor of keeping the death penalty, and also a group supporting reducing the death penalty according to practical conditions. This variety and complexity stem from the individual views, arguments, or practices of these groups of views.

---

1 UN, “*Universal Declaration of Human Rights*” <<https://www.un.org/en/universal-declaration-human-rights/>> accessed on 25 January 2020.

2 OHCHR, “*International Covenant on Civil and Political Rights*” <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 25 January 2021.

(1) The group of views supporting the abolition of the death penalty argues that the imposition of the death penalty seriously violates everyone's right to life (stipulated in ICCPR (Article 6)) and is a cruel, inhumane treatment for human beings (stipulated in ICCPR (Article 7)); at the same time, abolitionists suppose that the imposition of the death penalty does not have a strong and convincing link to the reduction of the rate of extremely serious crime; moreover, mistakes in the condemnation and execution the death penalty will no longer have a chance to correct them like other penalties. Therefore, the retention of the death penalty contains more risks than the benefits of executing this penalty in the protection and promotion of human rights.

(2) The group of views supporting the retention of the death penalty argues that international human rights law does not have any provisions to prohibit capital punishment; moreover, the retention of the death penalty (the most severe punishment) plays a significant role in the prevention of dangerous offenses that are extremely dangerous to society and the right to life of others (such as drug crimes, intentional murder crimes). They took specific evidence in the pre and post - periods stipulating the death penalty to justify the effect of this punishment on reducing these extremely dangerous offenses. For example, in the UK, the murder rate increased dramatically since the death penalty was abolished in the country (in 1964), specifically from 300 cases in 1964 to 565 cases in 1994 and 833 cases per year in 2004 (the rate of 0.68 cases/100,000 people in 1964 increased to 1.42 cases/100,000 people in 1994); in the United States, between 1993 and 1997, when the number of death penalties imposed for murder increased, the murder crime rate fell to 26%<sup>1</sup>. Additionally, advocates for the retention of the death penalty argue that the use of alternative punishments (such as life imprisonment without sentence reduction) will increase public expenditures and that the imprisonment of prisoner whole life will cause their trauma, thus causing more suffering for offenders than they face the death penalty<sup>2</sup>. In addition, retentionists argue that the imposition of the death penalty for the most serious offenders (forced the imposition of the death penalty) is considered as one of adequate compensation to the victim and the victim's family, as well as a form of justice protection (appropriate punishment for offenses). Furthermore, suppose the humane treatment by not imposing the death penalty for this most serious offender seems nearly an inhuman treatment of the victim. In that case, the protection of the offender's right to life (abolishing the death penalty) is considered to have been fostering and favoring the rights of people who commit serious abuse or pose a serious threat to the right to life of

---

1 Wikipedia, "Death Penalty - Capital Punishment Debate" in Vietnam Lawyers Association, *The death penalty in international law* (Hong Duc Publishing House, Hanoi 2008) 22-23.

2 Vietnam Lawyers Association, *The death penalty in international law* (Hong Duc Publishing House, Hanoi 2008) 32.

others - but rather. They are the central subjects who need to be protected the right to life better instead of focusing too much on protecting the right to life for this prisoner.

(3) The group of views supporting the gradual reduction of the death penalty according to the practical conditions argues that the capacity of state governance is getting better and better, the national legal system is becoming more and more complete, intellectual level, cultural level and legal awareness of the people are raising along with the socio-economic development; therefore, the capacity of the State and the society to prevent and combat crimes, to maintain the social order and safety is becoming higher. Thus, the criminal policies of the countries are becoming more and more flexible, gradually reducing the death penalty and replacing it with other ones.

The absolute support for the abolition of the death penalty or the retention of the death penalty meets the objections of the other side because the arguments and reasons of each side are not convincing. In fact, in all measures applied by countries and states, the death penalty is the most severe and harshest punishment and demonstrating the strength of the state, which shows that whether to retain or reduce or abolish the punishment depends heavily on the state's capacity for managing and running the society, especially maintaining social order and safety and protecting human rights. Nevertheless, this capacity is regulated by the level of socio-economic development, the perfection of the legal system, measures to combat crimes, especially the most serious crimes, and the harmonious relationship between national and international interests in ensuring and promoting the development of human rights.

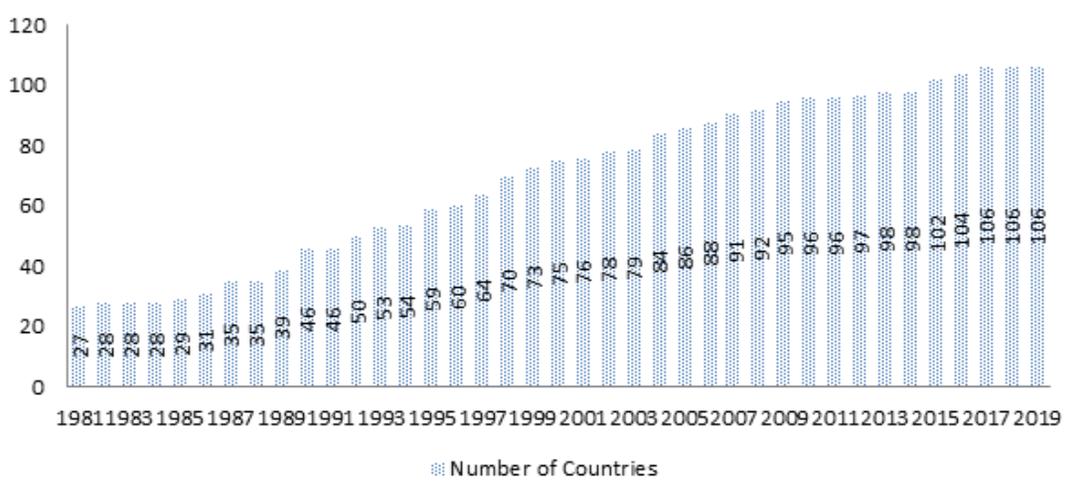
Therefore, countries in the world have declared the abolition of the death penalty since the 1948 Universal Declaration of Human Rights was proclaimed (8 countries abolished the death penalty<sup>1</sup>); 50 years later, in 1998, 70 countries in the world declared the abolition of capital punishment; by the end of 2019, 106 countries (are members of the United Nations) in the world declared the abolition of the death penalty in law or in practice<sup>2</sup>. Within these countries, the number of Asian countries abolishing capital punishment in law or practice tends to increase. Although some Asian countries have not abolished the regulations on the death penalty in the last ten years, these countries

---

1 The first eight countries abolished the death penalty: Venezuela (in 1863), San Marino (in 1865), Costa Rica (in 1877), Panama (in 1903), Ecuador (in 1906), Uruguay (in 1907), Colombia (in 1910), Iceland (in 1928), Amnesty International, "*Abolitionist and retentionist countries as of July 2018*" <<https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>> accessed 21 January 2021.

2 Amnesty International, "*Deaths sentences and executions 2007-2019*" <[https://www.amnesty.org/en/what-we-do/death-penalty/?utm\\_source=google&utm\\_medium=cpc&gclid=Cj0KCQiA0-6ABhDMARIsAFVdQv99\\_Jn76ySIR0uFSzG6pD8xg8IdFVyWp0NdWi1LGCWbGMV8tnu90T0aArltEALw\\_wcB](https://www.amnesty.org/en/what-we-do/death-penalty/?utm_source=google&utm_medium=cpc&gclid=Cj0KCQiA0-6ABhDMARIsAFVdQv99_Jn76ySIR0uFSzG6pD8xg8IdFVyWp0NdWi1LGCWbGMV8tnu90T0aArltEALw_wcB)> accessed on 10 January 2021.

have not imposed this penalty in practice, such as Brunei, South Korea, Laos, Mongolia, Myanmar, Sri Lanka, Maldives, and Tajikistan<sup>1</sup>.



**Chart 1: The number of countries abolishing the death penalty**

Source: AI (2021)<sup>2</sup> and Vietnam Lawyers Association (2008)<sup>3</sup>.

Currently, 63 countries still maintain and execute the death penalty<sup>4</sup>; however, legal regulations in these countries stipulate that only impose the death penalty for the most serious crimes and do not impose the death penalty for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. In which countries, in Asia, there are Vietnam, China.

**Table 1: Asian countries have abolished the death penalty in law or in practice**

Abolishing the death penalty in law		Only imposing the death penalty for the most serious offense	Abolishing the death penalty in practice	
Year	Nation/Territory		Year	Nation/Territory
1989	Cambodia	Kazakhstan	1957	Brunei
1993	Hongkong		1997	Korea (South)

1 Death Penalty Information Center, "Abolitionist in Practice" <<https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976>> accessed 22 January 2021.

2 Amnesty International, "Deaths sentences and executions 2007-2019" <[https://www.amnesty.org/en/what-we-do/death-penalty/?utm\\_source=google&utm\\_medium=cpc&gclid=Cj0KCQiA0-6ABhDMARIsAFVdQv99\\_Jn76ySIR0uFSzG6pD8xg8IdFVyWp0NdWi1LGCWbGMV8tnu90T0aArltEALw\\_wcB](https://www.amnesty.org/en/what-we-do/death-penalty/?utm_source=google&utm_medium=cpc&gclid=Cj0KCQiA0-6ABhDMARIsAFVdQv99_Jn76ySIR0uFSzG6pD8xg8IdFVyWp0NdWi1LGCWbGMV8tnu90T0aArltEALw_wcB)> accessed 10 January 2021.

3 Vietnam Lawyers Association, *The death penalty in international law* (Hong Duc Publishing House, Hanoi 2008) 107-108.

4 Amnesty International, "Death sentences and executions 2007-2019" <<https://www.amnesty.org/en/what-we-do/death-penalty>> accessed 21 January 2021.

1997	Nepal		1989	Laos
1998	Azerbaijan		1954	Maldives
1999	Turkmenistan		1988	Myanmar
2002	Timor Leste		1976	Sri Lanka
2003	Armenia		2004	Tajikistan
2004	But, Turkey			
2006	Philippines			
2007	Kyrgyzstan			
2008	Uzbekistan			
2017	Mongolia			

Source: *Death Penalty Information Center (2021)*<sup>1</sup> and *Amnesty International (2021)*<sup>2</sup>.

This fact shows that no matter what supports or opposes the retention of capital punishment, the tendency of decreasing and abolishing this penalty will also increase along with the general development of humankind (*Chart 1, Table 1*). Humankind has spent thousands of years of history to have the legal system to protect human rights like today. In history, humanity has seen the imposition of the death penalty quite arbitrarily, not following the strict procedures of law. The execution of this penalty was very cruel (beheading, quartering, throwing criminals into boiling cauldrons oil); so far, in countries where capital punishment is still maintained, this punishment has been applied according to a strict process. This form of execution has been much more humane than before. Along with the development of humankind, the treatment between man and man is more and more civilized, more humane; therefore, the forms of human treatment that are brutal and inhumane are gradually eliminated or replaced by less brutal and less inhumane measures.

Although the ICCPR does not have any articles prohibiting the imposition of the death penalty, it also recommends states to reduce and abolish the death penalty gradually: “Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant” (Article 6(6))<sup>3</sup>. It shows that international human rights law is very concerned with everyone’s right to life, so the implementation of measures to replace the death penalty should be taken into account; because obviously, both the argument for the retention and abolition of capital punishment

1 Death Penalty Information Center, “*Countries That Have Abolished the Death Penalty Since 1976*” <<https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976>> accessed 22 January 2021.

2 Amnesty International, “*Abolitionist and retentionist countries as of July 2018*” <<https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>> accessed 22 January 2021.

3 OHCHR, “*International Covenant on Civil and Political Rights*”, <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 25 January 2021.

is not strong enough to fill up the fact that in countries accelerating the use of the death penalty still does not reduce the number of crimes, the most serious offenses (such as drug convictions, murder sentences). Thus, it is not convincing enough to cite an inverse relationship between the retention, increase of the death penalty, and the reduction of the most serious crimes. Researches from the United Nations had shown that no scientific evidence showing that the execution of the death penalty was more effective in preventing crime than using life imprisonment<sup>1</sup>, such as in Canada, the murder crime rate had decreased from 3.09 cases per 100,000 residents in 1975 (the year before the country abolished the death penalty for this crime) to 2.41 cases per 100,000 residents in 1980 and continued to decrease, by 2003, this case was 1.73 cases / 100,000 people, in 2005 it was 2 cases / 100,000 people, 33.3% lower compared with 1975; In the United States, murder rates are higher in 36 states that retain and execute the death penalty than in states where the penalty has been abolished or is still regulated in law but not infrequently impose in practice<sup>2</sup>. Furthermore, it is illogical to invoke the imposition of the death penalty to protect the right to life for others or to adequately compensate the victim and the victim's family because depriving the offender of life cannot restore the victim's right to life and not completely overcome the victim's family of grief (in a deliberate murder case), but a person in society is deprived of the right to life. Thus, the abolition of the death penalty for the most serious offender does not mean the unfair and inhumane treatment for the victim and the victim's family because the offender will certainly receive punishment fitting their crime, but this punishment is an alternative to the death penalty, such as life without parole.

From the perspective of a human rights-based approach, the protection of everyone's right to life is a common duty of all states, nations, and societies. This theory aims to ensure, promote and develop human and human rights always guaranteed in all situations and at the center of all national and international policies and laws. Therefore, the reduction and abolition of the death penalty become a common and inevitable tendency to ensure, promote, and develop human rights in practice. This theory does not advocate for the immediate abolition or retention of the death penalty. However, it aims to support nations in planning, implementing public policies, and perfecting the law to step by step reduce and eventually abolish capital punishment in the national legal system and practice. The implementation according to the road map in order to completely abolish the death penalty

---

1 "Report of the Secretary-General of the United Nations on the imposition of penalties and the implementation of guarantees on the protection of human rights of people facing death penalty in the world, 2005" in Vietnam Lawyers Association, *Death Penalty in International Law* (Hong Duc Publishing House, Hanoi 2008) 23.

2 Vietnam Lawyers Association, *Death Penalty in International Law* (Hong Duc Publishing House, Hanoi 2008) 23 - 24.

in the national legal system and practice is consistent in the socio-economic development process, the enhancement of national governance capacity, the increase in preventing and combating crime, and the maintenance of social order and safety, the human rights protection by states, as well as the strenuous capacity to replace the death penalty by others in practice in different countries in terms of development level, culture, religion and the awareness of citizens to obey the law.

### **3. THE TENDENCY TO REDUCE AND ABOLISH THE DEATH PENALTY IN ASIAN COUNTRIES**

#### **\* The Philippines**

The Philippines is one of the countries in Asia to abolish the laws that impose the death penalty for all criminal offenses in 2006. The 1987 Philippine Constitution stipulated: “Excessive fines shall not be imposed, or cruel, degrading or inhuman punishment inflicted. Neither shall the death penalty be imposed unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua”<sup>1</sup>, On July 24, 2006, the country passed the Republic Act No. 9346 (Republic Act (R.A.) No. 9346), which was regarded as the “law abolishing the death penalty in the Philippines,” subsequently, on November 20, 2007, the Philippines ratified the Second Optional Protocol of the International Covenant on Civil and Political Rights on the abolition of the death penalty in 1989. By all these moves, the Philippines has affirmed its commitment to completely, absolutely, and permanently abolish the death penalty in its country.

Nevertheless, with the above provisions of the 1987 Constitution, the Philippines is now looking to re-enable the death penalty to combat the most serious crimes such as treason, piracy, kidnapping, robbery with violence or intimidation, aggravated rape, arson, carjacking, drug trafficking, cultivation of narcotic plants, child trafficking, and the production of child pornography or child prostitution which rage in this country (in President Rodrigo Duterte’s drug-crime sweeping campaign). Proposition No. 4727 proposes to re-impose the death penalty in the Philippines proposed by the House of Representatives to impose the death penalty for those, as mentioned earlier, most serious crimes, especially drug crimes, which provokes heated debate in this country. Many people in this country objected because the re-regulation and the imposition of the death penalty in the Philippines would go against the *pacta sunt servanda*<sup>2</sup> principle in implementing international commitments, including The Second Optional Protocol to the ICCPR in

---

1 “*Philippines’s Constitution of 1987*” <constituteproject.org> accessed 3 January 2021.

2 *Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith (Article 26) in “*Vienna Convention on the Law of Treaties 1969*” <<https://legal.un.org>> accessed 3 January 2021.

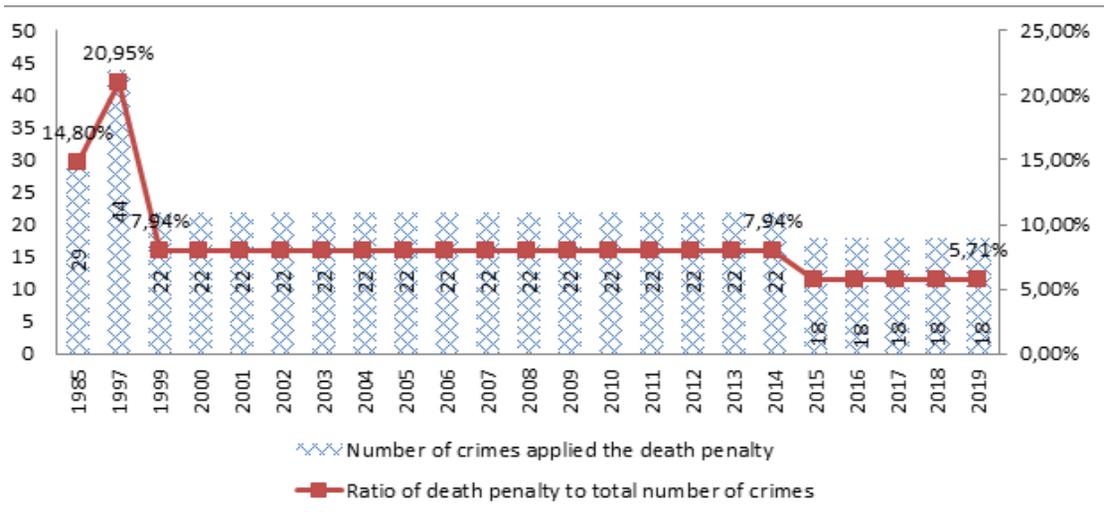
1989, and the Philippines ratified the ICCPR. In particular, Article 6 (2) (6) of the ICCPR implies that “a member state that has just abolish the death penalty cannot re-enact it.”

However, according to international practice, the priority level applying international treaties and national laws on the same issue within a member state must be the country’s constitutional provisions at first. The international treaty that country has signed and the law of that country, of course, such imposition is not contrary to the United Nations Charter. Therefore, the possibility of this country’s Parliament passing Proposition No. 4727 is entirely possible. Thus, the Philippines’ possibility of recovering the punishment for the above extremely serious crimes is entirely possible (especially for drug offenses).

#### **\* Vietnam**

The Constitution of The Socialist Republic of Vietnam (2013) affirms: “Everyone has the right to life. the law protects human life. No one may be deprived of life in contravention of the law.” (Article 19), simultaneously, “acts threatening the life or health of other persons and the community are prohibited” (Article 38(2)). This is the first time the Constitution prescribes the right to life. However, in the past, this right was always guaranteed under any circumstances if the person did not commit a crime which judgment of the court has taken legal effect that he/she faced the death penalty and has not been pardoned by the State President. The right to life is the natural, divine, and supreme right of each human being. However, the right to life is not only understood in a narrow sense as the integrity of life but also includes spiritual freedom, ensuring human existence such as the fight against war, war crimes, and prevention and combating acts of harming human life, reducing maternal and infant mortality.

In addition, Vietnam still stipulates and retains the death penalty for those committing the most serious offenses. However, the number of capital offenses has been significantly reduced along with the socio-economic development and building, perfecting the rule-of-law Socialist State. During the period from 1985 to 1999, the stricter approach was shown by increasing the death penalty in legal practice; if in the 1985 Criminal Code (The first Criminal Code in Vietnam) stipulated 29 capital offenses (accounting for 14.8% of the total number of criminal charges); after that, the Criminal Code was amended and supplemented four times (in 1989, 1991, 1992, 1997), the number of capital offenses increased to 44 offenses (accounting for nearly 21% of the total number of criminal counts). From 1999, the criminal policy in Vietnam has softened by narrowing and clearly defining the scope and conditions for the imposition of the death penalty. The 1999 Criminal Code (amended and supplemented in 2009) stipulated that there were only 22 capital crimes (accounting for nearly 8% of the total number of criminal offenses); up to the 2015 Criminal Code (amended and supplemented in 2017), the number of capital offenses is only 18 (accounting for 5.7% of the total number of penalties).



**Chart 2: The number of capital offenses in Vietnam from 1985 to 2019**

*Source: Authors aggregated from Vietnam Criminal Codes 1985, 1997, 1999, 2015, 2017*

According to the 2015 Vietnam Criminal Code (amended and supplemented in 2017), “death sentence is a special sentence imposed for people committing the most 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)); in addition to gradually reducing the death penalty for a number of criminal charges, this Code also strictly prescribes procedural limitations and guarantees when imposing the death penalty as this penalty is only imposed for a person who commits the most serious crimes, except for offenses which are manufactures or deals in counterfeit medicines for treatment or prevention of diseases (Article 194), most of economic crimes do not carry capital punishment<sup>1</sup>; The death penalty does not impose for “the person sentenced

<sup>1</sup> The 2015 Criminal Code (amended supplemented in 2017) provides for 18 criminal offenses, including: (1) Crimes of infringing upon national security: Crime of betraying the Fatherland (Article 108), Crime of carrying out activities aimed at overthrowing the people’s administration (Article 109), Crime of espionage (Article 110), Crime of riot (Article 112), Crime of terrorism against the people’s administration (Article 113), Crime of sabotage material and technical foundations of the Socialist Republic of Vietnam (Article 114); (2) crimes infringing upon human life, health, dignity and honor: Murder (Article 123), Rape of persons under 16 years of age (Article 142); (3) crimes violating the economic management order: Crime of manufacturing and trading counterfeit products as medicine, preventive medicine (Article 194); (4) drug-related crimes: Crime of illegal production of narcotics (Article 248), Illegal possession of narcotics (Article 249), Crime of illegal trading in narcotics (Article 251); (5) crimes violating public safety and public order: Terrorism (Article 299); (6) crimes of office: embezzlement (Article 353), Crime of accepting bribes (Article 354); (7) crimes of undermining peace, against humanity and crime of war: Crime of destroying peace, causing war of aggression (Article 421), Crime against humanity (Article 422), Crime of war (Article 423), Vietnam National Assembly, “Vietnam Criminal Code 2015, amended in 2017” <<https://m.thuvienphapluat>.

to death for embezzlement or taking bribes, after being sentenced, has returned at least three - fourths of the property embezzled or bribes taken, and actively cooperates with the authorities in the process of detecting investigating or tackling crimes, or has made reparation in an effort to atone for the crime.” (Article 40 (3)(c)); Capital punishment does not apply to “offenders who are below than 18 years old at that time of committing crimes, and to women who are in a state of pregnancy or women nursing their children under 36 months old or people aged full 75 years or older at that time offense is committed or on trial; does not execute the death penalty for pregnant women, women nursing children under 36 months old, or those who are full 75 years or older (Article 40 (2), (3)). The current Criminal Code also stipulates that convicts have their death penalty commuted to life imprisonment if they meet the conditions prescribed in this Code (Article 40 (4)).

In addition, in order to ensure that the proceedings for cases that crimes are the most serious, the 2015 Criminal Procedure Code contains strict regulations of the procedures for investigation, prosecution, adjudication and judgment execution for the accused are prosecuted with capital crimes, such as: the courts competent to hear cases related to the death sentence at first instance trials are provincial courts (Article 268); in case of the defendants, the accused charged with capital crimes or their family do not seek the assistance of defense counsel, the investigating bodies, procedural organizations or courts shall assign law offices to appoint defense counsel for such persons (Article 76); after the death judgments become legally valid, the case files must be promptly submitted to the President of the Supreme People’s Court and the judgment must be immediately sent to the Chairman of the Supreme People’s Procuracy, within two months, these authorities must decide to or not to appeal through reopening or cassation procedures (Article 367 (1) (a), (c)); within seven days after the judgments take legal effect, those who sentenced to death have the right to send amnesty petitions to the State President (Article 367 (1) (d)); The judgments shall be only executed if there is no any reopening or cassation procedure of the President of the Supreme People’s Court and the Chairman of the Supreme People’s Procuracy and the convicted do not send the amnesty petitions to the State President or they has sent the petitions but the President rejected these petitions (Article 367 (1) (e)).

### \* China

In 1979, China enacted the first Criminal Code, which stipulated 28 capital offenses; after that, China amended the Criminal Code in 1997. The number of capital crimes increased to 68 offenses<sup>1</sup>. By 2011, China amended a new Criminal Code, which abolished

---

[vn/van-ban/bo-may-hanh-chinh/Van-ban-hop-nhat-01-VBHN-VPQH-2017-Bo-luat-Hinh-su-363655.aspx](http://vn/van-ban/bo-may-hanh-chinh/Van-ban-hop-nhat-01-VBHN-VPQH-2017-Bo-luat-Hinh-su-363655.aspx)> accessed 10 January 2021.

<sup>1</sup> Roger Hood, “Abolition of the Death Penalty: China in World Perspective”, *City University of Hong Kong Law Review* (HongKong, 1:1, 2009) 3.

13 capital offenses, the number of crimes imposed for the death penalty was 55 crimes (a decrease of 19% of capital offenses) and made provisions not to impose the death penalty on people who are under 18 years old and aged full 75 and above<sup>1</sup>. In 2015, China amended the Criminal Code, continuing to abolish nine capital crimes<sup>2</sup>; thus, so far, China has only 46 capital offenses. Compared with 1997, the number of death penalties stipulated in Chinese law has decreased significantly (down 32.35%). This fact shows that China is trying to reform its criminal policy towards more human, and protecting, developing, and promoting human rights getting better and better.

Practice in Asian countries shows more clearly the tendency of reducing and abolishing the death penalty in these countries. This process is associated with rapid socio-economic development, legal system improvement, building a rule-of-law state. Vietnam and China are clear examples of this reality. With the domestic and international, legal and ethical, economic and cultural, social impact in a multidimensional way, human rights have been respected and guaranteed better, clearly demonstrated in the numbers of criminal counts which are punishable by the death penalty in Asian countries tends to decrease significantly compared to the total number of criminal penalties imposed, especially many countries have declared the abolition of capital punishment in law. This result is the efforts of the Asian states and their common communities and communities around the world, aiming to put the human being at the center, not let anyone be left behind, to protect, promote and develop human rights in practice by all efforts, especially everyone is right to life.

#### 4. CONCLUSION

Recognizing the death penalty issue in different countries (some countries have abolished this penalty, these have retained or been gradually reducing to abolish this penalty eventually) under the perspective of human rights-based approach gives us a holistic, thorough, non-extreme viewpoint. It does not create a conflict between an abolition advocate and a retention advocate. Each side has its reasons for consolidating its point of view. However, regardless of the point of view, ensuring, promoting, and developing human rights in practice is always the main trend in contemporary society, so the tendency of reduction and abolition of capital punishment in Asian countries are inevitable when socio-economic level, law, culture, lifestyle, legal awareness in these

---

1 Zhenjie ZHOU, “*The Death Penalty in China: Reforms and Its Future*” <<https://core.ac.uk/reader/144456997>> accessed 10 January 2021.

2 Laney Zhang, “*China: Death Penalty Crimes to Be Further Reduced*” <<https://www.loc.gov/law/foreign-news/article/china-peoples-republic-of-death-penalty-crimes-to-be-further-reduced/>> accessed 17 January 2021.

countries are growing and gradually approaching the level of development of developed countries in the world.

## REFERENCES

1. Amnesty International, “*Abolitionist and retentionist countries as of July 2018*” <<https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>> accessed 22 January 2021.
2. Amnesty International, “*Death sentences and executions 2007-2019*” <<https://www.amnesty.org/en/what-we-do/death-penalty>> accessed 21 January 2021.
3. Commission on Human Rights of the Philippines and Dr. Christopher Ward, SC, “*In defense of the right to life: international law and the death penalty in the Philippines*” <<http://regnet.anu.edu.au/sites/default/files/uploads/2017-03/In-Defense-of-the-Right-to-Life-IL-and-Death-Penalty-in-the-Philippines.pdf>> accessed 3 January 2021.
4. Dao Tri Uc and Vu Cong Giao, “The right to life under international law and Vietnamese law,” in Dao Tri Uc, Vu Cong Giao and Truong Thi Hong Ha, *Right to life and the death penalty* (Vietnam National Political Publishing House, Hanoi 2015).
5. Dau Cong Hiep, “Concept and connotation of the human rights-based approach”, in Vu Cong Giao, Ngo Minh Huong (Co-eds), *Human rights-based approach: Theory and practice* (Hanoi National University Press, 2016).
6. Death Penalty Information Center, “*Abolitionist in Practice*” <<https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976>> accessed 22 January 2021.
7. Death Penalty Information Center, “*Countries That Have Abolished the Death Penalty Since 1976*” <<https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976>> accessed 22 January 2021.
8. Gudmundur Alfredsson & AsjØrn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Nguyen Dang Dung, Vu Cong Giao, La Khanh Tung translated) (Thanh Nien Publishing House, Hanoi 2017).
9. Laney Zhang, “*China: Death Penalty Crimes to Be Further Reduced*” <<https://www.loc.gov/law/foreign-news/article/china-peoples-republic-of-death-penalty-crimes-to-be-further-reduced/>> accessed 17 January 2021.
10. OHCHR, “*International Covenant on Civil and Political Rights*” <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed on 25 January 2021.

11. OHCHR, *Frequently asked questions on a human rights-based approach to development cooperation* <<https://www.ohchr.org/documents/publications/faqen.pdf>> accessed 3 January 2021.
12. “*Philippines’s Constitution of 1987*” <[constituteproject.org](http://constituteproject.org)> accessed 3 January 2021.
13. Roger Hood, “Abolition of the Death Penalty: China in World Perspective”, *City University of Hong Kong Law Review*, (HongKong, 1:1, 2009).
14. UN, “*Universal Declaration of Human Rights*” <<https://www.un.org/en/universal-declaration-human-rights/>> accessed 25 January 2020.
15. United Nations, “*UN General Assembly resolution 32/61 of 8 December 1977*” <<https://www.amnesty.org/download/Documents/156000/act500061997en.pdf>> accessed 12 January 2021.
16. “*Universal Values Principle One: Human Rights-Based Approach*” <<https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>> accessed 11 January 2021.
17. “*Vienna Convention on the Law of Treaties 1969*” <<https://legal.un.org>> accessed 3 January 2021.
18. Vietnam Lawyers Association, *Death Penalty in International Law* (Hong Duc Publishing House, Hanoi 2008).
19. Vietnam National Assembly, “*Vietnam Constitution 2013*” <<https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Hien-phap-nam-2013-215627.aspx>> accessed 10 January 2021.
20. Vietnam National Assembly, “*Vietnam Criminal Code 2015, amended in 2017*” <<https://m.thuvienphapluat.vn/van-ban/bo-may-hanh-chinh/Van-ban-hop-nhat-01-VBHN-VPQH-2017-Bo-luat-Hinh-su-363655.aspx>> accessed 10 January 2021.
21. Vietnam National Assembly, “*Vietnam Criminal Procedure Code 2015*” <<https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Bo-luat-to-tung-hinh-su-2015-296884.aspx>> accessed 10 January 2021.
22. Zhenjie ZHOU, “*The Death Penalty in China: Reforms and Its Future*” <<https://core.ac.uk/reader/144456997>> accessed 10 January 2021.

# DEATH PENALTY IN CANADA AND ITS ABOLITION: THE WAY TO GO FOR ASIAN COUNTRIES?

Sébastien Lafrance\*

**Abstract:** *This paper presents the historical and legislative background and discusses the evolution of Canada's position on the death penalty, which includes considerations of international legal standards. A few of the main arguments usually raised by those in favour or against it are also briefly covered.*

**Keywords:** *death penalty, abolition, Canada.*

## 1. INTRODUCTION

Currently, Vietnam reserves the death penalty in some “sporadic cases.”<sup>1</sup> Since “Vietnam represents a prime, unique case to understand the nature, role, and issues concerning the death penalty and justice,” and because “[m]uch has been written about the death penalty in Vietnam,” our primary focus, as a Canadian scholar, will instead be on Canada and on what led it to abolish the death penalty eventually.

---

<sup>1</sup> Crown Counsel (Prosecutor) at the Public Prosecution Service of Canada in the Competition Law Section. Former part-time professor of law at University of Ottawa, Canada (2010-2013). LL.M. / Law Candidate (Laval University), LL.B. / Law (Université du Québec à Montréal), B.Sc. / Political Science (University of Montreal). Former clerk for the Honorable Marie Deschamps of the Supreme Court of Canada (2010-2011) and also Counsel at the Law Branch of the Supreme Court of Canada (2011-2013). Former clerk for the Honorable Michel Robit, Chief Judge of the Quebec Court of Appeal (2008-2009). Public speaker since 2010 on various legal issues around the world in 19 countries so far, including many times in Vietnam. He published several book chapters and articles in Australia, India, Indonesia, United Kingdom and Vietnam, and he will soon also publish in France. Polyglot, e.g. he studied Vietnamese and Chinese Mandarin (University of Toronto); Indonesian (General Consulate for Indonesia in Toronto); Russian (McGill University); Arabic (University of Montreal); German and Spanish (Collège de Maisonneuve), etc. *This work was prepared separately from this author's employment responsibilities at the Public Prosecution Service of Canada. The views, opinions and conclusions expressed herein are personal to this author and should not be construed as those of the Public Prosecution Service of Canada or the Canadian federal Crown.*

Ho Trong Ngu, ‘A matter of life and death: rethinking capital punishment’ (*Vietnam Law & Legal Forum*, December 14, 2009) 1 <<https://vietnamlawmagazine.vn/a-matter-of-life-and-death-rethinking-capital-punishment-3634.html>> accessed 1 March 2021; see also Ho Trong Ngu, ‘Some Issues Related to Death Penalty Judiciary in Vietnam’ [2009] International Association of Democratic Lawyers, Commission 2: Anti-Terrorism Laws, Hanoi, Vietnam <<https://iadllaw.org/commissions/commission-2-anti-terrorism-laws-hanoi-2009/>> accessed 1 March 2021.

In Canada, capital punishment has been “a highly controversial issue” for many years<sup>1</sup>, and it may still be nowadays for some portions of the Canadian population since a recent poll held in Canada suggested that “over half of Canadians are in favour of reinstating the death penalty in Canada as a punishment for murder.”<sup>2</sup> This is not new since it was also the case in the distant past.<sup>3</sup> In that respect, it is interesting to note that Justice La Forest of the Supreme Court of Canada (hereinafter ‘Court’) warned in *Kindler v. Canada* against judging the death penalty “in terms of statistical measurements of approval or disapproval by the public at large,” and gave weight in the same decision to the assumption that “the Canadian people *through* their elected representatives [who] have voted against the death penalty numerous times.”<sup>4</sup> This shows how representative democracy<sup>5</sup> may not always be reflective of the will of some of the Canadian population who were and are in favour of capital punishment. On a global scale, “[t]he debates between the advocates that support capital punishment and those who condemn it has been going on since ages.”<sup>6</sup>

Contrary to what Sahni and Junnarkar stated, we can hardly agree that capital punishment is just “another kind of punishment prescribed by law.”<sup>7</sup> Because the life of an accused is at stake with such punishment, this sole fact should be enough to make it stand out from other punishments. In all fairness for these authors, they further clarified, “Whether or not a convict should be sentenced to death is not just a matter of the law of the land, but it also entails a huge human rights issue.”<sup>8</sup> On that, the author of this paper agrees. In fact, “there seems to be nothing more contentious than the issue of the death

1 Marc-Antoine Rancourt, Catherine Ouellet & Yannick Dufresne, ‘Is the Death Penalty Debate Really Dead? Contrasting Capital Punishment Support in Canada and the United States’ [2020] *Analyses of Social Issues and Public Policy*, 1.

2 Carly Yoshida-Butryn, ‘51% of Canadians support return of capital punishment for murder convictions, poll suggests’ (*CTV News*, 3 March 2020). <<https://bc.ctvnews.ca/51-of-canadians-support-return-of-capital-punishment-for-murder-convictions-poll-suggests-1.4837434>> accessed 1 March 2021.

3 For example, in the middle of the 1960s, “[a]lthough most of the population continued to favour the use of the death penalty for the most serious violent crimes and acts of treason, many inside and outside of the government came to see it as an outdated sentence that belonged to a passing era in Canadian history”: Andrew S. Thompson, ‘Uneasy Abolitionists: Canada, the Death Penalty, and the Importance of International Norms, 1962-2005’ (2008) *Journal of Canadian Studies/Revue d’études canadiennes*, 42(3), 174.

4 Thomas Bateman, ‘The new globalism in Canadian charter of rights interpretation: extradition, the death penalty, and the courts’ [2003] *The International Journal of Human Rights* 7:3, 58 (italics added).

5 Representative democracy is a type of democracy founded on the principle of elected officials representing a group of people as opposed to direct democracy.

6 Sanjeev P. Sahni and Mohita Junnarkar, *The Death Penalty - Perspectives from India and Beyond* (Springer 2020), 2.

7 *Ibid.*, p. 1.

8 *Ibid.*, p. 2.

penalty, especially since the right to life started to emerge as one of the most fundamental human rights.”<sup>1</sup>

What Koestler and Camus wrote about the death penalty in 1957 is also worth mentioning:<sup>2</sup>

[...] even by overturning fundamental conceptions of the law, with the sole aim of making the law on the death penalty a little less barbaric, the contradictions it contains would remain unresolved. [...] since *it is impossible to say with precision when a man acted* freely and must die, *when he acted under duress* and keeps the right to live, the only solution is to bring back the law on the death penalty at the level of the other laws, by eliminating the punishment that it foresees, since only it is fixed in advance, prohibits any gradation and leaves the choice only between all or nothing.

Since then, and to briefly mention Canada’s current legal reality regarding the issue of voluntariness, suffice to say that the Court defined ‘moral involuntariness’ in a criminal law context as a situation in which the accused “retains conscious control over her bodily movements [and whose] will is overborne by threats of another,” the bottom line being that “[h]er conduct is not, in a realistic way, freely chosen by threats of another,” the bottom line being that “[h]er conduct is not, in a realistic way, freely chosen.”<sup>3</sup>

## 2. A FEW ARGUMENTS AGAINST AND IN FAVOUR OF THE DEATH PENALTY

With respect to the death penalty, all States “can be divided into two categories - those that are retentionists and others who are abolitionists.”<sup>4</sup> That being said, with respect to this division, one should refrain from adopting a simplistic Manichean approach that would aim to determine, in pure moralistic terms about good and evil, what State is right or wrong; to decide what is day or night, light or darkness, sun or moon. *Not that one should be deprived of standing up for one side (and, in all transparency, the author of this paper does that, too). However, this issue is not as simple as it first looks like, especially for jurists - even for those who support this or that side - for whom all arguments that have some merit should be at least known, if not examined with scrutiny. This is so primarily because “[i]f you know the enemy and know yourself, you need not fear the result of a hundred battles; If you know yourself but not the enemy, for every victory gained you*

1 Tran and Vu, *supra*, 1-2.

2 Arthur Koestler and Albert Camus, *Réflexions sur la peine de mort* [Thoughts on the Death Penalty] (first published 1957, Gallimard 2002), 137-138 (italics added) [translated in English by Sébastien Lafrance].

3 *R. v. Ruzic*, [2001] 1 S.C.R. 687, para. 44; see also Zoe Sinel, ‘The Duress Dilemma: Potential Solutions in the Theory of Right’ (2005) 10:1 Appeal: Rev Current L. & L. Reform 56, 62.

4 Sahni and Junnarkar, *supra*, 1.

will also suffer a defeat.”<sup>1</sup> *Here, the enemy remains in the realm of ideas and arguments and intellectual discourse.*

*In many countries, the death penalty is limited to “the most heinous crimes that can be committed by a person.”*<sup>2</sup> Robinson wrote, “advocates of capital punishment assert that death is a proper punishment for those who commit the most heinous crimes because offenders owe their lives to society as payment for the harms they inflicted on society (retribution).”<sup>3</sup> For example, in 1865, murder, treason or rape (now covered by the more catch-all offence of sexual assault<sup>4</sup>) carried the death penalty in Canada.

Interestingly, Robinson distinguished between ‘retribution’ and ‘vengeance,’ explaining that “[v]engeance is a human emotion experienced by individual people. Retribution is a collective response to wrongdoing from society rather than individual family members.”<sup>5</sup> Vietnam exemplifies the practical application of this distinction throughout its history: “The death penalty was used [in the past] as a tool to take revenge against the violated for their anti-social behaviours,” but now “Vietnam does not recognize such punishment as means of vengeance.”<sup>6</sup> In addition, Ngu argued that “death penalty defined in the [Vietnamese] *Criminal Code* does not mean to take away the human life, but only *when there are no other measures* which can be used to save a committed person, and that the perpetrator himself cannot be reintegrated in any way back into the human society, and that *the State has used every other means it can.*”<sup>7</sup> This approach brings us back to the dichotomy of the “all or nothing” mentioned above and identified by Koestler and Camus where, in fact, nothing would prevent a State from adopting legislative measures to make possible commutation of a death sentence to life imprisonment.<sup>8</sup> This

1 Sun Tzu, *Sun Tzu on the Art of War - The Oldest Military Treatise in the World*, (first published 5<sup>th</sup> century B.C.; Allandale Online Publishing, 2002) 11, para. 18. In the original version in Chinese Mandarin: “知己知彼，百战不殆；不知彼而知己，一胜一负；不知彼不知己，每战必殆”.

2 Sahni and Junnarkar, *supra*, p. 2.

3 Matthew B. Robinson, ‘Assessing Scholarly Opinion of Capital Punishment: The Experts Speak’ in Robert M. Bohm (ed), *The Death Penalty*, Routledge, 2008, 114.

4 Section 271 of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46; see also Lafrance, Sébastien Lafrance, ‘Women in the Context of Canadian Criminal Offences’ [2021] *Vietnam National University (VNU) Journal of Science: Legal Studies*, 37(1); Sébastien Lafrance, ‘Do You Need Guts, As Men, To Stand Up for Women? If Yes, Get Some’, (*The Law Culture*, July 26, 2020) <<https://thelawculture.in/do-you-need-guts-as-men-to-stand-up-for-women-if-yes-get-some/>> accessed 1 March 2021.

5 Robinson, *supra*, 115.

6 *Ibid*, p. 5.

7 *Ibid* (italics added).

8 For example, “From 1963 to 1968, under the direction of Prime Minister Pearson, the Liberal government was responsible for making Canada *de facto* abolitionist, intervening in all capital cases to commute each death sentence to life imprisonment without parole”: Michael Nicholson, ‘Unpopular Abolition: Analysis of Canadian Parliament’s 1976 Debate to Abolish Capital Punishment’, Master of Arts Thesis, University of Guelph, 2014), 8.

would not require the State either to reintegrate the accused into the society. In other words, contrary to what Ngu claimed, there are means available that are different than having to resort to the imposition of death on an accused should a State decide to make it possible, but it is true, however, that the means do not exist (yet) in Vietnam. It leaves us with the “major issue of contention with regard to retribution [that] is whether capital punishment actually achieves retribution,” which issue will be left for another day.

Another argument in favour of the death penalty is that it serves as a “*specific deterrent*” by preventing a murderer, for example, “from killing a, gain,” but we agree with the fact that this is “a form of incapacitation rather than deterrence.”<sup>9</sup> “A sentence emphasizing specific deterrence is a sentence intended to *discourage* the accused from again committing the offence.”<sup>10</sup> Discouraging the accused from committing wrongful actions he may commit in the future mandatorily implies that the accused is meant to remain alive, which would not happen, obviously, if the accused is put to death following a sentence of the death penalty. In short, “[m]any experts were insistent that the death penalty does not deter.”<sup>11</sup>

Moving on to the issue of wrongful convictions in the context of capital punishment, one expert stated, “there is no evidence that convinces me that during the modern period of capital punishment that an innocent was executed. *Maybe...* but not convincing proof”.<sup>12</sup> With respect to Canada more specifically, Topping asked, “Have any innocent persons been hanged in Canada? This is a *difficult* question to answer.”<sup>13</sup> However, saying that “maybe” it happened, that it is a difficult question to answer should not be sufficient to end the debate. The only possibility that a wrongful conviction *may* have happened and entailed the death penalty is precisely the starting point of most analysis of cases involving potential wrongful convictions, and it should not be the final answer that puts to bed and dismisses this issue. Roach also recalled, “An awareness of the alarming reality of wrongful convictions in both Canada and other criminal justice systems led the Supreme Court of Canada in 2001 to overturn prior jurisprudence that allowed Canada to extradite fugitives to face the death penalty.”<sup>14</sup>

---

9 Ibid, p. 117 (italics added).

10 *R. v. Woodward*, 1993 CanLII 8183 (NL CA), p. 253.

11 Robinson, *supra*, p. 149; see also, generally, National Research Council, *Deterrence and the Death Penalty*. The National Academies Press, 2012. <https://doi.org/10.17226/13363>.

12 Robinson, *ibid*, 126.

13 C. W. Topping, ‘The Death Penalty in Canada’ [1952] *The Annals of the American Academy of Political and Social Science* 284(1), 153 (italics added).

14 Kent Roach, ‘Wrongful Convictions in Canada’ [2013] 80(4) *U. Cin. L. Rev.*, 1465; *United States v. Burns*, [2001] 1 S.C.R. 283; see also, generally, Sébastien Lafrance, ‘The Presumption of innocence in Canada: A Comparative Perspective with Vietnam’, Conference Paper: ‘The Presumption of Innocence’ Online

As for the arguments against the death penalty, the main ones are that “it is morally wrong, it is cruel and unusual, it constitutes a human rights violation.”<sup>1</sup> The author of this paper will discuss this later. Let us just point out, for now, that in addition to the death penalty itself, “[p]rolonged delay following sentence of death prior to execution may [also] be deemed a form of cruel, inhuman and degrading treatment or punishment.”<sup>2</sup>

In a nutshell, Tran and Vu brilliantly summarized the two opposite primary schools of thought regarding the death penalty as follows:<sup>3</sup>

There is a growing consensus among the international community about the need to abolish the death penalty with many arguments pertaining to the nature, role, and ineffectiveness of the death penalty in combating crimes, a better adherence of sovereign states to universal human rights standards to which the right to life is the most fundamental, and more interestingly, the emergence and reception of modern. [Those who support the death penalty] rely on a wide range of justifications for maintaining the most brutal punishments ranging from culture, politics, ideology, religion, law, history, and even economics.

### 3. INTERNATIONAL LEGAL STANDARDS

The nation’s position also reflects Canada’s “opposition to the death penalty on the international level.”<sup>4</sup> The most well-known international legal instrument is probably the Universal Declaration of Human Rights<sup>5</sup> (hereinafter ‘Universal Declaration’); “Although the Universal Declaration is not a binding treaty, it has played a seminal role.”<sup>6</sup> It states “the right to live in absolute terms in Article 3: ‘Everyone has the right to life, liberty and security of person.’ The silence of Article 3 on the death penalty issue has a dual explanation. It can either be seen as supporting the retention of the death penalty or as foreshadowing its eventual abolition.”<sup>7</sup> However, as Tohme pointed out, “[p]resenting the right to live in absolute form, the drafters *implicitly* supported the abolitionist

---

Experts Workshop, 2020. <<https://law.unimelb.edu.au/centres/alc/news-and-events/the-presumption-of-innocence-online-experts-workshop#papers>> accessed 1 March 2021.

1 Robinson, *supra*, 115.

2 William A. Schabas, *The Abolition of the Death Penalty in International Law* (2<sup>nd</sup> ed., Cambridge University Press, 2020), 141.

3 Tran and Vu, *supra*, 2.

4 John Pak, ‘Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life’ [1993] *Cornell International Law Journal* 26(1), 264.

5 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

6 Schabas, *supra*, p. 23.

7 Roni Tohme, *Abolition of the Death Penalty: A Process in Motion*, LL.M. thesis, Faculty of Law, McGill University, 2001, 18-19.

movement.”<sup>1</sup> Besides, Schabas remarked, “The death penalty, by its very definition, is a form of punishment, and it is surprising that the drafters of the Universal Declaration [...] did not consider that it might be deemed ‘cruel.’”<sup>2</sup>

In 1976, Canada acceded to the 1966 *International Convention on Civil and Political Rights*<sup>3</sup> (hereinafter ‘ICCPR’) and its *Optional Protocol*<sup>4</sup>: “This was significant for a number of reasons. First, articles 1 and 6 of the ICCPR discouraged states from employing the death penalty: the former protected the right to life against arbitrary execution; the latter encouraged parties to the treaty to become abolitionist.”<sup>5</sup> As Tohme noted:<sup>6</sup>

[...] unlike the Universal Declaration of Human Rights, the ICCPR mentions the death penalty as an exception to the right to life. When reading Article 6, one can notice that the application of the death penalty, although accepted, was restricted to certain crimes and certain groups of people were excluded from its ambit—the second paragraph of Article 6 limits the application of the death penalty to the most severe crimes. The same paragraph states that the death penalty can be carried out if two conditions are satisfied: (a) the punishment as provided by law, and (b) the punishment is carried out as a result of a judgment rendered by a court.

In addition, paragraph 6 of Article 6 of the ICCPR states: “nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present Covenant.”<sup>7</sup> Further, it also contemplates its abolition”.<sup>8</sup>

In its decision rendered in 2020 *Quebec (Attorney General) v. 9147-0732 Québec inc.*<sup>9</sup>, the majority of the Court stated: “This Court has recognized a role for international and comparative law in interpreting *Charter* rights. However, this role has properly been

1 Ibid, 20 (italics added).

2 William A. Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (Northeastern University Press, 1996), 8.

3 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 *United Nations Treaty Series* 171, *Canada Treaty Series* 1976 No. 46, 6 *International Legal Materials* 368 (accession by Canada 19 May 1976).

4 *Optional Protocol to the International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, 6 I.L.M. 383 (1967).

5 Thompson, *supra*, 178.

6 Tohme, *supra*, 22-23.

7 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 *United Nations Treaty Series* 171, *Canada Treaty Series* 1976 No. 46, 6 *International Legal Materials* 368 (accession by Canada 19 May 1976); see also Tohme, *ibid*, 23.

8 Thome, *Ibid*.

9 2020 SCC 32 [hereinafter ‘9147-0732 Québec inc.’].

to *support* or *confirm* an interpretation”.<sup>1</sup> It also stated, “While this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms.”<sup>2</sup> That being said, both the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>3</sup> and the ICCPR “are both bindings on Canada, thus triggering the presumption of conformity.”<sup>4</sup>

#### 4. CANADA’S (SHORT) RELEVANT HISTORICAL BACKGROUND

Topping mentioned, “The four capital offences in Canada, according to the Revised Statutes of 1927 with Amendments, are murder, treason, making war against Her Majesty, and rape”<sup>5</sup> Canada abandoned the death penalty in 1976, abolishing the death penalty for all offences. One thousand four hundred eighty-one people had been sentenced to death, and 710 had been executed. However, the death penalty was *de facto* abolished in Canada in 1963 and *de jure* in 1999. Thomson recalled, “Parliament officially removed the death penalty from Canada’s *Criminal Code* in 1976 and defeated a motion to have it reinstated in 1987, and yet both debates were deeply divisive and did little to settle the issue for Canadians, the majority of whom still favoured the practice.”<sup>6</sup>

#### 5. CANADA’S RELEVANT LEGAL BACKGROUND

In 1977, in *Miller*<sup>7</sup>, the Court unanimously “considered that the death penalty, as provided for by the *Criminal Code* as a sanction for the murder of a police officer or a

1 Ibid, para. 28; see also, generally, Sébastien Lafrance, “The Role and Utility of Comparative Law” (Podcast), *The Contemporary Law Forum* 2020 <<https://www.youtube.com/watch?v=zfuLv87aK2A>> accessed 1 March 2021.

2 Ibid, para. 22.

3 Can. T.S. 1987 No. 36.

4 9147-0732 Québec inc., *supra*, para. 39; see also its Preamble: “The presumption of conformity is the firmly established interpretive principle that the [*Canadian Charter of Rights and Freedoms*] is presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified”; see also, generally, Lafrance, Sébastien, ‘A Brief Overview of Quebec Civil Law and Canadian Constitutional Interpretation in Canada’, Amicus Institute (Australia), 2020 <<https://www.amicusinstitute.org/scholarship-series>> accessed 1 March 2021.

5 Topping, *supra*, 147. Of note, the offence of ‘making war against Her Majesty’ existed because Canada was and still is a constitutional monarchy where the official Head of State is the monarch of the United Kingdom (but now their role is quite limited to a symbolic role). As for the offence of ‘rape’, see note 18 above.

6 Thompson, *supra*, 172.

7 [1977] 2 S.C.R. 680.

prison guard, did not authorize the imposition of cruel and unusual punishment in the sense of section 2(b) of the Canadian Bill of Rights. Six of [the nine judges] deduced this conclusion from a literal interpretation of the Declaration; three [of them] are done by seeking to define what is cruel and unusual punishment.”<sup>1</sup> The *Canadian Bill of Rights*<sup>2</sup> is a statute that comes into effect in 1960. Brun opined regarding this decision that it was “disappointing because of the literal and restrictive interpretation it gives of the right to protection against cruel and unusual treatment and punishment in Article 2(b) of the Declaration.”<sup>3</sup> But this should come as no surprise since rights were interpreted narrowly “in most of the cases where the [Supreme Court of Canada] was asked to use the *Canadian Bill of Rights*.”<sup>4</sup> The rights as they are provided in the *Canadian Bill of Rights* were given a ‘static interpretation.’<sup>5</sup>

The same right not to be subject to cruel and unusual treatment punishment is also provided by section 12 of the *Canadian Charter of Rights and Freedoms* (hereinafter ‘Charter’)<sup>6</sup>; the *Charter* was enacted in 1982,<sup>7</sup> and its interpretation “should be [...] a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection.”<sup>8</sup>

In 1991, in the decisions of *Ng*<sup>9</sup> and *Kindler*<sup>10</sup>, the Court had to decide whether unconditional surrender to the United States where these accused could eventually face the death penalty constituted a violation of their rights under sections 7 and 12 of the *Charter*, which protects the ‘right to life and ‘principles of fundamental justice,’ and the right not to be subjected to ‘cruel and unusual punishment,’ respectively. The Court established the

1 Henri Brun, ‘Feu la D.C.D.: l’Arrêt Miller et la Peine de Mort’ [The Canadian Declaration of Rights: The Miller decision and the Death Penalty] (1977) 18 C. de D. 567, 571.

2 S.C. 1960, c. 44.

3 Ibid, 576.

4 Shruti Bedi and Sébastien Lafrance, ‘The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada’ in Salman Khurshid, Lokendra Malik & Yogesh P. Singh, *The Supreme Court and the Constitution: An Indian Discourse* (Wolters Kluwer, 2020), 74; Berend Horvius, ‘The Legacy of the Supreme Court of Canada’s Approach to the Canadian Bill of Rights: Prospects for the Charter’ (1982) 28 McGill L. J. 31, 37.

5 Bedi and Lafrance, *ibid*; Bruce P. Elman, ‘Altering the Judicial Mind and the Process of Constitution-Making in Canada’ (1990) 28 Alta. L. Rev. 521, 524.

6 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act, 1982 (U.K.), 1982 c.11.

7 Sébastien Lafrance, ‘A Brief Overview of Quebec Civil Law and Canadian Constitutional Interpretation in Canada’, *supra*.

8 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, para. 117; see also *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, 156.

9 [1991] 2 S.C.R. 858.

10 [1991] 2 S.C.R. 779.

test of whether their possible execution would ‘shock the conscience. Tohme summarized the Court’s rationale in those decisions “In *Kindler* and *Ng*, the Canadian Supreme Court justified its decision for extraditing without seeking assurances by citing two main reasons. First, extradition without assurances did not violate the provisions of the Canadian Charter, which prohibits cruel and unusual punishment. Second, in the absence of a customary norm that prohibits the imposition of the death penalty, and despite the trend among Western countries to abolish the death penalty, the Canadian Supreme Court is free to extradite without assurances.”<sup>1</sup>

However, ten years later, in *Burns*<sup>2</sup>, the Court departed from its earlier decisions and “concluded that subject to exceptional circumstances, Canadian officials must obtain assurances that the death penalty will not be imposed (or, if imposed, will not be carried out) prior to extradition. Support for this conclusion derived from Canada’s advocacy against the death penalty on the international stage as well as the practices of other countries that Canada regards as models in the protection of fundamental rights.”<sup>3</sup> Tohme pointed out that “[t]he significance of the case of *Burns* [...] is that the [...] Court, even when Canada is not a party to international and regional abolitionist protocols, has used the prohibition of applying the death penalty found in these protocols to narrow the possibility of extradition.”<sup>4</sup> This is a different conclusion and a shift from what the Court previously decided in *Kindler* where “the Court observed no international norm on the death penalty and therefore tilted in favour of ministerial discretion.”<sup>5</sup> Indeed, in *Burns*, it may be understood from the Court’s rationale that “[i]t is sufficient that a ‘significant movement towards acceptance internationally of a principle of fundamental justice that Canada has already adopted internally’ can be detected.”<sup>6</sup>

As noted by Bateman, “countries around the world have increasingly abolished the death penalty. Advanced democracies, save the US, Japan and India, have done so.”<sup>7</sup> Indeed, the Supreme Court of India, for example, wrote in 1980 in its oft-cited<sup>8</sup> decision *Bachan Singh v. the State of Punjab*: “the power of appeal under Article 134

---

1 Tohme, *supra*, pp. 73-74.

2 *United States v. Burns*, [2001] 1 S.C.R. 283.

3 Lorraine E. Weinrib, ‘Canada’ in Dennis Davis, Alan Richter & Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (London: Hart Publishing, 2015), 111112; see also Bateman, *supra*, 49-50.

4 Tohme, *supra*, 74.

5 Bateman, *supra*, 58.

6 *Ibid.*

7 *Ibid.*

8 Including recently in 2020, see, e.g., the decision of the Supreme Court of India in *Shatrughna Baban Meshram v. State of Maharashtra*, 2020 SCC OnLine SC 901.

of the Constitution show that the death penalty or its execution cannot be regarded as unreasonable, cruel, or unusual punishment”.<sup>1</sup> The apex courts of Canada and India - two Commonwealth countries that inherited the same legal tradition from the United Kingdom<sup>2</sup> - currently stand on two opposite sides on whether the death penalty may be considered as cruel or unusual punishment.

## 6. CONCLUSION

One Vietnamese proverb says, ‘Đi một ngày đàng học một sàng khôn’ (*A day of travelling will bring a basket full of learning*), then even though the circumstances of the current pandemic do not currently allow us to meet in person to discuss the critical topic of the death penalty, the author of this paper truly hopes that our minds and thoughts may still be able to travel anyhow to, maybe one day, make the sharing of our respective knowledge and experience between our countries reach new horizons so that the sun of justice may shine even stronger in the future on the lives of the citizens of our countries. As Ngu claimed about Vietnam, “the elimination of death penalty in criminal charges is unavoidable.”<sup>3</sup> Eleven years have passed since Ngu made that statement, and capital punishment still exists in Vietnam. Significant social and legal changes often take time: ‘Có công mài sắt có ngày nên kim’ (*if you sharpen an iron rod, in the end, you get a needle*) - patience comes with everything.

---

1 *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684: 1980 SCC (Cri) 580, para. 136.

2 Lafrance, Sébastien. (2020). “Should Canadian Law Matter to Indian Jurists? Advocating for More Substantial Legal Discussion Between the ‘Long Lost Siblings’”, *The Contemporary Law Forum*. Retrieved from: <https://tclf.in/2020/07/08/should-canadian-law-matter-to-indian-jurists-advocating-for-more-substantial-legal-discussion-between-the-long-lost-siblings/>

3 Ngu, Ho Trong. (December 14, 2009). “A matter of life and death: rethinking capital punishment”, *Vietnam Law & Legal Forum*, p. 7; see also Ngu, Ho Trong. (2009). “Some Issues Related to Death Penalty Judiciary in Vietnam”, *International Association of Democratic Lawyers, Commission 2: Anti-Terrorism Laws*, Hanoi, Vietnam. Retrieved from: <https://iadllaw.org/commissions/commission-2-anti-terrorism-laws-hanoi-2009/>

# CAPITAL PUNISHMENT FOR DRUG-OFFENSES IN ASEAN: FROM THE PERSPECTIVE OF INTERNATIONAL OBLIGATION

Thanh Phuong Hoang and Quynh Anh Nguyen<sup>1</sup>

**Abstract:** The death penalty for a drug offense has long been a matter of debate, especially in Asia, where just ten years ago, more than 90 percent of the world's executions took place<sup>2</sup>. Although there has been a trend of decline in capital punishment in light of implementing international legal instruments, there are still different points of view on this issue in Asia, particularly in ASEAN. This is because of unclear indicators in relating treaties and different points of view stemming from these countries' social and historical context. The paper analyzes the reasons behind ASEAN member states' reluctance when considering death penalty abolishment for a drug offense. It suggests some solutions to harmonize the differences in their policies of this issue using international legal instruments and mechanisms.

**Keywords:** death penalty, drug offense, ASEAN.

## 1. INTRODUCTION

The death penalty is a long-standing punishment, applied since ancient times, with many types of crimes in society, to exclude the offenders from the human community. When it comes to the death penalty and its barbarism, people tend to think of the Middle Ages in Europe because brutal tortures of the offenders often accompanied the death penalty. However, little-known is that the first death penalty regulations were acknowledged in a Code in Asia, the Code of King Hammurabi of Babylon from the 18th century B.C, applying to more than 25 different crimes<sup>3</sup>. In ancient Israel, the death penalty was applied to almost every crime, from murdering, desecrating to cursing others'

---

<sup>1</sup> Faculty of International Law, Hanoi Law University.

<sup>2</sup> David T. Johnson, "Asia's Declining Death Penalty", *The Journal of Asian Studies* Vol. 69, No. 2 (May) 2010: 337–346, pg.337.

<sup>3</sup> See: <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty#:~:text=The%20first%20established%20death%20penalty,penalty%20for%2025%20different%20crimes.&text=Death%20sentences%20were%20carried%20out,%2C%20burning%20alive%2C%20and%20impalement.>

parents<sup>1</sup>. In the Middle Ages, with the growth and the widespread influence of the Chinese dynasties, legal doctrines, and the five-punishment system, there were three death penalty ranks presented: decapitation or hanging, displaying one's head, and mutilation. Under the Qing dynasty in China, 850 crimes are punishable by death<sup>2</sup>. In short, in the ancient and Middle Ages, the death penalty could be applied to many crimes in a way that made death row prisoners suffer from excruciating pain before death. The phenomenon of abusing the death penalty as a form of retaliation is not considered humane, especially when the movement of human freedom protection has grown stronger in the modern era. With the development of humanity and human rights, the number of punishable crimes and the way of death penalty execution has changed in a positive way, which is to reduce the number of crimes punishable by the death penalty and to make execution less barbarous. The advent of the guillotine in France in the late 18th century or the abolition of horse-dragging and quartering in England in the early 19th century is a testament to that. In the modern era, whether for countries to eliminate or maintain the death penalty in their jurisdiction is still a controversial issue around the world. Globally, however, the general trend is gradually decreasing towards the abolition of the death penalty. In 2019, Amnesty International (AI) recorded 657 executions in 20 countries and territories, 5% less than the number in 2018, which is also the lowest number over the past decade.

Along with that trend, policies on applying the death penalty in Asian countries have also changed. More specifically, more than half of Asian countries have officially removed the death penalty from their punishment system or still maintained it but not executed for ten years. According to AI, 2019 can be considered a milestone when there is a first-time decrease in the number of countries executing the death penalty in the Asia-Pacific region. Only seven countries have executed the death penalty throughout the year<sup>3</sup>. In addition, crimes facing the death penalty in Asian countries often include crimes against national security (such as causing riots (Article 77), crimes of inviting foreign invasions (Article 81), and crimes of supporting foreign invasions (Article 82)) of the Japanese Penal Code; crimes against national defense interests (such as manufacturing, trading, transporting, sending parcels storing firearms, ammunition, and explosives (Article 125), theft or robbery of firearms, ammunition, explosives, or committing theft, robbery, radioactive, contagious, harmful to public order (Article 126 Criminal Law of China)); crimes that directly harm the lives or bodies of others (such as murder, intentional injury,

---

1 David T. Johnson , "Asia's Declining Death Penalty", *The Journal of Asian Studies* Vol. 69, No. 2 (May) 2010, pg. 337.

2 David T. Johnson , "Asia's Declining Death Penalty", *The Journal of Asian Studies* Vol. 69, No. 2 (May) 2010, pg. 337.

3 Amnesty International, "Death penalty in 2019: Facts and figures". Available at: <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/>

illegal detention under Chinese law<sup>1</sup>, acts of burning or flooding buildings which have someone inside or flipping trains which cause one's death in Japanese law<sup>2</sup>); and drug-related crimes<sup>3</sup>. Thus, in the modern era, the death penalty is not applied as commonly as in previous periods but mainly applies to serious crimes in Asian countries. Currently, the execution of death row prisoners has also been carried out in a more humane method, mainly lethal injection and shooting that help minimize the effects of this punishment on the psychology of offenders and people who directly execute the death penalty. This positive change is due to many factors. However, in Asia, the one with the strongest impact must be the emergence of The 1966 International Covenant on Civil and Political Rights. Article 6 of the Covenant affirms, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". At the same time, paragraph 2 of this Article also acknowledged: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes... This penalty can only be carried out according to a final judgment rendered by a competent court". Most Asian countries have signed, ratified, and adhered to the Covenant or, to some extent, accepted its binding.

However, the fact that some Asian countries have signed but not ratified the Covenant, such as China, especially some countries that have not yet joined the Covenant such as Brunei, Myanmar, Malaysia, and Bhutan, has shown their hesitation towards the provisions of the Covenant, including the above provision on the death penalty. The statistics also show that although the number of death penalty crimes has decreased, the rate of executions in Asia is still high compared to other continents, mainly concentrated in China and Southeast Asia. These are also the last countries in the world that still maintain the death penalty. (According to AI, by the end of 2019, 106 countries have abolished the death penalty out of their jurisdiction, 142 countries have abolished the death penalty both in law and in practice)<sup>4</sup>.

After proving that different views of ASEAN member states towards death penalty abolition are the reason why this area becomes a hotspot of the death penalty for a drug crime in the world map, the paper would show the view of authors on how to make use of ASEAN mechanism to urge the member states to decrease death penalty executions, aiming towards death penalty abolition for drug offenses.

---

1 Art. 232, 234, 238 Criminal Law of China.

2 Art. 108, 119, 126 Penal Code of Japan.

3 Art. 347, 355 Criminal Law of China, Art. 248, 250, 251 Criminal Law of Vietnam.

4 Amnesty International, "Death penalty in 2019: Facts and figures". Available at: <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/>.

## 2. DIFFERENCES IN THE VIEWS OF ASEAN COUNTRIES ON THE ABOLITION OF THE DEATH PENALTY FOR DRUG CRIMES IN ASEAN

Although the ICCPR has provided rules on the application of the death penalty for “most serious crimes,” the Covenant does not specify how to assess whether that crime is serious enough to be sentenced to death, in its General Comment No.36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life in 2018, Human Rights Committee (HRC) explained that this term “must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing. Crimes not resulting directly and intentionally in death, such as attempted murder, corruption, and other economic and political crimes, armed robbery, piracy, abduction, drug, and sexual offenses, although serious, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty. State parties are under an obligation to review their criminal laws to ensure that the death penalty is not imposed for crimes that do not qualify as the most serious crimes. [161] They should also revoke death sentences issued for crimes not qualifying as the most serious crimes and pursue the necessary legal procedures to re-sentence those convicted for such crimes.”<sup>1</sup>. Thus, in this Comment, compared to the General Comment No.6 and No.14 in - 1982 and 1984, the concept of “most serious crime” - one of the most controversial points - has been made clearer for scholars. Also, one of the reasons many countries invoke for the maintenance of the death penalty is more clarified. In this General Comment, HRC also pointed out that drug crimes do not meet the “most serious” criteria because they do not directly and intentionally lead to death.

However, as analyzed above, although most other Asian countries have signed, ratified, and adhered to the ICCPR, some ASEAN member countries such as Brunei, Malaysia, and Myanmar have not done it (see Table 1 below). Therefore, this interpretation of HRC is only for reference in these countries. Even for early acceding countries such as the Philippines or Vietnam, the death penalty is maintained for a long time for crimes that the HRC recommended cannot be considered “most serious crimes” as regulated in Article 6 of the ICCPR, including drug crimes.

**Table 1: Status of ASEAN member states to ICCPR**

ASEAN member	Signature	Accession, succession, ratification
Brunei	No	No
Cambodia	17th October 1980	26th May 1992

<sup>1</sup> General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Human Rights Committee, para. 35.

Indonesia		23rd February 2006
Laos	7th December 2000	25 September 2009
Malaysia	No	No
Myanmar	No	No
The Philippines	19th December 1966	23rd October 1986
Singapore	No	No
Thailand		29th October 1996
Vietnam		24h September 1982

Source: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en)

Based on the status of the death penalty execution in ASEAN countries, it can be divided into three groups: a group of countries that maintain the death penalty in their jurisdiction with high death penalty execution rate - as a result of this called retentionists (including Indonesia, Malaysia, Singapore, and Vietnam), group of countries which have eliminated the death penalty in practice but maintain the death penalty in their national law - at this moment called de facto abolitionists (including Laos, Thailand, Brunei, and Myanmar), and the group of countries that have eliminated the death penalty both in law and in practice - at this moment called abolitionists (Cambodia and the Philippines).

#### a) Retentionists

According to the statistics from Harm Reduction International, in the world today, drug crime is the crime that can be executed in 35 countries and territories, of which 4 ASEAN countries are considered to have high death penalty execution dates: Indonesia, Malaysia, Singapore, and Vietnam. These four countries can be put into one group because the number of drug offenders sentenced to death and who are on death row in these countries is quite large compared to the second group. In detail, all of these four countries have the highest minimum confirmed death sentences for drug crimes in 2019. They are Vietnam, Indonesia, Singapore, and Malaysia, where Vietnam and Indo are prominent with the numbers 74 and 54, respectively. Although Singapore is a small country, it is considered to have the strictest anti-drug laws globally. The Singaporean government has shown drastic in applying the death penalty for drug crimes. Between 1991 and 2003, more than 400 prisoners<sup>1</sup> were hanged in Singapore, making this small country the one with the highest rate of death penalty execution globally. The Harm reduction International statistics also indicate that in 2019, Singapore ranked third in terms of confirmed death sentences for drug crimes (13 people)<sup>2</sup>. In Malaysia, the death penalty is maintained in

1 Amnesty International, "Singapore The death penalty: A hidden toll of executions", available at <https://www.amnesty.org/download/Documents/96000/asa360012004en.pdf>.

2 See: Harm reduction International, "The Death penalty for Drug Offences: Global Review 2019", pg. 9.

law for many crimes. However, it is now mainly applied to murder and drug trafficking. As of February 2019, in Malaysia, 73% of crimes sentenced to death were drug crimes.

A common pattern of these countries is that the government considered drug crimes as extremely serious crimes and stick to their opinion about maintaining the death penalty for this type of crime. This is clearly reflected in their national law.

Article 82 (1a) of Indonesia's Law No. 22 of 1997 on Narcotics punishes anyone who "imports, exports, offers for sale, traffics, sells, purchases, offers up, accepts, or acts as an intermediary in the sale, purchase or exchange of a Category I narcotic" with death, life in prison, or up to twenty years in jail and a fine of up to one billion rupiahs<sup>1</sup>. In Singapore, the death penalty is the penalty that has been imposed on a variety of crimes such as drug-related crimes, using or attempting to use firearms, or trafficking in arms and kidnapping for ransom since the time it was under the domination of the UK and has been perpetuated until now. For drug crimes, The Misuse of Drugs Act 1971 stipulates that the death penalty could be the punishment for at least 20 drug-related crimes, including trafficking, illegally importing, exporting, or manufacturing various drugs in different volumes. In Malaysia, the death penalty is currently maintained with 33 charges. In Vietnam, the Criminal Code 2015 of Vietnam acknowledges, "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 of the Criminal Code 2015 of Vietnam).

Governments in these countries bring out many reasons to maintain the death penalty in general, and the death penalty for drug crimes in particular:

Firstly, there is strong public support in death penalty retention for drug crimes. It can be seen that these countries can sustain the death penalty for drug criminals because they get agreement from their citizens. Johnson also mentions this in his 2009 article: "There is strong support for capital punishment everywhere in Asia where the issue has been studied—whatever the execution rate."

This conclusion remains true in later periods. Nearly all sociological and criminological surveys of this issue have yielded a similar result to Johnson's. A public opinion survey of Roger Hood on the mandatory death penalty for drug trafficking, murder, and firearms offenses across Malaysia shows that up to about 70% of people surveyed support the application of the mandatory or discretionary death penalty or for drug trafficking<sup>2</sup>. In

---

1 Available at <http://www.aseansec.org/Law%20of%20the%20 Republic%20of%20Indonesia%20 Number%2022,%20Year%201997%20on%20Nar cotics.doc> (English translation by Indonesian National Narcotic Board).

2 Roger Hood, "The death penalty in Malaysia", available at <https://www.deathpenaltyproject.org/wp-content/uploads/2018/02/Malaysia-report.pdf>, pg.11.

Singapore, recent research also illustrates that most Singaporean citizens support the application of the death penalty for intentional murder, illegal drug trafficking, and discharging a firearm<sup>1</sup>. 84.6% of Indonesia's population also have the same perspective because they think drugs are destroying young people<sup>2</sup>. Thus, despite receiving many negative reactions from the international community, the governments of these countries do not face domestic pressure. This creates resonance with the second cause - standpoint about national sovereignty.

Secondly, from a historical and social context, ASEAN countries generally believe that maintenance or elimination of the death penalty is a matter of national sovereignty of criminal justice. In his article, Johnson affirmed that the most important difference in attitudes towards the death penalty in Asia and Europe or Africa is that for Asian countries, the death penalty is considered a national issue and instead of international or regional issues<sup>3</sup>. Indeed, this point of view was reaffirmed by leaders of the countries in this group in different forums on the death penalty abolition as well as became the justifications in front of the international community. These governments have repeatedly emphasized that the death penalty is not considered a human rights issue but a criminal justice issue. Therefore, whether to abolish the death penalty is a question for the sovereign jurisdiction of each country<sup>4</sup>. Although always protected by the constitutions of these states, the right to life is "not the only right," and... "it is the duty of societies and governments to decide how to balance competing rights against each other."<sup>5</sup>

From another aspect, the decision to abolish or maintain the death penalty, in fact, can be seen as a means of manifesting the government's power. Therefore, there are frequent changes in the death penalty policy in these countries when there is a change in the

---

1 See: Chan WC, "The Singapore Story on the Death Penalty and Tan ES, Public Opinion on the Death Penalty: Findings from a Singapore Survey" (presented at Maruah Forum, The Death Penalty—Yay or Nay, 27 May 2017).

2 Deasy Simandjuntak, "Spectacle of the Scaffold? The Politics of Death Penalty in Indonesia", *Perspective journal* No.46, 28 August 2015, available at: [https://www.iseas.edu.sg/images/pdf/ISEAS\\_Perspective\\_2015\\_46.pdf](https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2015_46.pdf), pg.1.

3 David T. Johnson, "Asia's Declining Death Penalty", *The Journal of Asian Studies* Vol. 69, No. 2 (May) 2010: 337–346, pg.343.

4 Vietnam and Singapore, the two most renowned for execution number share this view. Their official statements, when being questioned about this issue often cite this view as a factor to protect themselves. See: Amnesty International, "Singapore The death penalty: A hidden toll of executions", Amnesty International Report, available at <https://www.amnesty.org/download/Documents/96000/asa360012004en.pdf> for the statement of Singapore and <https://thanhvien.vn/thoi-su/viet-nam-len-tieng-ve-viec-ap-dung-an-tu-hinh-nhieu-thu-4-the-gioi-1070345.html> for the statement of Vietnam.

5 See: Amnesty International, "Singapore The death penalty: A hidden toll of executions", Amnesty International Report, available at <https://www.amnesty.org/download/Documents/96000/asa360012004en.pdf>.

government structures. This can be seen through the history of the death penalty application as a whole in ASEAN countries. This is also a hindrance on the path of finding a common voice at the regional level for this issue, like many other sensitive issues in ASEAN.

Thirdly, the maintenance of the death penalty for drug crimes is a self need of this group of countries as the drug crime situation becomes increasingly complex. The increase in the number of drug crimes forces these countries to look for powerful solutions to the problem, especially in the global context, when mobility and trade tend to move forward to a higher degree of freedom. These countries believe the death penalty is consistent with the severity of the drug crime. Following the flow of debate with criticism of international organizations and non-government organizations (NGOs) from the human rights perspective, these countries' governments claim that drug crimes "lead to indiscriminate loss of life. In that sense, they are no better than murderers and serial killers", that drug crimes "are destroying human beings slowly but surely<sup>1</sup>. Therefore, this must be considered a serious crime and get adequate punishments.

b) De facto abolitionists

The death penalty for drug offenses was maintained lawfully in this group of countries. However, this type of punishment was carefully considered when applying it in practice. The ASEAN countries found in this group consists of Laos, Thailand, Myanmar, and Brunei.

Article 146 of Laos Penal Law applies the death sentence to "the production, trade, distribution, possession, import, export, and transport through Lao PDR of specified (and modest) amounts of listed substances." Nevertheless, the last execution recorded in Laos was in 1989, which helps it to be classified as de facto abolitionists. In Thailand, although it has been nine years since the last execution, the Thai Penal Code still stipulates the death penalty in 55 Articles for various crimes such as intentional murder, terrorism, economic crimes, and drug-related crimes. Article 65, 66 of Thailand's Narcotics Act 1979 emphasizes that the death penalty can be applied for: manufacturing, importing and exporting illegal type 1 drugs with the aim of distributing and trafficking or possessing illegal drugs with pure content exceeding 20 grams.

In Brunei and Myanmar, even though the second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (hereinafter called ICCPR-OP2), has not been signed and ratified, Brunei has the establishment a moratorium on all executions since 1957 and so has Myanmar since

---

1 Colman Lynch, "Indonesia's use of capital punishment for drug-trafficking crimes: legal obligations, extralegal factors and the Bali nine cases", available at: <https://www.corteidh.or.cr/tablas/r22145.pdf>, pg.541.

1988. These two countries share the same viewpoint as Laos and Thailand that the act of manufacturing, distributing, selling, exporting, or importing illegal drugs in Myanmar and Brunei are punishable by death<sup>1</sup>. In Brunei, a person can be charged with drug possession for trafficking even if they only hold the keys to the drug container. Therefore, Brunei and Myanmar are also classified as *de facto* abolitionists.

Report of the United Nations Secretary-General submitted to the Economic and Social Council in 2015 session shows that within 30 years since the quinquennial reports began recording States as a *de facto* abolitionist, there have been 82 countries and regions in this group. After three decades, only three countries have revived the practice and also conducted executions. Some expressed determination to abolish the death penalty. Others declared they had established a moratorium on all executions, but that does not mean they are ready for death penalty abolition<sup>2</sup>. The report concludes that “the status of *de facto* abolitionist appears to be a very useful and accurate indicator of future behavior and a valuable concept to assist in understanding trends concerning capital punishment in both practice and law.”<sup>3</sup> Thus, it can be seen that the recognition of the *de facto* abolitionist category allows some countries who hesitate to totally eliminate the death penalty to have more time to come to a decision as well as consider the effectiveness of this policy in practice. Some others maintain the death penalty as the symbol of the solitude of the law.

Two ASEAN countries - Laos and Thailand belong to the first one. In these nations, non-execution means their hesitation to abolish the death penalty entirely. Despite not executing death row prisoners for a long time, neither Laos nor Thailand established an official moratorium. According to reliable sources used by the Harm Reduction International in the organization’s Report on the global death penalty for drug crimes in March 2020, until 12/12/2019, 312 people were on death row in Thailand, 64% of which is drug crimes. In Laos, this figure was 311 people<sup>4</sup>. Regarding the number of drug offenders sentenced to death, several NGOs complain that it is difficult to gather information on this data in these two countries. However, it is certain that the courts continue to apply the death penalty with many crimes, including drug crimes<sup>5</sup>.

---

1 Myanmar Narcostic Drug and Psychotropic Substance Law 1993, Paragraph 20 and Brunei Misuse of Drugs Act, Revised Edition in 2001, articles 3-5 and 15-16.

2 See: Report of the Secretary-General to Economic and Social Council in 2015 session, available at: <https://www.ohchr.org/Documents/Issues/DeathPenalty/E-2015-49.pdf>, Para 13-16.

3 Report of the Secretary-General to Economic and Social Council in 2015 session, available at: <https://www.ohchr.org/Documents/Issues/DeathPenalty/E-2015-49.pdf>, para.13.

4 See: Harm reduction International, “The Death penalty for Drug Offences: Global Review 2019”, pg.28 and 33.

5 See: *Report on Thailand at 25<sup>th</sup> session of the Working Group on the Universal Periodic Review of Human Rights Council*, prepared by the International Federation for Human Rights (FIDH) and the Union for

Two other countries, Myanmar and Brunei, maintain the death penalty in law to symbolize the strictness of the law as in practice, the number of people sentenced to death in these two countries is very low. In 2019, there were no death sentences or executions in Brunei recorded. In Myanmar, there were three death sentences declared for murder, none for drug crimes<sup>1</sup>.

As mentioned above, after a period of moratorium on execution, there are two trends. One is to reinstate the death penalty, and the other is to abolish the death penalty entirely. So what is the meaning of de facto abolition in the 4 ASEAN countries?

On the one hand, Laos and Thailand are both classified as de facto abolitionists. Both refuse to establish an official moratorium on execution. Nevertheless, these two countries do not share the same political will. Although the governments confirmed to “review the list of offenses subject to the death penalty under the current Penal Law [...] to be in full compliance with Article 6 of the ICCPR”<sup>2</sup>, no effective amendments to the law have taken place in Laos. In addition, Laos has always been a country that has received pressure to make the death penalty data public and transparent.

Furthermore, the UN and NGOs often recommend a restrictive application of the death penalty for extremely serious crimes. This shows that Laos is not ready to abolish the death penalty completely. For drug offenses, this determination is made more explicit since currently, the death penalty is mainly declared for drug crimes in Laos. On the other hand, in Thailand, the country has continuously publicized the possibility that the death penalty will be eliminated in the future. In March 2012, replied to the Working Group’s report on the Thailand UPR (The FIDH-UCL joint Universal Periodic Review), Thailand stated it was beginning the “process of studying the possibility of abolishing the death penalty.” This assertion was repeated in many forums, both at the regional and global levels, in 2013-2018. At the regional level, the Thai Government announced that

---

Civil Liberty (UCL), April 2016, para.8 and Report on Lao People’s Democratic Republic at 123<sup>th</sup> session of the Working Group on the Universal Periodic Review of Human Rights Council, prepared by Harm Reduction International and the World Coalition against death penalty, June 2018, pg.3.

1 See: *Report on Thailand at 25<sup>th</sup> session of the Working Group on the Universal Periodic Review of Human Rights Council*, prepared by the International Federation for Human Rights (FIDH) and the Union for Civil Liberty (UCL), April 2016 and *Report on Lao People’s Democratic Republic at 123<sup>th</sup> session of the Working Group on the Universal Periodic Review of Human Rights Council*, prepared by Harm Reduction International and the World Coalition against death penalty, June 2018.

2 *Report on Lao People’s Democratic Republic at 123<sup>th</sup> session of the Working Group on the Universal Periodic Review of Human Rights Council*, prepared by Harm Reduction International and the World Coalition against death penalty, June 2018, pg.3.

it would soon pass the law on abolishing the death penalty and is considering endorsing the ICCPR-OP2<sup>1</sup>.

Meanwhile, at the global level, Thailand has also promised to consider the possibility of abolishing the death penalty both officially and unofficially<sup>2</sup>. However, reality shows that Thailand has repeatedly given the reason for not immediately accepting the death penalty recommendations from the UN and NGOs due to the consensus from the public. Several Thai government officials and politicians make public statements supporting the death penalty. In 2014, a survey in Thailand revealed that up to 68.7% of people surveyed favor withholding the death penalty. Thailand's government also recognizes that differences in public sentiments are a factor that makes Thailand extremely circumspect and approaches the matter step by step<sup>3</sup>.

Consequently, despite the strong statements from the government about the abolition of the death penalty in general and the death penalty for drug crimes in particular, the practice in Thailand is relatively challenging. In 2019, HRI even moved Thailand from the "low application" group to the "high application" group. In Thailand, the number of people on death row for drug-related crimes is high. HRI's 2019 report also reached a similar conclusion to Laos. In these two countries, drug-related crimes are the main ones who are sentenced to death<sup>4</sup>. In addition, it should also be noticed that these are two countries located in the Golden Triangle Area, which is famous for producing, trading, and transporting drugs since the 60s of the twentieth century. The situation in this area seems to be worse, which causes the elimination of the death penalty with this type of crime more difficult than in other countries in the region. In this aspect, the death penalty act as deterrent methods to drug offenses.

---

1 During a conference of several Southeast Asian governments on prospects for abolishing the death penalty, held in Bangkok on 22-23 October 2013, Thailand's Ministry of Justice announced that the government would soon propose legislation to abolish the death penalty and was considering ratifying the ICCPR-OP2. See: *Report on Thailand at 25<sup>th</sup> session of the Working Group on the Universal Periodic Review of Human Rights Council*, prepared by the International Federation for Human Rights (FIDH) and the Union for Civil Liberty (UCL), April 2016, pg.3.

2 Non-officially in a letter to the UNGA President which contained Thailand's human rights pledges and commitments as part of its candidature for a seat at the United Nations Human Rights Council for the 2015-2017 term and officially in Thailand's third National Human Rights Plan (2014-2018). See: *Report on Thailand at 25<sup>th</sup> session of the Working Group on the Universal Periodic Review of Human Rights Council*, prepared by the International Federation for Human Rights (FIDH) and the Union for Civil Liberty (UCL), April 2016, pg.3.

3 See: UN Human Rights Council, 33rd session, *Report of the Working Group on the Universal Periodic Review - Thailand*, 7 September 2016, UN Doc. A/HRC/33/16/Add.1, Para 20.

4 See: Harm reduction International, "The Death penalty for Drug Offences: Global Review 2019", pg.31 and 34.

On the other hand, Brunei and Myanmar show a different perspective when their courts have hardly sentenced drug crimes to death. The most recent statistics on drug offenses on death row in Brunei was in 2017, with 2 Malaysian citizens selling drugs<sup>1</sup>. In a speech, King Hassanal Bolkiah of Brunei officially announced that Brunei officially establishes a moratorium on execution for drug offenses, including ones in the amendment and supplement of the Islamic Law Shariah Penal Code<sup>2</sup>. In Myanmar, although the moratorium on execution has not been officially announced, drug crimes are not the main criminal group that must receive this sentence. On that basis, the authors assess that the possibility of the abolishment of the death penalty in these two countries is higher than in Thailand and Laos.

### c) Abolitionists

In ASEAN, two remaining countries, Cambodia and the Philippines have removed the penalty system's death penalty.

Cambodia is the pioneer in abolishing the death penalty in Asia in general and in ASEAN in particular. This is also the country with the longest time of abolishing the death penalty in ASEAN. The country has banned the application of the death penalty for all types of crimes since 1989. Cambodia ratified ICCPR - OP2 in 1992, which imposes an obligation to implement their commitments on the death penalty abolition in practice as well as in national law. To fulfill its obligations, in 1993, Cambodia brought the issue to its new Constitution: "Everyone has the right to life, liberty, and security of person. In any case, there shall be no death penalty"<sup>3</sup>. At the same time, the country has also removed the death penalty in the Penal Code. This determination of Cambodia has been warmly welcomed by the international community, especially after the bloody period of the Khmer Rouge.

Cambodia's political determination is more consistent than that of the Philippines. Considered as "a society that has received more exposure to democratic tenets and human rights advocacy than other Southeast Asian countries"<sup>4</sup>, in the Philippines, in 1987, under the President Corazon Aquino administration, partly due to the political motivations and pressure from the media and international community, the Philippines abolished the death penalty. However, this country is also a good example of using the death penalty as an instrument of a government authority. Therefore, in the following years, the maintenance

---

1 Harm reduction International, "The Death penalty for Drug Offences: Global Review 2019", pg.36.

2 See: *Brunei death penalty moratorium applied to new Shariah laws*, AP News, available at: <https://apnews.com/article/fe8f64aae454b2aa7278447249b3b67>.

3 Art.32, Cambodia Constitution.

4 See: Arlie Tagayuna, "Capital Punishment in the Philippines", *Explorations in Southeast Asian Studies Journal*, Vol 5, No.1, 2004, available at: <https://core.ac.uk/download/pdf/5094815.pdf>

or elimination of the death penalty depends much on the point of view of the ruling Government. In 1993, the Philippines government under the Ramos administration reinstated capital punishment for 13 crimes through the Republic Act (RA) 7659<sup>1</sup>, which later was amended to apply for 46 crimes. In his paper, Johnson argues that this is one of the most expansive capital statutes in Asia<sup>2</sup>. The period between 2000 and 2006 witnessed no execution in the Philippines. In 2006, the death penalty was declared to be abolished in Philippines law for the second time. However, in 2016, when President Rodrigo Duterte came into office, he launched the anti-drug campaign “Operation Double Barrel,” which in HRI 2017 report called “a bloody anti-drug campaign.” Part of this campaign was to develop a Bill on re-establishing the death penalty under lethal injections for drug offenders identified in the Comprehensive Dangerous Drugs Act of 2002. It was approved by the Philippines House of Representatives on March 7, 2017, with 216 votes in favor, 54 against, and one abstention<sup>3</sup>. President Duterte is working hard for the Bill to continue to be approved in the Senate. The HRI report also notes that the number killed is the largest number of civilian deaths in southeast Asia since the Khmer Rouge genocide and Vietnam war in the 1970s<sup>4</sup>. The President, in his speech, justifies the re-establishment of this penalty because “This law will not only help us deter criminality but also save our children from the dangers posed by the illegal and dangerous drugs.”

From the perspective of International Law, the Philippines has ratified ICCPR-OP2 since 1986, which means that the Philippines has committed that “no person in the member state of the Protocol will be executed” (Article 1). In HRC’s General Comment No. 36 (2018), on the right to life, the Committee stated that when States parties to the Covenant had abolished the death penalty, by amending their domestic laws, becoming parties to the Second Optional Protocol to the Covenant or adopting another international instrument obligating them to abolish the death penalty, such abolition was “legally irrevocable” and States were barred from reintroducing it (para. 34).

As such, the Philippines’ intention to pass this Bill is contrary to the commitments they have made when joining such international treaties. Moreover, the Philippines’ choice to revive the death penalty of drug crimes is also contrary to the HRC explanation mentioned in the previous section.

---

1 See: Arlie Tagayuna, “Capital Punishment in the Philippines”, *Explorations in Southeast Asian Studies Journal*, Vol 5, No.1, 2004, available at: <https://core.ac.uk/download/pdf/5094815.pdf>.

2 David T. Johnson, “Asia’s Declining Death Penalty”, *The Journal of Asian Studies* Vol. 69, No. 2 (May) 2010: 337–346, pg.344.

3 See: Amnesty International, “Philippines: The death penalty is an inhumane, unlawful and ineffective response to drugs”, available at: <https://www.amnesty.org/en/latest/news/2017/03/philippines-the-death-penalty-is-an-inhumane-unlawful-and-ineffective-response-to-drugs/>.

4 Harm reduction International, “The Death penalty for Drug Offences: Global Review 2017”, pg.16.

On the other hand, the government of Duterte declared that the main justification for this bill which re-establishing the death penalty for drug crimes, is the deterrent effect on the country's growing drug crime situation. This is also the reason that the retentionists in ASEAN use to justify their decision. However, this argument is not convincing enough for the UN and NGOs because "the death penalty does not help "deter crime and achieve retribution while being administered fairly and reliably"<sup>1</sup> because "there is no evidence that the death penalty deters drug-related or other crime more than other methods of punishment."

### **3. SOLUTIONS TOWARDS DEATH PENALTY ABOLITION FOR DRUG CRIMES FROM THE PERSPECTIVE OF ASEAN**

Approaching the issue of capital punishment for drug offenses from the perspective of human rights, The ASEAN Charter claims that one of the goals of ASEAN is "... to promote and protect human rights and fundamental freedoms" (Art. 1, para. 7). The Charter also requires "ASEAN and its Member States shall act under the following Principles: ... (h) adherence to the rule of law, good governance, the principles of democracy and constitutional government; (i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice". However, if we look deeper at this document, while still "uphold the United Nations Charter and international law, including international humanitarian law, subscribed to by the ASEAN Member States," ASEAN emphasized much more on the "respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States." For that reason, human rights cooperation is mostly under the traditional principles, which are always highly respected by the ASEAN Member States, especially the principle of non – external interference. Despite that fact, it is undeniable that the highest effect document of ASEAN admits fundamental human rights, including "right to life," which is compatible with ICCPR and other related human rights treaties.

Regarding drug offenses, ASEAN member states started to be aware that this was not only a national issue but also a regional issue since 196 when they claimed in the ASEAN Declaration of Principles to Combat the Abuse of Narcotic Drugs that they "considered the necessity of further developing and emphasizing ASEAN efforts to overcome the drug problem"<sup>2</sup> and they were "conscious of the need for combined action at the regional level"<sup>3</sup> 10 years later. This partly shows their acknowledgment that this problem needs to

---

1 David T. Johnson, "Asia's Declining Death Penalty", *The Journal of Asian Studies* Vol. 69, No. 2 (May) 2010: 337–346, pg.344.

2 See: The Introduction of ASEAN Declaration of Principles to Combat the Abuse of Narcotic Drugs 1976.

3 Joint Statement on the International Problem of Drug Abuse and Trafficking Kuala Lumpur, 9 July 1985, para.2.

be approached from a national perspective and a regional level. ASEAN has already had some common actions towards this problem which can be seen in various documents in this area. However, there seems to be a contrary here between their acknowledgment and their attitude when considering capital punishment for drug offenses. ASEAN leaders, as above, most agree that this is a national issue. At the same time, still, need international and regional cooperation in other fields when talking about drugs. The difference between their approach and international standards could be big trouble that causes them stuck inside the problem.

Most of the ASEAN member states, especially The Philippines and Singapore, based their argument on a “non - tolerance approach,” as confirmed in ASEAN Statement in the 62<sup>nd</sup> session of the Commission on Narcotic Drugs High-Level Segment in 2019. Nevertheless, this argument is also in contrast to their pillar of law enforcement in their new Work plan on securing Communities Against Illicit Drugs 2016-2025 adopted by the 5th ASEAN Ministerial Meeting on Drug Matters (AMMD) held in Singapore on 19-20 October 2016 which says that ASEAN member States would work towards the improvement of access to equitable justice for all individuals in the ASEAN region. It cannot be done while ASEAN member states do not share the same attitude towards capital punishment for drug offenses because of the different punishment they give for this same kind of crime.

It is also noted that the ASEAN Member States’ reservation about their point of view that this is a national issue is opposite to the world’s trend of capital punishment abolishment. By Dec 2018, 86 countries have completed their ratification to ICCPR-OP2. HRC encourages ICCPR members to access or ratify this protocol. The UN also issues a range of resolutions to call for establishing a moratorium on all executions in all member countries aiming to abolition.

In fact, out of 10 member States, two have abolished capital punishment in their legislation, four have been de facto abolitionists. Although to be retentionists, the rest declare to reduce the number of punishable crimes with capital punishment. This can be seen as ASEAN member States’ effort and desire to catch up with the world’s revolution. It also means that as long as the existence of a suitable solution, it is not so difficult for ASEAN member states to solve the problem. The ASEAN Way should also be accounted for when approaching the problem from a regional perspective.

Based on those factors, we highly recommend the following solutions:

Firstly, this should be a “visible” issue in ASEAN. Currently, ASEAN countries seem to avoid considering death penalty abolition the topic in ASEAN forums. Therefore, in the short term, it could be better if ASEAN includes the issue in the agenda of Channel

1's meeting (Official Channel) from the ASEAN Summit to High-ranking Official level... and Channel 2 (Informal Channel) through forums, seminars... to discuss the abolition of the death penalty for drug crimes in particular and for other types of crime, in general, to gradually gain a common voice on this issue. The ASEAN Way may work here, which satisfies the need of all ASEAN member states by agreeing with proper recommendations in those channels. These can be reducing the number of executions in retentionist countries while abolishing capital punishment out of legislation in de facto abolitionist countries and no reinstatement of capital punishment in abolitionist countries. Common deadlines for these should also be included.

Secondly, to achieve this goal, ASEAN also needs to develop a regional surveillance mechanism integrated with the existing monitoring mechanisms through The ASEAN Intergovernmental Commission on Human Rights (AICHR), coordinated with the National Human Rights Bodies of the member states. Also, ASEAN may use its Working Group for an ASEAN Human Rights Mechanism for making a report on death penalty abolition for drug crimes every year, which serves as a basis to improve the abolition in ASEAN member states.

## REFERENCES

1. Amnesty International, the *Death penalty in 2019: Facts and figures*, available at: <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/> (accessed on 4 February 2021).
2. Amnesty International, *Philippines: The death penalty is an inhumane, unlawful, and ineffective response to drugs*, available at: <https://www.amnesty.org/en/latest/news/2017/03/philippines-the-death-penalty-is-an-inhumane-unlawful-and-ineffective-response-to-drugs/>(accessed on 1 February 2021).
3. Amnesty International, *Singapore The death penalty: A hidden toll of executions*, Report, available at <https://www.amnesty.org/download/Documents/96000/asa360012004en.pdf> (accessed on 23 January 2021).
4. Arlie Tagayuna, *Capital Punishment in the Philippines*, Explorations in Southeast Asian Studies Journal, Vol 5, No.1, 2004, available at: <https://core.ac.uk/download/pdf/5094815.pdf> (accessed on 4 February 2021).
5. ASEAN Declaration of Principles to Combat the Abuse of Narcotic Drugs 1976.
6. ASEAN Joint Statement on the International Problem of Drug Abuse and Trafficking Kuala Lumpur, 9 July 1985.

7. *Brunei death penalty moratorium applied to new Shariah laws*, AP News, available at: <https://apnews.com/article/fe8f64aae454b2aa7278447249b3b67> (accessed on 10 February 2021).
8. Cambodia Constitution.
9. Chan WC, *The Singapore Story on the Death Penalty* (presented at Maruah Forum, The Death Penalty—Yay or Nay, 27 May 2017).
10. Colman Lynch, *Indonesia's use of capital punishment for drug-trafficking crimes: legal obligations, extralegal factors and the Bali nine cases*, available at: <https://www.corteidh.or.cr/tablas/r22145.pdf>.
11. Criminal Law of China.
12. Criminal Law of Vietnam.
13. David T. Johnson, *Asia's Declining Death Penalty*, *The Journal of Asian Studies* Vol. 69, No. 2 (May) 2010: 337–346
14. Deasy Simandjuntak, *Spectacle of the Scaffold? The Politics of Death Penalty in Indonesia*, *Perspective journal* No.46, 28 August 2015, available at: [https://www.iseas.edu.sg/images/pdf/ISEAS\\_Perspective\\_2015\\_46.pdf](https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2015_46.pdf) (accessed on 10 February 2021).
15. General Assembly resolution 71/187.
16. General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Human Rights Committee.
17. Harm reduction International, *The Death penalty for Drug Offences: Global Review 2017*.
18. Harm reduction International, *The Death penalty for Drug Offences: Global Review 2019*.
19. Kristel Limpot, CNN Philippines, *Duerte calls for revival of the death penalty by lethal injection for a drug-related crime*, 27 Jul 2020, available at: <https://www.cnnphilippines.com/news/2020/7/27/Duterte-death-penalty-revival-fifth-SONA.html> (accessed on 10 February 2021).
20. Misuse of Drugs Act of Brunei, Revised Edition in 2001.
21. Narcotics Act 1979 of Thailand.
22. Narcotic Drug and Psychotropic Substance Law 1993 of Myanmar.
23. Penal Code of Japan.
24. Report of the Secretary-General to Economic and Social Council in 2015 session, available at: <https://www.ohchr.org/Documents/Issues/DeathPenalty/E-2015-49.pdf>.

25. Report of the Secretary-General to General Assembly, Moratorium on the use of the death penalty in 73<sup>rd</sup> session, available at <https://undocs.org/pdf?symbol=en/A/73/260>.
26. *Report on Lao People's Democratic Republic at 123rd session of the Working Group on the Universal Periodic Review of Human Rights Council*, prepared by Harm Reduction International and the World Coalition against the death penalty, June 2018.
27. *Report on Thailand at 25<sup>th</sup> session of the Working Group on the Universal Periodic Review of Human Rights Council*, prepared by the International Federation for Human Rights (FIDH) and the Union for Civil Liberty (UCL), April 2016.
28. Roger Hood, *The death penalty in Malaysia*, available at <https://www.deathpenaltyproject.org/wp-content/uploads/2018/02/Malaysia-report.pdf>.
29. Tan ES, *Public Opinion on the Death Penalty: Findings from a Singapore Survey* (presented at Maruah Forum, The Death Penalty—Yay or Nay, 27 May 2017).
30. The Misuse of Drugs Act 1971 of Singapore.
31. UN Human Rights Council, 33rd session, *Report of the Working Group on the Universal Periodic Review - Thailand*, 7 September 2016, UN Doc. A/HRC/33/16/Add.1.
32. Vu Han, *Viet Nam len tieng ve viec ap dung tu hinh nhieu thu 4 the gioi*, available at <https://thanhvien.vn/thoi-su/viet-nam-len-tieng-ve-viec-ap-dung-an-tu-hinh-nhieu-thu-4-the-gioi-1070345.html> (accessed on 10 February 2021).

# DEATH PENALTY AND STATE OF EMERGENCY: IN SEARCH OF SOME ASIAN COUNTRIES AND VIETNAM

Nguyen Dinh Toan<sup>1</sup>

**Abstract:** The state of emergency is generally defined as the process when the nation's life is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergencies. The death penalty is the person's execution according to a legal process as a punishment for a criminal act. It is considered the most effective crime prevention solution (permanently eliminating the accused from society). The purpose of the death penalty is to punish those who commit serious crimes and give the most severe warning to those who intend to commit similar crimes, thereby minimizing similar crimes in the future. In some cases, the death penalty is related to the state of emergency. This paper examines the relationship between the death penalty and the state of emergency in some Asian countries and Vietnam. Following this, it can be considered whether the death penalty should exist or not.

**Keywords:** State of emergency, death penalty, capital punishment, human rights.

## 1. DEATH PENALTY AND THE STATE OF EMERGENCY: AN OVERVIEW

From a legal perspective, the death penalty can be seen as a punishment for taking away the life of a person who has committed a severe crime under a sentence declared by a lawfully established court following the law. Historically, most countries' legal systems have recognized this form of punishment and widely applied it to prevent crime and protect society from dangers.<sup>2</sup> The death penalty is the most severe criminal sanction

---

<sup>1</sup> PhD Candidate, Graduate Academy of Social Sciences of Vietnam.

This paper is in partial fulfillment of the requirements for the Doctor of Law degree (the doctoral thesis titled "Law on the State of Emergency in Vietnam today /Pháp luật về tình trạng khẩn cấp ở Việt Nam hiện nay") that Ph.D. Candidate NGUYEN DINH TOAN is working at the Graduates Academy for Social Sciences under Vietnam National Academy for Social Sciences.

<sup>2</sup> Nguyen Minh Hai, Nguyen Van Hoan and Nguyen Minh Khue, 'Khả năng Việt Nam gia nhập Nghị định thư tùy chọn thứ hai về bãi bỏ hình phạt tử hình theo Công ước quốc tế về các quyền dân sự và chính trị (ICCPR) [On the possibility of Viet Nam ratifying the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty]' (Research Report EU JULE 2019).

imposed by a state, resulting in deprivation of the right to life, permanently excluding an individual from society.<sup>1</sup>

In Vietnamese Criminal Law, the death penalty is the most memorable and severe punishment in the punishment system, depriving convicts of the right to life and only applies to offenders of particular danger for society. The death penalty is specified in the Criminal Code and decided by the Court. Besides, the death penalty is also a kind of punishment to prevent recidivism completely from the convicted person (separate prevention). Existing in criminal law, the death penalty is an objective social phenomenon because it is a means of society's self-defense against the violation of its conditions of existence. Crime threatens society's existence, so society has to react to punish offenders (Pham, 2015) naturally.<sup>2</sup>

The state of emergency/ state of exception/ state of alarm/ state of siege/ stems from a government's declaration to respond to an unusual situation that poses a fundamental threat to the country.<sup>3</sup>

The declaration allows for hanging up certain normal government functions, alert citizens to alter their normal behavior, or authorize government agencies to implement emergency preparedness plans and limit or suspend civil liberties and human rights.

The governmental declaration allows for hanging up some normal government functions, alarm citizens to change their normal operations, or empower government agencies to implement emergency preparedness plans. Besides, it also bounds or eliminates civil liberties and human rights.<sup>1</sup>

The need to declare a state of emergency may arise from situations as diverse as an armed action against the state by internal or external elements, a natural disaster, civil unrest, an epidemic, a financial or economic crisis, or a general strike.

State of emergency may originate from exceptional circumstances, for example: (1) a natural disaster, (2) an epidemic, (3) civil unrest, (4) a general strike, (5) an armed action against the state by internal or external factors, or (6) financial or economic crisis.

---

1 Vu Cong Giao, 'Quyền sống và hình phạt tử hình trong pháp luật quốc tế và pháp luật Việt Nam [The right to live and the death penalty in international law and Vietnamese Law]' (Ensuring human rights in legal proceedings, Vinh City, Decmeber 2017).

2 Pham Van Beo, 'Xóa bỏ hay duy trì hình phạt tử hình đối với một số tội phạm cụ thể [Elimination or maintenance of the death penalty for certain crimes]' (2015) 20, Tạp chí *Nghiên cứu Lập pháp* [Journal of Legislation Studies] 300.

3 DCAF, 'State of emergency' (Security sector governance and reform, October 2005) <[http://www.dcaf-tunisie.org/adminDcaf/upload/ejournal/bg\\_states-emergency.pdf](http://www.dcaf-tunisie.org/adminDcaf/upload/ejournal/bg_states-emergency.pdf)> accessed 28 December 2020.

Emergencies are not uncommon, for example, during the Covid-19 epidemic. Especially, emergencies can persist, or even last, in dictatorial regimes. In some emergencies, martial law is also enacted, giving the military greater authority.

## **2. DEATH PENALTY IN THE STATE OF EMERGENCY IN SOME ASIAN COUNTRIES**

The right to live is a fundamental right of humans. However, as a permissible exception, the death penalty is recognized in the International Covenant on Civil and Political Rights (ICCPR). In particular, the ICCPR provides that the right to live will not be arbitrarily deprived; the use of the death penalty is listed in several specific limitations and restrictions.

Article 6 paragraph 2 of the ICCPR stipulates that: “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes following the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out in according to a final judgment rendered by a competent court”.

Moreover, anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. The death penalty shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.

According to Ni Wayan Sinaryati,<sup>1</sup> in law enforcement for extraordinary and severe crimes in nature, capital punishment sanctions are still relevant to be carried out. As shown above, in some countries, the death penalty still applies to criminals related to extraordinary and state of emergency.

Some death penalty relates directly or indirectly to the state of emergency. For example, eight countries permit the death penalty only for severe crimes in exceptional circumstances, such as those committed during times of war, endangering national security. The death penalty is a crucial tool in sentence systems for the better application of criminal penalties.<sup>2</sup>

In fact, in some cases, criminals lead to a state of emergency. The situation in the Philippines is an example. President Rodrigo Duterte commanded extrajudicial killing for

---

1 Ni Wayan Sinaryati, ‘Formulative policy of death penalty for corruptors in Indonesia’ (2020) 4 Journal of Public Administration, Finance and Law 431.

2 Joko Sriwidodo, Kristiawanto, ‘Death penalty from the perspective of human rights in Indonesia’ (2020) 10 International Journal of Scientific and Research Publications 17.

a drug offender. From July 2016 to January 2017, the police have killed over 7,000 people assumed of drug-related crimes.<sup>1</sup>

In Indonesia, the death penalty is necessary and vital as a crucial criminal punishment to reduce and control the illegal drug trade. The government leadership of the country named the illegal drug trade a “drug emergency.” Following this, the government leadership and the National Narcotics Agency (BNN) hold up strongly capital punishment to fight the ‘drug emergency.’<sup>2</sup> Indonesian President Joko Widodo stated that Indonesia was in a state of emergency due to drug use and trafficking. Criminal subjects could only be faced with capital punishment. The President responded: “there are between 30 and 50 people in Indonesia dying per day because of drugs”.<sup>3</sup>

Regarding the perspective of the public interest, the implementation of capital punishment can help to protect society. Following this, in order to save many others, we put a trafficker to death. This also means that. It helps other people avoid illegal drug trafficking.<sup>1</sup> Illegal drug trafficking not only kills people but also demolishes the lives and future of the nation’s next generation. Therefore, it is a rational choice to choose the death penalty for drug traffickers to save the nation as well as the state.<sup>1</sup>

“That drug abuse is an extraordinary crime (extraordinary crime) and transnational crime (transnational crime) because of the effects of drug abuse has not only destroyed themselves drug but also can damage the structure of the life of society, nation and country”.<sup>1</sup>

In other cases, homicide in the context of war/armed conflict is currently regulated by both international human rights law and humanitarian law. According to the current general opinion, if this behavior takes place between the armed forces of the warring parties that comply with the provisions of international humanitarian law (prohibiting attacks on civilians and civilian targets, prohibiting the killing of enemy soldiers when they have surrendered or are no longer able to resist) or in other words, deaths resulting from lawful acts of war (deaths resulting from lawful acts of war) is not considered a violation of the right to life recognized in international human rights law (Vu, 2017).<sup>4</sup>

1 Amnesty International, ‘More than 7,000 killed in the Philippines in six months, as president encourages murder’ (Global report Amnesty International 2020) <<https://www.amnesty.org.uk/philippines-president-duterte-war-on-drugs-thousands-killed>> accessed 28 December 2020.

2 Sefriana, Dodik Setiawan Nur Heriyanto, ‘Ineffective and inhumane: Time to end Indonesia’s death penalty for drug traffickers’ (2020) 13 International Journal of Innovation, Creativity and Change 650.

3 Matt Payton, ‘Indonesia hope to execute ten foreign death row prisoners without an international ‘soap opera’ Independent (London, 13 May 2016). <<https://www.independent.co.uk/news/world/asia/indonesia-hope-execute-ten-foreign-death-row-prisoners-without-international-soap-opera-a7027951.html>> accessed 28 December 2020.

4 Vu Cong Giao, ‘Quyền sống và hình phạt tử hình trong pháp luật quốc tế và pháp luật Việt Nam [The right to live and the death penalty in international law and Vietnamese Law]’ (Ensuring human rights in legal proceedings, Vinh City, Decmeber 2017).

During the period from 1960 to 1970 in Nepal, the country only carried out three executions. However, the death penalty continued in the 1959 Army Act and the Treason Act, so the death penalty is still applied for some crimes. It is severe in the political and military realm. The last death sentence was executed in Nepal in 1979 for the assassination of the King. However, in the 1980s, due to political upheaval, Nepal reapplied the death penalty for murder without going to court, kidnapping, hijacking, and torture, indiscriminate use of weapons, and terror. The Special Services Act of 1985 made it a crime that disclosed and improperly used confidential information in the intelligence industry could imposition the death penalty. Nepal officially abolished the death penalty through a 1990 constitutional amendment, which came into effect in 1991.<sup>1</sup>

In Korea, the latest revised criminal law of 2013 still stipulates the death penalty for several crimes, including rioting, collusion with foreign riots, murder, and robbery. However, the death penalty does not apply to people under 18 years old, pregnant women, and people with mental illness.<sup>5</sup>

The Philippines has been a member of the ICCPR since 1986 and is a member of the 2007 Death Penalty Abolition Protocol. The process of abolishing the death penalty in the Philippines is relatively complicated. This country maintained the death penalty as early as a Spanish colony and then a US colony and continued to maintain it after gaining independence in 1946. With the development of the Philippines legal system, especially under President Ferdinand Marcos's (1965-1986) leadership, the use of the death penalty was expanded, covering also illegal trafficking of drug substances. By 1987, the Philippines Constitution abolished the death penalty. However, it still maintained a provision permitting the death penalty to the ruthless crimes that brought the Philippines to become the first country in Asia to abolish the death penalty. By 1999, the death penalty was restored and maintained until 2006, when the President passed Act No. 9346 to abolish the death penalty. The Philippines government approved the Protocol on the Abolition of the Capital Penalty in 2007.<sup>2</sup> However, in 2016, President Rodrigo Duterte promised that he was ready to restore the death penalty to preserve social order and safety and fight crime. Subsequently, the act on using the death penalty for many drug-related crimes was passed by the House of Representatives in February 2017. Currently, this act

---

1 Nguyen Minh Hai, Nguyen Van Hoan and Nguyen Minh Khue, 'Khả năng Việt Nam gia nhập Nghị định thư tùy chọn thứ hai về bãi bỏ hình phạt tử hình theo Công ước quốc tế về các quyền dân sự và chính trị (ICCPR) [On the possibility of Viet Nam ratifying the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty]' (Research Report EU JULE 2019).

2 Nguyen Minh Hai, Nguyen Van Hoan and Nguyen Minh Khue, 'Khả năng Việt Nam gia nhập Nghị định thư tùy chọn thứ hai về bãi bỏ hình phạt tử hình theo Công ước quốc tế về các quyền dân sự và chính trị (ICCPR) [On the possibility of Viet Nam ratifying the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty]' (Research Report EU JULE 2019).

is waiting for the approval of the Senate. As such, the Philippines will likely restore the death penalty. The President supports this. A public opinion poll on restoring the death penalty shows that more than 67% of Filipinos support the death penalty.<sup>1</sup>

Criminals are executed and sentenced to death by the state as punishment. In some countries, it can be different forms of drug-related offenses, terrorism-related acts and “murder,” “treason,” “acts against national security,” “collaboration” with a foreign entity, “espionage,” “questioning the leader’s policies,” participation in “insurrectional movement and terrorism,” “armed rebellion against the ruler” and other “crimes against the state.”

Some of these sentences relate to the state of emergency, for example: (1) State of emergency on 11 September 2001 in America related to terrorism; (2) or a case of Pervez Musharraf: Pakistan ex-leader is an instance. He was convicted to death for treason. The reason is that he suspended the constitution in 2007 and declared an emergency to extend his tenure.

According to Amnesty International,<sup>2</sup> there are 106 countries where the law does not allow the death penalty; 8 countries where the law does not allow capital punishment, except for severe crimes in exceptional circumstances; 28 countries where the use of the death penalty is allowed by law but in fact, these nations have not executed anyone for over 1tenyears; and 56 countries which retain capital punishment laws.

### 3. DEATH PENALTY IN VIETNAM

Like some other countries, Vietnam maintains the death penalty in the Criminal Code, according to Article 40 of the 2015 Criminal Code (amended in 2017):

**“Article 40. Death sentence**

1. Death sentence is a remarkable sentence imposed upon people committing severe crimes that infringe national security, human life, drug-related crimes, corruption-related crimes and some other severe crimes defined by this document.

2. Life imprisonment shall not be imposed upon juvenile offenders, women who are pregnant or raising children under 36 months of age,e and people from 75 years of age or older when they commit the crime or during the trial.

1 Frances Mangosing, ‘Pulse Asia: Most Filipinos still support death penalty’ (INQUIRER.net, 5 May 2017) <<https://newsinfo.inquirer.net/894552/pulse-asia-most-filipinos-still-support-death-penalty>> accessed 28 December 2020.

2 Amnesty International, ‘Death sentences and executions 2019’ (Global report Amnesty International 2020) <<https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF>> accessed 28 December 2020.

3. The life sentence shall not be executed in the following circumstances:

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 one-third of the property embezzled or bribes taken closely cooperates with the authorities in the investigation process or trial, or has made reparation to atone for the crime.

4. In the circumstances specified in Clause 3 of this Article or the death sentence is commuted, the death sentence shall be replaced with life imprisonment.”

Crimes still applying the death penalty under the Penal Code 2015 include: Raping people under 16 years old (Article 142); Producing and trading counterfeit products that are medicines and preventive medicine (Article 194); Murder (Article 123); Property embezzlement (Article 353); Accepting bribes (Article 354); Destroying peace, causing a war of aggression (Article 421); Against humanity (Article 422); War crimes (Article 423); Betraying the Fatherland (Article 108); Illegal trading in narcotics (Article 251); Activities aimed at overthrowing the people’s administration (Article 109); Riot (Article 112); Spy (Article 110); Terrorism (Article 299); Terrorism against the people’s administration (Article 113); Destroying material and technical foundations of the Socialist Republic of Vietnam (Article 114); Illegally producing narcotics (Article 248); Illegally transporting narcotics (Article 250).<sup>1</sup>

## CONCLUSION

According to the law of the countries that still keep the death penalty, this penalty is usually only applied to crimes of particular danger, infringement of national security, world peace effects, and drug crime, murder. The death penalty is an effective and irreplaceable deterrent to prevent grave crimes such as murder, terrorism, drugs. The death penalty means killing a person to deter many people.<sup>4</sup>

The death penalty is an ancient punishment. Today, some scholars declare that the application of the death penalty is unnecessary, unfair, or ineffective. Some argued that it is necessary to remove the death penalty from a democratic and civilized society to ensure effective real practical human rights to life.<sup>2</sup> Recently, the number of countries

---

1 Bộ luật Hình sự [Criminal code] (2015) cl3.

2 Nguyen Minh Hai, Nguyen Van Hoan and Nguyen Minh Khue, ‘Khả năng Việt Nam gia nhập Nghị định thư tùy chọn thứ hai về bãi bỏ hình phạt tử hình theo Công ước quốc tế về các quyền dân sự và chính trị (ICCPR) [On the possibility of Viet Nam ratifying the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty]’ (Research Report EU JULE 2019).

abolishing the death penalty has increased. However, keeping or eliminating the death penalty depends a lot on the country's political, cultural, social, economic, and religious contexts.<sup>1</sup> As analyzed, the death penalty application provoked a strong social outcry, leading to a state of state emergency. However, in some cases, certain crimes cause or threaten to cause a national emergency, and the death penalty applied is appropriate.

---

1 Amnesty International, 'Death sentences and executions reports 2015' (Global report Amnesty International 2015) <[https://www.amnesty.org/en/what-we-do/death-penalty/?utm\\_source=google&utm\\_medium=cpc&gclid=CjwKCAiAuoqABhAsEiwAdSkVVC0qBDM4DrNxZ6ILWZNG-3\\_CvKH1OKsvTszExJ2FS-qqLEFxeA717xoCnmoQAvD\\_BwE](https://www.amnesty.org/en/what-we-do/death-penalty/?utm_source=google&utm_medium=cpc&gclid=CjwKCAiAuoqABhAsEiwAdSkVVC0qBDM4DrNxZ6ILWZNG-3_CvKH1OKsvTszExJ2FS-qqLEFxeA717xoCnmoQAvD_BwE)> accessed 28 December 2020.

# DEATH PENALTY IN CONFUCIAN LEGAL CULTURE IN CHINA AND VIETNAM

Lan Chi Le (Ph.D.)<sup>1</sup>

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

**Keywords:** Death penalty, Confucianism, Punishment, China, Vietnam.

## CONFUCIANISM AND PERSPECTIVE ON CAPITAL PUNISHMENT

Derived from the concept of “天地之大德曰生” (respect for life is the most extraordinary morality within the world) in the Book of Changes (I Ching), Confucianism expressed respect for human life and love for the people. “The Confucian principle of “*Ren*” involves benevolence or humaneness. *Ren* was believed to be crucial to an orderly

---

<sup>1</sup> VNU-School of Law, Hanoi, Vietnam; Email: lelanchi@vnu.edu.vn.

and virtuous society” (Lu, H., & Miethe, T. D. (2010). “Ren” is one of the major categories of Confucian ideology and the norm in human interactions, according to which, “仁者二人者” (respect for interpersonal relationships), human beings have to care for, love and tolerate each other. If people can treat each other that way, society will be orderly, harmonious, and live-in peace. Confucius was the one who introduced the policy of leading the people by Morality and guiding the people into order by Rite. “Ren” is the core of the legal value system, the essence of values, and the logical starting point of Confucius when contemplating Law (Du, 2020, p. 257).

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

Derived from the role of education, Confucianism generally did not favor punishing the offender by the death penalty if the offender had not previously received education from the ruler of society. Confucius condemned the policy of “不教而殺謂之虐” (the rulers who do not educate the people, allow them to commit crimes and then kill them are tyrannical). Killing without educating is tyrannical. Forcing people to do what one wants without disciplining them is atrocious and forcing people to be on time while making slow administrative orders is detrimental (Analects XX, 4). Mencius had the same policy as Confucius and assumed that “教而後誅” (education before punishment, if a person is educated but does not show repentance, such person then shall be killed).

In the conception of Confucianism, the State must focus on educating people and making them “克自” (stoic), “內省” (self-critical), “自律” (self-disciplined) and “自訟” (self-blaming) for self-control. Thus, education must be given prominence, and the State is responsible for educating its people. If education cannot reform the people, then the death penalty shall be brought up; however, such a penalty is the last resort.

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

The fact that Confucian scholars did not support the death penalty stems from the Confucian conception that the ruler is also responsible for creating a social environment that leads to the crime of the people. Mencius affirmed that: “人之初性本善” (Human nature is good) while Confucius believed that: “性相近也，習相遠也”(By nature, men are nearly alike; by practice, they get to be wide apart). Therefore, when applying punishments to the people, the rulers must feel heart-rending or even criticize themselves as they have to do such thing, “哀矜折獄” (feel heart-rending instead of happy); when making judgments and punishing the offenders, “哀矜勿” (one must feel anguished to think about the cause of the crime). People commit crimes due to lack of education, tyrannical policies, unrighteous rulers, and moral transgression of the superior. Therefore, the kings and the mandarins must regulate the livelihood of the people, so as to make sure that, for those above them, they shall have sufficient wherewith to serve their parents, and, for those below them, sufficient wherewith to support their wives and children; that in good years they shall always be abundantly satisfied, and that in bad years they shall escape the danger of perishing. People have to be financially stable before they can be emotionally stable. When they thus have been involved in crime, to follow them up and punish them - this is to entrap the people. Therefore, the application of heavy punishments, including the death penalty, was not supported by Confucians as they saw the responsibility of the politicians and the educators therein.

Mencius believed that “Human nature is good,” meanwhile, concerning Legalism, Han Fei assumed that human nature is greedy, selfish, and evil, humans do bad and evil things by nature. It is necessary to use law and penalty to punish offenders, educate and

deter others. Thus punishments must be strict, and the use of punishment is inevitable. Shang Yang strongly underlined the role of heavy punishments in refraining the people from transgressing to be no punishment. Therefore, if “以刑止刑” (use punishments to end the use of punishments) and “用刑其欲無刑” (use punishments so that there will be no punishments) are intended to be applied, the punishments must be severe. Thus, the death penalty - the most severe punishment must be prescribed and applied, stemming from the educational role through the deterrent nature of this penalty.

Meanwhile, Confucianism did not support capital punishment. This originates from the word “Ren” in Confucian conception. At the same time, it also comes from the fact that Confucianism did not appreciate the educational role through the perceived deterrent nature of the death penalty. Effective education must come from the ruler’s love for the people and through the Rule of Rite and Rule of Virtue so that the educated people can be stoic, self-critical, self-disciplined, and self-blaming in order to control their thoughts and actions and return to their inherently good nature.

Capital punishment is the heaviest and most punitive in nature of penalties. Stemming from the Confucian philosophy of “Zhongyong,” Confucianism also did not promote this penalty because of the approach for the degree of punishment in Confucianism were “刑中” (moderate punishment), “威而不猛” (strict but not cruel), “緩猛相濟” (a combination of light and heavy punishments), “捨小過” (condone minor errors, it is normal for the superior to get along with those of an inferior position). “Li Ji” (the Book of Rites) developed the questioning of Confucius and re-expressed the Confucian thought on the degree of punishment as follows: “愛百姓故刑罰中，刑罰中故庶民安” (moderate punishment because of the love for the people, loved by the people because of the moderate punishment). Mencius also had the same way of approaching the problem with Confucius. However, he introduced the concept of “省刑” (lighten the punishments as they should be light and only applied to those who commit crimes). Mencius condemned an overkill on capital punishment: “今夫天下之人目，未有不嗜殺人也？” (“Now among the shepherds of men throughout the nation, there is no one who does not find pleasure in killing men). Mencius believed that punishments should be applicable to only those who commit the crime “刑罰罪不挈” (the wives and children of criminals were not involved in their guilt). “If there were one who did not find pleasure in killing men, all the people in the nation would look towards him with outstretched necks. Such being indeed the case, the people would flock to him, as water flows downwards with a rush, which no one can repress” (the Book “Liang Hui Wang” II).

Regarding the purpose of the death penalty, Confucianism posed the issue: “生道殺民.” Like most Confucian matters and ancient doctrines, “生道殺民” is interpreted in different ways as “Like most ancient doctrines, Confucianism can be subject to various

interpretations. It is a fact that different ways of punctuating the Confucian classics can produce different meanings (Hu, 2007). The first explanation is that before deciding whether to kill the offender or not, it is necessary to find relevant evidence and arguments to spare such a person's life. In his book "Longgang Qianbiao," Ou Yangxiu of the Song dynasty recounted how his father told his mother: "This is a death penalty sentence, I wanted to find a way to spare the criminal's life but I could not... I tried to find every way that could save their life, but I failed to do so. Thus both the dead person and I have no regrets". Thus, the first explanation pertains to each specific case of the death penalty, with the judge's responsibility and the penalty decision. The second explanation also includes the content of the first one but is more extensive in the way that: the death penalty - murder is applied to save and ensure the lives of others. Zhu Xi of the Song Dynasty said: "A criminal deserves to die, I failed to save his life, then I killed him to reassure the masses and warn others. That is to kill by ethics.

There is nothing to resent." The second explanation, in our opinion, is broader and more comprehensive. "天地之大德曰生.....該死之所以生之也，苟非其人實有害於生人，絕不忍置之於死地。死一人所以生千萬人也。是故，無益於生人必不輕置人於死" (Heaven and earth's great virtue is life. If a person truly does not harm the lives of others, then do not force that person to die). According to the book "Mengzi Ji" of Zhao Qi, "殺此罪人者，其意欲民生也，故雖伏罪而死，不怨殺者" (killing criminals is to let others live. Therefore, the ones who get killed are not allowed to resent those who kill them). In short, "生道殺民" is the principle that before carrying out the death penalty, it is necessary to consider if the offender has a chance to live. Suppose the crime is too severe and capital punishment must be applied. In that case, this penalty should be regarded as the last resort for the criminal, and the execution of the death penalty is for the lives of the people. In such a case, the person sentenced to death shall be wholly convinced and has no resentment.

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

Regarding the decision on the penalty, especially the death penalty, Confucianism demanded: "慎罰" (to be careful when it comes to deciding on the type of punishment).

Mencius referred to “慎罰” in “省刑慎罰” (light and straightforward punishments, to be careful when it comes to punishment). Confucius believed that “慎罰” is the careful, objective, and careful consideration of the parties’ opinions before making a decision on the type of penalty. He introduced the thought of “眾惡之，必查焉；眾好之，必查焉” (the bad must be investigated and the good must be investigated) or “聽獄之兩詞” (listen to both sides to judge, avoid listening to just one side when judging). Mencius said that: “左右皆曰可殺，勿聽。諸侯大夫皆曰可殺，勿聽。國人皆曰可殺，然後殺之，見可殺焉，然後殺之” (When all those about you say, “this man deserves death,” do not listen to them. When all your great officers say, “This man deserves death,” do not listen to them. When the people all say, “This man deserves death,” then inquire into the case, and when you see that the man deserves death, put him to death” (the Book “Liang Hui Wang” II). Xun Kuang inquired that: “聽之精，明其情，參悟明謹施其刑。顯者必得，隱者浮現民反成” (the trial of a case must clarify the actual situation, it is necessary to consider clearly and carefully when deciding the type of punishment). The decision on the type of punishment must be based on the principle of “權” (temporization) and “時” (time): to be flexible according to time, place and circumstances when committing the crime so that “一張一弛” (there shall be both strictness and flexibility at times).

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

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

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

of the laws of China. The death penalty was also a punishment existing throughout the history of the laws of Vietnam.

Concerning the criminal laws of Chinese feudal dynasties, Lu & Miethé (2010) collected the number of capital crimes from various historical sources with the statistics as follows: The Tang Code (653 AD) included a total of 233 capital offenses. The Song Dynasty (960 - 1279) retained all capital offenses from the Tang Dynasty and gradually added sixty other offenses, making 293 capital offenses. The number of separate capital provisions then dropped dramatically to a low of 135 offenses in the Yuan Dynasty (1279 - 1368). The number of different capital codes increased again, including 282 capital. The death penalty's historical and legal development was 33 offenses during the Ming Dynasty (1368 - 1644) and then skyrocketed to over 800 separate offenses in the Qing Dynasty (1644 - 1911). The Criminal Code of the Tang Dynasty set forth a penalty system with five main penalties (the Five Punishments), namely Chi, Zhang, Du, Liu, Si (beating with a light stick, beating with a heavy stick, penal servitude, life exile, and death) with long-term influence on later criminal laws of China and "was still considered authoritative as late as the fourteenth century and was used as a model by the Ming dynasty (1368-1644)", "the Five Punishments in the Tang Code, and all the codes after that until the Qing dynasty (1644 - 1911) (Muhlhahn, 2009, p. 31). However, it is believed that the Sui Dynasty (prior to the Tang Dynasty) set up the system of the Five Punishments, while before the Sui Dynasty, the ancient Five Punishments regime with Mo, Yi, Fei, Gong, Da Pei had already been present in the Shang Dynasty. In particular, Mo means tattooing, Fei is amputation of a leg, Yi (Ty) is amputation of the nose, Gong is male genital castration and female genital mutilation, and especially Da Pei, which is the death penalty (Vuong & Dich, 2004, p. 358).

Muhlhahn (2009, p. 31) also argued that the Tang Code was "proved remarkably influential not only in China but also in East Asia" and the Five Punishments of this Code "was adopted with some modifications by Japan in the early eighth century and later by Korea and Vietnam." In the Le Dynasty (1418 - 1656 AD), "Quoc Trieu Hinh Luat" (the National Penal Code), or "Bo luat Hong Duc" (Hong Duc Code), was adopted under the order of King Le Thanh Tong (Hong Duc) in 1483 in Vietnam. "What is of importance is that regardless of the nature of the social relation in question, it is all regulated by the threat of imposing a criminal punishment, in case it is violated, with the most severe one: Death. Moreover, the Code threatened people with 149 capital crimes out of 722 provisions (Tran, & Vu, 2019). Later on, as regards the Nguyen Dynasty (1802 - 1945 AD), there existed an important but often criticized code, namely "Hoang Viet Luat le" (also known as Gia Long code), promulgated under the order of King Gia Long in 1815. It consists of 22 volumes and 398 provisions. This can be considered as the last code of

the feudal regime in Vietnam, and similar to the previous codes, it stipulated 105 crimes that can be given capital punishment (Vu, 1971 in Tran & Vu, 2019). In general, all aforementioned feudal codes follow the system of Five Punishments, including (1) “Chi” (flogging penalty), (2) “Zhang” (cudgel penalty), (3) “Tu” (servitude penalty), (4) “Liu” (exile penalty), and (5) “Si” (capital punishment). The category/system of crimes for which capital punishment is applied varied in different dynasties. However, in general, capital punishment may be applied to a number of crimes, and certain types of crimes were laid down in all codes for which capital punishment is applied. Before the Le dynasty were the Dinh, Tien Le, Ly, Tran, and Vietnam can no longer retain the criminal code of the Tran and Dinh dynasties or the rules of the Dinh and Tien Le dynasties. History books only recorded that the Tran dynasty also prescribed brutal types of the death penalty, such as burying alive or crucifying prisoners on a wooden board and then taking them to the market before execution, as well as brutal or destructive physical punishments. The Dinh dynasty set forth the types of capital punishment such as putting the criminal in a cauldron of oil, putting the criminal in an iron crib, and letting them be eaten by tigers, while in the Tien Le dynasty, the execution was implemented by wrapping straw with oil in it around the body of the offender then setting them on fire (Le, 2018, p. 56).

Regarding the death penalty in China and Vietnam, we believe that both countries share things in common. In particular, first, the regulations on the forms of the execution of the death penalty are often included in the criminal laws and other forms of capital punishment equivalent to different degrees of the death penalty (for example, strangulation is considered lighter than decapitation, decapitation is less severe than lingchi (death by a thousand cuts). Indeed, this phenomenon is caused by the fact that feudal penal codes in China and Vietnam were the general rules for all social relations, and there was no separate code of criminal procedure (Lu & Miethe, 2010). Second, the death penalty is also a punishment that not only results in the death of but can also inflict physical pain for the convicted person. Thus, it can be categorized into the group of physical punishments - the punishment those which cause physical pain and destroys the body as recorded in history, such as the penalties mentioned by Le (2018, p. 56), including the decapitation of limbs, toes, and fingers in the Tran dynasty of imperial Vietnam. In China, “供刑” (castration) was initially applied to punish men and women for adultery, then later used to punish protesters in the Qin and Han dynasties, typically the case of Sima Qian. The Sui dynasty removed castration in the criminal law, and later such punishment was not mentioned in the criminal laws of other dynasties, but until the Ming and Qing dynasties, evidence of the existence of this kind of punishment remained to be found (Vuong & Dich, 2004, p. 360). Third, many forms of the execution of the death penalty were of a deterrent nature to others, such as decapitation with putting a decapitated head in public and crucifying the

criminal on a wooden board and displaying in the market before execution (Nguyen & Gian 1992, p. 290). Fourth, the death penalty was not only applied to the offenders but also to others related to the offender based on the principle of joint responsibility or collective responsibility such as “誅夷三族” (three familial exterminations), or even nine familial exterminations. Vuong & Dich (2004, p. 360) referred to Zhu Di, the third king of the Ming Dynasty who even carried out ten familial exterminations to college professor Fang Xiaoru, which killed all ten generations and friends, students with the death toll being over 870 people.

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

“History witnessed a fierce battle in the ideology and practice of the Rule of Virtue and the Rule of Law, and history also shows the failure of the extreme application of either means” (Do, 2013, p 284). The Han dynasty rejected Han Feizi’s Rule of Law style. It promoted the Rule of Virtue in the style of Confucius. Was Liu Bang more virtuous

than Qin Shi Huang? That is not true. The king of the Han dynasty was no less brutal than the king of the Qin dynasty. However, why did he prefer the Rule of Virtue to the Rule of Law? Because Confucius taught him that to rule the people, the Rule of Virtue was more effective than the Rule of Law (Vu, 1997, p. 123). The legal culture in feudal dynasties in China and Vietnam was Confucian because the moral values according to Confucian standards and the Virtue category of Confucianism were highly valued. In Confucian legal culture, as moral values assigned by Confucian standards were upheld and protected, Legalism was, therefore, pushed downwards in the formal and populism formula of “DeZhuXingFu/德主刑辅” (morality is primary, punishment is secondary). Given the fact that criminal law was used to regulate almost all social relations and the death penalty was a common punishment and enforced in many barbaric forms, the formula showing the essence of Confucian legal culture, at least, in the criminal justice field was “刑主德辅/Xing Zhu De Fu” (the supremacy of “刑” (punishment or penalty” and the subservience of “德” (morality). Law or criminal laws demonstrated the authoritarian power of the emperors, so “Xing” (upholding punishments, incapacitation, deterrence, and prevention with the severity of penalty) shows the central role, expressed in significant shared common and permanent manner; “De” (virtues and rites) as a supplementary role, expressed in a minor, uncommon, non-permanent manner in stipulations on punishments and their enforcement.

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

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

Currently, both China and Vietnam are maintaining capital punishment. The death penalty is specified only for “the most heinous crimes” (the 1997 Criminal Law of the People’s Republic of China, Article 48) and for persons committing extremely serious crimes (the 2017 Penal Code of the Socialist Republic of Vietnam, Article 40). China set out the exceptions in which the death penalty is not imposed on persons who have not reached the age of 18 when the crime is committed or on women who are pregnant at the time of trial. Meanwhile, Vietnam still supports humanitarian policies that juveniles, the elderly, and pregnant women when they commit or are tried will not receive the death penalty. Besides, women raising children under 36-month-old at the time of committing the crime or of being adjudicated are exempted from the death penalty. In these cases, persons sentenced to death receive commutations of the death penalty to life imprisonment (Luong, 2021). In addition, both countries set forth provisions on reconsideration of the death penalty judgment in a way that gives the offender who is subject to the death penalty a chance to live. “In the case of a criminal element which should be sentenced to death, if immediate execution is not essential, a two-year suspension of execution may be announced at the same time the sentence of death is imposed. Suppose a person sentenced to death with a suspension of execution does not intentionally commit a crime during the period of suspension. In that case, he is to be given a reduction of sentence to life imprisonment upon the expiration of the two years; if he demonstrates meritorious service, he is to be given a reduction of sentence to not less than fifteen years and not more than twenty years of fixed-term imprisonment upon the expiration of the two years; if there is verified evidence that he has intentionally committed a crime, the death penalty is being executed upon the approval of the Supreme People’s Court” (the 1997 Criminal Law of the People’s Republic of China, Article 48, 50). Vietnam also sets out regulations on the reconsideration of death sentences following cassation and retrial by the Justice Council of the Supreme People’s Court. It reduces the death penalty to life imprisonment under the State President’s authority (the 2015 Criminal Procedure Code of the Socialist Republic of Vietnam, Article 367).

Both countries are in the process of reducing the number of capital crimes. In Vietnam, the reduction in capital crimes is from 44 in the 1985 Penalty Code to 29 provisions in the 1999 Penalty Code, and subsequently, to 25 provisions in the amended 1999 Penalty Code which was adopted in the latest session of 12th the National Assembly in 2009 and to 18 crimes in the 2015 Criminal Code (Tran & Vu, 2019). In China, as Luong (2021) states, in February 2011, China abolished the death penalty for 13 non-violent crimes, reducing the number of crimes punishable by death from 68 to 55. However, it is indisputable that

both China and Vietnam are still upholding the death penalty both in law and in practice. The question is, does Confucian legal culture still exist, and what impact may it have on the maintenance and limitation of the death penalty in these two countries?

In China and Vietnam, Confucianism has no longer been the official ideology, and the Confucian legal system has no longer been implemented. Socialist and global elements significantly inform the jurisprudential, structural, substantial, and cultural elements of the current legal systems in both China and Vietnam. There is another field of the legal system in which the impact of Confucianism is prominent, namely legal culture. The triumph of Communism, the reception of socialist law, and the diffusion of international laws have considerably removed Confucian, structural, and substantial elements from the legal system. However, the Confucian legal culture constantly exists in the people's thinking for thousands of years. It operates at a subconscious level, and therefore, it is not easy to be eradicated within a short time. As a result, the Confucian legal culture remains its long-lasting influences in the two countries (Son, 2013). Currently, the Confucian moral values are replaced. In the cultural area, the ideals of a "new kind of socialist man" have substituted the outdated Confucian gentleman. Socialist collectivism replaced the three yokes and five relationships (*tam-cuong, ngu-thuong*) of Confucianism (Nghia, 2005). However, the modern political values, namely "Socialist collectivism" and the traditional political values of Confucianism, are similar in terms of emphasizing collectivism. Confucianism has shaped the relationship between the people and the State as one between the individual and the collective, between the private and the common for more than 2000 years. In this relationship, "the primacy of public or common interests over individual interests, the broad and active role of the ruler or state to serve the common interests of the people, and the conception that law is just one of the tools used by the state to maintain social order. This also explains why the Confucian authoritarian style of government may also have contributed its characteristics to Asian Communism (Peerenboom, 2002 in Nghia, 2005).

As for Vietnam, it was evident that the shortcoming in the history of the Vietnamese political system is that the Rule of Law of our state apparatus has never had a civic society in history (Vu, 2009, p. 83). In China, "collective rights tend to be granted more importance than individual ones, amounting to rights abuses at the expense of individual interests" (Jiang, 2016, p.109). Confucian legal culture helps the people to accept the death penalty more easily with the philosophy of collective interest as Confucianism introduces the concept "生道殺民" (death penalty should be regarded as the last resort and the execution of the death penalty is for the lives of the people). On the other hand, the people's acceptance of "the thought that law is just one of the tools used by the state to maintain social order" and the state's death penalty, after all, is also the legacy of Confucianism with the ideology of "君父"

(the king is the father), “子民” (the people are the children), “父尊子卑” (give prominence to the father and belittle the children), the people must be submissive to the king: “Parents kill the child because the child is disobedient, the child should not be resentful as the child would not exist without the parents, thus when the parents kill their child, it is as if the child was not born at all” (Preface of the Book of Wei (Wei Shu) in (Du, 2020, p. 22). China is still a so-called paternalistic state. The law enforcement system is likely to have both natural and symbolic status as the protector of anonymous collective interests, such as public security or social stability (Wu & Vander Beken, 2012).

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

## **CONCLUSION AND RECOMMENDATION**

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

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

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

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

**REFERENCES**

1. Dam Gia Kien, *Lich su van hoa Trung Quoc (The history of Chinese Culture)* (Khoahocxahoi 1993).
2. Do Duc Minh, *Hoc thuyet Phap tri Trung Hoa co dai - Gia tri tham khao trong quan ly xa hoi o Viet Nam hien nay (The ancient Chinese Legalism - References Values in Governing the Contemporary Vietnam Society)* (Chinh tri hanh chinh 2013).
3. Du Vinh Can, *Nho gia phap Tu tuong thong luan (Overview on Confucianism on Philosophy of Law)* (Hong Duc 2020).
4. *Hoang Viet Luat Le (The National Penal Code of the Nguyen Dynasty)* (Van hoa thong tin 2002).
5. Shaohua Hu, 'Confucianism and contemporary Chinese politics' (2007) *Politics & Policy*, 35(1), 136-153.
6. Jiang Na, *Wrongful Convictions in China* (Springer 2016).
7. Le Van Cam, *Phap luat hinh su Viet Nam tu the ki X den nay - Lich su va thuc tai (Vietnam Criminal Law from the 10<sup>th</sup> Century to Date - The History and Modernity)*, (Daihoc Quoc gia Ha noi 2018).
8. Hong Lu and Terance D. Miethe, *China's death penalty: History, law and contemporary practices* (Routledge 2010).
9. Luong Thanh Hai, 'Why Vietnam continues to impose the death penalty for drug offenses: A narrative commentary' (2021) *International Journal of Drug Policy*, 88, 103043.
10. Pham Duy Nghia, 'Confucianism and the conception of the law in Vietnam' (2005) *Asian socialism and legal change: The dynamics of Vietnamese and Chinese reform*, 76-90.
11. Nguyen Ngoc Chi, 'Mot so suy nghi ve hinh phat tu hinh trong luat hinh su Viet Nam' (Some Comments on Death Penalty in Vietnam Criminal Law) (2012), *Khoa hoc ĐHQGHN, Lua thoc* 28(2012), 42-48.
12. Randall Peerenboom, *China's long march toward rule of law* (Cambridge University Press 2002).
13. Bui Ngoc Son, 'Confucian constitutionalism in imperial Vietnam' (2013) *NTU L. Rev.*, 8, 373.
14. Tran Kien and Vu Cong Giao, 'The changing nature of death penalty in Vietnam: A historical and legal inquiry' (2019) *Societies*, 9(3), 56.

15. Weiming Tu and Weiming Du (eds.), *Confucian traditions in East Asian modernity: Moral education and economic culture in Japan and the four mini-dragons* (Harvard University Press 1996).
16. Vuong Kien Huy and Dich Hoc Kim, *Tinh hoa tri thuc van hoa Trung Quoc (The Chinese Intellectual Elite)* (The gioi 2004).
17. Vu Quoc Thong, *Phap che su Viet Nam (The History of Law of Vietnam)* (Dai hoc Sai gon 1971).
18. Nguyen Hien Le and Gian Chi, *Dai cuong triet hoc Trung Quoc (Overview on Philosophy of China)* (ThanhphoHoChiMinh 1992).
19. Vu Khieu, *Nho giao va phat trien o Viet Nam (Confucianism and the Development in Vietnam)* Khoa hoc xa hoi 1997) vol 2.
20. Vu Minh Giang, *Lich su Viet Nam - truyen thong va hien dai (The history of Vietnam - The Tradition and Modernity)* (Giao duc Viet Nam 2009).
21. Wu Wei and Tom Vander Beken, 'The evolution of criminal interrogation rules in China' (2012) *International Journal of Law, Crime and Justice*, 40(4), 271-295.
22. Wu Wei and Tom Vander Beken, 'Understanding criminal punishment and prisons in China' (2018) *The Prison Journal*, 98(6), 700-72

# THE RULE OF LAW AND THE DEATH PENALTY IN EASTERN EUROPEAN COUNTRIES AND EXPERIENCES LEARNT FOR ASIA

Xuan Loc Dang<sup>1</sup>

**Abstract:** In the late 1980s and early 1990s, the world witnessed several structural changes around the world. That was the end of the Cold War, which led to the dissolution of the Soviet Union, the crisis, and the collapse of the socialist regime in Eastern European countries such as East Germany, Poland, Belarus, Czech, Slovakia, Bulgaria, Hungary, Moldova, Romania, Ukraine. Soon after, all of these countries rebuilt an utterly new Constitution to ensure the necessary and sufficient conditions to join the European Union. A new member country must sign and ratify treaties that are legally binding to build a civilized nation and society under the motto governed by the Rule of Law and the respect of Human Rights. These are Treaty on European Union, European Convention on Human Rights in 1950, Protocol No. 6 in 1982, and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, adopted by the Council of Europe in 2002.

Nowadays, Rule-of-law may be one of the most discussed concepts of constitutional law and can be unquestionably related to the transition from state law to the Rule of Law. The universality of the rule of law can be admitted everywhere as an indispensable reference system for countries, which shows that the rule of law has become a common standard for the whole world. The Constitution of many countries has noted that the Rule of Law state represents the model of the state apparatus and the critical rule of law principles such as human rights and citizenship. In Asia, many countries also recognized and applied the rule of law state model, including the Charter of ASEAN countries in reality. However, more than 90 percent of the world's executions for the death penalty occurred in Asia.

This article analyzes specific interferences between the Rule of Law and the Death Penalty from Eastern European Countries' perspective, simultaneously and the assessment of the actual impacts of the Rule of Law on capital punishment in some countries in Asia past period. On this basis, recommendations were released to minimize the number of executions for the death penalty and promoting at the point of abolition in Asia.

**Keywords:** *Rule of Law; Human Rights; Capital punishment; Death Penalty abolition.*

---

<sup>1</sup> Ph.D Candidate, Hanoi Law University.

In partial fulfillment of the requirements for the Ph.D. degree Thesis titled “*Building the state based on rule of law in the renovation perspective in Vietnam and Eastern European countries/ Xây dựng nhà nước pháp quyền trong bối cảnh Đổi mới ở Đông Âu và Việt Nam*” that the author working on at the Hanoi University of Law, Vietnam.

## INTRODUCTION

Throughout history, the death penalty was applied across the world, in various cultures and religions, for the most severe crimes such as murder, and sometimes also for more trivial ones. Even though countries used it to varying degrees, there was always controversy around the subject of the death penalty. A first step of the importance of international human rights law emerged following the Second World War with the creation of the United Nations and the adoption and ratification of the core human rights treaties<sup>1</sup>.

Subsequently to this milestone, the fundamental importance of human rights has been universally acknowledged. Because of those mentioned above, the abolitionist movement gained momentum, driven by increased public awareness about the value of life and the right to life, the dignity of human beings, the risk of judicial errors, and the fact that execution involves torture<sup>2</sup>. This movement united Europe around the shared principles of the Rule of law as it is recognized that “*Human rights are the bedrock principles which underpin all societies where there is the rule of law and democracy.*” Considering that the primary goals of the European Union are to promote democracy, to protect human rights and the rule of law, the EU Member States have abolished the death penalty as such seemed to serve no purpose in a civilized society governed by the rule of law and respect for human rights.

The European Union (EU) countries are bound by the European Convention on Human Rights<sup>3</sup> (ECHR) in 1950, particularly its Article 2 and its Protocols no. 6 and no. 13. A meaningful note to be highlighted is that, following Protocols no. 6 and no. 13 and as a consequence of European Union practice in observing the moratorium on the death penalty, Article 2 has been amended to prohibit the death penalty in all circumstances<sup>4</sup>. The European Union is required by its Treaties to respect and promote human rights in all its internal and external policies. Moreover, the European Union Member States consider that the death penalty is unacceptable in a democratic society, as it opens the door for the arbitrary use of power to take the place of democracy and the rule of law<sup>5</sup>. Those as mentioned above were also sustained by Thorbjørn Jagland, former Secretary-General of Council of Europe, which started in September 2010 that “*The death penalty is a travesty of justice. It is barbaric and does not deter crime. It does not help the victims of crime. Moreover, it transforms murderers into martyrs and judicial errors into irreversible tragedies*”.

---

1 [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) accessed on 15.01.2021.

2 [https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635516/EPRS\\_ATA\(2019\)635516\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635516/EPRS_ATA(2019)635516_EN.pdf).

3 [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) accessed on 15.01.2021.

4 <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-97575%22%5D%7D>} - Case of Al-Saadoon and Mufdhi vs. the United Kingdom, Application no. 61498/08, Judgment, Strasbourg, 2 March 2010.

5 <https://www.ohchr.org/documents/publications/handbookparliamentarians.pdf>. accessed on 15.01.2021.

## 1. THE RULE OF LAW AND THE DEATH PENALTY

### 1.1. The Rule of Law

As we all know, the idea of the rule of law state has existed since the ancient Greek-Roman state and it has always been associated with the thought of democratic development expressed in the views of thinkers such as: *Solon* (638-559 BC) on a democratic basis through elections and the integration of state power and the law; *Socrate* (469-399 BC) reflects a view of justice in compliance with the law, fairness must go along with the legalization; *Plato* (427-347 BC) presents in the works “*The Republic*” and “*The Laws*”, including the thesis “*where the law is not valid and under the power of someone in there, the state will collapse quickly*”; *Aristotle* (384-322 BC) wrote “*The Constitution of Athens*” and other important works such as “*The Politics*”, “*The Ethics*”, “*The Rhetoric*” to point out the views on the existence of common, nature law is higher than the specific law issued by the state; morality must serve the law; fair action means acting following the law, condemning the rulers not to obey the law, attempting to dominate with violence and requiring decentralization in state organizations; *Cicero* (106-43 BC) with famous works such as “*On Government*”, “*On the Laws*” and “*On duties*”. He had progressive ideas about the rule of law, there has a particularly famous view: “*Everyone is under the force of the law, and the people must regard the law as their refuge.*”

The Rule of Law ideology was further developed into increasingly complete theories in the medieval, near and modern times with political and legal thinkers such as *N.Machiavelli* (1469-1527) with “*Le Prince*” includes the idea that the state has equal dominance then can eliminate the monarchy; *Thomas Hobbes* (1588-1679) the English philosopher with the work “*Leviathan*”; *John Locke* (1632-1704) with the work “*The Second Treatise on Government*” showed the viewpoint that limiting state power must be organized on the principle of decentralization if not be restricted and controlled, the most obvious consequence is the violation of human rights and freedoms *C. Montesquieu* (1689-1755) with the classic work “*The spirit of the law*” has outlined the basic features of civil society and the rule of law as well as clearly analyzed the theory of the three rights of isolation; *J.J.Rousseau* (1712-1788) with the work “*Social contract*”, he advocated the idea of democracy, social contracting, then found political solutions about a republic. The legislative power always belongs to the people so that the monarchy will shift to a republic of elected officials; *A.V.Dicey* (1835-1922) famous English legislator with “*Introduction to the Study of the Law of the Constitution*” refers to the Rule-of-Law with eight essential characteristics that must be followed. Next, many other legalists and thinkers such as *I.Kant*, *G.W.Hegel*, *M.James*, *T.Jefferson*, *A.Hamilton* also contributed to the development of the idea of the Rule-of-Law as well as a new legal worldview.

In modern times, the concept of the rule of law is a constitutional reality whose foundation is found in the mechanisms of the exercise of state power, in the relations between power and liberty of every individual of the society, and the application of the principle of legality to the entire state activity, but also the behavior of each member of society. The Rule of law has formed and spread over three primary models<sup>1</sup>:

- The *English model* of the “Rule of Law” is characterized by the limitation of the monarch’s power and preserving the power of the parliament.

- The *German concept* emphasizes the need to ensure the legality of the administration and its judicial control.

- The *French concept* regards the rule of law as a legal state, proclaiming and maintaining the principle of legality.

Initially formed and developed in these Western European countries, the rule of law theory was gradually imported, popularized to other countries and regions, step by step internationalized, and recognized as a principle, standard for adjusting relations between countries. Traditionally, the rule of law has been viewed as the domain of lawyers and judges. Nevertheless, everyday issues of safety, rights, justice, and governance affect us all; everyone is a stakeholder in the rule of law. The practical rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of justice, opportunity, and peace underpinning development, accountable government, and respect for fundamental rights. According to an independent organization to promote the rule of law worldwide - WJP<sup>2</sup>, four universal principles constituted a working definition of the rule of law. They were developed following internationally accepted standards and norms. They were tested and refined in consultation with a wide variety of experts worldwide. The rule of law is a durable system of laws, institutions, norms, and community commitment that delivers:

- *Accountability*, the government as well as private actors are accountable under the law.

- *Just Laws*, the laws are clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property, and human rights.

- *Open Government*, the processes by which the laws are enacted, administered, and enforced, are accessible, fair, and efficient.

- *Accessible Justice*, justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

---

1 Luc Heuschling, *Etat de droit: Rechtsstaat: Rule of Law*, Dalloz Sirey Publishing, 2002.

2 <https://worldjusticeproject.org/about-us/overview/what-rule-law>, accessed on 16.01.2021.

## 1.2. The Death Penalty an overview in the World and Europe

Many old civilizations included some use of the death penalty in their society. As far back as the Ancient Laws of China, the death penalty has been established as a punishment for crimes. Thus, one of the earliest written documents that supported the death penalty was the Code of Hammurabi, which was written on stone tablets around 1760 BC. The code uses talionis, the idea of “*an eye for an eye*,” and inflicts the death penalty for twenty-five crimes<sup>1</sup>, although murder was not one of them. Death sentences were carried out by such means as crucifixion, drowning, beating to death, burning alive, and impalement. The death penalty was also part of the Hittite Code in the 14th century B.C., the Draconian Code of Athens in the 7th century B.C., or Roman Law of the Twelve Tables 5th century B.C. The first death sentence historically recorded occurred in 16th Century BC Egypt. The wrongdoer, a member of the nobility, was accused of magic and ordered to take his own life.

In the American colonies, legal executions took place as early as 1630. As in England, the death penalty was imposed for many crimes, even minor ones such as picking pockets or stealing a loaf of bread. Gradually, however, England and America reduced the number of capital offenses until the main focus was on first-degree murder - murders showing deliberation, willfulness, and premeditation. They also moved executions within the walls of prisons to eliminate the spectacle of public executions.

Even if the death penalty was considered for so many years a rule, in Europa, more and more states acknowledge that the death penalty undermines human dignity and that its abolition, or at least a moratorium on its use, contributes to the enhancement and progressive development of human rights. Thus, the reason why countries have abolished the death penalty was a broader understanding of human rights. For example, Spain abandoned the last vestiges of its death penalty in 1995, stating that: “*the death penalty has no place in the general penal system of advanced, civilized societies. What more degrading or afflictive punishment can be imagined than to deprive a person of his life?*”<sup>2</sup>.

Because of the aforementioned, it has to be noted that the imposition of the death penalty is incompatible with fundamental tenets of human rights, in particular human dignity, the right to life, and the prohibition of torture or other cruel, inhuman, or degrading treatment or punishment. The application of the death penalty often also violates the right to equality and the principle of non-discrimination<sup>3</sup>.

---

1 R. Steffoff “*Furman v. Georgia: Debating the death penalty*” Marshall Cavendish Benchmark, 2008.

2 R. Hood & C Hoyle “*The Death Penalty: A Worldwide Perspective*” Oxford University Press, 2008.

3 [https://www.ohchr.org/Documents/Issues/DeathPenalty/A-HRC-30-18\\_en.pdf](https://www.ohchr.org/Documents/Issues/DeathPenalty/A-HRC-30-18_en.pdf) accessed on 17.01.2021.

From the early 1960s, although most countries still used the death penalty, the drafters of the International Covenant on Civil and Political Rights (ICCPR) had already begun moves for its abolition in international law. Although Article 6 of the ICCPR permits the use of the death penalty in limited circumstances, it also provides that “*nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*” In 1989, by adopting the Second Optional Protocol to the ICCPR, aiming at abolishing the death penalty, States enshrined their stronger abolitionist stance in international law. Since 1997, the General Assembly has adopted five resolutions that called on States to establish a moratorium on executions with a view to abolishing the death penalty.

Even though at one time the death penalty was used in almost every part of the globe, in the latter decades of the 20th century, many countries abolished it. In China, severe cases of corruption are still punished by the death penalty. In some Islamic countries, sexual crimes, including adultery and sodomy, carry the death penalty, as do religious crimes such as apostasy, the formal renunciation of Islam. In times of war or martial law, even in democracies, military justice has meted out death sentences for offenses such as cowardice, desertion, insubordination, and mutiny.

As such, today, over two-thirds of the world’s countries have abolished the death penalty in law or in practice. However, the death penalty continues to exist in many parts of the world, especially in countries with large populations and authoritarian rule. There has been a clear downward trend in the number of death sentences and executions worldwide in recent decades. As the last date made available to the public is related to the year 2019, below is an overview of the death penalty until 2019.

Therefore, in 2019, the most known executions occurred in China, Iran, Saudi Arabia, Iraq, and Egypt<sup>1</sup>. China remains the world’s top executioner - but the true extent of using the death penalty in China is unknown as this data is classified as a state secret. It has to be noted that up to date<sup>2</sup>, 105 States have abolished the death penalty for all crimes, eight have abolished it for ordinary crimes, and 50 have introduced a moratorium on executions, whether by law or de facto, for a total of 163 States. However, the death penalty is still applied in 34 States and territories.

In Europe, the death penalty has been completely abolished in all European countries except for Belarus and Russia. The death sentence has been indefinitely suspended (under moratorium) since 1996.

---

1 <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/> accessed on 17.01.2021.

2 <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/death-penalty/the-death-penalty-around-the-world/> accessed on 17.01.2021.

### 1.3. The Rule of Law and its relation to the Death Penalty

As previously mentioned, the death penalty was used by many old civilizations, the earliest written document that supported being the Code of Hammurabi. However, over time, the individuals became aware that the death penalty violates fundamental human rights. Public support for abolishing the death penalty gained ground following the massive loss of life in World War II. Numerous states began to move towards abolition because of human rights and the rule of law. The rule of law, which has existed since the ancient Greek-Roman state, is at the intersection of development, human rights, peace, and security. This overwhelming narrative has the legitimizing effect of both being the means and the end of good governance.

As such, international and European bodies have increasingly made statements and adopted policies favoring the abolition of the death penalty. These statements and policies are beginning to be backed up by national court decisions ruling out the death penalty as a substantial violation of human rights. The primary international standard concerning the death penalty can be found in the UN International Covenant on Civil and Political Rights (ICCPR), a legally binding treaty, which explicitly recognizes each person's right to life, the Human Rights Committee that supports this encouragement with strong statements promoting abolition, as well as the European Convention on Human Rights (ECHR), particularly its Art. 2 and by its Protocols no. 6&13. Thus, the death penalty issue has clearly moved firmly into the human rights arena and is no longer accepted as simply a national criminal justice policy issue.

Last but not least, the Rule of Law and its relation to the Death Penalty is strongly evidenced in the book *The Rule of Law* written by Tom Bingham<sup>1</sup>. The book begins with some historical background to the rule of law and Lord Bingham's working definition of the concept, which divides it into eight principles: (i) accessibility, (ii) law not discretion, (iii) equality, (iv) exercise of power, (v) human rights, (vi) dispute resolution, (vii) fair trial, and (viii) compliance with international law. Thus, for a better understanding of those mentioned above, it has to be highlighted that the rule of law requires adequate protection of fundamental human rights. The rule of law is also said to require states to comply with their international law obligations. This idea is nowadays a leitmotif in counsel's arguments in public law cases.

In conclusion, it can be concluded that the choice to abolish or retain the death penalty should be considered a choice about what kind of society one individual wants to live in. Even if the death penalty is often analyzed and evaluated on its own, being separated from

---

<sup>1</sup> Tom Bingham, *The Rule of Law* Penguin Books London, 2002.

other social matters, such as misleading, abolishing the death penalty is part of a package of values marked by human rights, democracy, and most important and the Rule of Law.

## **2. THE RULE OF LAW AND ABOLITION OF THE DEATH PENALTY IN EASTERN EUROPE**

### **2.1. Building and consolidating the Rule of Law in Eastern Europe.**

As soon as the revolution in Eastern Europe ended, all interim Governments had conducted free elections to create their own Parliaments and Constitutions. The completely new Constitutions all showed in terms of the rule of law ideology through the first articles of their Constitutions as in article 2 of the Polish Constitution,<sup>1</sup> Article 1 of the Czech Constitution<sup>2</sup>, Article B, clause 1 of the Hungarian Constitution<sup>3</sup>, Article 1, clause 3 of the Romanian Constitution<sup>4</sup>, Article 4, paragraph 1 of the Bulgarian Constitution<sup>5</sup>. The structure of the new constitutions ensuring the necessary and sufficient conditions for joining the European Union as well as the essential rule of law principles such as the separation of state power is concrete and clear, state power control mechanism over all branches of power from within the state power system to the outside and vice versa.

Despite having the same starting point in terms of context and time, Eastern European countries all have territorial, demographic, cultural, and economic differences as well as the choice of solutions in the building of the rule of law state. This led to the recognition and evaluation of the EU bloc community in the negotiations, welcoming<sup>6</sup> Poland, Estonia, Hungary, Latvia, Lithuania, Malta, Czech, Cyprus, Slovakia, Slovenia to join in 2004 after that Bulgaria, Romania in 2007 and Croatia in 2013. The above series of events represented the unification between Eastern and Western Europe in the European Union. However, it has also been a historical milestone, evaluating the theoretical completion of the rule of law state construction. The European Union has developed several new members through a legal system with common standards applicable to all countries in the bloc. So before being allowed to join the European Union, the candidate country must fulfill the rule of

1 Article 2 in the Constitution of the Republic of Poland of 2nd April, 1997: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice."

2 Article 2 in the Czech Republic's Constitution of 1993 with Amendments through 2002: "The Czech Republic is sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens."

3 Article B-1 in the Hungary's Constitution of 2011, " Hungary shall be an independent, democratic state governed by the rule of law".

4 Article 1.3. Romania's Constitution of 1991 with Amendments through 2003: "Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizen's rights and freedoms..."

5 Article 4(1) Bulgaria's Constitution of 1991: "The Republic of Bulgaria shall be a State governed by the rule of law. It shall be governed by the Constitution and the laws of the country."

6 [https://europa.eu/european-union/about-eu/history\\_en](https://europa.eu/european-union/about-eu/history_en), accessed on 18/01/2021.

law state to achieve democracy, the corresponding freedoms, institutions, and respect for the law. This integration process is also used to refer to enhanced cooperation among European Union member states; national governments allow for gradual harmonization of national laws to conform to the general rules of the European Union. This is also one of the basic rules of the rule of law principle that the European Union proposes.

The role of the European Union is considered to be the most influential promoter of democracy and the rule of law in Eastern Europe. Joining the EU brings the rule of law state framework to the candidate countries. Nevertheless, the reality shows that, after joining the EU, member states still have many things to improve. Private interests are also contested. These optimistic statements contradict the pre-and post-accession experiences of most Eastern European countries; in some places, “the rule of law has not improved significantly and has even deteriorated.” Citizens of these countries still highly appreciate the achievements of the old regime and have been frustrated with what the new regime has set out but has yet to achieve.

For example, Romania and Bulgaria joined the European Union on January 1, 2007, and still have problems with incomplete judicial reform corruption and especially in the case of Bulgaria, where organized crime has existed. Consequently, the European Commission established Co-operation and Verification Mechanism<sup>1</sup> (CVM), a transitional measure to help the two countries solve these problems. The Commission continued to assess the development of Bulgaria and Romania after their accession to help them develop and streamline the administrative and judicial system so that they can fulfill their EU membership and ensure the correct application of European laws, policies, and programs. Reforming the judiciary and combating corruption and organized crime are critical issues for Romanian and Bulgarian citizens. Once the goals in this area were reached, the next step was to join Schengen; then, they will be able to exercise their rights as European citizens fully. However, in early 2017 the Romanian government systematically undermined the rule of law by issuing an Emergency Order<sup>2</sup> to change the Penal Code to save corrupt political leaders from prison. Bulgaria also experienced significant upheavals in 2013 and 2020, with numerous street protests and controversies reaching the European Commission over the threat of the foundations of justice<sup>3</sup>.

In addition, Poland also experienced an unconstitutional rule of law crisis in 2015 when the ruling Party controlled both the president and the parliament appointed its

---

1 [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm_en) accessed on 18.01.2021.

2 [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0446\\_RO.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0446_RO.html) accessed on 19.01.2021.

3 <https://www.europarl.europa.eu/news/en/press-room/20201002IPR88445/bulgaria-meps-call-for-eu-values-to-be-fully-and-unconditionally-respected>. accessed on 18.01.2021.

judges to the Constitutional Court. More recently, after the Covid epidemic broke out again, the Polish government violated the rule of law by postponing the election two years later than when it should have held an election.<sup>1</sup> Similarly, Hungary has violated the rule of law by declaring an indefinite state of emergency.

## **2.2. The Rule of Law and practices for the abolition of the Death Penalty in Eastern Europe.**

The flow of thought to abolish the death penalty was very early and famous in European history. However, it has only been a trend that has been applied in practice since the end of World War II since human rights became a particular priority. After the United Nations adopted a resolution titled “Universal Declaration of Human Rights,” The European Convention on Human Rights was also adopted in 1950. However, it took several countries years to ratify. As of 1989, most Western European countries had abolished them.

Socialist Eastern European countries with the Soviet Union did not take part in these moves against the death penalty. The death penalty was used in most CEE from the beginning to the middle of the twentieth century and was retained after World War II in Czechoslovakia, Poland, Yugoslavia, Bulgaria, and Romania. In Germany, the area occupied by the Soviet Union became the German Democratic Republic and still applied the death penalty until 1987. Hungary had not applied this penalty since 1988 and was officially abolished on October 24, 1990, by the Constitutional Court<sup>2</sup>. Later this was adopted in Article XIV of the new Constitution. In 2015, after the murder of a woman in southern Hungary, Prime Minister Orbán suggested that Hungary restore the death penalty. This statement caused an intense backlash from EU officials as well as citizens. As a result, Orbán had to withdraw this radical statement.

In Poland, the death penalty remained in law until 1997 when Article 40 was passed along with the new Constitution<sup>3</sup>. However, in fact, since 1988, the executions have been suspended. Polish criminal law established has not had the form of the death penalty since then. In the Czech Republic, the death penalty is prohibited under the Charter of Basic Rights and Freedom in article 3 of the Constitution of the Czech Republic<sup>4</sup>. The 1989 Revolution in Romania was one of the bloodiest in Eastern Europe that caused thousands

---

1 <https://www.euronews.com/2020/04/15/first-hungary-now-poland-time-for-europeans-to-speak-out-against-covid-19-power-grabs-view> accessed on 18.01.2021.

2 [http://acta.bibl.u-szeged.hu/6720/1/juridpol\\_041\\_231-245.pdf](http://acta.bibl.u-szeged.hu/6720/1/juridpol_041_231-245.pdf) accessed on 18.01.2021.

3 Article 40 in the Constitution of the Republic of Poland 1997: “No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited.”

4 Article 3 in the Czech Republic’s Constitution of 1993 with Amendments through 2002: “The Charter of Fundamental Rights and Basic Freedoms forms part of the constitutional order of the Czech Republic.”

of deaths. The last people to be convicted and executed in Romania were former dictator Nicolae Ceaușescu and his wife, Elena Ceaușescu; This was also the last act to mark the end of the revolutionary period. The death penalty was immediately abolished in 1990 and banned by article 22, paragraph 3 of the 1991 Constitution<sup>1</sup>. Last in the group was Bulgaria. It was not until 1998 that Bulgarian authorities coordinated their efforts to abolish the death penalty. The moratorium on the death penalty was introduced in July 1990. However, the courts continued to pass death sentences on those convicted of aggravated murder. According to an unofficial report published in May 1998, 19 men were under sentence of death. In November, three more men were sentenced to death.

### **3. THE RULE OF LAW & DEATH PENALTY IN SOME AREAS OF ASIA FROM EASTERN EUROPE EXPERIENCE**

Currently, Asia is the continent with the most population and densities in the world. Of the approximately 7 billion inhabitants of the planet, there are more than 4 billion people live in Asia, accounting for about 60% of the total population of the Earth. Asia's natural growth rate is close to 15%, which means that for every 1000 people, there will be 15 more people per year. Thus, every year, Asia's population increases by 50 million people. With a long history and culture, some significant civilizations of the world, such as India, Babylon, and China, are all located in Asia. The rise of the Mongol, Byzantine, and Ottoman empires had much influence in the world. Many early inventions in the life, science, economy, and culture of Asia have occupied the leading position for a long time, making significant contributions to the world. In which, we must mention technical inventions such as burning ceramics, porcelain wares and casting forging ores, written and systematic watering works, saddle, reins and wheels, horse pedal, gunpowder, compasses, papermaking and printing techniques, and cultivation of rice at the earliest, decimal calculation techniques, medicine.

During the late medieval period, East Asia gradually became backward in cultural and scientific development due to the dynastic policy of the dynasties. To the postmodern era, with the rise of capitalism and colonialism in Europe and the long-term decline of Asia, many of the territories were colonized or semi-colonized by the colonialists. Only Japan had successfully reformed to become the only Asian country with full status on the international arena as a "great power," then participated in World War II with German troops in Asia and eventually surrendered after being dropped with two atomic bombs Hiroshima and Nagasaki by the United States. After the Second World War, Asian countries and peoples began to scramble for independence, with the flow of socialist thought in the West spreading to the Asian mainland. The East Asia region had

---

<sup>1</sup> Article 22(1) in Romania's Constitution of 1991: "Capital punishment is prohibited"

continuously established many socialist governments such as Vietnam, Korea, China, Laos. Following that, the Korean<sup>1</sup> and Vietnamese<sup>2</sup> wars were the front lines of an aggressive war between socialism and capitalism in Asia. In Western Asia, South Asia, and the Middle East also gained independence, such as India - Pakistan<sup>3</sup>, Israel-Palestine<sup>4</sup>, Iran - Iraq, Afghanistan.

Because the borders in Asia are so vast that they span many latitudes and coordinates, the nation is crowded and prosperous, so the cultural diversity is extreme. The difference is enormous, so there is hardly a single term or uniform standard of "Asian culture." Furthermore, Asia is also the birthplace of all world religions like Christianity, Buddhism, Islam, and Hinduism.

The collapse of the Soviet Union affected the Eastern European bloc. It liberated in Central Asia many newly independent states such as Kazakhstan, Turkmenistan, and Uzbekistan, all of which have abolished the death penalty. At the same time, it had been causing a wave of changes in institutions, constitution, and the rule of law state to many other countries participating in the socialist ideology. In Southeast Asia, in recent decades, the concept of the rule of law state has also been incorporated and developed through constitutional reforms depending on the context of each country. Besides, the constitutional trend can also be seen at the regional level. A prime example is the Charter of the Association of Southeast Asian Nations (ASEAN), which requires adherence to law, good governance, democratic principles, and constitutional government. Several countries have strengthened the role of the constitution through the establishment of constitutional courts and constitutional councils. In this area, however, there are still legacies of authoritarian rule, political interference in the judiciary, and human rights violations sanctioned by state agencies. According to The World Justice Project (WJP) Rule of Law Index<sup>5</sup> in 2020, Southeast Asian countries has ranked poorly in the rule of law indexes out of 128 assessed globally: Singapore (12), Malaysia(47), Indonesia(59), Thailand(71), Vietnam(85), Philippines(91), Myanmar (112) and Cambodia (127).

It is worth noting that most cases around the world took place in Asia. Meanwhile, China is the country that has continuously carried the record of the execution of the most death penalty. The number of people executed in this country is more than the rest of the world combined each year<sup>6</sup>, excluding Hong Kong, Macao, and Taiwan. It is followed

---

1 <https://www.history.com/topics/korea/korean-war> accessed on 19.01.2021.

2 <https://www.archives.gov/research/vietnam-war> accessed on 19.01.2021.

3 <https://www.cfr.org/global-conflict-tracker/conflict/conflict-between-india-and-pakistan> acc. on 19.01.2021.

4 <https://history.state.gov/milestones/1945-1952/creation-israel> accessed on 19.01.2021.

5 [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf) acc. on 19.01.2021

6 <https://deathpenaltyinfo.org/policy-issues/international/executions-around-the-world> accessed on 19.01.2021

by North Korea and Vietnam, where the death penalty is still considered a state secret. The most important differences here from Eastern Europe are the persistence of national control over the death penalty policy; the proliferation of enduring one-party regimes, and the endurance of hard-line dictatorships, focusing on handling the consequences but not looking at the source of the cause to handle, these three countries are the last remaining socialist countries in the world and both maintain high execution rates. However, Vietnam had marked some progress from the 2014 Human Rights Report of the British Foreign Ministry. It became a bright spot through observations of the EU JULES<sup>1</sup> Program 2019 Research Report on the possibility of Vietnam joining the Second Optional Protocol on the Abolition of the Death Penalty under the International Covenant on Civil Rights and Politics (ICCPR) of United Nations although before that Vietnam joined ICCPR from 24 September 1982 with a declaration of compliance with the provisions of paragraph 1 of Article 26 and 48.

### **CONCLUDING REMARKS**

Nowadays, the rule-of-law is one of the most discussed concepts of constitutional law and is unquestionably related to the transition from State law to the Rule of Law. The universality of the rule of law is admitted everywhere as an indispensable reference system for countries, which shows that the rule of law has already become a common standard for the whole world. Nevertheless, in practical applications, it is essential to consider whether this reference system is real applied or not. Probably still has existed in some countries. The statement of recognizing the rule of law is only theoretical and formal, more like a political slogan than a legal one. From East to West, North to South, from ancient to modern, from capitalist to socialist, the rule of law has become popular as a political standard, as a typical value of human civilization. However, across South East Asia, we can observe opaque judicial procedures, non-independent judiciaries, impunity and disregard for human rights, and inconsistent application of the law. There is evidence of governments adopting the language of the rule of law to suppress the political opposition and civil society. This demonstrates how the universal standard of the rule of law has by no means been accompanied by a universal definition and application.<sup>2</sup>

In recent decades, the rise of Asian nations has also been partly due to adopting successful Western methods from free-market economy to science and technology, from democracy to the rule of law. According to this trend, reducing the death penalty or

---

1 EU JULES Research Report “Vietnam’s Possibility to Join the Second Optional Protocol to Abolish the Death Penalty under the International Covenant on Civil and Political Rights. MOJ, UNDP, and EU in 2019.

2 [https://www.griffith.edu.au/\\_\\_data/assets/pdf\\_file/0023/901913/W7-West-Ch6-WEB.pdf](https://www.griffith.edu.au/__data/assets/pdf_file/0023/901913/W7-West-Ch6-WEB.pdf) accessed on 18.01.2021.

abolishing the death penalty should be applied, especially if the country sets a social and political change economic development goal. There is a flow of thinking that keeping the death penalty is objective and appropriate to deter and suppress the increasing crime situation. It is necessary to ensure peaceful life for people and the common good of society. However, from a different perspective, the death penalty does not have a deterrent effect, helping to reduce the rate of serious crime as many people have thought. Abolition of the death penalty is an inevitable trend in a civilized society, a contemporary and humanitarian trend. Although the application of the death penalty has a high deterrent meaning, it is not the best solution. It is just a measure to solve the problem of the consequences which has been named the criminal. According to the experience of Eastern European countries, the elimination of the death penalty does not mean an increase in crime numbers in the region. The method of solving the problem of crime from the cause will be more effective through legal education, the enhancement of the people's knowledge, improvement of life, access to justice, and change in the mode of national governance. The abolition of the death penalty is humane, under the laws of history and human development. At the same time, it is possible to avoid many unjust crimes that violate human rights.

## REFERENCES

1. Luc Heuschling, *Etat de droit: Rechtsstaat: Rule of Law*, Dalloz Sirey Publishing, 2002.
2. Tom Bingham, *"The Rule of Law"* Penguin Books London, 2002.
3. R.Steffoff, *"Furman v.Georgia Debating the death penalty"* M. C. Benchmark, 2008.
4. R.Hood & C.Hoyle, *"The Death Penalty: A Worldwide Perspective"* Oxford Uni Press, 2008.
5. Rights (FIDH), *The Death Penalty in North Korea in Machinery of a Totalitarian State* 2013.
6. Peter H. & W.A. Schabas, *"Capital Punishment Strategies for Abolition"* Cambridge University Press 2004.
7. L.Morlino & W. Sadurski, *"Democratization and the European Union, Comparing Central and Eastern European post-communist countries"* Routledge Taylor & Francis Group, 2010.
8. Sandra J. Jones, *"Coalition Building in the Anti-Death Penalty Movement - Privileged Morality, Race Realities"* Lexington Books, 2010.
9. C. Anckar, *"Determinants of the Death Penalty A comparative study of the world"* Routledge Taylor & Francis Group, 2004.

10. Andrew Hammel, *“Ending the Death Penalty - The European Experience in Global Perspective”* Palgrave Macmillan, New York, 2010.
11. Susan Trevaskes, *“Palgrave Series on Asian Governance - The Death Penalty in Contemporary China”* Palgrave Macmillan, New York, 2012.
12. Mai Sato, *“The Death Penalty in Japan - Will the Public Tolerate Abolition?”* King’s College London, UK, 2011.
13. Andrew Novak, *“The Global Decline of the Mandatory Death Penalty Constitutional Jurisprudence and Legislative Reform in Africa, Asia, and the Caribbean”* Ashgate Publishing Burlington, 2014.
14. D.T. Johnson, & E.Z Franklin, *“The next frontier national development, political change, and the Death penalty in Asia”* Cambridge University Press 2009
15. A. Koestler & A. Camus, *“Relecții asupra pedepsei cu moartea”* trad. I.Ilie Humanitas Publishing, București, 2008.
16. Olivian Mastacan, *“Pedeapsa capitala in Dreptul Romanesc - Capital punishment in Romanian law”* Universul Juridic 2010.
17. Constitution of the Poland Republic 2nd April 1997.
18. Constitution of the Czech Republic 1993 with Amendments through 2002.
19. Constitution of the Hungary Republic 2011.
20. Constitution of the Romania Republic 1991 with Amendments through 2003.
21. Constitution of the Bulgaria Republic 1991.
22. Constitution of the People’s Republic of China 1949.
23. Constitution of the Democratic People’s Republic of Korea 1948.
24. The Constitution of Japan 1947.
25. Constitution of the Socialist Republic of Vietnam 1991 1993 with Amendments through 2013.
26. Tran K, Vu CG. *The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry*. Societies. 2019; 9(3): 56.
27. *Penalty under the International Covenant on Civil and Political Rights*. MOJ, UN, EU in 2019.
28. EU JULES Research Report *“Vietnam’s Possibility to Join the Second Optional Protocol to Abolish the Death*.

29. Martin Mendelski, 2016. "The EU's rule of law promotion in CEE: Where and Why does it fail, and what can be done about it?" EconStor Preprints 129437, ZBW - Leibniz Info Centre for Economics.
30. [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) accessed on 15.01.2021.
31. [https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635516/EPRS\\_ATA\(2019\)635516\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635516/EPRS_ATA(2019)635516_EN.pdf).
32. <https://www.ohchr.org/documents/publications/handbookparliamentarians.pdf>. Accessed on 15.01.2021.
33. [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) accessed on 15.01.2021.
34. [https://hudoc.echr.coe.int/eng#%7B%22itemid%22:\[%22001-97575%22\]%7D](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:[%22001-97575%22]%7D) - Case of Al-Saadoon and Mufdhi vs. the United Kingdom, Application no. 61498/08, Judgment, Strasbourg, 2 March 2010.
35. <https://www.ohchr.org/documents/publications/handbookparliamentarians.pdf>. Accessed on 15.01.2021.
36. <https://worldjusticeproject.org/about-us/overview/what-rule-law> accessed on 16.01.2021.
37. [https://www.ohchr.org/Documents/Issues/DeathPenalty/A-HRC-30-18\\_en.pdf](https://www.ohchr.org/Documents/Issues/DeathPenalty/A-HRC-30-18_en.pdf) accessed on 17.01.2021.
38. <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/> accessed on 17.01.2021.
39. <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/death-penalty/the-death-penalty-around-the-world/> accessed on 17.01.2021.
40. [https://europa.eu/european-union/about-eu/history\\_en](https://europa.eu/european-union/about-eu/history_en) accessed on 18/01/2021.
41. [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm_en) accessed on 18.01.2021.
42. [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0446\\_RO.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0446_RO.html) accessed on 19.01.2021
43. <https://www.europarl.europa.eu/news/en/press-room/20201002IPR88445/bulgaria-meps-call-for-eu-values-to-be-fully-and-unconditionally-respected>. Accessed on 18.01.2021.
44. <https://www.euronews.com/2020/04/15/first-hungary-now-poland-time-for-europeans-to-speak-out-against-covid-19-power-grabs-view> accessed on 18.01.2021.

45. [http://acta.bibl.u-szeged.hu/6720/1/juridpol\\_041\\_231-245.pdf](http://acta.bibl.u-szeged.hu/6720/1/juridpol_041_231-245.pdf) accessed on 18.01.2021.
46. <https://www.history.com/topics/korea/korean-war> accessed on 19.01.2021.
47. <https://www.archives.gov/research/vietnam-war> accessed on 19.01.2021.
48. <https://www.cfr.org/global-conflict-tracker/conflict/conflict-between-india-and-pakistan> acc. on 19.01.2021.
49. <https://history.state.gov/milestones/1945-1952/creation-israel> accessed on 19.01.2021
50. [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf) acc. on 19.01.2021.
51. <https://deathpenaltyinfo.org/policy-issues/international/executions-around-the-world> accessed on 19.01.2021.
52. [https://www.griffith.edu.au/\\_\\_data/assets/pdf\\_file/0023/901913/W7-West-Ch6-WEB.pdf](https://www.griffith.edu.au/__data/assets/pdf_file/0023/901913/W7-West-Ch6-WEB.pdf) accessed on 18.01.2021.

# DEATH PENALTY IN VIETNAM CRIMINAL LAW

Assoc.Prof. Dr. Tran Van Do<sup>1</sup>, M.A Le Thi Diem Hang<sup>2</sup>

**Abstract:** The death penalty is a criminal sanction that deprives people of the right to life and is applied worldwide for a long time. However, the tendency of international treaties and a policy of countries in the world is to remove this penalty. In the scope of this article, we will focus on analyzing policies and regulations of the Vietnamese criminal law over the periods from the establishment of the Democratic Republic of Vietnam to the present, thereby giving some recommendations to minimize and eventually eliminate the death penalty in Vietnam.

**Keywords:** punishment, the death penalty, international standards, policy, criminal law, Vietnam.

## 1. INTRODUCTION

As a punishment that deprives people of the right to life, the death penalty is the most severe sanction in the Vietnamese legal system and many countries worldwide. However, this penalty has always been a controversial topic in the world as many states and current viewpoints believe that the death penalty should be abolished; however, there are still many other countries and other views considering it necessary to keep the death penalty.

The death penalty has appeared in Vietnam for a long time, changing in each historical period of the country. Policies and laws on this penalty have changed more in the direction of humanity, reducing regulations relating to cases that applied the penalty in accordance with laws and restrictions of application in practice. However, because of the general trend of international law, Vietnam needs to have concrete and practical studies to reduce and eventually eliminate the death penalty.

## 2. INTERNATIONAL STANDARD AND TENDENCY OF COUNTRIES IN THE WORLD ON THE DEATH PENALTY

The death penalty is a punishment that deprives the convicted person of the right to life<sup>3</sup>. Entirely, it can be acknowledged that the death penalty is the deprivation of a

---

1 Former Deputy Chief Justice of the Supreme People's Court, Member of Parliament XII, XIII.

2 Lecturer at Hanoi Law University.

3 Institute of Legal Science of Ministry of Justice, *Law Dictionary*, Vietnam Encyclopedia Publishing House and Judicial Publishing House, p.829.

person's life according to a judgment declared by a lawfully established court to punish that person for committing a serious crime<sup>1</sup>.

The death penalty was recognized and applied in most primitive and ancient societies. The Bible teaches that "an eye for an eye" has become popular, meaning that you will pay a fair price if you kill. The ancient Code of Hammurabi - one of Babylon's earliest preserved ancient laws from 1772 BC has already stipulated the death penalty. In addition, the Torah of Israel or the laws of the ancient Egyptians also recorded criminals subject to the death penalty<sup>2</sup>.

The right to life is a divine-human right and is universal. Article 3 of the Universal Declaration of Human Rights passed by the General Assembly of the United Nations on December 10, 1948, recognized "Everyone has the right to life, freedom and personal safety." However, the right to life is not absolute. It can be deprived of by the state if the individual commits certain crimes in accordance with the law<sup>3</sup>. This content was also stipulated in several international documents<sup>4</sup>.

However, the death penalty is not a right. On what basis do people have the right to kill others<sup>5</sup>? These thoughts have made some changes in the concept of the application of the death penalty. From around the early 1960s, when the death penalty was still prevalent in many countries, regulations on the restriction and abolition of the death penalty began to be included in international documents on human rights gradually<sup>6</sup>. Although it is not direct, Clause 2 of Article 6 of the International Covenant on Civil and Political Rights stipulates, "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant." The only international treaty on abolishing the death penalty is currently the Second Optional Protocol on the Abolition of the Capital Penalty under the 1989 International Covenant on Civil and

---

1 Vietnam Lawyers Association (2008), *Death penalty in the international law*, Hong Duc Publishing House, Hanoi, p. 13.

2 Anthony Galvin (2015), *Old Sparky: The Electric Chair and the History of the Death Penalty*, Simon and Schuster.

3 Vietnam Lawyers Association (2008), *Death penalty in the international law*, Hong Duc Publishing House, Hanoi, p.46.

4 As in Clause 2 Article 6 of the International Covenant on Civil and Political Rights (ICCPR), Clause 2 Article 4 of the American Convention on Human Rights...

5 Cesare Beccaria (2009), *On Crimes and Punishments*, Transaction Publishers New Brunswick (USA) and London (U.K).

6 EU Jule (2019), Report on researching of Vietnam's possibility to join the Second optional Protocol on Removing death penalty in accordance with The International Covenant on Civil and Political Rights (ICCPR), Hanoi , p.8.

Political Rights. Until December 2018, this Protocol has 86 member countries, and one country has signed but not ratified (Angola signed in 2013)<sup>1</sup>.

Up to July 2018, there have been 142 countries in the world abolishing the death penalty (in law and in practice, of which 106 countries have abolished the death penalty for all crimes; 08 countries abolishing for severe criminals and 28 countries did not enforce the death penalty); only 56 countries still maintain and apply the death penalty in their legal system. Thus, it can be seen that the general trend of countries around the world is the abolition of the death penalty. It can be divided into groups such as countries that completely abolished the death penalty (Australia, Canada, the Philippines, and most of these countries are members of the Second Optional Protocol on the abolition of the death penalty); countries eliminated the death penalty for serious crimes (Brazil, Chile, Israel) and countries eliminated in practice - meaning these countries still stipulate the death penalty for serious crimes such as murder but can be considered de facto eradicated. Because these countries have not applied this penalty in practice in the last ten years and it is believed that there are policies or regulations in place to not apply or execute the death penalty in practice. Besides, there are also a number of countries that have signed international agreements not to use the death penalty (Brunei, Laos, Myanmar, Korea)<sup>2</sup>.

Among ASEAN countries, three countries have abolished the death penalty, including Cambodia, East Timor, and the Philippines. In October 2018, the Malaysian government announced that the country intends to abolish the death penalty for all crimes. Brunei, Laos, and Myanmar did not enforce the death penalty. Thailand was once classified into a group of countries that did not enforce the death penalty in practice until it conducted its execution after nearly ten years in June 2018. Singapore also limits the number of enforcement of the death penalty annual (09 cases in 2018 and no case in 2010, 2012, and 2013). Currently, only two countries in Indonesia and Vietnam do not have clear plans to abolish the death penalty<sup>3</sup>.

---

1 EU Jule (2019), EU Jule (2019), Report on researching of Vietnam's possibility to join the Second optional Protocol on Removing death penalty in accordance with The International Covenant on Civil and Political Rights (ICCPR), Hanoi , p.10.

2 See: Abolitionist and retentionist countries as of July 2018, source: <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf> accessed 3/3/2021).

3 EU Jule (2019), Report on researching of Vietnam's possibility to join the Second optional Protocol on Removing death penalty in accordance with The International Covenant on Civil and Political Rights (ICCPR), tdd, p.13,14.

### **3. OVERVIEW OF VIETNAMESE POLICIES AND LAWS ON THE DEATH PENALTY BEFORE THE PROMULGATION OF THE 2015 PENAL CODE**

#### **3.1. Death penalty in accordance with criminal law from 1945 to 1985**

This is a period of many fluctuations in national history, and the top priority in this period is national liberation, national reunification, stabilization of the political, economic, and social system. Shortly after the independence day of September 2, 1945, the birth of the Democratic Republic of Vietnam, the country again experienced nine years of resistance against French colonialism, 30 years of resistance against the American Empire, the Northern border war, and the Southwest border war.

In such historical background, criminal law has become an instrument of the people's democratic government to suppress anti-revolutionary crimes, stabilize the situation, and maintain social order and safety. The death penalty was used as an effective legal instrument to carry out that task. However, in this period, the death penalty was stipulated in many different documents but not codified. Some typical documents can be mentioned such as Decree No. 133-SL dated January 20, 1953, of the President of the Democratic Republic of Vietnam on the punishment of reactionary Vietnamese; Decree No. 151 / SL dated April 12, 1953, of the President on punishing landlords against the law in areas where land reform policies are implemented; The 1967 Ordinance on Punishment of Counter-revolutionary Crimes; The 1967 Ordinance on sanctions of infringement of socialist property; The 1970 Ordinance on the punishment of crimes of infringing upon the private property of citizens; Ordinance on the punishment of bribery dated May 20 1981 of the Standing Committee of the National Assembly and Ordinance on sanctions of speculation, trafficking, counterfeiting, illegal business on June 30, 1982, by State Council...

Regarding the form of execution of the death penalty, first of all, Circular No. 498 / P-4 dated October 31, 1946, instructed, "Executing the death penalty from now on using guns instead of guillotines." Compared with the previous form of execution of the death penalty during the French colonial period, this provision demonstrates the humanity of the Democratic Republic of Vietnam. By 1974, the Ministry of Public Security issued Directive No. 138 / KCL on the execution of the death penalty, specifying the Council for the execution of the death penalty, the process of executing the death penalty, the cases temporarily postponed enforcing. On November 30, 1978, the Ordinance on the commutation of the death penalty was issued together with the procedure for considering the application for commutation passed by the State Council in Resolution No. 14 / NQ / HDNN7 dated August 28, 1981...

Thus, from 1945 to 1985, due to the country's peculiarities, the death penalty was stipulated in many different legal documents; however, the primary purpose of this stipulation

is to punish, especially for counter-revolutionary crimes. However, the criminal policy of this period began to show humanity when there was a provision for the execution of the death penalty by gun instead of the guillotine; regulations on the cases of postponement of the execution of the death penalty and the commutation of the death penalty.

### **3.2. Death penalty in accordance with the 1985 Penal Code**

Based on the subsidized economy, the legal documents system began with the appearance of the 1980 Constitution to institutionalize the path of the Communist Party of Vietnam in a new period. On June 27, 1985, in response to the need for codification in the criminal field, the National Assembly of the Socialist Republic of Vietnam passed the Penal Code 1985. "This Code inherits and develops The criminal law of our State from the August Revolution up to now, summarizing the experiences of fighting against and preventing crimes in our country over the decades." The Code has become the fundamental source of Vietnamese criminal law.

The 1985 Penal Code regulates the death penalty in Article 27:

"The death penalty is a special punishment applied to offenders in, severe cases.

The death penalty does not apply to juvenile offenders to pregnant women when committing the crime or trial. The death penalty is postponed for pregnant women and women nursing children under 12 months.

In cases a person sentenced to death receives a commutation, the death penalty becomes life imprisonment.

Only in exceptional cases which having different laws and regulations will the death penalty be executed immediately after the trial".

Based on criminal policy whose concept of the death penalty is still essential in the fight against crime, in the 1985 Penal Code, the death penalty was initially regulated in 29 articles (out of 195 articles in total, accounting for 14.9%); and undergone four amendments (1989, 1991, 1992, 1997), the death penalty was added and stipulated in up to 44 articles (out of 214 articles, accounting for 20.6%). The code still stipulates the death penalty in sanctions for crimes on violating national security; infringing upon the life, honor, and dignity of others; property infringement crimes; business crimes; drug-related crimes; crimes on position; crimes of infringing upon the military's obligations and responsibilities; crimes of undermining peace, against humanity and war crimes.

Along with the regulations on the death penalty, the Penal Code of 1985 also stipulates not to apply the death penalty for people under 18 years old, pregnant women; to postpone the enforcement for women who are pregnant or nursing children under 12 months of age; to add provisions on the death penalty commutation.

Following the appearance of the 1985 Penal Code, the 1988 Criminal Procedure Code created a formal legal basis for the application of the death penalty in Articles 288 and 289. These two articles provide specifying and detailing the execution relating to the time limit, the order, and measures for executing the death penalty.

Thus, the 1985 Penal Code and the 1988 Criminal Procedure Code have specific provisions on the death penalty and the execution of the death penalty. Despite some rational regulations and a number of humanitarian ideas in legal policy; due to the characteristics of the post-war socio-economic situation and the centralized bureaucratic and subsidy mechanism, the role of the death penalty was not considered exactly too many regulations and the tendency to strengthen sanctions with the death penalty is a limitation of the criminal law in this period.

### **3.3. Death penalty in accordance with the 1999 Penal Code**

The 6th Congress of the Communist Party of Vietnam in December 1986 decided to implement the line of comprehensive national renewal, abolishing the centralized bureaucratic and subsidy mechanism and development of the country according to the market mechanism. By the 1992 Constitution, our State affirmed that “Building a multi-sector commodity economy under the market mechanism, under the State’s management, according to the socialist orientation” (Article 15). Therefore, the 1985 Penal Code - built on a centralized and subsidized economy, after 15 years of implementation - has shown inadequacies, no longer consistent with the innovation path and world trends. Thus, on December 21, 1999, the Penal Code 1999 was passed by the 10th National Assembly of the Socialist Republic of Vietnam, the 6th session.

Regarding the death penalty, when the political system of the country was stable; the economy shifted to an international economic integration market mechanism; to correspond with international law and the general trend of gradually reducing and towards the abolition of the death penalty, the 1999 Penal Code has made positive changes such as:

- Clearly define the limits on the application of the death penalty, whereby the death penalty applies only to persons committing grave crimes;
- Expand the scope of not applying and enforcing the death penalty for women nursing children under 36 months old when committing crimes or on trial;
- Eliminate provisions of the 1985 Penal Code on the possibility of the execution of the death penalty immediately after the trial;
- Reducing the number of articles providing the death penalty (from 44 articles in the 1985 Penal Code to 29 articles in the 1999 Penal Code and the 2009 amendment and supplement, only 22 articles).

Procedures for the execution of the death penalty are specified in Chapter XXVI of the 2003 Criminal Procedure Code, Article 258 - Procedures for considering the judgment on the death penalty before its execution and Article 259 - Execution of the death penalty.

In conclusion, the 1999 Penal Code and its amendment and supplementation in 2009 decreased the number of crimes with the death penalty provisions, abolished the death penalty provision right after the trial, and added regulations on non-applicable and non-executed subjects. However, the number and proportion of defendants being subjected to the death penalty are still high, not consistent with the humanitarian criminal policy of the Party and State and the requirements of national integration.

#### **4. THE DEATH PENALTY IN THE CRIMINAL POLICY OF THE JUDICIAL REFORM AND THE 2015 CRIMINAL CODE**

##### **4.1. The role of the death penalty in criminal policy under the Judicial Reform Strategy and the 2013 Constitution**

Resolution No. 08-NQ/TW dated January 2, 2002, of the Politburo of the Communist Party of Vietnam on a number of crucial judicial tasks in the coming time, has set out the task of changing the implementation organization of the death penalty and study of limits of the death penalty provision in the Penal Code. Next, Politburo's Resolution No. 49-NQ / TW dated June 2, 2005, on the Judicial Reform Strategy to 2020 affirmed that the policy "focuses on the completion of criminal policies and judicial proceedings promote effective prevention and goodwill in handling offenders. Limit the application of the death penalty towards only a few types of grave crimes".

According to the Constitution 2013, human rights are recognized, respected, protected for implementation. The right to life is the most important and sacred right of all human rights, whereby "Everyone has the right to life. Human life is protected by law. No one may be deprived of life in contravention of law"(Article 19); Simultaneously, "Human rights and citizens' rights may not be limited unless prescribed by a law solely in case of necessity for reasons of national defense, national security, social order and safety, social morality and community well-being." (Article 14).

Thus, according to the policy of judicial reform of the Party and State, the reduction of the death penalty inevitably meets the urgent requirement of completing the criminal legal system in association with the guarantee of human rights under the spirit of the Constitution, which is the humanization of punitive measures, suitable for the socio-economic development conditions and ethics of the nation, and in accordance with the requirements of the crime prevention and fighting practice<sup>1</sup>.

---

<sup>1</sup> Drafting Committee of Penal Code (amended), Reporting relating to asking for the Drafting Committee's opinion on some basic contents of the Project on reducing the death penalty in the spirit of judicial reform, Hanoi, 2015.

It is necessary to affirm that the policy of limiting the death penalty of the Party and State is substantive, in which “Restrictions on application,” in fact, is not a general reduction and declarative policy; the abolition of the death penalty was never applied in practice or used technical means to reduce the death penalty.

#### **4.2. Death penalty in accordance with the 2015 Criminal Code**

Institutionalization of the policy of restricting the application of the death penalty is affirmed in the Party’s Resolutions on judicial reform. Through concretizing the spirit of the 2013 Constitution and assimilating the trend of international law, the Criminal Code 2015 has made fundamental changes in the provisions on the death penalty. Specifically:

- First, narrowing the range of crimes with the death penalty. Article 40 of the Criminal Code clearly defines the death penalty as a special punishment applicable only to persons committing grave offenses belonging to groups of crime such as infringing upon national security, human life, drug-related crimes, corruption, and a number of other severe crimes as prescribed by this Code;

- Secondly, expanding the subjects not applied the death penalty. The death penalty not only does not apply to people under 18 years of age, women being pregnant or nursing children under 36 months old, but also does not apply or is not enforced against humans aged 75 or over when committing a crime or on trial;

- Thirdly, expanding the scope and conditions for non-execution of the death penalty and converting the death penalty to life imprisonment for 02 cases, including (i) people aged full 75 years or older and (ii) people convicted the death penalty for property embezzlement, accepting bribes but after being convicted, actively surrendering at least three-quarters of the embezzled property, bribe, and actively cooperating with authorities in distributing, investigating, handling crimes or making outstanding achievements.

- Fourthly, abolish the death penalty for 07 crimes: (1) Robbery (Article 168); (2) Production and trading of banned goods which are food, food additives (Article 193); (3) Illegal possession of narcotic substances (Article 249); (4) Appropriating narcotics (Article 252); (5) Destroying works, facilities and essential means of national security (Article 303); (6) Insubordination (Article 394); Surrendering to an enemy (Article 399). As for the crime of libel activities specified in the 1999 Penal Code, with the highest penalty, the death penalty was decriminalized in the Criminal Code 2015. Thus, the 2015 Penal Code only maintained the death penalty for 18 out of 314 defined crimes (accounting for 5.73%) of 07 out of 14 criminal groups. In addition, the 2015 Penal Code has removed the provision on applying the death penalty to attempted crimes.

According to the Law on Execution of Criminal Judgments 2010 and the Law on Execution of Criminal Judgments 2019, Vietnam uses only one method of execution of the death penalty being lethal injection instead of shooting. Regulating the execution of the death penalty by lethal injection also reflects the humanity of Vietnam's criminal law when dealing with offenders, avoiding causing pain to the executed, as well as reducing the mental burden for them.

In general, the provisions on the death penalty in the Penal Code 2015 and a number of other legal documents have institutionalized the humanitarian criminal policies of the Party and the State of Vietnam. However, with the trend of eliminating the death penalty from countries in the world, in our opinion, Vietnam needs to make more positive changes to limit and eventually eliminate this penalty.

## **5. INTERNATIONAL REQUIREMENTS AND ROADMAP FOR VIETNAM TO REDUCE AND REMOVE THE DEATH PENALTY**

### **5.1. International requirements for removal of the death penalty**

The United Nations has adopted a series of Resolutions calling on member states to take measures suspending the execution of the death penalty with the ultimate aim of eliminating this penalty in all countries. One of the recommendations that the Vietnam Government follows from the Universal Periodic Review (UPR) mechanism of the Human Rights Council and of the Committees monitoring the implementation of conventions to which Vietnam is a member is to reduce the number of offenses where the death penalty is possible and to consider suspending the application of this penalty<sup>1</sup>.

The general tendency of countries worldwide nowadays is to remove the death penalty, predominantly in provisions of the Law but also in practice. Many states also have strategies and programs to promote the global elimination of the death penalty. Some countries have considered abolishing the death penalty as a prerequisite for diplomatic relations and bilateral cooperation with countries that still maintain the penalty<sup>2</sup>.

“Promoting the completion, building a uniform, synchronous, modern, feasible, open, transparent, stable, accessible, international competitive legal system, ensuring rights and legitimate interests of the people.” This is the central mission of the XIII Congress

---

1 EU Jule (2019), Report on researching of Vietnam's possibility to join the Second optional Protocol on Removing death penalty in accordance with The International Covenant on Civil and Political Rights (ICCPR), p.2.

2 EU Jule (2019), Report on researching of Vietnam's possibility to join the Second optional Protocol on Removing death penalty in accordance with The International Covenant on Civil and Political Rights (ICCPR), p.37.

of the Communist Party of Vietnam. Facing this target with the analysis of international requirements, it is evident that reducing and subsequently eliminating the death penalty is a mandatory requirement that Vietnam has to aim at and ensure, contributing to the harmonization of the domestic legal system with standards in international law and customs<sup>1</sup>.

## **5.2. Some recommendations on a roadmap for Vietnam to reduce and subsequently remove the death penalty**

Firstly, in the current social conditions of our country, the maintenance of the death penalty is still essential in order to effectively fight against several, severe crimes. According to the ICCPR, countries can still impose the death penalty for the most severe crimes. The definition of “the most serious crimes” can be interpreted differently by jurisdictions, depending on social, cultural, religious, and political conditions<sup>2</sup>. However, according to General Comment No. 36 approved by the Human Rights Commission in May 2018, “The term “the most serious crimes” must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing.” Therefore, crimes that do not directly and unintentionally cause death, such as attempted murder, corruption, economic crimes, robbery, kidnapping, and serious sexual crimes, should not be justified for applying the death penalty as provided in Article 6. Consequently, the scope of application of the death penalty should be narrowed further in the Penal Code to comply with international standards.

According to our research, following the effective Vietnam Penal Code, the death penalty is categorized into three groups: (i) provisions with a political and legal meaning rather than criminal (crimes in Chapter XXVI - Crimes of undermining peace, against humanity and war crimes); (ii) regulations which are predominantly precautionary rather than applicable in practice (crimes of infringing upon national security) and (iii) regulations to be applied in practice (crimes infringing upon life, products, drug-related crimes, corruption crimes)<sup>3</sup>. In our opinion, in the next five years, the death penalty should only be retained for the offenses applied in practice, but also limited to some common and especially dangerous crimes for the society such as:

- Murder: Considering removing some aggravating circumstances that could lead to the death penalty;

---

1 Trinh Quoc Toan (2012), *The death penalty regime in the Vietnamese Criminal Law and some complete recommendations*, p.31.

2 Roger Hood, *The death penalty A world-wide perspective*, Oxford Clarendon Press, 1996, p.56.

3 In Vietnam, in the last 5 years, the death penalty applies mainly to murder and drug-related crimes (accounting for more than 99.06% of the total number of people making up the death penalty). The remainder of the very few are property embezzlement, Rape of children, Bribery. (According to: Duong Viet Dung (2019), *Death penalty in accordance with Penal Code 2015*, Master’s thesis in jurisprudence, Hanoi Law University).

---

- Some drug-related crimes: Specifically, the crime of illegally producing narcotics and illegally trading narcotics. The crime of illegally transporting narcotics should be removed from the scope of applying the death penalty because its nature is not as dangerous as the above two behaviors.

Moreover, we should consider abolishing the death penalty for the crime of raping under 16 years old, embezzlement, bribes. Also, we should consider eliminating the crime of violating the economic management order, including the manufacture and trade of counterfeit drugs as curative medicines and preventive medicine from the scope of the death penalty because “according to incomplete statistics, the number of countries applying the death penalty for economic crimes is scarce... and criminals of economic nature that infringe upon and cause economic damage, if the economic consequences are recovered, should not be executed “<sup>1</sup>.

For crimes that death penalties are not applicable in practice, as we have mentioned above, Vietnam also needs to consider removal.

Secondly, it is essential to quickly study and take measures or penalties to replace the death penalty and gradually limit the application in practice. It can be referred to provisions for the postponement of the execution of the death penalty with the possibility of conditional commutation for some crimes to pave the way for actual reduction of the execution while still meeting the prevention requirements of crimes as defined in the Chinese Penal Code (Articles 48 and 50). The other method is to allow substituted penalty rather than the death penalty, which has been effectively and possibly implemented by other countries. For example, the penalty of life imprisonment without the possibility of expiration has been applied in many nations and territories such as British, Sweden<sup>2</sup> or the penalty of life-long imprisonment has been used in the United States<sup>3</sup>.

## CONCLUSION

The death penalty is tied to the right to life, which is one of a human being's fundamental and universal rights. Although the death penalty has existed for a long time, it is undeniable that in the current world, promoting human rights, the trend to abolish the death penalty has become an inevitable thing. Although Vietnamese Criminal law regulates the death penalty during the periods, a humanitarian policy is still guaranteed. In particular, the abolition of many regulations on the death penalty and adding several

---

1 Dr. Dinh The Hung (2018), *Regarding death penalty in Vietnam Penal Code*, link: <https://tapchitoaan.vn/bai-viet/thoi-su/ve-hinh-phat-tu-hinh-trong-blhs-viet-nam>, accessed March 3, 2021.

2 Dr. Le Khac Dai, *Ensuring the right to life and maintaining Death penalty in the Vietnamese Criminal law*, quoted in the Proceedings of the National Conference: Death penalty in the world and Vietnam, p.16,17.

3 Vietnam Lawyers Association (2008), *Death penalty in the international law*, tldd, p.343.

cases that do not apply and enforce the death penalty at the Vietnam Penal Code 2015 have demonstrated that the criminal policy of Vietnamese criminal law is humanitarian. However, in the face of the urgent requirement of international standards and the general trend of the world, it is necessary to have research towards reducing and eliminating the death penalty in Vietnam during the next period.

## REFERENCES

1. Pham Quoc Anh (ed), *The Death penalty in the international law*, Hong Duc Publishing House, Hanoi, 2008.
2. Anthony Galvin (2015), *Old Sparky: The Electric Chair and the History of the Death Penalty*, Simon and Schuster.
3. Drafting Committee of Penal Code (amended), *Reporting relating to asking for the Drafting Committee's opinion on some primary contents of the Project on reducing the death penalty in the spirit of judicial reform*, Hanoi, 2015.
4. Dr. Pham Van Beo (2010), *Regarding Death penalty in the Vietnamese Criminal law*, National Political Publishing House, Hanoi.
5. Cesare Beccaria (2009), *On Crimes and Punishments*, Transaction Publishers New Brunswick (USA) and London (U.K).
6. Assoc.Prof.Dr. Nguyen Dang Dung & authors, *Things to know about Death penalty*, reference book, National Political Publishing House, 2009.
7. Duong Viet Dung (2019), *the Death penalty in accordance with Penal Code 2015*, Master's thesis in jurisprudence, Hanoi Law University.
8. Dr. Le Khac Dai, *Ensuring the right to life and maintaining Death penalty in the Vietnamese Criminal law*, quoted in the *Proceedings of the National Conference: Death penalty in the world and Vietnam*.
9. EU Jule (2019), *Report on researching Vietnam's possibility to join the Second Optional Protocol on Removing death penalty in accordance with The International Covenant on Civil and Political Rights (ICCPR)*, Hanoi. Roger Hood, *The death penalty A world-wide perspective*, Oxford Clarendon Press, 1996.
10. Vietnam Lawyers Association (2008), *the Death penalty in the international law*, Hong Duc Publishing House, Hanoi.
11. Dr. Dinh The Hung (2018), *Regarding death penalty in Vietnam Penal Code*, link: <https://tapchitoaan.vn/bai-viet/thoi-su/ve-hinh-phat-tu-hinh-trong-blhs-viet-nam>

12. Vu Thi Thuy (2007), the Death penalty in the Vietnamese Criminal law, Doctor's thesis, Ho Chi Minh Law University.
13. Trinh Quoc Toan (2012), The death penalty regime in the Vietnamese Criminal Law and some complete recommendations, Journal of Science, Vietnam National University, Law 28 (2012).
14. Prof.Dr. Dao Tri Uc - Assoc.Prof.Dr. Vu Cong Giao - Assoc.Prof.Dr. Truong Thi Hong Ha (eds, 2015), Right to life and death penalty, National Political Publishing House, Hanoi.
15. Institute of Legal Science of Ministry of Justice, Law Dictionary, Vietnam Encyclopedia Publishing House and Judicial Publishing House.

# MOVING AWAY FROM THE DEATH PENALTY IN VIETNAM: POSSIBILITIES AND CHALLENGES

A/Prof. Dr. Vu Cong Giao<sup>1</sup>, Dr. Nguyen Quang Duc<sup>1</sup>

**Abstract:** In countries, the death penalty has been used for a long time and is still being applied in Vietnam.

There has been much discussion about the necessity for the death penalty in Vietnam. However, most local experts, lawmakers, and the public are still in favor of capital punishment. This paper provides an overview of the history of the death penalty in Vietnam, which focus on the modern time. It analyzes the tendency of the death penalty application in the country. As demonstrated by the authors, factors contributing to the abolition of the death penalty in Vietnam include the global trend towards abolishing capital punishment, the pressure from the EU and United Nations human rights agencies, and the campaign of some Vietnamese experts and institutions.

Meanwhile, factors influencing the maintenance of this penalty in Vietnam include the limited understanding of government agencies and the public about capital punishment and social prejudice against some severe crimes. Considering those pushing-pulling factors, the authors believed that the death penalty would continue the downward trend in Vietnam shortly, but it will not be abolished in the short term. The authors also suggest several activities to accelerate reducing and eliminating the death penalty in Vietnam in the coming years.

**Keywords:** death penalty, deterrent effect, right to life, Vietnam.

## 1. OVERVIEW OF THE HISTORY AND ACTUAL STATUS OF THE DEATH PENALTY IN VIETNAM

Vietnam's written law can be considered to begin with the Ly Dynasty's Penal Code (1042).<sup>2</sup> Now that this set of laws has been lost, there have been opinions that it includes provisions on the death penalty. In contrast, others believe that this type of penalty was not in use during this period, at least in a certain period, since this was the time when Buddhism was the national religion of Vietnam.

---

1 VNU School of Law.

2 Consists of three volumes, compiled by King Ly Thai Tong in 1042.

In case the death penalty has already been provided for by the Code, it means that the death penalty has been established in Vietnamese written law since the Ly dynasty.<sup>1</sup> Following the Ly dynasty was the Tran dynasty. In the Tran dynasty, the system of legal documents included the 'Quoc Trieu Thong che'<sup>2</sup> and the 'Hoang Trieu Dai Dien'.<sup>3</sup> Both of these laws provided for the death penalty. During the (Late) Le dynasty, there was a famous law not only in Vietnam but also in the world, which was the 'Quoc Trieu Hinh Luat' (also called the 'Bo Luat Hong Duc) (1483).<sup>4</sup> Although it contained many profound humanitarian provisions, the Bo Luat Hong Duc also included provisions on the death penalty. In the Nguyen dynasty, the famous law was 'Hoang Viet Luat le' (also called 'Bo luat Gia Long') (1815).<sup>5</sup> This can be considered the last law of feudalism in Vietnam, and similar to the laws of the previous dynasties, it also includes provisions on the death penalty.

In general, the aforementioned feudal laws all follow the five-sentence system of xuy (penalty of beating with a whip), truong (penalty of hitting with a stick), do (punishment of forced hard labor), luu (punishment of exile), tu (death penalty). The systems of criminals that could be sentenced to death in different dynasties vary, but in general, the number of crimes that can be punished is significant, including some types of crimes that all laws stipulate the death penalty such as murder, treason, accepting bribes, embezzlement. Many methods of execution of the death penalty are of the nature of cruelty or cruel revenge. Such as 'chu di tam toc,' 'tung xeo'<sup>6</sup>, 'phanh thay', 'bam xac', 'dao ma', according to the motto "duc phat bat nhi bach" (punishing a person for deterring hundreds of people), or "dung hinh ky vu vo hinh" (stipulate the penalty so that the punishment is not needed).<sup>7</sup>

After the August Revolution in 1945, the Democratic Republic of Vietnam was established. The first legal documents establishing the foundation for the new Vietnamese State's judiciary were President Ho Chi Minh's Decree No. 33 dated September 13, 1945<sup>8</sup>, in which Decree No. 33C provides, Military courts have the right to sentence and enforce those who have taken actions that are detrimental to the independence of the Democratic Republic of Vietnam (except for prisoners who are soldiers, they shall be

1 Law Faculty - Hanoi National University (2010), *Things to know about the death penalty (monograph book)*, Labor and Social Publishing House, Hanoi, pp.212-213.

2 Compiled by King Tran Thai Tong in 1230, including 20 volumes.

3 Compiled by King Tran Du Tong in 1341.

4 Compiled by King Le Thanh Tong in 1483, including six Volumes, 13 Chapters, and 722 Articles.

5 Compiled by King Gia Long in 1815, including 22 Volumes, 398 Articles.

6 Also called as "Lang tri".

7 Law Faculty - Hanoi National University (2010), cited, p.214.

8 Including Ordinance No. 33A allowing General Security Office to arrest people who are dangerous to the democracy of the Republic of Vietnam for safekeeping; Ordinance No. 33B defining the rules for General Security Office and Police Office to follow when arresting someone; Ordinance No. 33C establishing Military Courts; Ordinance No. 33D regulating the release of criminals convicted before August 19, 1945.

judged by military law) of various types of penalties, of which the highest is the death penalty. A person sentenced to death has the right to seek parole from the President. Thus, the death penalty has been stipulated in the law of the new Vietnam very early.

Following the above legal documents, in the period from 1945 to 1985, the issue of the death penalty was also regulated in many other legal documents of the State, including the Ordinance, Law, Order, Circular.<sup>1</sup> As researching these documents, we can draw some comments as follows: Firstly, due to the country's circumstances, the legislative and regulatory work has not yet been developed and perfected, therefore there is no separate document providing for the death penalty as well as the penalty system in general. The death penalty is mentioned sporadically in many legal documents enacted in different years. Secondly, the death penalty at this time was influenced by the war situation, so it was heavy for the purpose of punishment, associated with many crimes in terms of national security<sup>2</sup> and not clearly distinguished from administrative sanctions. Thirdly, in terms of procedures, this period applied the procedure for reviewing the death penalty. Under the Law (no number) of July 14, 1960 on the organization of People's Courts, death sentences must be reviewed by the Plenary Council of Judges of the Supreme People's Court before being executed, of which only when there are 2/3 of the total number of judges of the Supreme People's Court attending and more than half of the attending judges agree, the Resolution will be valid.<sup>3</sup>

The Criminal Code (Penal Code) was first issued in Vietnam in 1985, then amended and supplemented in 1989, 1991, 1992, 1997. In the Criminal Code's criminals section of 1985, the death penalty is defined with 29 articles out of 195 laws on crime. However, through the four amendments, by 1997, the number of laws providing for the death penalty in the Penal Code in 1985 had increased to 44 out of 216 articles. This increase reflects the direction of crime prevention towards becoming increasingly stricter in the period 1985-1997 in Vietnam.

The 1999 Penal Code was passed by the National Assembly on December 21, 1999, to replace the 1985 Penal Code (amended in 1991, 1992, 1997), including 24 chapters, articles, of which 29 articles have the highest penalty frame being the death penalty. However, this Code was amended in 2009, which abolished the death penalty with eight (08) articles.<sup>4</sup>

---

1 See also: Pham Van Loi (editor) (2006): Some issues about the death penalty and the execution of the death penalty, National Political Publishing House, Hanoi, pp.36-38.

2 Crimes can be named as Espionage; Rebellion; Infringement upon territory; Conducting banditry activities; Illegal emigration for the purpose of opposing the people's government; murder, infliction of bodily harm upon other people, arresting or threat of murder for counter-revolutionary purposes; Sabotaging; Sabotaging implementation of State policies and laws, etc.

3 Law Faculty - Hanoi National University (2010), *cited*, pp.217-218.

4 Including: Rape (Article 111); Appropriating property through swindling (Article 139); Smuggling (Article 153); Making, storing, transporting and/or circulating counterfeit money, treasury bills and/or bonds (Article 180); Hijacking aircrafts, ships (Article 221); Offering bribes (Article 289); Destroying military weapons, technical means (Article 334).

The aforementioned amendment originated from the policy of restricting the death penalty, which was set out by the Communist Party of Vietnam in 2002 (three years after the 1999 Penal Code was issued). Specifically: Resolution No. 08/NQ-TW dated January 2, 2002, of the Politburo on a number of crucial judicial tasks in the coming time (Resolution No. 08/NQ-TW) has proposed the task of researching to limit the application of the death penalty in the Penal Code. Next, the Politburo's Resolution No. 49/NQ-TW dated June 2, 2005, on the Judicial Reform Strategy to 2020 (Resolution No. 49/NQ-TW) affirmed the policy "restricting the application of the death penalty towards the direction that the penalty applied only to a few severe crimes." This policy has been implemented since 2009, when the Penal Code 1999 was amended and supplemented and continued to be implemented when the Penal Code was formulated and issued in 2015.

The 2015 Penal Code (revised in 2017) continues to abolish the death penalty for eight (08) other offenses, and at the same time stipulates that people under 18 years old when committing crimes, pregnant women, women nursing children under 36 months old a person aged 75 years or older when committing a crime or being tried is not subject to the death penalty. In total, the number of crimes with the death penalty in the Penal Code in 2015 (as revised in 2017) is 18/314 offenses.

**Table 1. Progress in the number of crimes subject to the death penalty through Vietnam's Penal Codes since 1985**

<b>Penal Code</b>	<b>Penal Code 1985</b>	<b>Penal Code 1985 (revised in 1989, 1991, 1992, 1997)</b>	<b>Penal Code 1999</b>	<b>Penal Code 1999 (revised in 2009)</b>	<b>Penal Code 2015 (revised in 2017)</b>
<b>Crimes</b>					
Number of crimes subject to the death penalty	29	44	29	22	18
Total number of crimes in the Penal Code	195	218	263	272	314

In terms of the execution of the death penalty, unlike many countries, in recent decades, Vietnam has not made public the number of people executed. At the Universal Periodic Review on Human Rights on January 22, 2019, the representative of Vietnam explained this matter as follows: "The death penalty data is a content related to legal provisions protecting Vietnam's state secrets. In fact, considering many social reasons and aspects, Vietnam does not disclose death penalty data. However, the execution of the death penalty in Vietnam is conducted openly and in strict accordance with the procedures

prescribed by the criminal procedure code”.<sup>1</sup> However, according to some sources, the number of death sentences declared and executed in Vietnam has decreased from 67 in the 1996-2000 period to 21 in the 2009-2013 period.<sup>2</sup> In the Report of five years (2011-2016) that the Ministry of Public Security publicly announced in February 2017, Vietnam had 1,134 death row inmates, and in three years (2013-2016), there were 429 prisoners executed by injecting poison, half of which have not yet served sentence.<sup>3</sup>

**Table 2. Number of defendants sentenced to death in 11 years (1992 - 2002)<sup>4</sup>**

Year	Total number of defendants tried at first instance per year	Number sentenced to death	Percentage of defendants applied sentenced to death/total number of defendants tried (%)	The number of defendants sentenced to death corresponds to four groups of crimes: Corruption (I), Drugs (II), Rape of children (III), Murder, murder, and other crimes (IV)
1992	39920	88	0.22	
1993	47237	95	0.20	
1994	47822	88	0.18	
1995	51757	104	0.20	
1996	62494	117	0.18	
1997	42440	162	0.38	<u>Group I</u> : 7; <u>Group II</u> : 26; <u>Group III</u> : 10; <u>Group IV</u> : 118.
1998	75280	200	0.26	<u>Group I</u> : 8; <u>Group II</u> : 57; <u>Group III</u> : 7; <u>Group IV</u> : 128.
1999	76663	202	0.26	<u>Group I</u> : 9; <u>Group II</u> : 78; <u>Group III</u> : 5; <u>Group IV</u> : 109.
2000	61272	208	0.34	<u>Group I</u> : 2; <u>Group II</u> : 87; <u>Group III</u> : 9; <u>Group IV</u> : 99.
2001	58454	159	0.27	<u>Group II</u> : 60; <u>Group III</u> : 3; <u>Group IV</u> : 90.
2002	62264	140	0.22	
Total		1471		

1 National Report on Human Rights Exercise at the Universal Periodic Review of Human Rights in front of the United Nations Human Rights Council of Vietnam, January 22, 2019 in Geneva, Switzerland. Source: <https://www.rfa.org/vietnamese/news/vietnamnews/vietnam-refuses-to-reveal-no-of-dead-penalty-citing-national-secret-01222019213828.html> (last accessed: 25 / 01/2021).

2 Roger Hood, “Elimination of the death penalty - an urgent demand for human rights”, Proceedings of the International Workshop ‘Right to Live in International Law and Vietnamese Law’, Hanoi September 22, 2014 , p.18.

3 National Report on the Exercise of Human Rights at the Universal Periodic Human Rights Review in front of the United Nations Human Rights Council, cited material.

4 Reference: Office of the Supreme People’s Court. Remarks: Le Van Cam, Nguyen Thi Lan (2014), “The death penalty in Vietnam’s criminal law: Maintain or need to be reduced and progressively eliminated”, Journal of Science, VNU - *Jurisprudence Journal*, Volume 30, Number 3, pp.1-14, p.13.

## 2. FACTORS FAVORABLE TO THE ABOLITION OF THE DEATH PENALTY IN VIETNAM

### 2.1. The trend of abolishing the death penalty in the world

The trend to abolish the death penalty has increased dramatically over the past 50 years. When the Universal Declaration of Human Rights was passed in 1948, only eight countries abolished the death penalty, and when the International Covenant on Civil and Political Rights (ICCPR) was approved by the General Assembly of the United Nations (UN) in 1966, the number of such countries was only 26. However, in less than 50 years, the number of countries abolishing the death penalty has gone from the minority to the overwhelming majority.<sup>5</sup> According to Amnesty International, at the end of 2018, 106 countries have abolished the death penalty for all crimes, eight have abolished the death penalty for ordinary crimes, 28 retentionist countries did not actually apply the death penalty. Thus, the total number of countries abolishing the death penalty in law and in fact 142 countries, only 56 countries are still maintaining the death penalty and applying it in practice.<sup>6</sup>

In Asia, the country that is believed to have the most death sentence execution, China has also changed. In 2007, the Chinese delegation at the United Nations Human Rights Council announced: “The scope of the death penalty application will soon be reconsidered [...] with the aim of eliminating this penalty”.<sup>7</sup> That same year, China conducted a reconsideration of all death sentences executed immediately by the Provincial People’s Court (empowered during the “purge” campaigns of (1980) and the Supreme People’s Court, which led to a reduction in the number of death penalty charges since 2011. However, China does not publish data on the application of the death penalty. Though many legal statistics sources, it can be that the number of people executed has been reduced by at least a half since 2007. Perspectives in favor of abolishing the death penalty are also increasingly popular in China. For example, Professor Zhao Bingzhi of Beijing Pedagogy University asserted: “The abolition of the death penalty is an inevitable trend, as well as a sign of the open thinking of civilized nations (the broad-mindedness of civilized countries) [...] Removal of the death penalty, is now a compulsory international requirement”.<sup>8</sup>

The abolition of the death penalty and the promotion of the abolition of the death penalty have become a global movement. Many international organizations such as the

---

5 Penal Reform International (2011), *International trends toward abolition Death Penalty Information Pack*, Link: [http://www.penalreform.org/wp-content/uploads/2013/06/PRI\\_DP\\_Info\\_Pack-1.pdf](http://www.penalreform.org/wp-content/uploads/2013/06/PRI_DP_Info_Pack-1.pdf) (last accessed: 22/01/2021).

6 Amnesty, *Abolitionist and retentionist countries as of July 2018*, <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>

7 Remarks: Roger Hood, “Abolishing the death penalty - an urgent demand for human rights”, cited, p.21.

8 Remarks: Roger Hood, “Abolishing the death penalty - an urgent requirement for human rights”, cited., p.21.

UN have had many initiatives to support this trend.<sup>1</sup> A number of other countries have also incorporated the issue of suspension and abolition of the death penalty in their foreign policies. For example, Australia has adopted a strategy and action plan to carry out temporary detention campaigns. cease to apply and abolish the death penalty<sup>2</sup>; The Swiss Ministry of Foreign Affairs has approved the Action Plan on the abolition of the death penalty globally for the period 2017 - 2019<sup>3</sup>, while the UK government also has a strategy to abolish the death penalty for the period 2011-2015.<sup>4</sup>

The trend towards the abolition of the death penalty can be seen in many ways as a result of the rise in international human rights law. In addition, other factors are influencing this trend. For example, there is an increasing number of evidence-based studies showing that the death penalty does not outweigh other penalties in crime prevention. However, what most profoundly influenced the trend to abolish the death penalty is the acceptance by states, international organizations, and the public that it is cruel, unusual, and has no place in a civilized society.

In the above international context, Vietnam maintains a “neutral”<sup>5</sup> stance but gradually moves towards abolishing the death penalty, reflected in the 2019 Universal Human Rights Examination session, the representative of Vietnam stated, “Vietnam still maintains the death penalty, but applies only to severe crimes,” and Vietnam “is also considering joining an additional protocol on the ICIPR convention to work towards the abolition of the death penalty”.<sup>6</sup>

1 United Nations High Commissioner for Human Rights, Abolishing the death penalty - lessons from national experience, Reference link: [https://www.ohchr.org/Lists/MeetingsNY/Attachments/27/moving\\_away\\_from\\_death\\_penalty\\_web.pdf](https://www.ohchr.org/Lists/MeetingsNY/Attachments/27/moving_away_from_death_penalty_web.pdf) (last accessed: 25/01/2021).

2 Nguyen Thi Thanh Hai, Nguyen Van Hoan, Nguyen Minh Khue (2019), *cited*, p.6.

3 See: Swiss Ministry of Foreign Affairs, FDFA Action Plan to abolish the death penalty globally, 2017-2019, available at: [https://www.eda.admin.ch/dam/eda/en/documents/publications/MenschenrechtehumanitaerePolitikundMigration/aktionsplan-todesstrafe-2017-19\\_EN.pdf](https://www.eda.admin.ch/dam/eda/en/documents/publications/MenschenrechtehumanitaerePolitikundMigration/aktionsplan-todesstrafe-2017-19_EN.pdf) (last accessed: 25/01/2021).

4 See: UK Department of Foreign Affairs, HMG Strategy to abolish the death penalty period 2010-2015, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/35448/death-penalty-strategy-oct-11-15.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/35448/death-penalty-strategy-oct-11-15.pdf) (last accessed: 25/01/2021).

5 Penal Reform International (2011), *cited* (last accessed: January 22, 2021).

6 During the sessions of the United Nations General Assembly, Vietnam did not oppose, but abstained from all four resolutions introduced from 2007 to 2012 (which were supported by the majority of countries) which calls for a moratorium of the adoption and enforcement of the death penalty worldwide. Vietnam has not yet joined the group of countries that sent a note opposing each of these resolutions to the United Nations Secretary-General (this note states: “*There is no international consensus on whether the death penalty should be adopted by the United Nations which is considered a violation of human rights*” and “*Each country has the inalienable right to choose its criminal justice system without interference by another state in any way*”). See Roger Hood, “Abolition of the death penalty - an urgent human rights imperative”, *tld.*, p.18.

## 2.2. Advocacy by the United Nations human rights agencies and the European Union

In 2005, the UN Human Rights Commission asked states that still maintain the death penalty to “completely abolish the death penalty and, for the time being, delay the execution.”<sup>1</sup> In December 2007, the UN General Assembly adopted a landmark resolution calling on states to postpone the application of the death penalty and reaffirming the UN’s commitment to abolishing the death penalty. The resolution was passed with 104 supportive countries, 54 against countries, and 29 abstentions. In 2008 and 2010, the UN General Assembly passed the second and third resolutions reaffirming the call for the suspension of the death penalty. These resolutions reflect trends at the international level, seen as an essential step in the international effort towards the abolition of the death penalty.

The above movements are based on international law restricting and limiting the application of the death penalty. Specifically, Article 6 (2) of the International Covenant on Civil and Political Rights (ICCPR) states: “In countries where the death penalty has not been abolished, it is only allowed to apply to the most serious criminals, in accordance with current law at the time the crime was committed and not contrary to the provisions of this Convention...”. In addition, there are the death penalty restrictions and limitations set forth in a variety of other international agreements and instruments, such as the Convention on the Rights of the Child (CRC) and Guarantee Regulations, to ensure the protection of the rights of persons facing the death penalty (adopted in accordance with UN ECOSOC Resolution 1984/50 in 1984). A summary of international limitations and restrictions on this issue can be found in the following table:

**Table 3. International protective regulations aim to limit the death penalty in countries<sup>2</sup>**

International protective regulations	
The death penalty is only allowed for the most severe offenses based on the current law at the time the crime is committed.	Article 6(2) ICCPR and Protective regulation no. 1 and 2
The death penalty is executed only on the basis of an already valid judgment issued by a competent court.	Article 6(2) ICCPR and Protective regulation no. 5
Comply with rules of a fair trial, including a presumption of innocence, minimum guarantees of the right of defense, and the right to legal aid at all stages of the proceedings.	Article 14 ICCPR and Protective regulation no. 5

1 National Report on Human Rights Exercise at the Universal Periodic Human Rights Review in front of the United Nations Human Rights Council of Vietnam, *cited*.

2 Penal Reform International (2011), *cited*, Last accessed: January 22, 2021.

The death penalty is only applied when the fault of the accused is based on clear and convincing evidence, and no other factual explanation is possible.	Protective regulation no. 4
The right to appeal and review judgments by a Higher Court	Article 14(5) ICCPR and Protective regulation no. 6
Right to apply for parole and reduced sentence	Article 6(4) ICCPR and Protective regulation no. 7
The death penalty may not be executed while it is pending an appeal, amnesty, or reduction	Protective regulation no. 8
When executing the death penalty, the least painful method must be used	Protective regulation no. 9

Europe now plays a leading global role in the effort to eliminate the death penalty.<sup>1</sup> The European Union (EU) actively advocates for abolishing the death penalty through bilateral and multilateral relations with all countries that are also maintaining the penalty. This stems from the European Court of Human Rights (ECtHR) considering the death penalty a violation of human rights. Specifically, in the 2010 ruling on *Al-Saadoon and Mufdhi v. the UK*, ECtHR relied on Article 2 of the European Convention on Human Rights (the right to life) to explain the obligation not to deport or lead the offenders back to the country they are facing the death penalty. The EU's guidance on the death penalty (adopted in 1998) is instrumental for the EU in its fight against the death penalty and sets minimum standards in the application of the death penalty.<sup>2</sup>

In the case of Vietnam, most recently, through a death court hearing of the Hanoi People's Court on September 14, 2020<sup>3</sup>, the EU has continued to call on Vietnam to abolish this penalty. For many years, the EU has been campaigning for Vietnam to postpone the application of the death penalty, considering it the first step towards abolition. The most potent campaign is that through the EVFTA Trade Agreement, the EU thinks that if Vietnam wants to have an equal relationship with the EU, it is necessary to respect the EU's principles, including not applying the death penalty.<sup>4</sup>

### 2.3. Support from academia and society

Although there are only a few studies on this issue, the academics in Vietnam generally support the policy of reducing and eliminating the death penalty. Many researchers suggest

1 The Parliamentary Assembly of the Organization for Security and Cooperation in Europe (OSCE) adopted a resolution in 2009 calling on member states that still maintain the death penalty to declare an immediate moratorium on death penalty execution.

2 Penal Reform International (2011), cited, Last accessed: January 22, 2021.

3 A commune in My Duc district, Hanoi city.

4 Quoc Phuong, What does the EU declaration on Dong Tam's trial show?, Reference link: <https://www.bbc.com/vietnamese/vietnam-54238069> (last accessed: 31/01/2021).

reducing and eliminating the death penalty from the view that<sup>1</sup>: 1) It is contrary to the humanitarian principles of criminal law; 2) Abolishing the death penalty will contribute to bringing humanitarian values and humanitarian principles to life; 3) Under the present globalization, many humanitarian values, including the abolition of the death penalty, are generally globally compulsory and 4) Countries that are maintaining or reintroducing the penalty all try to minimize this penalty.

In addition, Vietnamese scholars also gave other reasons to propose the elimination of the death penalty, including<sup>2</sup>: 1) The death penalty effectively protects life value of human; 2) All criminal justice systems have problems and possibilities of error, no system can claim to be perfect, so the risk of innocent people being sentenced to death and being deprived of one's life is an irreversible mistake; 3) The brutality of the death penalty is unacceptable; 4) The application of the death penalty risks injustice and discrimination in criminal proceedings; 5) Due to the cruel nature of the death penalty, the application of this penalty is contrary to moral values, significantly damaging human dignity and tolerance - fundamental moral values that all societies need to be nurtured; 6) The death penalty is contrary to the principle of tolerance - humanity in judicial activities; 7) The issue of the preventive effectiveness of the death penalty needs to be reconsidered because there is no evidence to show the superior effectiveness of the death penalty in preventing crime (even in some cases the imposition of the death penalty even aggravates the crime situation); 8) The meaningless and viciousness of the death penalty (Example: A person sentenced to death for murder is not only not helping to regain the victim's life but also cause an additional death); 9) The cost of implementing the death penalty is in fact very expensive; 10) The death penalty threatens to violate general standards of international human rights law; and 11) The death penalty is contrary to the humanitarian spirit - tolerance of religion. To the public, in 2011, the Faculty of Law - Hanoi National University conducted a sociological survey, "Survey of preventive effects of some penalties in the Penal Code"). Based on analysis of the survey data on awareness of three groups of respondents (including (i) Prisoners serving punishment in some prisons, (ii) Selected people (random individuals and postgraduate students<sup>3</sup>) on the need to remove the death penalty provisions from Vietnamese criminal law shows support for the elimination of the death penalty from target groups has a significant difference. However, most favor the abolition of the death penalty.

---

1 See: The report by Ho Sy Son in the Documentation at the Scientific Workshop with the topic "The issue of limiting the death penalty in some crimes in Vietnam". Re-cited: Le Van Cam, Nguyen Thi Lan (2014), cited, p.3.

2 See: Vietnam Lawyers Association (2008), The death penalty in international law (Reference book), Hong Duc Publishing House, Hanoi, p. 37 - 41.

3 Application of in-depth interview therefore was not included in the rate calculation.

**Table 4. Proportion in favor of abolishing the death penalty<sup>1</sup>**

No	Group of respondents	Number of votes in favor of the abolition of the death penalty / Number of votes issued	Rate
1.	Group I	222/500	44.4%
2.	Group II	348/500	69.6%

However, in another report<sup>2</sup> based on a few short interviews with legal experts working in a number of ministries and sectors; officers directly engaged in investigation, prosecution, and adjudication in some localities; Lawyers and staff working in research and teaching at law training and research institutions<sup>3</sup>, the results showed that most of the respondents said that now is not the right time to remove the death penalty in Vietnam altogether because the crime situation in Vietnam is complicated and tends to increase in both the quantity and nature, the severity of the danger and the scale of the crime. However, the interviewees also admitted that death is a punishment that deprives the person of the right to life - the most fundamental right of the person, deprives the convicted person of chances of community reintegration and rehabilitation. They also agreed that the execution of the death penalty would eliminate the possibility of overcoming injustice that may actually occur, so it is necessary to gradually narrow the scope of the death penalty application in the future. The people interviewed also said that the death penalty should only be applied to certain crimes that have severe consequences for people's lives, health, national interests, and public order and safety, such as crimes: betraying the Fatherland, murder, terrorism, some drug-related crimes.

In December 2018, in a consultation workshop on the topic “*Possibility of Vietnam's accession to the Second Optional Protocol on the abolition of the death penalty under the ICCPR Convention*” was held in Danang city<sup>4</sup>, the majority of workshop participants said that maintaining the death penalty is the most potent and most effective measure against certain types of serious crimes (e.g., national security breaches, violent crime,

1 We base on the survey data as follows: generated 1103 questionnaires for both groups I (including 500 prisoners serving penalties in 3 provinces of Thanh Hoa, Bac Giang and Hanoi) and II (including 500 randomly selected ordinary people) on whether (or not to) remove the death penalty from the Vietnamese penal system. Survey data in the study: Le Van Cam, Nguyen Thi Lan (2014), cited, p.12.

2 Nguyen Thi Thanh Hai, Nguyen Van Hoan, Nguyen Minh Khue (2019), cited, pp.33-34.

3 Including: Ministry of Public Security, Supreme People's Court, Central Committee of Vietnam Fatherland Front, People's Procuracy of Dong Thap Province, People's Court of Vinh Long Province, High Court in Ho Chi Minh City, the Bar Association of An Giang province, the Bar Association of Ben Tre province, Hanoi Law University.

4 The workshop was held on December 17, 2018 in Da Nang city within the framework of the Program on Strengthening Law and Justice in Vietnam (EU JULE).

drug crime), but also agrees with the need to study alternative measures of the death penalty and gradually limit its use.<sup>1</sup>

### **3. FACTORS HINDERING THE ABOLITION OF THE DEATH PENALTY IN VIETNAM**

#### **3.1. Inaccurate understanding of the effects of the death penalty**

Besides the views that support abolition, there is also a view in Vietnam that wants to maintain the death penalty, which is primarily based on inaccurate misunderstandings about the effect of this penalty.

An analysis of publications in Vietnamese criminal justice books (in the first two decades of the 21st century) shows that, in general, the authors support the continuation of the death penalty in Vietnam based on the view that this penalty has a special deterrent effect, it is, therefore, necessary to maintain it due to the complicated criminal situation.<sup>2</sup> This is also the official stance raised by the Government of Vietnam to the United Nations.<sup>3</sup>

In addition, some authors also argue that the maintenance of the death penalty: 1) Will ensure the principle of equity in criminal law; 2) Contribute to improving human dignity; ensure the quality of life and ensure social safety; 3) Not contrary to humanitarian principles, not contrary to international law and not in violation of human rights; 4) Currently, the abolition of the death penalty is not a worldwide trend;<sup>4</sup> 5) The death penalty contributes to justice for crime victims; 6) It is less expensive to execute offenders to be executed than detaining them; 7) Death penalty would be more “humane” because “imprisonment for a lifetime or for extended periods in prison is even more painful” for the convicted; 8) The abolition of the death penalty is contrary to religious morality and 9) Domestic opinion in most countries still supports the application of the death penalty.<sup>5</sup>

---

1 Nguyen Thi Thanh Hai, Nguyen Van Hoan, Nguyen Minh Khue (2019), cited, p.34-35.

2 See also: Trinh Quoc Toan (2012), “The death penalty regime in Vietnam’s criminal law and some perfect recommendations”, VNU Science Journal - Law Specialist, Volume 30, No. 1, p.30-41. In this article, the author argues that in Vietnam, the death penalty is still necessary and needed to punish those who commit particularly serious offenders to strictly discipline the country, ensure social security and order, which means that this kind of punishment is still effective in preventing crime and effectively protecting the public interest. (p.36).

3 Viet Nam’s National Report on the Exercise of Human Rights at the Universal Periodic Review of Human Rights before the United Nations Human Rights Council, cited, outlines the cultural and human reasons for the death punishment, and affirms “this is a necessary measure to prevent particularly serious crimes.”

4 Vo Khanh Vinh, Nguyen Manh Khang, Pham Van Tinh (2008), The issue of limiting the death penalty in some crimes in Vietnam, Scientific workshop coordinated by the Institute of State and Law (Vietnam Academy of Social Sciences) with Konrad Adenauer Stiftung Institute held on 23-24 December 2008 in Hanoi; Pham Van Beo (2010), The death penalty in Vietnamese criminal law (Reference book), National Political Publishing House, Hanoi, pg. 210.

5 Vietnam Lawyers Association (2008), cited, p. 22-35.

On the part of the public and those working in practice, the interview results showed that<sup>1</sup> most of the respondents also said that now is not the right time to abolish the death penalty in Vietnam altogether. Because the crime situation is still complicated, it tends to increase both quantity and nature and level of danger. Many people believe that the death penalty is a preventive measure and a way to raise public awareness about the severe consequences of crime. Currently, there is no substitute punishment as a very effective measure capable of deterring and preventing crime to replace the death penalty. However, opinions also agree that the death penalty deprives people of the right to life - a fundamental right of the man. Therefore, it is necessary to gradually narrow the scope of the death penalty application and proceed to eliminate this penalty in the future.

From the above analysis, it can be seen that the sentiment in favor of maintaining the death penalty is still quite popular in Vietnam. This is similar in many other countries. Even in countries where the death penalty has been abolished, at the time of abolition and after abolition, public opinion polls show that the percentage of people who support the maintenance of this penalty is still higher than the rate of for.

However, it should be seen that poll results do not always have to reflect the true nature of the problem, even exacerbate prejudices or inaccurate social perceptions about the problem. Some studies have shown that the above results in other countries, as well as in Vietnam, may be due to the content of the question and unreasonable organization of opinion polls on the death penalty (often ignoring the harmful effects of this penalty).<sup>2</sup>

### **3.2. Revenge culture**

The death penalty from its inception has brought in the character of revenge against the offender before it is “assigned” for the purposes of crime prevention, deterrence, private prevention, general prevention... At first, it was revenge between individuals, but when the society developed, revenge was passed through the state to re-establish social order and justice. At the same time, the death penalty is meant to comfort, caress the hatred of the victim or the victim’s relatives (although this is not the mentality of all the victims or the relatives of the victim). Societies have long considered such thoughts and arguments about death punishment to be plausible, so this punishment exists as a matter of course.

In other words, the maintenance of the death penalty is rooted in human awareness, culture, so only when the perception of it changes, this penalty will be eliminated entirely

Culture is formed by the influence of many factors. The existence of society plays a decisive role on the level of culture, demonstrating humanity, eliminating hatred in

---

1 Nguyen Thi Thanh Hai, Nguyen Van Hoan, Nguyen Minh Khue (2019), cited, p.43.

2 Reference: Penal Reform International (2011), *cited*, last access: 22/01/2021.

each person. The culture of Vietnam contains many noble humanitarian values. However, like many other cultures, it still has room for hatred. Like many other ethnic groups, Vietnamese people often justify the application of the death penalty on the basis of “retributivism”, expressed through the viewpoint of “a life for a life,” which has been deeply rooted in Vietnamese folklore, of which the most typical example for this issue is the Tam Cam fairy tale. In this story, tortured and harmed by the mother and daughter Cam, after being reborn by the Buddha, Tam - despite being a beautiful and honest girl - but committed terrible revenge that is to trick Cam down in the pit and sent his servants to pour boiling water to death, then bring the body to make a fish sauce and send it to Cam’s mother, saying that it was a gift from Cam to trick Cam’s mother into eating fish sauce made from her daughter’s meat when Cam’s mother ate the fish sauce and discovered the truth, she was so horrified that she died.<sup>1</sup>

The hallmark of revenge in the culture today is still evident in the Vietnamese people’s perception of the death penalty. According to the project “Survey of preventive effects of some penalties in the Vietnam Penal Code 1999,” conducted by a group of experts from the Faculty of Law, National University of Hanoi shows that most people consider having the death penalty within the structure of the penalty system is natural, without it, the law will be void and injustice. With 04 questions: (1) Eliminate the death penalty in the penalty system; (2) Maintaining the death penalty; (3) Limiting the application of the death penalty; (4) other opinions, the corresponding percentages in the total number of respondents are 37, 82% (222 people); 5, 96% (35 people); 51, 96% (305 people); 4, 26% (25 people), if the ratio of questions (2) + (3) of those who agree with the maintenance of the death penalty being 57, 92 will be higher than the rate of 37.82% of those advocates view to eliminate this penalty.<sup>2</sup>

The vengeance in a particular culture is clearly shown through debates about severe cases, but the 2011 Bac Giang gold shop robbery case (Le Van Luyen case) is a specific proof.<sup>3</sup> In that case, although the defendant committed grave crimes (killing three people of a family, including 01 children) and robbing property, because he was under 18 years old at the time of the crime, in accordance with the law, the defendant has not been subject to the death penalty. The court’s trial is in accordance with Vietnamese law and international

---

1 Read Tam Cam fairy tale (original) at <https://doctruyencotich.vn/truyen-co-tich-viet-nam/truyen-co-tich-tam-cam-ban-goc.html>

2 Project “Survey of preventive effects of a number of penalties in the Vietnam Criminal Code 1999” by the Center for Criminal Studies at the Faculty of Law, Hanoi National University, 2011. Referral: Nguyen Ngoc Chi (2012), “Some thoughts on the death penalty in Vietnam’s criminal law”, Science Journal of Hanoi National University - Journal of Law, Vol. 28, pp.42-48, p.46.

3 Overview the entire case here: Hoang Sang, Overview of the massacre in Bac Giang, Reference link: <https://vietnamnet.vn/vn/thoi-su/toan-can-h-vu-tham-sat-o-bac-giang-56475.html> (last accessed: 31/01/2021).

law but has caused incredible frustration in the media.<sup>1</sup> Many people, including those with high status and high education, believe that Le Van Luyen should be executed, regardless of the defendants under 18 years of age. That attitude contains memories of revenge and violence that have taken root in Vietnamese culture and many other cultures.

From the above incident, it can be seen that, as in many other countries, the culture of revenge is the biggest obstacle to the abolition of the death penalty in Vietnam. The culture of revenge hinders the structural reform of the state's penalty system. If the death penalty is immediately abolished, it will quickly lead to people's reactions, causing social unrest.<sup>2</sup>

## CONCLUSION

Like in many other countries, the death penalty is a controversial issue in Vietnam. The maintenance or elimination of this penalty is influenced by many factors, both at home and abroad, in which, at home, the factors of awareness and culture are important. At the same time, the movement of the EU and international human rights organizations has a considerable impact abroad.

Although Vietnam still belongs to the countries that maintain the death penalty in law, the number of crimes sentenced to death in the Penal Code has decreased steadily since 1999. That Vietnam is following the general trend of the world to reduce this penalty. However, in Vietnam, the number of crimes sentenced to death in the Penal Code is still high, and the number of people sentenced to death and executed (statistics through legal and public sources) is still high compared to many other countries in the world.

In the context of increasingly deepening international integration, increasing people's intellectual standards, and more open society, Vietnam in the future will still follow the trend of reducing the death penalty in law and reducing the application of the death penalty in practice. However, this will be a gradual progression, not a quick change in a short period, as there are still many incentives to maintain this penalty.

The reduction and elimination of the death penalty in Vietnam depends heavily on intensive and comprehensive studies to prove that the death penalty does not have as superior preventive effects on crime as the current prejudice of many legislators and the majority of the public. In addition, in order to be highly influential, studies on this issue in Vietnam also need to demonstrate the adverse effects of the death penalty on society, especially on issues where the law setters and the public rarely paid attention to, such as the increase in crime rates of children whose parents are sentenced to death, or the increased violence and lack of tolerance of the public.

---

1 See also: Tam Lua, Than Hoang, From the Le Van Luyen case: Should we fix the law ?, Reference link: <https://tuoitre.vn/tu-vu-le-van-luyen-co-nen-sua-luat-473762.htm> (last accessed: January 31, 2021).

2 Nguyen Ngoc Chi (2012), cited, p.46.

**REFERENCES**

1. Amnesty International Global Report, *Death Sentences, and Executions 2016*, available at: <https://www.amnesty.org/en/what-we-do/death-penalty/> (last accessed: 25/01/2021), p.25.
2. National Report on Human Rights Exercise at the Universal Periodic Human Rights Review in front of the United Nations Human Rights Council of Vietnam, January 22, 2019, in Geneva, Switzerland. Available at: <https://www.rfa.org/vietnamese/news/vietnamnews/vietnam-refuses-to-reveal-no-of-dead-penalty-citing-national-secret-01222019213828.html> (last accessed: 25/01/2021).
3. UK Department of Foreign Affairs, *HMG Strategy to abolish the death penalty period 2010-2015*, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/35448/death-penalty-strategy-oct-11-15.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/35448/death-penalty-strategy-oct-11-15.pdf) (last accessed: 25/01/2021).
4. Swiss Ministry of Foreign Affairs, *FDFA Action Plan to abolish the death penalty globally, 2017–2019*, available at: [https://www.eda.admin.ch/dam/eda/en/documents/publications/MenschenrechtehumanitaerePolitikundMigration/aktionsplan-todesstrafe-2017-19\\_EN.pdf](https://www.eda.admin.ch/dam/eda/en/documents/publications/MenschenrechtehumanitaerePolitikundMigration/aktionsplan-todesstrafe-2017-19_EN.pdf) (last accessed: 25/01/2021).
5. Pham Van Beo (2010), *The death penalty in Vietnamese Penal Code* (Reference book), National Political Publishing House, Hanoi.
6. Le Van Cam, Nguyen Thi Lan (2014), “The death penalty in Vietnam’s criminal law: Maintain or need to be reduced and progressively eliminated”, *Journal of Science, VNU - Jurisprudence Journal*, Vol. 30, Number 3, pp.1-14.
7. Nguyen Ngoc Chi (2012), “Some thoughts on the death penalty in Vietnam’s criminal law”, *Journal of Science, Hanoi National University - Jurisprudence Journal*, Vol. 28, pp.42-48.
8. Nguyen Thi Thanh Hai, Nguyen Van Hoan, Nguyen Minh Khue (2019), *Report on the possibility of Vietnam joining the Second Optional Protocol on the abolition of the death penalty under the International Covenant on civil and political rights (ICCPR)*, PDF version available at: file:///C:/Users/Administrator/Downloads/DP%20Report%20(VIE).pdf (last accessed: 22/01/2021).
9. Vietnam Lawyers Association (2008), *The death penalty in international law (Reference book)*, Hong Duc Publishing House, Hanoi.
10. Law Faculty - Hanoi National University (2010), *Things to know about the death penalty (monograph book)*, Labor and Social Publishing House, Hanoi.

11. Pham Van Loi (editor) (2006): *Some issues about the death penalty and the execution of the death penalty*, National Political Publishing House, Hanoi.
12. United Nations, Resolution 2857 (XXVI) on the death penalty, 20 December 1971, available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/328/73/IMG/NR032873.pdf?OpenElement> (last accessed: 25/01/2021).
13. United Nations (Human High Commissioner), *Abolishing the death penalty-lessons from national experience*, Reference link: [https://www.ohchr.org/Lists/MeetingsNY/Attachments/27/moving\\_away\\_from\\_death\\_penalty\\_web.pdf](https://www.ohchr.org/Lists/MeetingsNY/Attachments/27/moving_away_from_death_penalty_web.pdf) (last accessed: 25/01/2021).
14. Tam Lua, Than Hoang, *From the Le Van Luyen case: Should we fix the law?*, Reference link: <https://tuoitre.vn/tu-vu-le-van-luyen-co-nen-sua-luat-473762.htm> (last accessed: January 31, 2021).
15. Penal Reform International (2011), *International trends toward abolition Death Penalty Information Pack*, Link: [http://www.penalreform.org/wp-content/uploads/2013/06/PRI\\_DP\\_Info\\_Pack-1.pdf](http://www.penalreform.org/wp-content/uploads/2013/06/PRI_DP_Info_Pack-1.pdf) (last accessed : January 22, 2021).
16. Quoc Phuong, *What does the EU declaration on the the Dong Tam case show?*, Reference link: <https://www.bbc.com/vietnamese/vietnam-54238069> (last accessed: 31/01/2021).
17. Roger Hood, “Elimination of the death penalty - an urgent requirement for human rights”, *Proceedings of the International Workshop ‘Right to Live in International Law and Vietnamese Law’*, Hanoi September 22 year 2014.
18. Roger Hood, *Death Penalty*, From the Encyclopedia, <https://www.britannica.com/topic/capital-punishment> (last accessed: 25/01/2021).
19. Hoang Sang, *Overview of the massacre in Bac Giang*, Reference link: <https://vietnamnet.vn/vn/thoi-su/toan-can-h-vu-tham-sat-o-bac-giang-56475.html> (last accessed: 31/01/2021).
20. Trinh Quoc Toan (2012), “The death penalty regime in Vietnam’s criminal law and some recommendations for improvement”, *VNU Journal of Science – Jurisprudence Journal*, Vol. 30, No. 1, p. 30-41.
21. Amnesty International (2013), *Death punishment and execution in 2012*, London.
22. Vo Khanh Vinh, Nguyen Manh Khang, Pham Van Tinh (2008), *The issue of limiting the death penalty in some crimes in Vietnam*, Scientific seminar by the State Institute and Law (Vietnam Academy of Social Sciences) coordinated with Konrad Adenauer Stiftung Institute to organize, on 23-24/12/2008 in Hanoi.

# WHY VIETNAM JUSTIFIES THE DEATH PENALTY?

A/Prof. Dr. Dang Minh Tuan<sup>1</sup>, Vu Thanh Cu<sup>2</sup>

**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. In practice, every year, many death sentences are declared and executed. This paper will examine the question of 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 the death penalty, is an offender's execution after being sentenced to death following conviction by a court of law of a criminal offense.<sup>3</sup> It is a criminal penalty and the most severe form of punishment. The historical development of capital sentences is affected by different factors such as culture, politics, religion, and ideology. Before the state authority interfering with the conviction process, this punishment was considered extra-judicial and personal revenge. Nowadays, the global conceptualization of human rights<sup>4</sup> and the rule of law<sup>5</sup> impacts academic and social perspectives on the death penalty.

---

1 Deputy Head of Constitutional & Administrative Law Department; School of Law, Vietnam National University, Hanoi.

Email: tuandangvnu@gmail.com.

2 School of Law, Vietnam National University, Hanoi.

Email: vtcdrij@gmail.com

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

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

5 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.

Capital punishment is a significant concern in light of depriving the right to life—the most fundamental human rights—since the Magna Carta’s enactment. According to Amnesty International, more than two-thirds of the world’s countries have abolished the death penalty in law or practice.<sup>1</sup> To be more specific, the number of abolitionists for all crimes and retentionists is 106 and 56 countries, respectively. Vietnam is still considered a retentionist country that retains the 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 away from capital punishment, Vietnam applies this sentence in practice. Therefore, researching this subject is inevitably crucial.

Since Vietnam represents an exceptional, unique case to understand the nature, role, and issues concerning the death penalty and justice<sup>2</sup>, this paper will examine 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.

## 1. THE LEGAL FRAMEWORK OF THE DEATH PENALTY IN VIETNAM

### *Historical development*

Vietnam’s feudal criminal law has a solid reference to China’s law due to their neighbor’s rule for almost 1000 years. Political philosophy in ancient China has a significant influence on the political life of many countries in the East, such as Vietnam, Japan, and Korea, especially the influence of Confucianism and Legalism<sup>3</sup>. In this period, the prominent role of law was to punish and maintain the social order. Therefore, criminal law plays a critical central role in the legal system with applying the death penalty for many types of crimes by many harsh and brutal forms of execution. Take Quoc trieu hinh luat<sup>4</sup>, a well-known criminal code 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

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

2 Tran K, Vu C.G., ‘The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry’ (2019) 9 (56) *Societies* 2.

3 Bùi Ngọc Sơn, *Triết lý chính trị Trung Hoa cổ đại và vấn đề nhà nước và pháp quyền: Suy ngẫm, tham chiếu và gợi mở* (Nxb Tư pháp, 2004).

4 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. <<file:///Users/thanhcuvu/Downloads/Quoctriehinhluat.pdf>>

of filial piety; (8) Discord; (9) Unrighteousness; (10) Incest. These were offenses under traditional Chinese law, and the first three were capital offenses. Besides the convicted offender, his/her relatives may be sentenced to death. This code contains 722 provisions with reference from the Tang and the Ming Dynasty of China.

Before independence, the 80-year-French-colonial-period impacted Vietnamese law profoundly. The Civil law tradition was incorporated into this South-East Asian country through the invasion of France. Rene David found this phenomenon. This comparative law scholar argued that the Civil law tradition extended its scope in two ways. The invasion of continental European countries was the first path<sup>1</sup>. The French imposed a parallel legal system in which a civil law system governed French citizens. At the same time, the Nguyen Code and customary practice continued to govern the Vietnamese people.<sup>2</sup> Indeed, they transplanted a rights-based law<sup>3</sup>. Moreover, Western-modelled institutions into Vietnam and opened a law school in Hanoi for training legal personnel to administer the legal system. Although the influence of France focused on private law<sup>4</sup>, the long-last product is the tendency of codifying different law fields, which leads to the adoption of different criminal codes in Vietnam.

Since independence<sup>5</sup>, Vietnam's criminal law is heavily influenced by Soviet criminal law. Four reasons could explain this. Firstly, when the Democratic Republic of Vietnam was born, this country needed to expand the economy beyond its borders. Therefore, the aid of communist-brother countries was inexorably precious. Vietnam sent many students to the Soviet to study and research; therefore, these future lawmakers, lawyers, and lecturers acquired knowledge from the Soviet's perspective. Secondly, Vietnam's criminal law approach is similar to Soviet jurisdiction. In the past, Vietnamese scholars considered criminal law a public law field in light of the state's power to keep the social order and national security. This perspective is a sign of communist countries such as the Soviet, China, and Vietnam. The third evidence is the similar structure of the Criminal Code of Vietnam and the Soviet, which makes each criminal code mention the general provisions, crime, punishment, and the assignment of the punishment and release from punishment.<sup>6</sup> Lastly, with the Communist Party of Vietnam (CPV) supreme leader, criminal law is a

---

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

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

3 *Ibid.*

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

5 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.

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

powerful tool to create political stability. To fight against the enemy force, the CPV needs to impose laws to stamp their identity<sup>1</sup> and protect the political regime<sup>2</sup>. The dictation of CPV is a constitutional fact when the 2013 Constitution is enacted. To be more specific, 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 the 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 leader of the Chinese Communist Party<sup>3</sup>.

Currently, Vietnam follows some views relating to the death penalty. Firstly, the penance needs to be “tit for tat” to punish the offenders. This standpoint is similar to the Code of Hammurabi, which provided that “If a man put out the eye of another man, his eye shall be put out. If he breaks another man’s bone, his bone shall be broken.”<sup>4</sup> The argument impacts significantly on the death penalty from both ethical and legal perspectives in which the death sentence is necessary to compensate for the pain of the victim and their family. Secondly, the death penalty has a unique deterrent, irreplaceable in preventing murder or other serious crimes. This way of thinking stems from the theory that each person’s behavior is affected by fear, so those who intend to commit a crime will have to think about the consequences that they may suffer - the manner of execution.<sup>5</sup> This is considered a common argument that countries that are maintaining the death penalty all put forward. Thirdly, the death penalty is more economical in comparison with imprisonment.<sup>6</sup> This sentence would reduce the financial burden imposed on the public budget. Fourthly, the death penalty’s application is to remove the most dangerous criminals from society so that delinquents do not have a chance to threaten security, peace, and others’ human rights.<sup>7</sup>

---

1 Bui N.S., ‘Contextualizing the Global Constitution-Making Process: The Case of Vietnam’ (2016) 64 (4) *The American Journal of Comparative Law* 931.

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

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

4 Yale Law School, ‘The Code of Hammurabi’ *The Avalon Project*.

5 Caldwell R.G., ‘Why is the death penalty retained?’ (1952) 284 (1) *The ANNALS of the American Academy of Political and Social Science* 51.

6 *Ibid.*

7 *Ibid.*

### *Death penalty legal framework in Vietnam*

Abolition of the death penalty is a strong tendency globally, and Vietnam criminal law has 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 provisions<sup>1</sup>. With the judicial reform 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, *the death sentence is a remarkable sentence imposed upon people committing severe crimes that infringe national security, human life, drug-related crimes, corruption-related crimes, and some other grave 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 the 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 one-third of the property embezzled or bribes were taken, closely cooperates with the authorities in the process of investigation or trial, or has made reparation to atone for the crime (Article 40.3). In the cases specified in Clause 3 of this Article, or the death sentence is commuted, the death sentence shall be replaced with life imprisonment (Article 40.4).*

The death sentence is provided in the Criminal Code and declared by the Court. It has its characteristics: (1) Because the death penalty is the most severe in the sentencing system by depriving sentenced people of life, it can only apply for people committing severe 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 excellent efficiency in general prevention; (4) Capital punishment is unaltered and has no opportunity to fix wrong conviction in judicial activities<sup>2</sup>.

The 2015 Criminal Code narrowed the scope of death sentence by removing seven capital offenses: Robbery (Article 168); Manufacturing and trading of counterfeit food

1 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/201312/thu-hep-pham-vi-ap-dung-hinh-phat-tu-hinh-trong-bo-luat-hinh-su-nam-1999-293434/>> accessed 2 February 2021.

2 There is always a possibility that an innocent man may be sentenced to death. See Bocharde E.M., 'Convicting the Innocent' (Garden City Publishing Co., 1932). Johnson J.E. (ed.), 'Capital Punishment' (H. W. Wilson Company, 1939).

or food additives (Article 193); Illegal storage of narcotic substances (Article 249); Appropriation of narcotic substances (Article 252); Destruction of works, facilities, or vehicles necessary to national security (Article 303); Insubordination (Article 394); Surrendering to an enemy (Article 399).

According to the 2015 Criminal Code, there are 18 death offenses divided into eight offenses groups. *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).

The method of capital punishment was switched from execution by a firing squad to the administration of lethal injection in 2011, according to Decree no. 82/2011/NĐ-CP. Then Decree no. 47/2013/NĐ-CP stipulated that the death sentence be conducted 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 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 a criminal law perspective, the right to a fair trial is essential in criminal proceedings to guarantee objectivity and accuracy of the whole process, which subsequently influences the court's decision. It plays a pivotal role in the 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 interest<sup>1</sup>.

---

<sup>1</sup> 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.

The right to a fair trial is a fundamental and universal principle that is mentioned in a plethora of international conventions. For instance, Article 10 of the Universal Declaration of Human Rights stated that “*everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and 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 should be promptly tried in an impartial and public manner by a court within a legally established time limit. In case of a closed trial under the 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 a 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’s criminal jurisdiction is heavily influenced by civil law tradition; therefore, they apply inquisitorial procedure<sup>1</sup>. This model reigns supreme in civil law countries. Its’ evident shortcoming is that the judge’s over-interference poses a severe threat to the trial’s objectivity. This can be explained by the fact that the judge’s arguments are based on the evidence provided by the Procuracy acting as the State’s prosecution. However, 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 justice equality. The 2015 Criminal Code and 2015 Criminal Procedure Code introduced the adversarial procedure<sup>2</sup>. This new model created 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<sup>3</sup> - a universal principle globally and the law of

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

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

3 Before the 2015 Criminal Code, Vietnam follows the Soviet’s criminal law perspective on this presumption of innocence, which seems different from the Common law system. Currently, Vietnam incorporated the connotation of this principle. See Quigley J, ‘The Soviet Conception of the Presumption of Innocence’ (1989) 29(2) *Santa Clara Review*.

evidence. The court's decision does not depend on the judge's thinking as much as the inquisitorial model.

## 2. DISCUSSION

Despite the global movement and judicial reform towards abolishing the death penalty, Vietnam still maintains it. The following arguments can explain this tendency.

First, the death penalty is widely recognized in criminal policy as an effective deterrent to crime. In the *Dang Tran Hoai case* in 2012<sup>1</sup>, the defendant was condemned for three crimes which are murder, rape of a child, and robbery. After considering, the judges decided that capital punishment would be applied to punish him and deter these severe crimes. Furthermore, retributive justice is still prevalent in the mind of society. Among all kinds of cases, murder cases are those with many death sentences in Vietnam.

Second, the death penalty is the Government's tool to protect national security, keep the social order, and notably the political regime. In the cases that threaten the national security and social order, many offenders stand with the execution of the death sentence—the public supports the maintenance of the death penalty to create social serenity and national security. In opinion polls on the death penalty, the public support for the death penalty is still relatively high.

Third, Vietnam can still create alternative sanctions to assure its purpose and keep the social order in current conditions. For instance, the economic, social, cultural, and legal conditions stay at a low level. Therefore, the crime situation is very complex and increasingly severe. Public awareness of the rule of law remains low.

Fourth, human rights are still not fully provided in comparison with international human rights standards. Human rights as natural rights or absolute freedoms are not recognized in the law. Conversely, human rights, including the right to life, can be restricted. Therefore, although the right to life is a constitutional right, the death penalty is still affirmed in the Constitution and the Criminal Code.

Fifth, the abolition of the death penalty is not widely discussed in public and studied among academics. It is still a sensitive political issue. It is challenging to assess information/statistics on the death penalty. All executions take place in extreme secrecy and silence; therefore, scholars face difficulties in collecting information and conducting analytics on the number of cases that apply the death penalty. International organizations that report on the death penalty in Vietnam rely on 'unorthodox' sources. Due to a lack of

---

1 Anh Thu, 'Những sát thủ gây phẫn nộ bị xét xử năm 2012', *VnExpress* (2012). <https://vnexpress.net/hung-sat-thu-gay-phan-no-bi-xet-xu-nam-2012-2404847.html>

academic studies and public discussion, reasons to abolish the death penalty are not fully understood.

Sixth, although lawmakers maintain that capital punishment is necessary, they have narrowed the application scope. This policy is consistent with the broader constitutional recognition of human rights in Vietnam. It is one of the essential steps in the gradual process of abolishing the death penalty in Vietnam in the future.

This process needs to be conducted in two aspects.

(1) From the legislative perspective, lawmakers need to conduct a public-opinion survey and fully evaluate to create a basis for abolishing provisions applied to the death penalty. The evaluation should concentrate on Vietnam's economic, political, and social conditions, the alternative to punish and educate prisoners; the citizens' attitude on the abolition of special provisions; the corporation of international conventions that Vietnam ratified.

(2) Suppose the death penalty is still provided in the law. In that case, the Court needs to receive instructions to consider the application of capital punishment as the last option, or it may not apply it in practice. Furthermore, the death sentence requires the legitimate, appropriate process of appeal and cassation procedures.

Lastly, abolishing or narrowing the capital sentence should base on public consultation. The consultation shows the importance of people towards this issue and a good reference for an appropriate policy.

### 3. CONCLUSION

Despite the irreversible global tendency towards abolishing the death penalty and the 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 punishment emerged as a severe and worthy punishment in Vietnamese people's minds for years. It would be hard for the citizens to understand the comprehensively different perspectives of the death penalty. From the Government's perspective, the death penalty is a valuable tool to punish and educate the convicted and prevent future severe crimes.

While South Korea – a nation with seemingly similar cultural values - abolished the death penalty<sup>1</sup>, the progressive thinking is not soaked enough to create changes in Vietnam and other Asian countries such as Japan and China<sup>2</sup>. The political regime of Vietnam can

---

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

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

explain this. As mentioned above, the CPV interferes vigorously with the law-making process, especially criminal law, in light of its ability to protect national security and keep the social order, notably the political regime. Moreover, public opinion plays an essential role in abolishing the death penalty. In South Korea, the relevant holders—civil society, non-governmental organizations—can promote abolition. In contrast, the Vietnam Government is striving to limit these parties' influence, pleading the stability and existence of the political regime, especially the CPV.

To conclude, Vietnam is moving towards abolishing capital death sentences by gradually narrowing the scope of death offenses in the criminal code since 1985. The actual abolition would occur when people's concept of capital punishment changed. Simultaneously, scholars and lawmakers need to research alternative sentences that should be applied in the future. These punishments have to meet the economic, cultural, political, and social requirements of Vietnam society and assure the penalizing, prevention, and educational purpose of criminal law. To establish the 'socialist' rule of law, Vietnam has the mission to guarantee national security and defense and the humane criminal policy to protect citizens' fundamental and constitutional rights.

## REFERENCES

1. Encyclopedia Britannica, 'Capital Punishment' <<https://www.britannica.com/topic/capital-punishment>>
2. Encyclopedia Britannica, 'Inquisitorial procedure' <<https://www.britannica.com/topic/inquisitorial-procedure>>
3. Encyclopedia Britannica, 'Adversarial Procedure' <<https://www.britannica.com/topic/adversary-procedure>>
4. Dallmayr F., "'Asian Values" and Global Human Rights (2002) 52 (2) *Philosophy East and West* 173.
5. 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.
6. Bae S., 'International Norms, Domestic Politics, and the Death Penalty: Comparing Japan, South Korea, and Taiwan' (2011) 44 (1) *Comparative Politics* 41.
7. Amnesty International, *Amnesty International Global Report: Death Sentences and Executions 2019* (2020) <<https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF>>
8. Quoc trieu hinh luat <<file:///Users/thanhcuvu/Downloads/Quoctrieuhinhluat.pdf>>

9. Vũ Văn Mẫu, *Cổ luật Việt Nam thông khảo và tư pháp sử*, Quyển thứ nhất, Tập thứ nhất (Sài Gòn, 1974).
10. Bùi Ngọc Sơn, *Triết lý chính trị Trung Hoa cổ đại và vấn đề nhà nước và pháp quyền: Suy ngẫm, tham chiếu và gợi mở* (Nxb Tư pháp, 2004).
11. 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).
12. Gillespie J., 'Private Commercial Rights in Vietnam: A Comparative Analysis' (1994) 30 *Stan. J. Int'l L.* 325.
13. Do G.N., *Control of Standard Terms in Consumer Contracts in Vietnamese Law: Lessons Learnt from European Experiences* Ph.D. thesis (Utrecht University, 2017).
14. 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.
15. Quigley J., 'The Soviet Conception of the Presumption of Innocence' (1989) 29(2) *Santa Clara Review*.
16. Bocharde E.M., *'Convicting the Innocent'* (Garden City Publishing Co., 1932).
17. Johnson J.E. (ed.), *'Capital Punishment'* (H. W. Wilson Company, 1939).
18. Nikiforov B.S., 'Fundamental Principles of Soviet Criminal Law' (1960) 23 (1) *The Modern Law Review* 31.
19. Caldwell R.G., 'Why is death penalty retained?' (1952) 284 (1) *The ANNALS of the American Academy of Political and Social Science* 51.
20. Tran K, Vu C.G., 'The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry' (2019) 9 (56) *Societies* 2.
21. Bui N.S., 'Contextualizing the Global Constitution-Making Process: The Case of Vietnam' (2016) 64 (4) *The American Journal of Comparative Law* 931.
22. Burbank J., 'Lenin and the Law in Revolutionary Russia (1995) 54 (1) *Slavic Review* 23.
23. Kuo-chun C., 'Leadership in the Chinese Communist Party' (1959) 321 *The Annals of the American Academy of Political and Social Science* 40.
24. 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/nguyen-cuu-trao-doi/201312/thu-hep-pham-vi-ap-dung-hinh-phat-tu-hinh-trong-bo-luat-hinh-su-nam-1999-293434/>>

25. Anh Thu, 'Những sát thủ gây phẫn nộ bị xét xử năm 2012', *VnExpress* (2012). <https://vnexpress.net/nhung-sat-thu-gay-phan-no-bi-xet-xu-nam-2012-2404847.html>
26. 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.
27. Nguyễn Quang Quynh, 'Hình luật tổng quát' (Lửa Thiêng, 1970).
28. Nguyễn Huy Chiêu, 'Hình luật' (Viện Đại học Saigon, 1973).
29. 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.
30. Nguyễn Ngọc Chí, Lê Lan Chi, *Giáo trình Luật Tố tụng hình sự Việt Nam* (Nxb Đại học Quốc gia Hà Nội, 2019).
31. Cao Thị Oanh, Lê Đăng Doanh, *Bình luận khoa học: Bộ Luật Hình sự năm 2015* (Nxb Lao động, 2016).
32. *Đại học Luật Hà Nội, Giáo trình Luật Hình sự Việt Nam* (Nxb Công an nhân dân, 2016).
33. Yale Law School, 'The Code of Hammurabi' *The Avalon Project*.

# “JUSTICE AS JUST PUNISHMENT” DEATH PENALTY PERCEPTION IN VIETNAM\*

Thi Bich Ngoc, Hoang<sup>1</sup>

**Abstract:** The notions of “justice” and “death penalty” are both mentioned and discussed for a long time throughout the world. Although accessing the death penalty problems from the perspective of justice is common in many countries, there is still a “blank space” in Vietnam. “Justice as just punishment” is a kind of justice involved in the field of substantive justice. Is the death penalty being considered a just punishment? - that is still a controversial question in many countries.

This paper will discuss the death penalty from a justice perspective and provide views from Vietnam to clarify the following points: (1) How is the relationship between the death penalty and justice expressed? (2) Does Vietnam have death punishment? If yes, what types of crime is the death penalty applied? (3) Does everyone think that the death penalty is a “just punishment”? This paper’s content will provide a new view from Vietnam - a country that belongs to the socialist system should have specific characteristics. Therefore, the Vietnamese people’s conception and the State’s regulations on “death penalty” and “justice as just punishment” should bring exciting and valuable references.

**Keywords:** Justice, capital punishment, Vietnam, awareness.

## 1. WHAT IS “JUSTICE AS JUST PUNISHMENT”?

### *Justice expression*

Justice is a concept that appeared early in the history of humanity. The concept of justice is not quite the same among the views because it is determined based on many factors such as geography, culture, history, and laws. Justice is divided into many categories and discussed by philosophers and jurists worldwide from ancient times to the present day, from the East to the West. Justice has also been an aspiration for social values such as freedom, justice, righteousness, kindness, and noble qualities in every person and society.

---

\* *In partial fulfilment of the requirements for the Doctor of Philosophy degree (the doctoral thesis titled “The Right of Access to Justice in Vietnam Law/Quyền tiếp cận công lý trong pháp luật Việt Nam”) that PhD. Candidate HOANG THI BICH NGOC is working at School of Law, Vietnam National University Hanoi*

<sup>1</sup> Ph.D. Candidate, School of Law - Vietnam National University Hanoi.

In Black’s Law Dictionary, the term “justice” has defined as “fair and reasonable, with three basic concepts: Emphasis on personal importance, requiring individuals to be treated in an appropriate, unbiased and equal manner.”<sup>1</sup>

For the United Nations, “justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies the rights of the accused, for the interests of victims and the well-being of society at large.”<sup>2</sup> The concept of justice is rooted in all national cultures and traditions. Its administration extends to both formal judicial mechanisms and informal dispute resolution mechanisms.<sup>3</sup>

Many definitions of justice exist. Almost all viewpoints uphold the role of justice in society, bringing justice and fairness together to realize the common goal of protecting human rights and improving society’s stability and development. The United Nations emphasizes the protection of justice in the field of proceedings, upholding the spirit of protection for the rights and obligations of the parties involved to ensure fair trial outcomes in the spirit of human rights respects.

Therefore, it can understand that the nature of justice is the State when the “standards of social values” find the intersection and harmony. That intersection exists - where morality (demands of social values) and legality (degrees of freedom and behavior) are put on the same value platform. These shared values are in most cases recognized by law and realized, then people can think of the existence of justice.

Thus, we should notice that justice is closely related to the law but cannot identify as law. Because only when the law ultimately conveys the values of justice will the law be the manifestation of justice. In contrast, a law that does not protect the weak and protects the firm’s rights and powerful minority is unjust. In short, only when the law is fair and transparent and the judgments are consistent with the law, then does justice exist.<sup>4</sup>

### *“Justice as just punishment”*

As discussed, law and justice are values that are of close interference but contain the difference because the law is the embodiment of justice and social order, safety, and

1 Henry Campell Black, *Black’s Law Dictionary* (West Publishing Co 1983) 447.

2 ‘The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies’ (Security Council-United Nations 2004) S/2004/616.

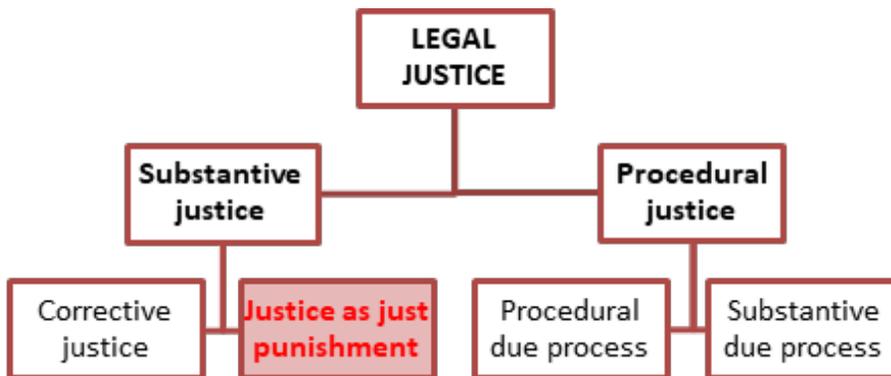
3 ‘Fact Sheet on the Importance of Women’s Access to Justice and Family Law’ (United Nations Development Fund for Women-UN Women) <<https://www.unssc.org/sites/unssc.org/files/UNWomenFactSheet.pdf>> accessed 1 March 2021.

4 The Hung, Dinh, ‘Exercising judicial power to ensure the right of access to justice in the rule of law state (Thực hiện quyền tư pháp nhằm đảm bảo quyền tiếp cận công lý trong nhà nước pháp quyền)’ (2010) 5 State and Law Review.

peace. Like Goethe said: “*Il vaut mieux une injustice qu’un désordre*,” which means it is better to be unfair than to be chaotic. Therefore, the law is deterministic, normative, and objective: people claim rights (according to the law), while justice is abstract and subjective: people wish for justice. As such, law is a tool for justice enforcement; *just punishment* is a part of that tool applied by the State’s law.

From the perspective of justice, justice is divided into many categories and discussed by philosophers and jurists worldwide from ancient times to the present. Suri Ratnapala sketched a system map of justice in the book *Jurisprudence*.<sup>1</sup> It has pointed out clearly that there are several forms in that justice does exist. Following Suri Ratnapala, justice generally is separated into four big groups, including (1) Justice as a virtue, (2) Legal justice, (3) Distributive (material) justice, and (4) Political justice.

“Justice as just punishment” defined as one type of justice that belongs to “legal justice,” as the following figure:



**Figure 1: The components of legal justice**

While *procedural justice* asks people to comply with fair legal procedure requirements, *substantive justice*, on the other hand, requires that everyone obey the law. This kind of justice cares about individual behaviors. It assigns responsibility to Judges and other law enforcement officials to comply with that country’s laws and ensure a fair outcome. In other words, substantive justice refers to the relationship between justice and regulations, enforcement, or application of laws to determine rights, obligations, and responsibilities for subjects in society.

‘Justice as just punishment’ means imposing a fair and just punishment is also a way of ensuring justice. There are several types of punishment nowadays, such as fines, forfeiture of property, term imprisonment, life imprisonment, death.

<sup>1</sup> Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2017) 392.

However, how is punishment considered as a just punishment? Justice is different in every country because justice is a broad concept, always open and dynamic depending on the specific culture and historical context. Consequently, the tools used to find or secure justice in society will also identify differently. Of course, the awareness of just punishment differs from person to person and country to country.

In precisely the case of the death penalty, is the death penalty considered as a just punishment? This question is difficult to answer fully and thoroughly. Like the concept of justice, this indistinguishability causes and is influenced by factors related to history, culture, law, people, security, politics, society. Moreover, the complex problem is how to make clear that the death penalty's goal is to ensure justice or the purpose of revenge. Death row criminals often commit horrendous crimes which leave the populace wanting revenge for those hurt; however, justice and revenge are two hugely different ideas. As Michael Sandel writes in *Justice: What is the Right Thing to Do?* "We must first separate our human desire for revenge as it clouds our judgment, and if we do not disregard it, we can never hope to attain true justice."<sup>1</sup>

### ***Is the death penalty just punishment?***

Since the dawn of civilization, societies have sought to punish criminals. The death penalty, also known as *capital punishment*, might be understood as killing someone as a punishment for a State's crime. Alternatively, it is explained as a "sentence that imposes the death penalty, the execution of an offender sentenced to death after conviction by a court of law of a criminal offense."<sup>2</sup> This type of punishment has been used to punish criminals as old as the earliest written history.

"The historical evolution of capital punishment from an extra-judicial or personal revenge, determined by a wide range of factors (culture, politics, ideology, religion) to a prescribed legal punishment administered by a state authority, to contemporary objection reflects the triumph of the notion of human rights and the rule of law in an increasingly globalized world."<sup>3</sup> Laws on the death penalty have changed over time and across nations. Nowadays, several forms of capital punishment exist in several countries, such as hanging, electrocution (using electric chairs), the gas chamber, firing squad (shooting), lethal injection.

---

1 Casey M. Bakarani and Elanor Andreassan, 'Thou Shalt Not Kill. No to Death Penalty' *The Summer Times* (USA, 2017) <<http://www.peasummertimes.com/2017/08/thou-shalt-not-kill-no-death-penalty/#:~:text=As%20Michael%20Sandel%20writes%20in,what%20the%20death%20penalty%20is>> accessed 4 January 2021.

2 'Capital Punishment | Definition, Debate, Examples, & Facts | Britannica'

<<https://www.britannica.com/topic/capital-punishment>> accessed 1 January 2021.

3 Amnesty International Global Report, 'Death Sentences and Executions Reports 2015' (Amnesty International 2015).

Data provided by Amnesty International in 2018 reported that “more than two-thirds of the countries in the world have now abolished the death penalty in law or practice. In which, 106 countries have abolished the death penalty in law for all offenses, 142 countries have abolished the death penalty in practice, and there are still 56 retentionist countries that retain this kind of sentence for frequent crimes.”

Capital punishment is a controversial matter in several countries and states since the right to life started to emerge as one of the most fundamental human rights that widely accepted throughout the world (such as in Article 3 of the Universal Declaration of Human Rights; Article 2 and Protocol 13 of the European Convention on Human Rights; Seven non-binding resolutions calling for a global moratorium on executions adopted by the United Nations General Assembly). Central to this debate is the idea of justice and retributive justice as a legitimate justification for the death penalty’s existence and use. As a form of justice, retributive justice contemplates that those who commit a crime, especially a serious one, morally deserve to receive a proportionate punishment, including death.<sup>1</sup>

Nevertheless, there is remaining debate on applying capital punishment worldwide between two contrast sides, support and non-support. Some reasons supporting both sides had given, but the common reason might be “one specific, definite possibility associated with the death penalty that could swamp all other considerations and produce major shifts in public opinion in short order - the danger of killing innocent people. This prospect comes up on both sides. On the pro-death penalty side, it is the danger that the defendant, if not sentenced to death, will be released and kill again. As we have seen, pro-death penalty capital jurors often use that argument in deliberations as an antidote to the reluctance to condemn an actual person to death. On the anti-death penalty side, it is the danger that the defendant himself may be innocent. Both of these dangers (especially subsequent murders by convicted murderers) are uncommon-events, but very concrete and potentially very influential.”<sup>2</sup> This debate continues.

Because everyone knows it is hard! As author Lloyd Steffen<sup>3</sup> researched, if capital punishment is recognized, many conditions must be fulfilled to ensure that capital

1 Kien Tran and Cong Giao Vu, ‘The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry’ (2019) 9 Societies <<https://www.mdpi.com/2075-4698/9/3/56>>.

2 Samuel R. Gross, ‘Update: American Public Opinion on the Death Penalty – It’s Getting Personal (Symposium: How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing System)’ (1998) 83 Cornell Law Review 1475 <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1188&context=articles>>.

3 Lloyd Steffen (2010), *The Moral and Spiritual Challenge of Capital Punishment*, Sacred Heart University Review Vol 19, Issue 1, p.11, <<https://digitalcommons.sacredheart.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1046&context=shureview>>

punishment is applied justly. He laid out nine (9) conditions that he thought would make capital punishment be imposed justly in practice, like the following:

1. *The punishment must be authorized by the competent authority.*
2. *There must be a just cause for using it, a grave cause, like self-defense.*
3. *The motivation for using it must be justice and not vengeance.*
4. *It must be imposed reasonably, without discrimination.*
5. *The punishment itself must not be cruel, for respect for persons prohibits torture.*
6. *The punishment must not subvert the very value (life) that it is supposed to protect and promote.*
7. *It must be a last resort: no other punishment could deliver justice adequately short of execution.*
8. *The end being sought must restore the equilibrium of justice upset by the offender's crime: the end must be the restoration of peace.*
9. *The punishment must not yield an effect out of proportion to the end being sought: it should be proportionately, the worst punishment for the worst crime."*

The challenge here is practical issues. Applying a fair death penalty theory is such a difficult task that many countries still must deal with.

## **2. THE OVERVIEW OF DEATH PENALTY IN VIETNAM**

How about Vietnam - one of the remaining socialist countries? Does Vietnam have the death penalty? How do people think about this type of punishment? Moreover, what are the reasons for that perception? This section will make it clear.

For the last two hundred years, Vietnam has undergone several changes in its ideological, political, economic, legal, and even cultural foundations. Vietnam has transitioned from a monarchical regime to a colonial society to socialism before democracy. The market-based economy found its way to Vietnam in the late twentieth century while retaining a socialist ideology.<sup>1</sup>

### **2.1. The situation of the death penalty in Vietnam**

Vietnam is one of the retentionist countries that retain the death penalty in the world. Article 40 of the Vietnam Criminal Code stipulates that "Death penalty is a special penalty

---

<sup>1</sup> Duy Nghia Pham, 'Confucianism and the Conception of the Law in Vietnam', *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (1st ed, The Australian National University: Canberra, Australia 2005) <<https://library.oapen.org/bitstream/handle/20.500.12657/33821/458803.pdf?sequence=1&isAllowed=y>> accessed 25 January 2021.

only applies to persons committing grave offenses belonging to one of the groups of crimes infringing upon national security and human life, drug-related crimes, corruption and several other grave crimes prescribed by this Code.”

Although Vietnam has not yet abolished the death penalty, it has been considering whether to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (OP2) to abolition the death penalty. Over time, the number of crimes for which the death penalty was retained as punishment has reduced from 44 crimes (1997) to 18 (2017). Before deciding on a sentence with the death penalty, the Court must consider the following factors. First is the importance of protected interests. Second is the nature, the seriousness of the crime, and the personal conditions of the criminals. The third is the practical demands and needs to combat that crime. Fourth is the availability and effectiveness of other penalties other than capital punishment. Furthermore, finally, it is the international trend concerning the crime in question.

*The scope of the death penalty in the 2015 Criminal Code*

- The crimes now include drug-related and corruption-related offenses, crimes infringing upon national security, human life or health, economic management, and public safety, and offenses related to sabotaging peace, crimes against humanity, and war crimes, which shown below:

**Table 1: The Criminal Offences retained the Death penalty in Vietnam**

No.	THE CRIMINAL OFFENCES RETAINED DEATH PENALTY IN VIETNAM (Vietnam Penal Code 2015, amended 2017)
<b>Offenses Against National Security</b>	
1	Article 108. High treason
2	Article 109. Activities against the people's Government
3	Article 110. Espionage
4	Article 112. Rebellion
5	Article 113. Terrorism to oppose the people's Government
6	Article 114. Sabotaging facilities of Socialist Republic of Vietnam
<b>Offenses Against the Person and Reputation</b>	
7	Article 123. Murder
8	Article 142. Rape of a person under 16s
<b>Economic Offences</b>	
9	Article 194. Manufacturing and trading of counterfeit medicines for treatment or prevention of diseases
<b>Drug-related Offences</b>	
10	Article 248. Illegal manufacture of narcotic substances
11	Article 249. Illegal storage of narcotic substances

12	Article 251. Illegal deal in narcotic substances
<b>Offenses Against Public Order and Public Safety</b>	
13	Article 299. Terrorism
<b>Offenses Related to Abuse of Power</b>	
14	Article 353. Embezzlement
15	Article 354. Taking bribes
<b>Disruption of Peace, Crimes Against Humanity, and War Crimes</b>	
16	Article 421. Disruption of peace, provocation of war of aggression
17	Article 422. Crimes against humanity
18	Article 423. War crimes

About inapplicable subjects, certain persons cannot subject to the death penalty in Vietnam, including juvenile offenders, persons above 75 years old, pregnant women, and women nursing children under 36 months old at the time of committing crimes or being tried.

- About non-execution subjects, certain persons cannot subject to the execution, including juvenile offenders, persons above 75 years old, pregnant women, and women nursing children under 36 months old at the time of committing crimes or being tried, and those who have imposed the death penalty for having committed the crime of embezzlement, receiving bribes but have returned three-fourths of the embezzled property or bribed property and cooperated with competent authorities in discovering, investigating, and handling the crime.

*The death penalty* has been changed from execution by a *firing squad* to lethal injection *administration* since 2011 (Decree no. 82/2011/NĐ-CP). At present, Decree no. 43/2020/NĐ-CP has come into force and replaced the past Decrees. This Decree has regulations on the conduction of lethal injection of the death penalty execution. The lethal injection procedure is completed when administering three drugs. The first dose of the drug causes unconsciousness; the second dose injects to paralyze the musculoskeletal system; the third dose is to stop the heart beating done. If the person is still alive 10 minutes after the third dose, the execution would be suspended. Doctors would then report to the council responsible for conducting the death penalty execution.

Following the data provided by the Supreme People’s Procuracy of Vietnam in table 2, the number of people who have executed to death penalty accounts for 4.04% of the total 1783 people sentenced to death by the Court count till the end of 2020 (include those were leftover from the previous years). In the past four years, under 100 people have been executed each year. With a population of nearly 98 million, the number of people executed each year is exceedingly tiny.

**Table 2: The statistics on the death penalty execution from 2017 to 2020 in Vietnam**

Content	2017	2018	2019	2020
Total number of people who had the death penalty execution decision	112	116	86	103
Total number of people whom the death penalty had executed	82	92	48	72

*(The statistics provided by the Bureau of Crime Statistics and Information Technology of The Supreme People's Procuracy of Vietnam)*

## 2.2. The perception of the death penalty

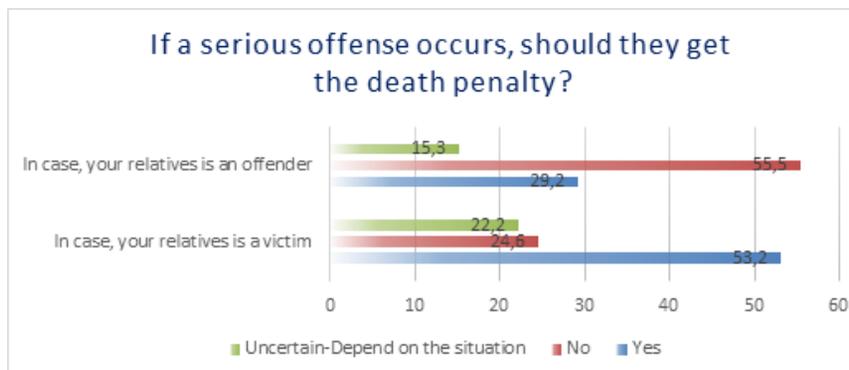
For the research purpose, a poll was made specifically for this paper. Three hundred forty-six random respondents live in Vietnam, of 18 to 65, different careers, and all genders. The period of the survey is 15 days. The poll's result shown as follows:

- Almost all respondents knew Vietnam has the death penalty (99.4%).

- More than half of respondents (84.1%) agreed that the death penalty's fear discourages people who might commit criminal acts. 13.3% disagreed with the above statement, and 2.6% left argued that it might vary between yes and no depending on different situations since it might be affected by perceptions of the offenders. For example, lack of legal awareness as they do not know the consequences they might get or create a reverse effect. Some offenders might react more harshly and dangerously because they know the consequence is death if they get caught.

- More than three-quarters (75.4%) of respondents thought that the death penalty gives victim(s), friend(s), and family(ies) justice. On the other hand, 20.2% said no, and 4.4% gave uncertain answers since it should depend on each case. However, most of those argued that the death penalty is primarily a deterrent and is not enough to compensate for the victim's loss and the pain that the victim's relatives might suffer.

- The exciting thing about the answers that respondents gave is that when the poll put them into a dilemma, there is a clear divergence in the responses, as Figure 2 shows below:

**Figure 2**

The result shows that if a severe offense occurs, more than 50% of respondents agreed that the death penalty should punish the offender if the victim were someone close to the respondents. Contrary to that result, when the poll placed them in the situation that if the offender were their relative, the answer would be reserved entirely. More than 50% of them said that the death penalty should not be applied.

Obviously, from a psychological perspective, people tend to be more selfish in the same situation if the consequences of the offense affect and hurt them or their relatives directly. Meanwhile, if their relative is an offender in the criminal case, they tend to be more forgiving and tolerant; This is certainly the psychological change. In the situation when the subject and the related relationship change, the people's judgment also changes. Therefore, somehow, we must accept that making an objective and fair decision is not easy, especially applying the death penalty.

Besides, some opinions depending on different cases, the severity, and the dangerous nature of the behavior and consequences, three-fourths of the respondents still choose to apply death penalty whoever performed the criminal act to ensure fairness and the solitude of the law.

- Notably, just 15.9% of the respondents do not support applying the death penalty in Vietnam, whereas 84.1% still raise their hands to keep the death penalty in society.

In the support group, the crimes that they want to apply death penalty might include murder, rape, illegal trading of narcotic substances, children-related crimes, offenses against national security, human trafficking, offenses against regulations of law on food safety and hygiene, corruption, terrorism, and crimes causing grave consequences.

In the non-support group, the respondents also write down several alternative penalties to replace the death penalty, such as life imprisonment, life imprisonment without parole, 15 years to 20 years imprisonment, and lifelong public service.

Overall, we must admit that the small number of people who did the poll cannot represent all the Vietnamese. However, the poll may give us some valuable ideas on what people think about it. The poll's answers and opinions are relatively telling the truth because the number of respondents is too small to represent more than ninety (90) million Vietnamese people. Maybe most of them have never had to go through either of the two hypothetical situations provided in the poll's questions (*If your relative is an offender and in case your relative is a victim if a serious offense occurs, should they get the death penalty?*). Therefore, it is difficult to say what the reaction would be when the situation happened. Moreover, the answer partly shows the "awkwardness" inside everyone when forced to choose in those situations.

Following the poll's result, respondents' perception has been illustrated quite clearly. Almost all of them know that the death penalty has existed in Vietnam and still want to have this kind of punishment to ensure justice for the victim's deterrence in society. As long as they still believe that the death penalty can guarantee justice, it also means that the death penalty is considered a just punishment.

### ***Important factors creating this perception***

1. *The country background and crime rate:* Vietnam is a developing country located in Southeast Asia. Despite its middle-low income, Vietnam is the most dynamic country in East Asia Pacific<sup>1</sup>. Its features of a small but largely populated area, combined with its specific location, invisibly facilitate the generation of crimes that have become more complicated, especially drug-related and grave crimes such as murder and rape. Statistics are shown below for the most common three types of crime that often have the death penalty in practice, which are (1) Drug-related crimes, (2) Murder, (3) Sexual assault against children.

(1) Drug-related crimes: According to statistics from the Ministry of Public Security, in 2020 (from 15 December 2019 to 14 December 2020), the number of drug-related crimes in 2020 nationwide is 25,598, which increases by 2,784 cases (12.20%) compared to 2019. Criminal acts concerning the drug in Vietnam have been chronically intricate. Remarkably, even though the total number of transnational drug crime activities operated as a whole has become lessened, the volume of synthetic drugs infused from Laos and Cambodia into Vietnam has continued to witness increments. In subsequence, the consumption of synthetic drugs by adolescents and teenagers has consistently escalated.

(2) Murder: According to statistics introduced by the Ministry of Public Security, over six years (from 2014 to 2019), there were 6,850 homicides occurred nationwide, in which 6,571 cases were caused by social reasons (accounting for 95.9%). The aggregated amount of homicide acts might have increased in some years and decreased in another, but always remained at a high level, averaging about 1,140 cases per year, which equivalent to about three homicides each day. In specific, over the last two years, the predicament of murderous crimes due to social causes has been exacerbated. Although the field accounts for a relatively low rate in the criminal structure (about 2%), nature and damage have become increasingly severe, inducing confusion, anxiety, and frustration among the citizens and creating severe consequences for the society.<sup>2</sup>

1 World Bank, 'Country Overview: Vietnam' <<https://www.worldbank.org/vi/country/vietnam/overview>>

2 Tu Le, 'Prevent crime of murder, due to social causes (Ngăn chặn tội phạm giết người do nguyên nhân xã hội)' *Nhan Dan Newspaper* (Vietnam, 2020) <<https://nhandan.com.vn/thoi-su-phap-luat/ngan-chan-toi-pham-giet-nguoi-do-nguyen-nhan-xa-hoi-616909/>> accessed 30 January 2021.

(3) Sexual assault against children: According to the Bureau of Crime Statistics and Information Technology (The Supreme People's Procuracy of Vietnam), this type of crime has also progressed ferociously. Based on unofficial data, from 2014 to 2018, the quantity of child abuse cases detected was more than 8,000. In only three years (from 2016-2018), the totality of these criminal acts brought to light was 4,780, with the involvement of more than 5,000 offenders. Notably, felony such as "Molestation of a person under 16" (Article 146 Criminal Code 2015) comprehended 799 cases employed by 727 offenders; "Rape of a person under 16" (Article 142) category had witnessed nearly 1,800 cases with 1,777 offenders put on trial. The crime of "Engaging in sexual intercourse or other sexual activities with a person aged from 13 to under 16" (Article 45) was executed in 2,789 cases by 2,624 offenders.<sup>1</sup>

2. *Law and history*: With knowledge developed upon the history of Vietnam law, the authors Tran & Vu stated clearly in their research<sup>2</sup> On the natural change of capital punishment in Vietnam that "the Law in Vietnam historically comprised of the written law (*ius scriptum*) and unwritten law (*ius non scriptum*). It is rather challenging to determine when capital punishment has been laid down in Vietnamese unwritten law as available sources of relevant information are comparatively limited. However, as noted in certain historical documents, capital punishment was applied heavily in the Dinh (968-980 AD) and early Le Dynasties (969-979 AD) under a range of severe forms, namely throwing criminals into tigers' and panthers' cages or boiling cauldrons of oil." Besides that, "In medieval Vietnam, the death penalty hardly served any criminal justice purpose, it was a tool of the ruler to protect their regime in disguise of maintaining an orderly and stable society under a heavenly mandate."<sup>3</sup>

In Colonial Vietnam, "The French introduced to the Vietnamese a new concept of criminal justice based on the theory of punishment. Based on this approach, punishment (including the death penalty) is justified from the idea of justice rather than an instrumental perspective; This is also the period in which a game-changing factor to capital punishment, which had emerged before, was introduced in Vietnam. It is the formal acknowledgment and endorsement of the idea of individual rights and later human rights as natural, fundamental, and universal that all men, regardless of race, social status, religion, ethnic shall enjoy. The 1948 Universal Declaration of Human Rights, many of its predecessors,

1 Gia Khanh, 'In 5 years, more than 8000 child abuse cases were found (Trong 5 năm, phát hiện hơn 8000 vụ xâm hại trẻ em)' *Saigon Giai Phong Newspaper* (2019) <<https://www.sggp.org.vn/trong-5-nam-phat-hien-hon-8000-vu-xam-hai-tre-em-595647.html>> accessed 30 January 2021.

2 Kien Tran and Cong Giao Vu, 'The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry' (2019) 9 *Societies* 4 <<https://www.mdpi.com/2075-4698/9/3/56>>.

3 Kien Tran, Giao Cong Vu, *Ibid*.

including the two famous documents, the 1776 Declaration of Independence of the United States of America and the 1789 Declaration of the Rights of Man and the Citizen of France, had been transplanted into Vietnam well before 1948. It also did lay the foundation for the establishment of a national, independent government in 1945. This factor would reemerge to shape Vietnam's understanding and debate about capital punishment in the late twentieth century."<sup>1</sup>.

In light of the socialist republic view in Vietnam since 1945, it realized that "[...] thousands of years of constantly using penal code as the main and only form of law enforcement and the major regulatory tool of the Government had left a strong influence on the country and mindset of even the new socialist leadership. Penal law with many provisions on criminal offenses was considered the best way to maintain societal order and deter anyone who dared to go against the socialist regime. The over-use of criminal offenses in the 1985 Penal Code not only reflected Vietnam's policies of employing capital crimes, but it also went hand in hand with contemporary underlying arguments of proponents of the death penalty."<sup>2</sup>.

Since the significant Reform (Đổi Mới) in 1986, Vietnam has witnessed profound positive changes in many aspects. The Reform was initiated primarily to bring about changes in the economy and economic management. However, when the economy started to show signs of development, the political and legal systems naturally adjusted to match with and assist those economic changes, helping Vietnam to keep up with the moving pace in the new globalization era. Subsequently, Vietnam started to pursue international organizations' memberships and fundamental changes in the system required to level with international laws and standards. Since the 1980s, Vietnam has ratified and joined several important international conventions about human rights such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, United Nations Convention against Torture and Other Cruelties, Inhuman or Degrading Treatment or Punishment. For the first time in the 1980 Constitution, the right to life was constitutionalized and further reinforced and reinstated in the 1992 and 2013 Constitutions. "Punishments no longer considered to be a tool at the disposal of the government to oppress the bourgeois class and reactionary elements, they now serve the purposes of retributive justice and deterrence."<sup>3</sup>. "The issue of capital punishment has been receiving increasing attention from the public in Vietnam, especially

---

1 Kien Tran, Giao Cong Vu, Ibid.

2 C.R. Sunstein and A. Vermeule, 'Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Trade-Offs' (2006) 58 *Stanford Law Review* 703.

3 Uc Tri Dao, Cong Giao Vu and Thi Hong Ha Truong, *The Right to Life and Death Penalty* (National Politics Publishing House Hanoi 2015).

since the National Assembly adopted the new 2015 Criminal Code, which reduces the number of capital offenses. The effects of capital punishment are still debatable, evoking many discussions on many forums, including the National Assembly. Still, it looks like the majority of people continue to support the death penalty as an effective deterrent."<sup>1</sup>

3. *Culture and people's perception:* Like other cultures, Vietnam's culture is built around high humanitarian values and hatred.

The bad guys being prevented or punished is a typical ending in Vietnamese fairy tales. It found in every popular piece of the story that's has been told and passed down from generation to generation, such as '*Cây Khế*,' '*Tám Cám*.' Although most of these stories are fictional, they deeply reflect the Vietnamese culture and the general people's desires for the final victory of the 'good' over the 'evil' and 'justice' restored in society. Though different in contexts, plots, and characters, the stories are all intended to convey some very similar messages: if a person lives well, that person will eventually receive good things (*ở hiền gặp lành*), always keep piety to your parents, and love your homeland. On the other hand, if a person does evil, that person will have to suffer the punishment that person deserves (*'tham thì thâm,' 'ác giả, ác báo,' 'gieo gió, gặt bão'*). The hallmark of revenge in today's culture is still demonstrated in the Vietnamese's perceptions of the death penalty, as shown in the poll results in this paper and other research in Vietnam recently.

Based on the research, many still believe that now is not the right time to abolish the death penalty altogether because the crime rate in Vietnam is still relatively high. The severity of the criminal offenses is increasingly alarming (there has been a rise in homicides, corruption, and drug-related crimes). A majority of people agree that the death penalty is a preventive measure and a way to raise public awareness about the severe consequences of committing a crime.

However, some people argue that the death penalty seriously violates people's right to live, and therefore it needs to be abolished. Because injustice and misinformed judgments still exist, this reasoning is thoroughly grounded.

While everyone can sympathize with the pain of the victim's family, not all of us know that the person sentenced to death is also suffering an equally unendurable pain. Is it only fair if the offender made to suffer the same pain as the defendant? It is a heated and controversial debate that is a long time away from the settlement. Therefore, this article aims to introduce the issue and present both arguments for contemplation to the readers.

---

1 Kien Tran, Cong Giao Vu, *ibid*.

### 3. CONCLUSION

Throughout the paper, it has established that the controversy over applying the death penalty is not a new issue. Still, it has continuously been considered a resounding issue in Vietnam and the whole wide world. The author of this paper believes that it is imperative to put the two issues of 'death penalty and 'justice' together for analysis since there is a solid connection between them.

In particular, these two issues encompass similar *forming characteristics*. Justice is a dynamic and open concept as it alters in harmony with how circumstances, space, and time change; This contributes to creating diversity and differentiating between the choice and application of penalties, including the death penalty among countries around the world since the form of punishment, as well as justice, are formed under the influence of collection factors including cultural, economic, political, the security situation of each country.

Simultaneously, there is a *dialectical relationship* between these concepts: In the process of movement, change and development, there would be an interaction between objects and phenomena. In practice, actual phenomena would affect people's viewpoint. In the future, the perceptions of justice and the death penalty still evolve on the testimony of that dialectic relationship.

For example, in the Hammurabi Code enacted by the ancient Mesopotamian State (from 1792 to 1750 BC), justice is the basic foundation of a benevolent and fair society that ensures peace and happiness. It was built by imposing a punishment equal to the damage caused by the offender, a form of corresponding retaliation. It also probably reflected the people's perception when seeing the criminal suffer a similar pain to the victim gives them a feeling of satisfaction (Talion revenge principles: 'An eye for an eye'). Traces of Talion law can still be found in many countries' criminal law today, mainly where the death penalty's renunciation is debated in light of fundamental human rights.

The perception of justice has undergone many changes and will continue to change in the future. In the dialectical relationship, the interaction and the death penalty's perception have also changed a lot. They will also continue to change in the future.

The author believes that recent positive perceptive changes in Vietnam to the death penalty have shown that the Government and people have started to open their minds to the issues. The majority of people still think death is a just punishment; in the future, when the contextual society and cultures change, this perception may also vary. For now, all we can do is to ensure the death penalty is applied justly and adequately (according to the conditions provided by Lloyd Steffen as shown above) to maintain its status as a 'just punishment.'

## REFERENCES

1. Amnesty International Global Report, ‘Death Sentences and Executions Reports 2015’ (Amnesty International 2015).
2. ‘Capital Punishment | Definition, Debate, Examples, & Facts | Britannica’ <<https://www.britannica.com/topic/capital-punishment>> accessed 1 January 2021.
3. Casey M. Bakarani and Elanor Andreassen, ‘Thou Shalt Not Kill. No to Death Penalty’ *The Summer Times* (the USA, 2017) <<http://www.peasummertimes.com/2017/08/thou-shalt-not-kill-no-death-penalty/#:~:text=As%20Michael%20Sandel%20writes%20in,what%20the%20death%20penalty%20is>> accessed 4 January 2021.
4. ‘Country Overview: Vietnam (Tổng quan về Việt Nam)’ (*World Bank*) <<https://www.worldbank.org/vi/country/vietnam/overview>> accessed 23 January 2021.
5. C.R. Sunstein and A. Vermeule, ‘Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Trade-Offs’ (2006) 58 *Stanford Law Review* 703.
6. Dao UT, Vu CG and Truong THH, *The Right to Life and Death Penalty* (National Politics Publishing House Hanoi 2015).
7. ‘Fact Sheet on the Importance of Women’s Access to Justice and Family Law’ (United Nations Development Fund for Women-UN Women) <<https://www.unssc.org/sites/unssc.org/files/UNWomenFactSheet.pdf>> accessed 1 March 2021.
8. Gia Khanh, ‘In 5 years, more than 8000 child abuse cases were found (Trong 5 năm, phát hiện hơn 8000 vụ xâm hại trẻ em)’ *Saigon Giai Phong Newspaper* (2019) <<https://www.sggp.org.vn/trong-5-nam-phat-hien-hon-8000-vu-xam-hai-tre-em-595647.html>> accessed 30 January 2021.
9. Henry Campell Black, *Black’s Law Dictionary* (West Publishing Co 1983).
10. Lloyd Steffen, ‘The Moral and Spiritual Challenge of Capital Punishment (2010) 19 *Scared Heart University Review* 11 <<https://digitalcommons.sacredheart.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1046&context=shureview>> accessed 23 January 2021.
11. Pham DN, ‘Confucianism and the Conception of the Law in Vietnam,’ *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (1st ed, The Australian National University: Canberra, Australia 2005) <<https://library.oapen.org/bitstream/handle/20.500.12657/33821/458803.pdf?sequence=1&isAllowed=y>> accessed 25 January 2021.
12. Samuel R. Gross, ‘Update: American Public Opinion on the Death Penalty – It’s Getting Personal (Symposium: How the Death Penalty Works: Empirical Studies of

- the Modern Capital Sentencing System' (1998) 83 Cornell Law Review 1475 <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1188&context=article>>.
13. Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2017).
  14. The Hung, Dinh, 'Exercising judicial power to ensure the right of access to justice in the rule of law state (Thực hiện quyền tư pháp nhằm đảm bảo quyền tiếp cận công lý trong nhà nước pháp quyền)' (2010) 5 State and Law Review.
  15. 'The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies' (Security Council-United Nations 2004) S/2004/616.
  16. Tran K and Vu CG, 'The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry' (2019) 9 Societies <<https://www.mdpi.com/2075-4698/9/3/56>>.
  17. Tu Le, 'Prevent crime of murder, due to social causes (Ngăn chặn tội phạm giết người do nguyên nhân xã hội)' *Nhan Dan Newspaper* (Vietnam, 2020) <<https://nhandan.com.vn/thoi-su-phap-luat/ngan-chan-toi-pham-giet-nguoi-do-nguyen-nhan-xa-hoi-616909/>> accessed 30 January 2021.
  18. World Bank, 'Country Overview: Vietnam'.

# OBSTACLES OF VIETNAM TO JOIN THE SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

LLM. Pham Thanh Tung<sup>1</sup>, LLB. Nguyen Thuy Nguyen<sup>1</sup>

**Abstract:** The death penalty is a legal concept mentioned in legal science and the science of criminal law in particular. This is the harshest punishment for severe crimes. Historically, the death penalty has been applied since the initial formation of the state and legal system. Today, the death penalty is still applied in many countries worldwide, notwithstanding the level of socio-economic development.

However, in recent years, the death penalty has been an internationally controversial issue. There are two opposing opinions on this issue, namely maintaining or abolishing this penalty. These controversies focus on two main topics: the morality and legality of the death penalty. Despite the lack of consensus, today's general trend is minimizing the death penalty and moving towards complete abolishment. Even in the case of countries that do not have a specific roadmap to abolish this penalty in the short term, they tend to reform the execution measures to improve the humanity of such sentences.

To achieve the progress of decreasing and moving towards eliminating the death penalty, the United Nations (UN) has played an essential role as a driving force. On 15 December 1989, the Second Optional Protocol of the International Covenant on Civil and Political Rights (from now on referred to as the **OP2**) to abolish the death penalty was adopted by the UN General Assembly in New York (entered into force on 11 July 1991). Currently, this Protocol has 88 member states. The adoption of this Protocol by the General Assembly (UN) demonstrates its determination to mobilize countries to reduce, postpone, and eliminate the death penalty. On a broader scale, based on the International Covenant on Civil and Political Rights (**ICCPR**) and its OP2, the UN also shows the goal of ensuring fair trials and humane treatment for death row inmates.

Vietnam is not out of this trend. In recent years, Vietnam has been reforming its criminal law gradually towards reducing the scope of application of the capital sentence. This is evident through amendments and supplements of the Penal Code over the years.<sup>2</sup>

---

1 International Law Faculty, Diplomatic Academy of Vietnam.

2 The Penal Code 1985 provides 44 legal provisions with the death penalty while the Penal Code 2015 provides only 18 legal provisions with such penalty.

With the trend mentioned earlier of judicial reform, Vietnam may ratify the 2<sup>nd</sup> Optional Protocol ICCPR in the future. However, at present, there are still many obstacles preventing Vietnam from joining the Protocol from practical and legal perspectives. Practically, the first thing that Vietnam needs to do to join the Protocol is abolishing the death penalty. However, this faces difficulty - controversial public opinions. From the legal perspective, due to the influence of the above-mentioned social life practices, Vietnam still faces the most significant difficulty that the domestic law is incompatible with the 2<sup>nd</sup> Optional Protocol ICCPR provisions.

Therefore, this topic was selected for research to clarify the death penalty issues, the roles of the 2<sup>nd</sup> Optional Protocol ICCPR in promoting the elimination of the death penalty, and obstacles to Vietnam's future accession when Viet Nam joins this Protocol.

**Keywords:** death penalty, Vietnam, the 2<sup>nd</sup> Optional Protocol ICCPR.

## 1. ABOLITION OF THE DEATH PENALTY AND THE ROLE OF THE 2<sup>ND</sup> OPTIONAL PROTOCOL ICCPR

### 1.1. Arguments of abolishing the death penalty

The matter that whether the death penalty should be abolished or not is still an endless debate. There are two main streams of opinion: supporting or opposing this penalty. There may be some general arguments that both sides used to support their arguments.

First, the deterrence of punishment: The question that may be raised related to applying the death penalty is whether this punishment can lead to the decrease and backsliding of crime? The deterrence of that punishment is one of the main reasons countries use to uphold the death penalty.<sup>1</sup> There have even been many studies carried out to assess the effectiveness of this punishment, but the results are not unified. Some studies show that applying the death penalty can reduce crime rates, such as research by Issac Ehrlich<sup>2</sup> or Dezhbakhsh, Rubin, and Shepherd<sup>3</sup>. By contrast, some results show that the death penalty does not reduce the crime rates, according to studies of Bailey and Peterson<sup>4</sup> or Hood and Bowers<sup>5</sup>. Besides, these studies are criticized due to their insufficient grounds and

1 Vietnam Lawyers' Association, *'Death Penalty in International Law'*, Hong Duc Publishing Company, 2008, p. 22.

2 Ehrlich & Isaac, *'The Deterrent Effect of Capital Punishment: A Question of Life and Death'*, (1975) *The American Economic Review* 65, no. 3, page: 397-417.

3 Dezhbakhsh, Hashem, Paul H. Rubin, & Joanna M. Shepherd, *'Does Capital Punishment Have a Deterrent Effect? New Evidence from Post moratorium Panel Data'*, (2003) *American Law and Economics Review* 5, no. 2, page: 344-376.

4 Bailey, W.C. and Peterson, R.D, *'Murder, Capital Punishment, and Deterrence: A Review of the Evidence and an Examination of Police Killings'*, (1994) *Journal of Social Issues*, 50, page: 53-74.

5 Hood, R. (2002), *'The Death Penalty: A Worldwide Perspective'*, Fourth Edition, Oxford University Press, p.344.

subjectivity.<sup>1</sup> These are also the arguments of the two sides - opposing and advocating the application of the death penalty. However, it is difficult to conclude that the death penalty is more of a deterrent than others, or that it has no effect in preventing crimes.<sup>2</sup>

Secondly, the cost of implementing the penalty: Arguments that are in favor of the death penalty argue that incarceration is more expensive than death execution. In order to enforce incarceration, it is necessary to prepare a large number of expenses for facilities and personnel, not to mention the risks of prison escape. In practice, incarceration requires a much greater cost than the execution and burial of prisoners.<sup>3</sup> However, some figures show that the cost of execution of the death penalty is, in essence, more expensive than the cost of incarceration. It is possible to take the United States - a country with an economic burden of incarceration - as an example, when it is the country with the most significant number of prisoners, accounting for about 25% of the total number of prisoners worldwide.<sup>4</sup> Specifically, Luke university's research shows that the cost of carrying out the death penalty is higher than the life imprisonment in the state of Texas, USA, in 1991. The study took the maximum average time for each life sentence is 40 years, and found the maximum cost of execution from sentencing to execution was USD 2,3136 million.

In comparison, the maximum cost of incarceration of a prisoner within 40 years was a maximum of USD 750,000.<sup>5</sup> Alternatively, in the state of Florida, the average cost of each death penalty is USD3.18 million. In contrast, the cost of life sentences is about USD 680,000.<sup>6</sup> Also, there is a study by Torin McFarland - the University of Susquehanna, held in 2016, compare the cost of implementing the death penalty and life imprisonment. After evaluating both actual and theoretical costs, the study concludes that the death penalty is more expensive in almost every aspect than simply incarcerating a prisoner for the entirety of his or her life.<sup>7</sup> Therefore, the cost of carrying out the death penalty is not a solid argument for upholding this penalty.

---

1 Fagan, J (2005), '*Deterrence and the death penalty: a critical review of new evidence*', Columbia Law School, p.11.

2 Vietnam Lawyers' Association, *Death Penalty in International Law*, Hong Duc Publishing Company, 2008, p. 28.

3 Faculty of Law, Vietnam National University, Hanoi, *Things need to be known about the death penalty*, Labour and Social Publisher Company Limited, p. 38.

4 Catherine Appleton, Bent Grøver, '*The Pros and Cons of Life Without Parole*', (2010) *The British Journal of Criminology*, Volume 47, Issue 4, July 2007, <<https://academic.oup.com/bjc/article-abstract/47/4/597/366540?redirectedFrom=fulltext>> p.611.

5 Robbert M. Baird & Stuart (edited by E. Rosenbaum), '*Punishment and the Death Penalty*', (Prometheus Books 1995), p.109.

6 Keith Harries & Derral Cheatwood, '*The Geography of Execution: The Capital Punishment Quagmire in America*', (Rowman & Littlefield 1997), p.6.

7 Torin McFarland, '*The Death Penalty vs. Life Incarceration: A Financial Analysis*', (2016) *Susquehanna University Political Review* 46 - 87, p.70.

Third, the humanity of the punishment: Regarding severe crimes under the laws of most countries around the world, if the death penalty is not executed, life imprisonment without parole is often used as an alternative to the death penalty. However, death penalty advocates argue that such detention inflicts more suffering on criminals rather than execution. Also, the impact of non-parole life imprisonment should be scrutinized, as otherwise, it would mean “encouraging a law that forces 25 people to work for a lifetime in prison to ensure one person is not executed.”<sup>1</sup> It is not to mention that there are criticisms that life imprisonment without parole violates national and international laws because they argue that this punishment has insulted the dignity of the offender.<sup>2</sup> However, the opinions in favor of abolishing the death penalty say that the application of the death penalty makes prisoners even more suffering, especially while waiting for their execution.<sup>3</sup> Nevertheless, the execution of the death penalty, which not only affects inmates - causes them to lose the hope of reining in the community but also strongly affects those who witness the execution sentence.<sup>4</sup>

It can be seen that controversial opinions raised around the death penalty have their conviction. However, arguments against the application of the death penalty seem to prevail in this inconclusive debate.

### 1.2. The 2<sup>nd</sup> Optional Protocol ICCPR– An international legal tool to abolish the death penalty

The 2<sup>nd</sup> *Optional Protocol ICCPR* aiming to abolition the death penalty is the only international treaty with a worldwide scale of prohibiting executions and providing provisions for the total abolition of the death penalty.<sup>5</sup>

This protocol requires the ratifying States to renounce the use of the death penalty definitively. The Preamble of the Protocol underscores the significance of abolition of the death penalty as a measure enhancing human rights and assumes the commitment of

1 The Harvard Law Review Association, ‘*A Matter of Life and Death: The Effect of Life-without-Parole Statutes on Capital Punishment*’. (2006) Harvard Law Review 119, no. 6, p.1838-1854.

2 Catherine Appleton, Bent Grøver, ‘*The Pros and Cons of Life Without Parole*’, (2010) The British Journal of Criminology, Volume 47, Issue 4, July 2007, < <https://academic.oup.com/bjc/article-abstract/47/4/597/366540?redirectedFrom=fulltext> > p.609. Specifically: *its indeterminacy and the differences in the regimes to which life-sentence prisoners are subject —that make it ‘particularly destructive to human dignity’*.

3 Vietnam Lawyers’ Association, ‘*Death Penalty in International Law*’, Hong Duc Publishing Book, 2008, p.33.

4 Freinkel, A., Koopman, C., & Spiegel, D., ‘*Dissociative symptoms in media eyewitnesses of an execution*’ (1995) The American Journal of Psychiatry, 151(9), 1335–1339 và C. Pickett and C. Stowers, ‘*Within These Walls: Memoirs of a Death House Chaplain*’, (St Martin Publisher 2003).

5 Pierre Desert, ‘*Second Optional Protocol: Frequently Asked Questions*’, (*World Coalition Against the Death Penalty, June 27th, 2008*) < <http://www.worldcoalition.org/Second-Optional-Protocol-Frequently-Asked-Questions.html> >, accessed 1<sup>st</sup> February 2021.

member States to this goal. Article 1 provides for a ban on executions and the abolition of the death penalty within the jurisdiction of Member States. Article 2 allows States to reserve the right to apply the death penalty during wartime for severe military crimes committed during wartime. Article 6 further specifies the non-derogatory nature of the ban on executions, even under emergency circumstances. Articles 3, 4 and 5 concern the reporting obligations of member States and the complaints procedure. Finally, Articles 7 to 11 cover the procedural issues.<sup>1</sup>

Regarding the reservation, Article 2 allows States to reserve the right to apply the death penalty in time of war according to a conviction for a most serious crime of a military nature committed during wartime. This reservation can only be made at the time of ratification. Since no other reservations may be made at any time, member States of the Protocol are committed to abolishing the death penalty even in the event of future changes in their domestic laws.

Besides Article 6 of the ICCPR, there are four international treaties that provide for the abolition of the death penalty. The 2<sup>nd</sup> Optional Protocol is the only one of worldwide scale. The other three which have regional scope are:

First, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the European Convention on Human Rights,<sup>2</sup> concerning the abolition of the death penalty, adopted by the European Council in 1982, provides for the abolition of the death penalty in peacetime. Member States may retain the death penalty for crimes “in time of war or of imminent threat of war.”

Secondly, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms of European Convention on Human Rights,<sup>3</sup> concerning the abolition of the death penalty in all circumstances, adopted by the European Council in 2002, provides for the abolition of the death penalty under all circumstances, including the time of war or imminent threat of war.

Thirdly, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty,<sup>4</sup> adopted by the General Assembly of the Organization of American States

---

1 Ibid.

2 Council of Europe, *Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty*, 28 April 1983, ETS 114, available at: <<https://www.refworld.org/docid/3ae6b3661c.html>>, accessed 2<sup>nd</sup> February 2021.

3 Council of Europe, *Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*, 3 May 2002, ETS 187, available at: <https://www.refworld.org/docid/3ddd0e4c4.html>, accessed 2<sup>nd</sup> February 2021.

4 Organization of American States (OAS), *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* (“Pact of San Jose”), 8 June 1990, OAS Treaty Series, N°.73, available at: <<https://www.refworld.org/docid/3de4b4884.html>>, accessed 2<sup>nd</sup> February 2021.

in 1990, provides for the total abolition of the death penalty but allows countries parties to retain the death penalty in wartime if they make a declaration to that effect at the time of ratifying or acceding to the Protocol.

## **2. OBSTACLES OF VIETNAM'S ACCESSION TO THE 2<sup>ND</sup> OPTIONAL PROTOCOL ICCPR**

### **2.1. Public opinions related to the death penalty**

Most countries that maintain the death penalty argue that their public opinion supports the application of this punishment.<sup>1</sup> Public opinion remains a diverse and transforming factor over time. Each social class, and at different periods, public opinion has a different attitude towards continuing implementing or eliminating the death penalty.

There is no denying that abolishing the death penalty is becoming a global trend. However, not all public opinions at any time and at anywhere always support such a trend. The United States can be considered as an example. Even within a country, some places abolished the death penalty early as Michigan (in 1843). However, some states still maintain this punishment to this day, like Texas.<sup>2</sup> The Genlapa Institute and several other organizations, since 1936, had begun to study and regularly conduct referendums of this matter. It is noted that after 20 years, from 1936 to 1957, the number of people advocating for the application of the death penalty in the United States decreased from 61% to 47%. For the next five years, until the annul of the death penalty in 1972, the index hovered within 50%. Since 1976 (when the Federal Supreme Court admitted the death penalty is not contrary to the U.S. Constitution) and in the next 20 years, the number of people advocating this penalty has increased. By 1995, 77% of federal states supported the application of this penalty. The ample range of fluctuations would be enormous if the study period were divided into two different phases within 30 years. It is clear that between 1936 and 1966, the number of people who supported the death penalty dropped from 61% to 42%, and from 1966 to 1995, it increased from 42% to 77%.<sup>3</sup> In the last recent 20 years, Gallup<sup>4</sup> research related to public opinion about the application of the death penalty in the U.S has shown that the number of people who support the death penalty was likely to decrease from 70% in 2000 to more than 50% in the last three years

---

1 Vietnam Lawyers' Association, *'Death Penalty in International Law'*, Hong Duc Publishing Company, 2008, p.34.

2 United Nations, *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty Report of the Secretary-General*, 2005, para 48.

3 Truongquang, Vinh, *'Public opinion of some countries on the application of the death penalty'*, *Journal of Law*, No. 61.

4 Gallup is a global data provider and analytics company. The company is based in the United States.

(from 2017).<sup>1</sup> 2019 was also the first year that most American people agreed with the use of life imprisonment instead of the death penalty.<sup>2</sup>

In Asia, China and Singapore are two countries with quite complicated public opinion about the death penalty. Both countries have in common when public opinion suggests that life imprisonment can be an alternative to the death penalty.<sup>3</sup> That means people can agree to eliminate the death penalty and replace it with other punishments. However, in Singapore, the question of whether Singapore should join the world trend and abolish the death penalty, the majority of the answer is to continue enforcing this punishment,<sup>4</sup> although public opinion suggests that three main criminal groups which have existed for a long time in Singapore should be applied such penalty: intentional murder, drug trafficking, and firearms offenses.<sup>5</sup> Similarly, in China, public opinion also advocates the application of the death penalty for severe crimes such as intentional murder, drug trafficking, child rape but does not support the death penalty for non-violent crimes such as counterfeiting, producing fake medicine, theft, corruption, embezzlement, organizing prostitution, or espionage.<sup>6</sup> Even the general population's attitudes towards the death penalty in China reflect a good deal of indifference and ignorance.<sup>7</sup> Thus, it can be seen that whether the death penalty should be eliminated remains a controversial issue and even does not receive any attention from public opinion.

---

1 Gallup, *Death Penalty*, <<https://news.gallup.com/poll/1606/Death-Penalty.aspx>> accessed 26<sup>th</sup> January 2021.

2 Death Penalty Information Center, *Gallup Poll—For First Time, Majority of Americans Prefer Life Sentence To Capital Punishment*, <<https://deathpenaltyinfo.org/news/gallup-poll-for-first-time-majority-of-americans-prefer-life-sentence-to-capital-punishment>> accessed 3<sup>rd</sup> February 2021

3 Chan, Wing Cheong and TAN, Ern Ser and Lee, Jack Tsen-Ta and MATHI, Braema, '*Public Opinion on The Death Penalty in Singapore: Survey Findings*', NUS Law Working Paper 2018/002, February 2018, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3122150](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3122150)> accessed 3<sup>rd</sup> February 2021, p.19 and Dietrich Oberwittler & Shenghui Qi, '*Public Opinion on the Death Penalty in China*', Max Planck Institute for Foreign and International Criminal law, p.25.

4 Chan, Wing Cheong and TAN, Ern Ser and Lee, Jack Tsen-Ta and MATHI, Braema, '*Public Opinion on The Death Penalty in Singapore: Survey Findings*', NUS Law Working Paper 2018/002, February 2018, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3122150](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3122150)> accessed 3<sup>rd</sup> February 2021, p.18, Table 4.5.

5 Chan, Wing Cheong, '*The Death Penalty in Singapore: in Decline but Still Too Soon for Optimism*' (2016) 11(3) *Asian Journal of Criminology* 179.

6 Dietrich Oberwittler and Shenghui Qi, '*Public Opinion on the Death Penalty in China*', Max Planck Institute for Foreign and International Criminal law , p. 25. "Only for murder, intentional injuring resulting in death, drug dealing, and rape of a female child, the support level for death penalty reaches a majority. The majority of respondents does not support the death penalty for most of non-violent crimes such as counterfeiting, producing fake medicine, theft, corruption, embezzlement, organizing prostitution, or espionage."

7 Ibid. "Only 25% of all respondents are interested in the issue of death penalty, and only slightly more claim some or much knowledge. In many of the general questions on the death penalty, a large proportion of respondents answer that they are undecided."

In Vietnam, there is currently a public opinion survey on the death penalty conducted by the Faculty of Law, Vietnam National University, Hanoi, which also shows that Vietnamese public opinion is still controversial, contradictory, and difficult to determine.<sup>1</sup> Apart from opinions related to the total removal or retention of the death penalty, Vietnam also has opinions on reducing the death penalty for several crimes when amending and supplementing the Penal Code 2017 (*Penal Code*). Specifically, at the Conference on the Completion of the Penal Code for the United Nations Development Programme (*UNDP*) and the Ministry of Justice held in November 2014, the Drafting Committee of the Penal Code revised that the proportion of crimes with the death penalty accounting for 8% of crimes in the Penal Code is relatively high. It is necessary to narrow the scope as well as have more strict conditions when applying this penalty.<sup>2</sup> After amendment and supplementation of the Penal Code, public opinions are also divided into four main groups, namely: (i) Agreeing with the elimination of seven types of crimes with the death penalty according to the draft of Penal Code; (ii) Abolishing several additional crimes with the death penalty; (iii) Disagreeing with the elimination of the death penalty for some crimes under the draft Penal Code; and (iv) Commenting on the applicable conditions of the death penalty.

However, it is said that lawmakers should stand out and not be the followers of public opinion.<sup>3</sup> Strong political and judicial leadership play an influential part in reforming the death penalty in Asia<sup>4</sup> and can influence public opinion.<sup>5</sup> Reformers have mainly driven death penalty reforms in China since 2006 within the Supreme People's Court rather than public demands for abolition.<sup>6</sup>

1 Tran, Kien and Vu, Cong G. 2019. '*The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry*' Societies 9, no. 3: 56. <<https://doi.org/10.3390/soc9030056>> accessed 2<sup>nd</sup> February 2021, p.21.

2 Truongho, Hai, '*Death penalty in draft amendment of the Penal Code: from public and professional viewpoints*', , the article's cited in Trinhquoc Toan & Vucong, Giao, '*Exercise of constitutional rights in the Vietnamese Constitution 2013*', Hong Duc Publishing Company, 2015, p.133.

3 Leila Toiviainen, '*Review The Death Penalty: A Worldwide Perspective, Fifth Edition*', <<https://yaleglobal.yale.edu/death-penalty-worldwide-perspective-fifth-edition>> accessed 30<sup>th</sup> January 2021.

4 David T. Johnson and Franklin E. Zimring, '*The Next Frontier: National Development, Political Change, and the Death Penalty in Asia*', (Oxford University Press, 2009), p.301 - 303.

5 Office of the High Commissioner for Human Rights (OHCHR), Regional Office for South-East.

Asia, '*Moving Away from the Death Penalty: Lessons in South-East Asia*' (2013) 18–19; Mai Sato and Paul Bacon, '*The Public Opinion Myth: Why Japan Retains the Death Penalty*' (Death Penalty Project, 2015), 12; Sangmin Bae, '*Death Penalty Moratorium in South Korea: Norms, Institutions and Leadership*' in Scherдин, 172.

6 Susan Trevaskes, '*Lenient Death Sentencing and the 'Cash for Clemency' Debate*' (2015) 73 China Journal 38, 40, 43-4.

## 2.2. The legal obstacles

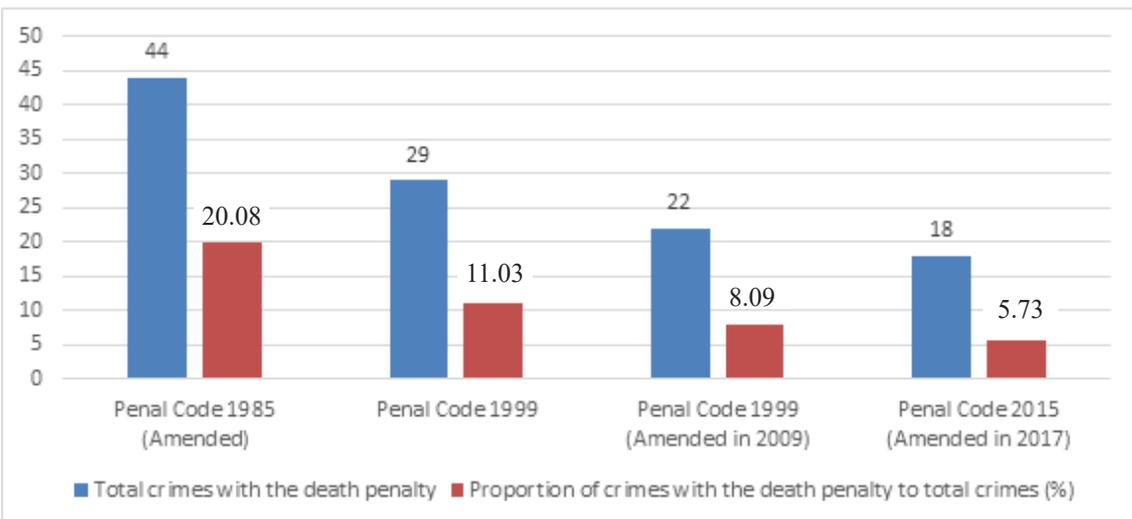
One of the biggest obstacles preventing Vietnam from joining the **2<sup>nd</sup> Optional Protocol** is the lack of compatibility between Vietnamese laws and international law on the death penalty.

### 2.2.1. Lack of compatibility between Vietnam Penal Code and the 2nd Optional Protocol

In general, the 2nd Optional Protocol provides two mandatory obligations for countries wishing to become members of this protocol as follows:

- Not executing any person within its jurisdiction; and
- Using all necessary measures to altogether abolish the death penalty within its jurisdiction.<sup>1</sup>

It could be seen that the 2<sup>nd</sup> Optional Protocol requires member states to abandon the death penalty in reality (de facto) and officially remove the penalty from the legal system (de jure). At present, Vietnam laws cannot satisfy both of the obligations mentioned above. However, it should be noted that, through the policy of judicial reform, Vietnam has shown a gradual decrease in the provisions of the death penalty in the Penal Code as follows:



**Table 1. Compare the total number of crimes with the death penalty and the rate compared to the total number of crimes in Vietnam Penal Codes**

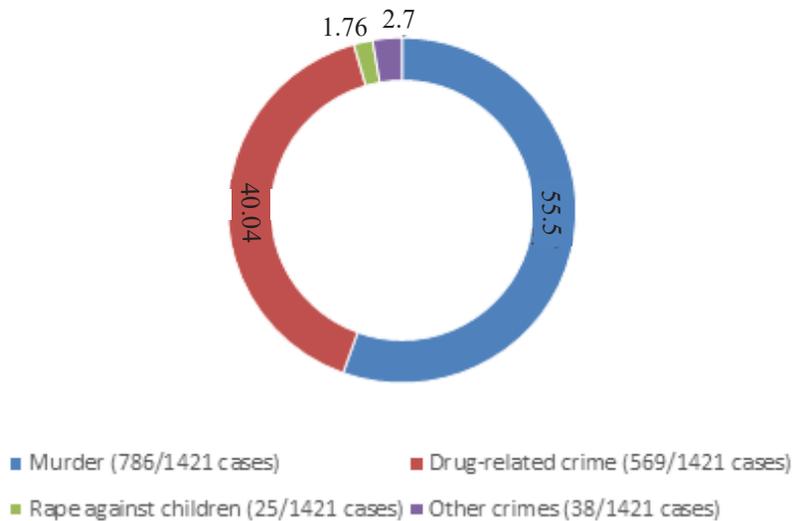
In general, through the Penal Code amendments, the crimes with the death penalty have been reduced in both absolute and relative numbers (from 44 crimes to 18 crimes,

<sup>1</sup> See more on Article 1 of the 2<sup>nd</sup> Optional Protocol:

“1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.”

which means from 20.08% to 5.73%). It should be noted that, although Vietnam is stipulating up to 18 crimes with the death penalty, the court's issuance of the death penalty usually revolves around the following three crimes: murder, drug-related crime, and rape against children. Other crimes sentenced to death by the court are minimal. According to data from 2001-2010<sup>1</sup>, the structure of the death penalty is distributed as follows:



**Table 2. Compare the rates of crimes with the death penalty in Vietnam in the period 2001 - 2010<sup>2</sup>**

Not only gradually limiting the number of crimes subject to the death penalty, but also limiting crimes being sentenced to death by the court, in reality, the trend of Vietnam's criminal justice reform also shows a narrowing of the subjects being executed with the death penalty as follows:

<sup>1</sup> Although the data is outdated, it is still worthy of reference because since this time, information on the death penalty has become confidential and is not widely disclosed, making research on the death penalty in Vietnam extremely difficult.

<sup>2</sup> Data available at: Trinhquoc, Toan, "The death penalty in the Vietnam Penal Code: Some recommendations for completion", articles by Trinhquoc Toan & Vucong, Giao "Exercise of constitutional rights in the Vietnamese Constitution 2013", (Hong Duc Publishing House 2015) p.120.

Penal Code 1985	Penal Code 1999	Penal Code 2015
<p>The death penalty does not apply to juvenile offenders to pregnant women when committing the crime or adjudication. The death penalty is postponed for pregnant women and women nursing children under twelve months.<sup>1</sup></p>	<p>- The death penalty does not apply to juvenile offenders, pregnant women, or women nursing children under 36 months of age when committing the crime or in adjudication. - The death penalty does not execute for pregnant women or women nursing children under 36 months old. In this case, the death penalty translates into life imprisonment.<sup>2</sup></p>	<p>- The death penalty does not apply to persons under 18 years of age when committing crimes, pregnant women, women nursing children under 36 months old, or persons aged full 75 years or older when committing crimes or in adjudication. - Not executing the death penalty against the convicted person if falling into one of the following cases: a) Pregnant women or women nursing children under 36 months old; b) Persons aged full 75 years or older; c) A person sentenced to death for property embezzlement or accepting bribes which, after being convicted, actively surrendered at least three-quarters of the embezzled property, accepted a bribe, and actively cooperated with the authorities in detecting, investigating, or handling crimes or making great success.<sup>3</sup></p>

Based on the above comparison table, it can be seen that the subjects must bear the sentence, and being executed is gradually narrowed over the years. In conclusion, it can be seen that the current reform process of criminal justice in Vietnam leads to 03 trends related to the death penalty:

- Decreasing the number of crimes with the death penalty.
- Decreasing the number of offenses that have been sentenced to death by a court in practice.
- Narrowing down the subject bearing the death penalty.

Via the above trends, it can be seen that, although it is not possible to meet the obligations required by the 2nd Optional Protocol immediately, Vietnam may fully meet those obligations in the future.

### **2.2.2. Incompatibility between Vietnam Penal Code on the death penalty and Article 6 ICCPR**

Currently, two international treaties dealing with the abolition of the death penalty are<sup>4</sup> (i) International Covenant on Civil and Political Rights, 1966 (Article 6); and (ii)

1 See more at: Paragraph 2 Article 27 Penal Code 1998.

2 See more at: Paragraph 2 and 3 Article 35 Penal Code 1999 amended in 2009.

3 See more at: Paragraph 2 and 3 Article 40 Penal Code 2015 amended in 2017.

4 UNDP, 'Study: On the possibility of Viet Nam ratifying the Second Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty', 2019, p.9.

The Second Optional Protocol to the International Covenant on Civil and Political Rights 1989, aiming at the abolition of the death penalty.

More specifically, Article 6 of the ICCPR Convention refers to the right to life in clause 1. Accordingly, this is “the supreme right from which no derogation is permitted.”<sup>1</sup> In addition, clauses 2, 3, 4, 5, 6 of Article 6 refer directly to limiting and proceeding to abolish the death penalty<sup>2</sup> as follows: (i) sentence of death may be imposed only for the most severe; (ii) not contrary to the provisions of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide; (iii) Death penalty can only be carried out according to a final judgment rendered by a competent court; (iv) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence; (v) Sentence of death shall not be imposed for crimes committed by persons below eighteen years old and shall not be carried out on pregnant women; (vi) Nothing in this article shall be invoked to delay or to prevent the abolition of death punishment by any State Party to the present Covenant.<sup>3</sup>

Notably, the ICCPR does not require states to abolish the death penalty immediately. However, the ICCPR stipulates that the death penalty is only allowed for “the most serious crimes.” To date, there is no specific definition of “the most serious crimes.” Nevertheless, through general recommendations and comments on Article 6 of the ICCPR, it can be seen that the scope of crimes considered the most serious is very narrow. The UN Commission on Human Rights (*UNCHR*) (now replaced by The United Nations Human Rights Council - *UNHRC*) argues that the concept of “the most serious crimes” does not include nonviolent acts such as financial crimes, political beliefs, religion, or consensual sex among adults.<sup>4</sup>

In some judgments for specific circumstances, UNCHR and Human Right Committee (*HRC*) also stated that some of the following crimes are not in the category of “the most serious crimes,”<sup>5</sup> namely: robbery; illegally transporting hazardous waste;<sup>6</sup> crimes related

1 Human Rights Committee, *CCPR General Comment No. 6: Article 6 (Right to Life)*. <<https://www.refworld.org/docid/45388400a.html>>, accessed 2<sup>nd</sup> February 2021, para 1.

2 Daotri, Uc and Vucong, Giao, ‘*The right to live in International Law and guarantees this right under the Vietnamese constitution 2013*’, article is cited in ‘*Exercise of constitutional rights in the Vietnamese Constitution 2013*’, Hong Duc Publishing Company, 2015, p.84.

3 Article 6, ICCPR.

4 Daotri, Uc and Vucong, Giao, ‘*The right to live in International Law and guarantees this right under the Vietnamese constitution 2013*’, article is cited in ‘*Exercise of constitutional rights in the Vietnamese Constitution 2013*’, Hong Duc Publishing Company, 2015, p.90.

5 Faculty of Law, Vietnam National University, Hanoi, ‘*Introduction of International Covenant on Civil and Political Rights (ICCPR, 1966)*’, Hong Duc Publishing Company, 2012.

6 Human Rights Committee, *Comments on Cameroon, U.N. Doc. CCPR/C/79/Add.33 (1994)*, <<http://hrlibrary.umn.edu/hrcommittee/G9416205.htm>> accessed 2<sup>nd</sup> February 2021, para 9.

to homosexuality, theft, corruption, economic crimes;<sup>1</sup> kidnapping criminals but not causing fatal consequences;<sup>2</sup> drug-related crimes and property-related crimes;<sup>3</sup> crimes related to treason and piracy.<sup>4</sup>

To clarify the applicable scope of the death penalty, Resolution 2005/59 dated 20/4/2015, UNHRC stated that the death penalty is not allowed to apply to non-violent crimes. Some crimes which are typical to mention are crimes related to financial activities, religion, freedom of speech, freedom of thought, consensual sex between adults.<sup>5</sup>

In addition to the abovementioned points, the report of the UN special rapporteur also excludes the application of the death penalty for victimless crimes or to religious and political activities (including high treason, espionage). In particular, crimes whose constituents are heavily qualitative such as treason, are not allowed to apply the death penalty. More specifically, in general comment No. 36 on Article 6 (dated 3 September 2019), paragraph 36, UNHRC said that: “Under no circumstances can the death penalty ever be applied as a sanction against conduct the very criminalization of which violates the Covenant, including adultery, homosexuality, apostasy, establishing political opposition groups or offending a head of state. States parties that retain the death penalty for such offenses violate their obligations under article 6, read alone and in conjunction with article 2 (2) of the Covenant, as well as of other provisions of the Covenant.”<sup>6</sup>

In addition, the member states of the convention are also not allowed to apply the death penalty to those crimes that generally affect general customs, moral values, and social norms (for example, crimes related to adultery, prostitution, or sexual acts).<sup>7</sup>

1 UNCHR, *Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories* (1995), <<http://hrlibrary.umn.edu/commission/country52/59-iran.htm>> accessed 2<sup>nd</sup> February 2021, para 8 and Human Rights Committee, *Concluding Observations of the Human Rights Committee, Libyan Arab Jamahiriya, U.N. Doc. CCPR/C/79/Add.101 (1998)* <<http://hrlibrary.umn.edu/hrcommittee/libya1998.html>> accessed 2<sup>nd</sup> February 2021, para 8.

2 UNCHR, *Organization of the work of the session, assistance to Guatemala in the field of human rights, 1997*, <<http://hrlibrary.umn.edu/commission/country51/15.htm>> accessed 2<sup>nd</sup> February 2021, para 8.

3 Human Rights Committee, *Comments on Sri Lanka, U.N. Doc. CCPR/C/79/Add.56 (1995).1996*, <<http://hrlibrary.umn.edu/hrcommittee/SRILANKA.htm>> accessed 3<sup>rd</sup> February 2021, para 14.

4 Human Rights Committee, *Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CCPR/CO/73/UK (2001)* <<http://hrlibrary.umn.edu/hrcommittee/uk2001.html>> accessed 3<sup>rd</sup> February 2021, para 37.

5 UNCHR, *Human Rights Resolution 2005/59: The Question of the Death Penalty, 20 April 2005, E/CN.4/RES/2005/59* <<https://www.refworld.org/docid/45377c730.html>> accessed 3<sup>rd</sup> February 2021

6 UNHRC, *General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35*, <<https://www.refworld.org/docid/5e5e75e04.html>> accessed 7<sup>th</sup> February 2021.

7 UNCHR, Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 1998/68. <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/100/19/PDF/G9910019.pdf?OpenElement>> accessed 3<sup>rd</sup> February 2021, para 63.

In reality, HRC has expressed its opinion on this issue in the case *Lubuto v. Zambia* government (No. 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev.1 (No. 390/1990, UN Doc. 1995)). In particular, in paragraph 7.2, the Committee noted that Mr. Lubuto had been sentenced to death under the aggravating penalty of armed robbery. Whether the sentence is considered “the most serious crime” under Article 6 (2) ICCPR or not. In response to that question, the Committee argued that Lubuto’s behavior, although dangerous to society, did not cause casualties to any person. The Committee concluded that the application of the death penalty in these cases violates article 6.2 of the ICCPR.<sup>1</sup>

Not only is it limited to making a point of view about the most severe crimes, but HRC also addresses who must receive this sentence. HRC believes that people who participate in the case as accomplices will not be subject to the death penalty.<sup>2</sup>

In Vietnam, in the process of building the Penal Code 2015, the drafting agency gave a clear view on amending and supplementing the provisions on the death penalty (Article 39) in the direction of institutionalizing the policy to limit the death penalty pursuant to the Politburo’s Resolutions No. 49/NQ-TW on judicial reform until 2020.<sup>3</sup> Accordingly, in the current Penal Code, Vietnam stipulates 18 crimes with the highest penalty frame as death penalty<sup>4</sup> as follows:

No	CRIMES WITH THE HIGHEST PENALTY IS DEATH PENALTY
<b>INFRINGEMENT OF NATIONAL SECURITY</b>	
1	Article 108. High treason
2	Article 109. Activities against the people’s government
3	Article 110. Espionage
4	Article 112. Rebellion
5	Article 113. Terrorism to oppose the people’s government
6	Article 114. Sabotaging facilities of the Socialist Republic of Vietnam
<b>OFFENCES AGAINST HUMAN LIFE, HEALTH, DIGNITY, AND HONOR</b>	
7	Article 123. Murder
8	Article 142. Rape of person under 16 years old

1 *Lubuto v. Zambia*, Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995). <<http://hrlibrary.umn.edu/undocs/session55/vws390r1.htm>> accessed 3<sup>rd</sup> February 2021.

2 UNHRC, *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35, <<https://www.refworld.org/docid/5e5e75e04.html>> accessed 3<sup>rd</sup> February 2021, para 35.

3 Vietnamese Government, *Official Letter 186/TTr-CP dated 27 April 2015 of the Government, submitted to the General Assembly on a plan to amend the Penal Code* <<http://duthaoonline.quochoi.vn/Pages/dsduthao/chitietduthao.aspx?id=526#hosoduan>> accessed 4<sup>th</sup> February 2021, p.16.

4 Vietnamese Penal Code 2015, edited 2017 < <http://congbao.chinhphu.vn/cong-bao-so-779-780-nam-2017-24869>> accessed 7<sup>th</sup> February 2021.

<b>ECONOMIC OFFENCES</b>	
9	Article 194. Manufacturing and trading of counterfeit medicines for treatment or prevention of diseases
<b>DRUG-RELATED OFFENCES</b>	
10	Article 248. Illegal manufacturing of narcotic substances
11	Article 249. Illegal possession of narcotic substances
12	Article 251. Illegal deal in narcotic substances
<b>OFFENCES AGAINST PUBLIC SAFETY AND ORDER</b>	
13	Article 299. Terrorism
<b>OFFENCES RELATED TO ABUSE OF POWER</b>	
14	Article 353. Embezzlement
15	Article 354. Taking bribes
<b>DISTURBING THE PEACE, CRIMES AGAINST HUMANITY AND WAR CRIME</b>	
16	Article 421. Disruption of peace, provocation of war of aggression
17	Article 422. Crimes against humanity
18	Article 423. War crimes

Based on the above statistics, it can be seen that there are seven criminal groups with the death penalty framework under the criminal law of Vietnam, which are: (i) infringement of national security; (ii) offenses against human life, health, dignity, and honor; (iii) economic offenses; (iv) drug-related offenses; (v) offenses against public safety and order; (vi) offenses related to abuse of power; and (vii) disturbing the peace, crimes against humanity and a war crime.

Among the above criminal groups, only the offenses against human life, health, dignity, and honor (specifically Article 123 Crime of murder) is consistent with HRC's description of the concept "the most serious crimes." The other groups emphasized by HRC not considered the most crimes: "The term "the most serious crimes" must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing (with direct victims). Crimes not resulting directly and intentionally in death, such as attempted murder, corruption, and other economic and political crimes, armed robbery, piracy, abduction, drug, and sexual offenses, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty."<sup>1</sup>

It can be seen that there are many enormous disparities between Vietnamese law and international law regarding the scope of crimes where the death penalty is applicable. The scope of crimes subject to the death penalty is much broader than ICCPR 1966's

<sup>1</sup> UNHRC, *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35, <<https://www.refworld.org/docid/5e5e75e04.html>> accessed 3<sup>rd</sup> February 2021, para 35.

general perception of the “most serious crimes.” This is one of the most significant guest barriers preventing Vietnam from joining the 2nd Optional Protocol ICCPR when this legal document requires the removal of all death penalty in Article 1 as follows<sup>1</sup>

*“1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.*

*2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.”*

### **3. EVALUATION ON THE ACCESSION OF VIETNAM TO THE 2<sup>ND</sup> OPTIONAL PROTOCOL ICCPR**

The policy of limiting and gradually eliminating the death penalty has appeared in Vietnam since the early years of the twenty-first century. Three years since the 1999 Penal Code was born, the Politburo issued Resolution No. 08/NQ-TW dated 2 January 2002 on a crucial of essential judicial tasks in the upcoming time, including: “To develop a proposal to change the execution of the death penalty and study to limit the death penalty in the Penal Code.”<sup>2</sup> Then, on 2 June 2005, the Politburo and the Central Committee of the Communist Party of Vietnam issued Resolution No. 49-NQ/TW on the judicial reform strategy to 2020. One of the most notable judicial reform tasks is: “Limiting the application of the death penalty towards gravely serious crimes.”<sup>3</sup> This policy has been applied directly in amending and supplementing many articles of the 1999 Penal Code. As a result, the amended and supplemented 1999 Penal Code has reduced 8 out of 29 crimes with the death penalty (accounting for 27.6%). Next, on 12 March 2014, the Politburo issued Conclusion No. 92-KL/TW on the continuation to implement Resolution No. 49-NQ/TW, which strongly affirmed: “continue to implement the targets, views and directions for judicial reform stated in the Politburo’s Resolution No. 49-NQ/TW”.<sup>4</sup> To realize that policy, the 2015 Penal Code, amended and supplemented in 2017, has reduced the number of crimes with the death penalty provisions from 22 crimes (1999 Penal Code which was

1 UN, *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* <<https://www.ohchr.org/en/professionalinterest/pages/2ndopcpr.aspx>>

2 Vietnamese Government, *B(1(đ)), part II, Resolution No 08/NQ-TW 02/01/2002 about on the key tasks of judicial work in the near future* (Nghị quyết số 08/NQ-TW ngày 02/01/2002 về một số nhiệm vụ trọng tâm công tác tư pháp trong thời gian tới).

3 Political Bureau, Central Executive Committee of the Communist Party of Vietnam, *Resolution No 49-NQ/TW on strategy for judicial reform to the year 2020*.

4 Political Bureau, Part 2, Conclusion 92-KL/TW dated 12 March 2014 of the Political Bureau on the continuous implementation of Resolution No 49-NQ/TW dated 2 June 2005 of the 4<sup>th</sup> Political Bureau on strategy for judicial reform to the year 2020 <<https://tulieuvankien.dangcongsan.vn/he-thong-van-ban/van-ban-cua-dang/ket-luan-so-92-kltw-ngay-1232014-cua-bo-chinh-tri-ve-viec-tiep-tuc-thuc-hien-nghi-quyet-so-49-nqtw-ngay-262005-cua-bo-chinh-223>> accessed 5th February 2021.

amended and supplemented in 2009) to 18 crimes (a reduction of 4 crimes, equivalent to 18.2%). Moreover, in the process of amending the 2015 Penal Code, the drafting committee also provides strict criteria when applying the death penalty,<sup>1</sup> specifically:

- Only the death penalty applies to certain subjects committing many, particularly the subject: The offender belongs to one of the subjects being the organizer, the offender is a hooligan character, the dangerous recidivist, the person who commits the crime in a barbaric, cruel, brutal manner or has many aggravations.

- Type of crime: Derived from the nature and seriousness of the crime and the personal characteristics of the offender; requests to protect the infringed object and request to crime prevention and the ability to suppress crime by means other than the death punishment. Based on consideration of the practical application of the death penalty, the Penal Code 2015 stipulates 18 crimes with the death penalty as listed above.

It can be seen that, despite the policy of restricting the application of the death penalty, as well as in the process of legalizing the Penal Code 2015, the drafting committee has taken into account many factors on the subject and type of crime to apply a severe penalty. However, the number of crimes with the death penalty is very high (18 crime s), and the scope of application is much broader than HRC's judgment on the concept of "the most serious crime."s." However, in the practice of criminal justice in Vietnam, only the following crimes are subject to the death penalty:

- Murder (the offender is the organizer, commits a crime of hooligan nature, dangerous recidivism, the person commits the crime in a barbaric, cruel, brutal manner or has much aggravation);

- Rape of people under 16 years old, especially rape of childFurthermore,;

- and Drug-related crimes (mainly those who buy, sell, store drugs in large quantities, organized activities).<sup>2</sup>

For other crimes, although there are provisions on the death penalty, they have not used in practice for a long time, in particular: Crimes of infringing upon national security (Crime of treason, Crime of operating to overthrow the people's government, Crime of destroying the material and technical foundations of the Socialist Republic of

1 Vietnamese Government, *Official Letter 186/TTr-CP dated 27 April 2015 of the Government, submitted to the General Assembly on a plan to amend the Penal Code*, p.16-17. <<http://duthaoonline.quochoi.vn/Pages/dsduthao/chitietduthao.aspx?id=526#hosoduan>> accessed 4<sup>th</sup> February 2021.

2 UNDP, *Study: On the possibility of Viet Nam ratifying the Second Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty*, 2019, p.32 and The Supreme People's Procuracy of VN, *Report No 144/BC-VKSTC-V8 05/12/2012* (Báo cáo của Viện Kiểm sát nhân dân tối cao về Tổng kết việc thi hành Bộ luật hình sự năm 1999).

Vietnam); international crimes (Destroying peace, causing wars of aggression, Crime against humanity, War crimes).<sup>1</sup> As can be seen, Vietnam did not actually enforce the death penalty for the crimes mentioned above. From the above points, it can be affirmed that the limitation and gradual elimination of the death penalty have been the policy of Vietnam that has been implemented throughout the years.

Why is it necessary to join the 2<sup>nd</sup> Optional Protocol when Vietnam can eliminate the death penalty in practice (for example, in the case of Korea, Thailand) and under the law (for example, the case of Fiji)? The answer is that if Vietnam does not show an international commitment (i.e., joining the 2<sup>nd</sup> Optional Protocol) on the abolition of the death penalty and that commitment is guaranteed by the Pacta Sunt Servanda principle, the returning of the death penalty under the Penal Code or continuing to proceed with the death penalty in practice will become a possibility, especially in some urgent circumstances. Therefore, joining the 2<sup>nd</sup> Optional Protocol is an act to ensure that Vietnam will not re-apply the death penalty in practice and re-regulate the death penalty under the law.

Looking at an overview, Vietnam's abolition of the death penalty and its accession to the 2<sup>nd</sup> Optional Protocol ICCPR faces some of the following obstacles:

- Public opinion on the death penalty.
- and Incompatibility between Vietnamese law and ICCPR and the 2<sup>nd</sup> Optional Protocol (particularly regarding the definition of “ the most serious crimes” and the immediate abolition of the death penalty without reservation).

These obstacles make it impossible for Vietnam to join the 2<sup>nd</sup> Optional Protocol shortly. However, as mentioned above, the reduction and gradual elimination of the death penalty has been a consistent Vietnam policy for many years. This policy has been demonstrated through the gradual reduction of the death penalty via each legalization. This may lead to the prospect that Vietnam will join the 2<sup>nd</sup> Optional Protocol in a further future, when the public opinion becomes more open, official information on the death penalty in Vietnam is public, and the laws of Vietnam become compatible with Article 6 ICCPR as well as the 2<sup>nd</sup> Optional Protocol ICCPR.

In the view of prediction, the authors think that the roadmap for Vietnam joining the 2<sup>nd</sup> Optional Protocol will occur as follows: First, Vietnam needs to continue to limit the scope and the subject of the death penalty application. Then, Vietnam should abolish the death penalty in practice (the Law still stipulates that some criminals are subject to the

---

1 Trinhquoc, Toan, '*Death penalty in Vietnam Penal code: Some Recommendation for completion*', article is cited in '*Exercise of constitutional rights in the Vietnamese Constitution 2013*', Hong Duc Publishing Company, p. 121.

death penalty but do not condemn or not execute such sentences in practice). This step is considered a test for the justice system and the whole society of Vietnam when the death penalty is abolished. Next, suppose the above de facto test succeeds. In that case, Vietnam will move to abolish the death penalty in the entire legal system officially. Finally, when the legal system is fully compatible, Vietnam will join the 2nd Optional Protocol.

## REFERENCES

1. Vietnam Lawyers' Association, *'Death Penalty in International Law,'* Hong Duc Publishing Company, 2008.
2. Ehrlich & Isaac, *'The Deterrent Effect of Capital Punishment: A Question of Life and Death,'* (1975) *The American Economic Review* 65, no. 3.
3. Dezhbakhsh, Hashem, Paul H. Rubin, & Joanna M. Shepherd, *'Does Capital Punishment Have a Deterrent Effect? New Evidence from Post moratorium Panel Data,'* (2003) *American Law and Economics Review* 5, no. 2.
4. Bailey, W.C. and Peterson, R.D, Murder, *'Capital Punishment, and Deterrence: A Review of the Evidence and an Examination of Police Killings,'* (1994) *Journal of Social Issues*.
5. Hood, R. (2002), *'The Death Penalty: A Worldwide Perspective,'* Fourth Edition, Oxford University Press.
6. Fagan, J (2005), *'Deterrence and the death penalty: a critical review of new evidence,'* Columbia Law School.
7. Vietnam Lawyers' Association, *'Death Penalty in International Law,'* Hong Duc Publishing Company, 2008.
8. Faculty of Law, Vietnam National University, Hanoi, *'Things need to be known about the death penalty,'* Labour and Social Publisher Company Limited.
9. Catherine Appleton, Bent Grøver, *'The Pros and Cons of Life Without Parole,'* (2010) *The British Journal of Criminology*, Volume 47, Issue 4, July 2007, <<https://academic.oup.com/bjc/article-abstract/47/4/597/366540?redirectedFrom=fulltext>>.
10. Robbert M. Baird & Stuart (edited by E. Rosenbaum), *'Punishment and the Death penalty'* (Prometheus Books 1995).
11. Keith Harries & Derral Cheatwood, *'The Geography of Execution: The Capital Punishment Quagmire in America,'* (Rowman & Littlefield 1997).
12. Torin McFarland, *'The Death Penalty vs. Life Incarceration: A Financial Analysis,'* (2016) *Susquehanna University Political Review* 46 - 87.

13. The Harvard Law Review Association, *'A Matter of Life and Death: The Effect of Life-without-Parole Statutes on Capital Punishment.'* (2006) Harvard Law Review 119, no. 6.
14. Catherine Appleton, Bent Grøver, *'The Pros and Cons of Life Without Parole,'* (2010) The British Journal of Criminology, Volume 47, Issue 4, July 2007, < <https://academic.oup.com/bjc/article-abstract/47/4/597/366540?redirectedFrom=fulltext> >.
15. Vietnam Lawyers' Association, *'Death Penalty in International Law,'* Hong Duc Publishing Book, 2008.
16. Freinkel, A., Koopman, C., & Spiegel, D., *'Dissociative symptoms in media eyewitnesses of an execution'* (1995) The American Journal of Psychiatry, 151(9).
17. C. Pickett and C. Stowers, *'Within These Walls: Memoirs of a Death House Chaplain,'* (St Martin Publisher 2003).
18. Pierre Desert, *'Second Optional Protocol: Frequently Asked Questions,'* (World Coalition Against the Death Penalty, June 27th, 2008) < <http://www.worldcoalition.org/Second-Optional-Protocol-Frequently-Asked-Questions.html> >
19. Gallup, *Death Penalty,* < <https://news.gallup.com/poll/1606/Death-Penalty.aspx> >.
20. Death Penalty Information Center, *Gallup Poll—For First Time, Majority of Americans Prefer Life Sentence To Capital Punishment,* < <https://deathpenaltyinfo.org/news/gallup-poll-for-first-time-majority-of-americans-prefer-life-sentence-to-capital-punishment> >
21. Chan, Wing Cheong and TAN, Ern Ser and Lee, Jack Tsen-Ta and MATHI, Braemar, *'Public Opinion on The Death Penalty in Singapore: Survey Findings,'* NUS Law Working Paper 2018/002, February 2018, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3122150](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3122150)>
22. Dietrich Oberwittler & Shenghui Qi, *'Public Opinion on the Death Penalty in China,'* Max Planck Institute for Foreign and International Criminal law.
23. Chan, Wing Cheong, *'The Death Penalty in Singapore: in Decline but Still Too Soon for Optimism'* (2016) 11(3) Asian Journal of Criminology.
24. Tran, Kien and Vu, Cong G. 2019. *'The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry'* Societies 9, no. 3: 56. <<https://doi.org/10.3390/soc9030056>>
25. Truongho, Hai, *'Death penalty in draft amendment of the Penal Code: from public and professional viewpoints,'* the article's cited in Trinhquoc Toan & Vucong, Giao, *'Exercise of constitutional rights in the Vietnamese Constitution 2013'*, Hong Duc Publishing Company, 2015.

26. Leila Toiviainen, 'Review *The Death Penalty: A Worldwide Perspective, Fifth Edition*, <<https://yaleglobal.yale.edu/death-penalty-worldwide-perspective-fifth-edition>>
27. David T. Johnson and Franklin E. Zimring, 'The Next Frontier: National Development, Political Change, and the Death Penalty in Asia', (Oxford University Press, 2009).
28. Office of the High Commissioner for Human Rights (OHCHR), Regional Office for South-East Asia, 'Moving Away from the Death Penalty: Lessons in South-East Asia' (2013).
29. Mai Sato and Paul Bacon, *The Public Opinion Myth: Why Japan Retains the Death Penalty* (Death Penalty Project, 2015).
30. Sangmin Bae, 'Death Penalty Moratorium in South Korea: Norms, Institutions and Leadership' in Scherdin.
31. Susan Trevaskes, 'Lenient Death Sentencing and the 'Cash for Clemency' Debate' (2015) 73 China Journal.
32. UNDP, 'Study: On the possibility of Viet Nam ratifying the Second Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty, 2019.
33. Faculty of Law, Vietnam National University, Hanoi, 'Introduction of International Covenant on Civil and Political Rights (ICCPR, 1966)', Hong Duc Publishing Company, 2012.
34. *Lubuto v. Zambia*, Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995). <<http://hrlibrary.umn.edu/undocs/session55/vws390r1.htm>>
35. UNHRC, *General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35*, <<https://www.refworld.org/docid/5e5e75e04.html>>
36. Vietnamese Government, *Official Letter 186/TTR-CP dated 27 April 2015 of the Government, submitted to the General Assembly on a plan to amend the Penal Code* <<http://duthaonline.quochoi.vn/Pages/dsduthao/chitietduthao.aspx?id=526#hosoduan>>
37. Vietnamese Penal Code 2015, edited 2017 <<http://congbao.chinhphu.vn/cong-bao-so-779-780-nam-2017-24869>>
38. UN, *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* <<https://www.ohchr.org/en/professionalinterest/pages/2ndopccpr.aspx>>
39. Vietnamese Government, *B(1(đ)), part II, Resolution No 08/NQ-TW 02/01/2002 about the critical tasks of judicial work shortly.*

40. Political Bureau, Central Executive Committee of the Communist Party of Vietnam, *Resolution No 49-NQ/TW on strategy for judicial reform to the year 2020*.
41. Political Bureau, Part 2, Conclusion 92-KL/TW dated 12 March 2014 of the Political Bureau on the continuous implementation of Resolution No 49-NQ/TW dated 2 June 2005 of the 4<sup>th</sup> Political Bureau on strategy for judicial reform to the year 2020 <<https://tulieuvankien.dangcongsan.vn/he-thong-van-ban/van-ban-cua-dang/ket-luan-so-92-kltw-ngay-1232014-cua-bo-chinh-tri-ve-viec-tiep-tuc-thuc-hien-nghi-quyet-so-49-nqtw-ngay-262005-cua-bo-chinh-223>>
42. Vietnamese Government, *Official Letter 186/TTR-CP dated 27 April 2015 of the Government, submitted to the General Assembly on a plan to amend the Penal Code* <<http://duthaoonline.quochoi.vn/Pages/dsduthao/chitietduthao.aspx?id=526#hosoduan>>
43. Council of Europe, *Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty*, 28 April 1983, ETS 114, available at: <<https://www.refworld.org/docid/3ae6b3661c.html>>
44. Council of Europe, *Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*, 3 May 2002, ETS 187, available at: <https://www.refworld.org/docid/3ddd0e4c4.html>.
45. Organization of American States (OAS), *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* ("Pact of San Jose"), 8 June 1990, OAS Treaty Series, N°.73, available at: <<https://www.refworld.org/docid/3de4b4884.html>>
46. United Nations, *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty Report of the Secretary-General*, 2005.
47. Human Rights Committee, *Comments on Cameroon, U.N. Doc. CCPR/C/79/Add.33 (1994)*, <<http://hrlibrary.umn.edu/hrcommittee/G9416205.htm>>
48. UNCHR, *Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories* (1995), <<http://hrlibrary.umn.edu/commission/country52/59-iran.htm>>
49. Human Rights Committee, *Concluding Observations of the Human Rights Committee, Libyan Arab Jamahiriya, U.N. Doc. CCPR/C/79/Add.101 (1998)* <<http://hrlibrary.umn.edu/hrcommittee/libya1998.html>>

50. UNCHR, *Organization of the work of the session, assistance to Guatemala in the field of human rights, 1997*, <<http://hrlibrary.umn.edu/commission/country51/15.htm>>
51. Human Rights Committee, *Comments on Sri Lanka, U.N. Doc. CCPR/C/79/Add.56 (1995).1996*, <<http://hrlibrary.umn.edu/hrcommittee/SRILANKA.htm>>
52. Human Rights Committee, *Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CCPR/CO/73/UK (2001)* <<http://hrlibrary.umn.edu/hrcommittee/uk2001.html>>
53. UNCHR, *Human Rights Resolution 2005/59: The Question of the Death Penalty E/CN.4/RES/2005/59* <<https://www.refworld.org/docid/45377c730.html>>

# CRIMINAL INJUSTICE IN DEATH PENALTY: REFLECTION FROM DEBATED CASES IN VIETNAM

A/Prof. Dr. Vu Cong Giao and Nguyen Thuy Duong<sup>1</sup>

**Abstract:** Criminal injustice is widespread in death penalty cases all over the world. This paper analyzes its nature, characteristics, and causes. 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 an unfair trial. Therefore, the death penalty is criminal injustice since the penalty conflict with most universal fair trial standards. As believed by the authors, some factors contributed to criminal injustice in death penalty cases in Vietnam, from the criminal justice system's loopholes to the limitations in the judicial oversight mechanism and the legal aid system's lack and inadequacies. The authors, therefore, believe that a variety of measures are needed to overcome the problem in Vietnam, of which the first and foremost is to 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 is still retaining capital punishment in law and practice, Vietnam faces various procedural risks in applying 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 regarding the death penalty in Vietnam are not clarified yet.

This paper attempts to fill the research gap. It is, in fact, the inheritance and development of the thematic article 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 previous paper's theoretical framework, the authors have provided an in-depth analysis of the status and causes of criminal Injustice in Vietnam through analyzing some the most controversial death penalty cases that have

---

<sup>1</sup> VNU School of Law.

recently happened in the country. In this paper, the authors try to address the following questions: What constitutes “*criminal injustice*”? What are the manifestations and most common factors contributing to criminal injustice in the use of the death penalty in Vietnam? Furthermore, how to solve injustice problems experienced by persons facing the death sentence in the country?

While many factors lead to criminal injustice in the death penalty in Vietnam, each of those can be addressed with a corresponding solution. At the same time, different measures need to be applied simultaneously. Concerning 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, on the one hand, conserves existing moral norms and practices; on the other, demands reform of these norms and rules (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. Justice often gives us reason to change regulations, 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 to a particular event or situation or a more prominent 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 (Judith, 1992; Edmond, 1975; Barrington, 1978), in every country, the matter of injustice is paid even more attention in case of criminal proceedings (criminal injustice), where human rights and even human life may be limited or taken away by judicial bodies. Unlike the sense of justice, which tends to be conceived in more abstract ways and to inspire contemplation rather than action, the sense of injustice is a powerful motivational condition, causing people to take action to

defend not only themselves but also others who suffered from unfair treatment (Thomas, 1995; Richard, 1998). In many countries, injustice makes people distrust the national judicial system and is crucial in creating social unrest. 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 sense, Eric Prokosch (Theme Research Coordinator of Amnesty International) argues that 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 the 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 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. 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 conclude from the above analysis that the unnatural taking of life via the death penalty is an unfair trial and a kind of criminal injustice. In this regard, mandatory death sentence, which is “forced to kill,” is the most apparent criminal injustice manifestation 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 circumstances and the circumstances of the offense. 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.

Concerning 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 death penalty's cruelty is manifested in the execution and the time spent under the death sentence. The prisoner constantly contemplates his or her death at the state's hands (Prokosch, 1998). In addition, the cruelty in many cases extends beyond death row inmates to the members of their family, to the judges, prosecutors, correctional officers, and the officials who have to carry out an execution. They manifested through their disconcerting 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 emphasized by many authors (Radelet and Borg, 2000; FIDH/CCR, 2013).

Concerning the third feature, the death penalty is also used for political purposes in many countries, such as disposing of political enemies or silence political opponents. One of the most prominent cases 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 the 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 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 undone. An innocent person may be released from prison for a crime they did not commit. However, execution can never be reversed (Amnesty International, 2007). This irreparable nature is, therefore, the inherent injustice of capital punishment.

The above analysis has 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 is canceled 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. 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 distributive justice theory, which assumes that those who commit certain wrongful acts, paradigmatically serious crimes, morally deserve a proportionate punishment. Therefore, 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 both absence of criminal justice and 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), as it was 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), under 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 the African Charter on Human and Peoples’ Rights, Article 13 of the Revised Arab Charter on Human Rights and Article 20 of the ASEAN Human Rights Declaration. 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 aid 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, the authors will mention not every fair trial standard in Article 14 of ICCPR in the following sections; only those closely associated with the death penalty's outstanding features 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**

Concerning 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, a 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 the principle of presumption of innocence, a person cannot be compelled to confess guilt or give evidence against themselves. It is for the state to produce evidence of guilt, not for the defendant to prove innocence (Fair Trials).

In terms of the death penalty, a 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 countries, violation of the presumption of innocence principle occurs quite commonly in administering the death penalty, of which Vietnam is not an exemption. The Ho Duy Hai case is the most controversial one 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 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. Eight months later, on November 28, he was sentenced to death by a local court, mainly because of his statement 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, Ho Chi Minh City's appellate court 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 of 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 defense lawyer have repeatedly maintained that he was innocent and wrongly convicted. Indeed, 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 did not match the blood found at the crime scene, and no witnesses could testify that he was at the crime scene; evidence indicated that the murderer was left-handed and Hai was right-handed.*

*For the past 12 years, Hai's case has been a typical example of controversial death penalty cases in Vietnam. The case is also mainly related to the presumption of innocence principle stipulated in Article 31 of the current Vietnamese Constitution. In this case, local courts at all levels have based their judgment on Hai's confession while ignoring all inconsistent evidential facts (Tuan V. Nguyen). Hai's case has also caused controversy about the investigative agency's impartiality 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 a reasonable doubt, was inadequately applied in the case. Firstly, in terms of the burden of proving, the investigation had been misconducted since the very first phases. The conviction was mainly based on Ho Duy Hai's confession, which was possibly obtained against his will. All the inconsistent facts with his confession, such as no murder weapon found in the crime scene, no witnesses, unmatch DNA with the blood found,... were ignored. In principle, with all these pieces of evidence, Ho Duy Hai should be presumed innocent even when he did confess to his crime. Mr. Truong Trong

Nghia - a member of Parliament - pointed out that the evidence collection process has seriously violated 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 by ignoring unmatched DNA in the blood found at the crime scene.

Secondly, the impartial application of a presumption of innocence is also caused by insufficient awareness of this principle. Although the presumption of innocence was recognized as a fundamental rule in a criminal proceeding, not only in the investigative stage but also in a trial, the accused tends to be proved guilty instead of innocent. At the same time, the fundamental human rights of the accused were violated during the investigation, for instance, the right to remain silent, 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 always to be treated with humanity and without being subjected to any psychological or physical violence, coercion, or intimidation. In addition, the 1990 UN Guidelines on the Role of Prosecutors contain in particular the following 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, concerning 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 four other wrongful cases that “shocked Vietnamese society” including 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 on September 28th, 2003. After that, in both hearings in the first instance by Bac Giang Province People's Court and 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 the 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 a complaint to the authority for many years, but to no avail.*

*On July 9th, 2013, the 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 significant evidence which was discovered by her family in June 2013. She urged the agency to re-conduct an investigation to save her husband. On September 30th, 2013, a task group was sent to Bac Giang Province to verify the information provided by Nguyen Thi Chien and Than Thi Hai (a relative of the family). The clue led the investigation to a new suspect, Ly Nguyen Chung, whose stepmother, Nguyen Thi Lanh, accidentally heard*

*he (Ly Nguyen Chung) told his father (Ly Van Chuc) how he committed the crime in ethnic languages. Being threatened by her husband, Nguyen Thi Lanh could not speak out. In October 2013, the investigation agency 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 the victim's shop to buy shampoo. After seeing her money box, he suddenly took out a knife and stabbed the woman. The accused 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 ten years 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 the presumption of innocence principle, even though the principle was adopted by law at that time. 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.

Subjective conclusions wrongfully convicted Nguyen Thanh Chan of the investigation agency, which was based on insufficient evidence. Besides, other fundamental rights of accused persons in the criminal proceeding were also severely violated, such as the right to a 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 to perform again in the court. Meanwhile, every kind of undue pressure exercised to obtain a statement from an accused person should be considered illegal according to the law. Record from the lawyer also pointed out shortcomings in the investigation process and a 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. Moreover, it took as long as more than ten years 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 emphasize the factors of discrimination based on race and class (Hagan, 1982; Fricker, 2007; Fyfe, 2019), while Denov focuses on the 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 factors mentioned above 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 countries including inadequate legal representation; police and prosecutorial misconduct; perjured testimony and false eyewitness testimony; racial prejudice; jailhouse “*snitch*” testimony; suppression, and misinterpretation of mitigating evidence; community/political pressure to solve a case (Amnesty International, 2003). Similarly, the Cornell Center demonstrated the determining 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 leading 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). Besides, other factors contributed to the wrongful convictions in death penalty cases in Vietnam, such as inadequate legal representation, suppression and 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.

The right to defense counsel is guaranteed to all the accused in all kinds of criminal cases. In case the accused charged with offenses 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 select defense counsel for their organizations’ members, according to Art. 76 Criminal Procedure Code 2015. As such, in a capital case, defense counsel is compulsorily required. If the defense counsel is absent, the trial panels must postpone the court sessions.

However, access to legal representation in a criminal case in Vietnam is difficult in practice. From January 1st, 2018 to May 31st 2019, there were 27,868 cases in the whole

country, of which 15,796 cases (about 57%) have defense counsel. Among 16,042/27,868 cases that 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 compared to previous years, it is still low. (Nguyen Thi Pha, 2019)

The fact that the Constitution's right to legal aid has not been recognized leads to insufficient awareness of this right of both procedure-conducting actors and procedure-participants. The accused may be unaware of their rights to have defense counsel, and procedure-conducting agencies guarantee such rights. Such limitation in the property's proper enjoyment has been derived from the lack of a human rights-based approach in protecting human rights in criminal proceedings. This also caused the poor implementation of related provisions on legal counsel in practice. Besides, the quality of representation a defendant receives in a capital case continuously remains poor, although such representation can make the difference between life and death. Especially in capital cases, the lawyer should be required more strictly than in 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 makes it more and more challenging to ensure the right to legal aid in practice. Especially when Vietnam became a middle-income country in 2010, sponsor from abroad for legal aid program has been drastically reduced.

- The other issues - police and prosecutorial misconduct; suppression 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 have raised many debates in society, such as Nguyen Thanh Chan's case and the others, which will be briefly summarized below.

#### *The case of Huynh Van Nen*

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

#### *The case of Han Duc Long*

*Han Duc Long was accused of child sexual abuse and murder in 2005 and was sentenced to 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 released after 11 years of imprisonment have raised*

*questions about police and investigative agencies' performances. Although the burden of proof is imposed on prosecutorial actors, the investigation process is hardly monitored or reviewed later due to a lack of an effective mechanism. The above cases show that in many criminal cases, a confession made by the accused is considered more important than evidence. The so-called "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 mechanisms of human rights in criminal proceedings, such as freedom from torture and the 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 that 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. However, it is more challenging to monitor death penalty cases in Vietnam because it is a sensitive issue. The death penalty data is even listed as a state secret. In this context, unfair trials 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 a said judge also passes the verdict; 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). 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. The risk level is more or less different throughout those states. Although it is not unique, the criminal injustice faced by capital defendants in Vietnam is rather severe.

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

Criminal injustice in death penalty cases deprives innocent people of their lives and 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 justice administration.

Since the right to life and international fair trial standards are attracting the international community's special attention, 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 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 concerning legal aid programs, and the weakness of the mechanism supervising death penalty cases are also the 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. It is also an essential element that contributes to maintaining the death penalty as well as criminal injustice in using capital punishment.

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

*First and foremost*, it is pivotal to tighten the mechanism of monitoring judicial officials' compliance with criminal procedure law. Vietnam has adopted criminal procedural law with quite comprehensive provisions applicable to death penalty cases. However, due to inadequate 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 resources 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 limited capital defense lawyers' capacity. High-quality legal representation is the first and most important defense against criminal injustice in death penalty cases. 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.

*Thirdly*, it is vital to provide judicial officials (prosecutors, police, and judges) training and impose strict sanctions for misconduct. Vietnam's experiences show that various violations of fair trial standards in death penalty cases result from the misconduct of

judicial officials. Training on international human rights standards in criminal proceedings for judicial officials is crucial to reducing criminal injustice in death penalty cases.

*Fourthly*, it is essential to eliminate prejudice against offenders who have committed serious crimes and face the death penalty in Vietnam. In addition, it is necessary to foster a tolerant and non-violent culture and a proper understanding of the brutal, meaningless nature of the death penalty. This is because in every country, the death penalty issues, including criminal injustice, depend very much on the awareness and attitudes of the public and public officials.

*Fifthly*, capital defendants who are wrongly convicted or unfairly treated and family members must be compensated as provided in Article 14 (6) of the ICCPR. Although Vietnam's law 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 families. This is not appropriate because, in death sentences, relatives of capital defendants often face severe 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 to avoid the legal consequences of handling death penalty cases. In this way, criminal injustice in death penalty cases can be reduced.

## REFERENCES

1. Amnesty International (2007), THE DEATH PENALTY, Questions, and Answers, AI Index: ACT 50/010/2007, [https://www.amnesty.org.uk/files/8.\\_amnesty\\_death\\_penalty\\_qa\\_2007.pdf?I8ogt4exmPPzsDT7N5iCXcE2YAKFOJaK=](https://www.amnesty.org.uk/files/8._amnesty_death_penalty_qa_2007.pdf?I8ogt4exmPPzsDT7N5iCXcE2YAKFOJaK=)
2. American Civil Liberties Union, "*The Case Against the Death Penalty*" (ACLU - 2020) <<https://www.aclu.org/other/case-against-death-penalty>> accessed 25 March 2021.
3. Barry, Kevin M., "*The Death Penalty & The Fundamental Right to Life*" (November 20, 2018). Boston College Law Review, Vol. 60, No. 1545, 2019. Available at SSRN: <https://ssrn.com/abstract=3287213> or <http://dx.doi.org/10.2139/ssrn.3287213>
4. Brian Duignan, "*Justice*," The Encyclopedia Britannica, <<https://www.britannica.com/topic/justice-social-concept>> accessed 25 Feb 2021.
5. Bedau, H., & Radelet, M., "Miscarriages of justice in potentially capital cases" (1987), Stanford Law Review, 40, 21-179.
6. CAT, Concluding Observations: Vietnam, CAT/C/VNM/CO/1 (2018) <<https://www.atlas-of-torture.org/en/document/urrka70n92?page=1>> accessed 22 Feb 2021.

7. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
8. Cornell Center on the Death Penalty Worldwide “Justice Denied: A Global Study of Wrongful Death Row Convictions” (2018) <[https://files.deathpenaltyinfo.org/legacy/files/pdf/innocence\\_clinic\\_report\\_2018\\_R4\\_final.pdf](https://files.deathpenaltyinfo.org/legacy/files/pdf/innocence_clinic_report_2018_R4_final.pdf)> accessed 12 Jan 2021.
9. Devins, Neal, and Herron, Roy Brasfield, “The Injustice of the Death Penalty” (1983). Popular Media. 337 <[https://scholarship.law.wm.edu/popular\\_media/337](https://scholarship.law.wm.edu/popular_media/337)>
10. Eric Heinze (2012), *The Concept of Injustice*. Routledge. ISBN 978-0415524414.
11. Edmond N. Cahn (1946), “Justice, Power, and Law.” *Yale Law Journal*. 55 (2): 336–364. doi:10.2307/792700. JSTOR 792700.
12. Eric Prokosch (1998), *HUMAN RIGHTS V. THE DEATH PENALTY: Abolition and Restriction in Law and Practice*, Amnesty International.
13. Fair Trials, *The Presumption of Innocence*, <https://www.fairtrials.org/presumption-innocence>.
14. Feinberg, Joel (1974), “Noncomparative Justice,” *Philosophical Review*, 83: 297-338.
15. Kien Tran and Cong Giao Vu (2019), *The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry*, *Societies* 2019, 9(3), 56; <https://doi.org/10.3390/soc9030056>
16. Human Rights Committee:
17. (1982), General comment No. 6 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life.
18. (1984), General comment No. 14 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life.
19. (2007), General Comment No. 32. Article 14, Right to equality before courts and tribunals and to a fair trial.
20. (2018), General comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life.
21. Human Rights Council, *Question of the death penalty - Report of the Secretary-General/HRC/27/23*, paras 40-42, 72, <[www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Pages/ListReports.aspx](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Pages/ListReports.aspx)> accessed 12 Feb 2021.
22. Martin Luther King, Jr., *Letter from a Birmingham Jail* (1963).

23. Miller, David (2017), "Justice," *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/fall2017/entries/justice>.
24. Naughton, M. (2016) 'Miscarriages of justice, wrongful convictions and victims' in Corteen, K., Morley, S., Taylor, P., & Turner, J (2016) (Editors) *A companion to crime, harm, and victimization*. Bristol, United Kingdom: Policy Press.
25. Ngọc Quang (2014), "5 vụ án oan nổi tiếng làm chấn động Việt Nam" (5 famous injustice cases shocked Vietnam), [giaoducnet.vn](http://giaoducnet.vn), 04/08/2014.
26. Nguyen Thi Pha (2019), *Trợ giúp pháp lý trong tư pháp hình sự* (Legal aid in criminal proceedings), <https://trogiupphaply.gov.vn/ngghien-cuu-trao-doi/tro-giup-phap-ly-trong-tu-phap-hinh-su>, last accessed: 14/02/2021.
27. Presumption Of Innocence, Nolo's Plain-English Law Dictionary, <https://www.nolo.com/dictionary/presumption-of-innocence-term.html>
28. Perry, Stephen, 2000, "On the Relationship between Corrective and Distributive Justice," in *Oxford Essays in Jurisprudence, Fourth Series*, edited by Jeremy Horder, Oxford: Oxford University Press.
29. Quynh-Vi Tran (2018), *Five Facts About Vietnam's Death Sentences and Executions in 2018*, Published on December 21, 2018, at the Vietnamese, <https://www.thevietnamese.org/2018/12/five-facts-about-vietnam-death-sentence-and-executions-in-2018/>.
30. Raphael, D. D. (2001), *Concepts of Justice*, Oxford: Clarendon Press.
31. Rawls, John (1971), *A Theory of Justice*, Cambridge, MA: Harvard University Press.
32. Rawls, John (2001), *Justice as Fairness: a restatement*, Cambridge, MA: Harvard University Press.
33. Sadakat Kadri (2016), *Forced to Kill: The Mandatory Death Penalty and its Incompatibility with Fair Trial Standards*. A report of the International Bar Association's Human Rights Institute.
34. Scheuerman, H. L. (2013). The relationship between injustice and crime: A general strain theory approach. *Journal of Criminal Justice*, 41(6), 375–385. <https://doi.org/10.1016/j.jcrimjus.2013.06.019>.
35. Thanh Nien News, *Man gets 12 years in a decade-long murder case that tests Vietnam's justice system* <http://www.thanhniennews.com/society/man-gets-12-years-in-decadelong-murder-case-that-tests-vietnams-justice-system-49277.html>, last accessed: Feb 13th, 2021.

36. Thomas J. Bernard, "Criminal Justice," Encyclopaedia Britannica, <https://www.britannica.com/topic/criminal-justice>
37. Tuan V. Nguyen, Capital Punishment in Vietnam and Ho Duy Hai, Asia Sentinel, 16/5/2020, <https://www.asiasentinel.com/p/capital-punishment-in-vietnam-and>
38. Tuan Son (2019), Vietnam's public security ministry, calls for legislation on extradition. Title Online, Tuesday, August 06, 2019, <https://tuoitrenews.vn/news/society/20190806/vietnams-public-security-ministry-calls-for-legislation-on-extradition/50895.html>
39. 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.
40. UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN General Assembly resolution 67/187 of 20 December 2012.
41. UN Guidelines on the Role of Prosecutors, 1990.
42. 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.
43. U.S Death Penalty Information Center (DPIC) (1997), Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent, <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/innocence-and-the-death-penalty-the-increasing-danger-of-executing-the-innocent>
44. 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, from now on the Declaration 1985).
45. Vietnamese Constitution 2013.
46. Vietnamese Penal Code 2015 (revised 2017).
47. Vietnamese Criminal Procedures Code 2015.

# THE ROLE OF DECRIMINALIZATION AND DEPENALIZATION IN THE ABOLITION OF THE DEATH PENALTY: THE CASE OF VIETNAM IN THE PERIOD 1985 - 2015

Vu Dinh Hoang<sup>1</sup> and Vu Viet Tuong<sup>2</sup>

**Abstract:** The diminishing of the death penalty has become a common trend in the development of the world. In recent years, The United Nations has promoted the abolition of capital punishment. By 2019, 106 countries have eliminated this penalty in their criminal law regulations. In harmony with this global process, in the last 35 years since 1985, The Criminal Code of Vietnam has been amended many times in the clemency direction. The number of provisions that implied the death penalty has decreased dramatically. In Vietnam, decriminalization and depenalization are two legal processes that play an essential role in capital punishment elimination. This kind of penalty can be abolished by (1) Replacing it with less severe ones; (2) Diminishing the criminal liability of a crime by the process of depenalization and decriminalization. As a result, to promote the elimination of capital punishment, having a clear understanding of the relationship between decriminalization, depenalization, and diminishing the death penalty is very important. However, the practice shows that the research on these two categories has not been received adequate attention from legal scientists. This disadvantage has led to the fact that the abolition of the death penalty does not base on scientific factors but is affected by many negative influences, such as subjective psychology, social pressure, the press, and more. To gradually overcome this limitation, within its scope, this article will clarify the role of criminalization and decriminalization that manifest the content of clemency in the national criminal justice policy to abolish the death penalty through the practice of Vietnam in the period 1985-2015.

**Keywords:** Decriminalization; Depenalization; The abolition of the death penalty; Human rights; Clemency.

## 1. INTRODUCTION

Along with the success of the democratic revolutions, the promotion and protection of human rights and developing the concept of the rule of law have become dominant

---

1 Ph.D. Candidate, School of Law, Vietnam National University, Hanoi.

2 Ph.D Candidate Vietnam National University, School of Law.

directions that the whole world pursued. In that trend, the limitation and elimination of capital punishment in a country is a crucial index to measure the level of clemency and progress. However, the practice of the elimination of the death penalty in recent decades has shown that this process is badly affected by many factors such as the social, the media, individual experiences, philosophical attitudes, and more. This fact requires the lawmakers to build up a system of scientific factors and principles to guarantee the accuracy of abolishing the death penalty. In the case of Vietnam, under the rule of law and the principle of socialist legalism, the abolition of capital punishment can only be conducted through decriminalization and depenalization. Unlike other countries, these legislative activities play essential roles in Vietnam legislation. We have a series of studies about principles and scientific factors needed to consider when conduct decriminalization and depenalization that guarantees the accuracy of abolishing the death penalty. Within its context, this article will demonstrate the dialectical relationship between the abolition of the death penalty in national criminal law from 1999 to 2015 in Vietnam and affirms the impediment of precise awareness on decriminalization and depenalization for eliminating capital punishment in any country.

## 2 DECRIMINALIZATION AND DEPENALIZATION IN VIETNAM JURISPRUDENCE

In the legal science field, comparing to criminalization, decriminalization, and depenalization are less concerned by jurists in both Civil law and Common law system. While the legal scientists introduced the concept, the scientific grounds, and prove the necessity to conduct studies on criminalization, the research about decriminalization only focuses on specific cases. Even less attention is paid to depenalization.

Until now, it is hard to find a common understanding among legal scientists on the concepts of decriminalization. In Common law countries, there are two main points of view on this concept. Some jurists have listed decriminalization as an integral part of criminalization<sup>1</sup>. They regard this concept as a legislative process that demonstrates the idea of criminal justice policy. In oppose to this idea, other researchers argue that this concept (and criminalization) is an executive activity delivered by the public authorities<sup>2</sup>. In countries following the Civil law system, Nina Persak has pointed out that criminalization and decriminalization have not received much attention from jurists<sup>3</sup>. From the quite noticeable belief on the part of legal scholars that the issue of

---

1 Luke Namara (Ed), 'Theorising Criminalisation: The Value of Modalities approach' (2018) 7(3) *Crime Justice Journal* 92.

2 Michelle Madden Dempsey, 'Processes of Criminalization in Domestic and International Law: Considering Sexual Violence' (2017) 4 *Crim Law and Philos* 4.

3 Nina Peršak, *Criminalising Harmful Conduct* (Springer, 2020) 23.

criminalization (and decriminalization) has much to do with distasteful party politics, where the particular interests of the power groups play a much more significant role in creating a law than any legal standards or values of the society as a whole, it would appear that there is not so much a lack of interest than a conscious avoidance of the topic. Similar to decriminalization, depenalization is not a popular concept acknowledged by legal scientists in international criminal law studies.

The approach method of Vietnamese legal scientists is different from that of Common law and Civil law authors. In Vietnam, due to the influence of dialectical materialism from Marxism and the classical criminal law school, crime is prescribed as a “dynamic” concept by the jurists. It has a social and legal nature, so it emerges, develops, and disappears with society, the state, and the law. Therefore, over time, the criminal law always needs to be amended and codified in response to social changes. Consequently, besides criminalization, other legislative activities related to criminal law like decriminalization and depenalization are also of interest to scientists.

In Vietnam and other Sovietique law countries, legal scientists separate the four concepts of criminalization, decriminalization, penalization, and depenalization. Each of these categories has a separate theoretical system, including concept, content, principles, and factors affecting each of these processes. This systematic division is necessary because each division assumes its role in the legislative process.

### **3. CONCEPTS OF DECRIMINALIZATION AND DEPENALIZATION AND THEIR RELATIONSHIP TO THE ELIMINATION OF THE DEATH PENALTY**

#### *The concept of decriminalization and depenalization*

Decriminalization and depenalization are two essential legislative processes in Vietnam. They are regarded as two out of four most important categories that demonstrate the content of criminal justice policy<sup>1</sup>. By these legislation processes, the lawmakers will amend or codify the regulations of the criminal code to meet the requirements of combatting crime and crime prevention.

According to Vietnamese scientists' ideas, decriminalization and depenalization are legislative activities. *Decriminalization narrows the applicable scope of criminal law by no longer considering an act a crime (that act used to be a crime) and removing the criminal liability imposed on an individual or legal person who committed that act*<sup>2</sup>. This definition

1 The 04 most important categories that demonstrate the content of Vietnamese criminal justice policy are (1) Criminalization; (2) Decriminalization; (3) Penalization; (4) Depenalization. See more: Le Van Cam, *The basics of criminal law science - General (Postgraduate Curriculum)* (Vietnam National University of Hanoi 2019) 41-56.

2 Le Van Cam, *The basics of criminal law science - General (Postgraduate Curriculum)* (Vietnam National University of Hanoi 2019) 41.

shows a common understanding with law scientists in the Soviet Union (before 1991) and Russia<sup>1</sup>. Based on thoroughly scientific grounds, lawmakers will consider whether an offense has all the factors that committed a crime. If they found that that illegal act does not need to be considered a crime, they would decriminalize it and remove its criminal liability. Depenalization is a form of policy implementation<sup>2</sup>, thereby *lowers the critical level of criminal law by reducing criminal liability for criminals*<sup>3</sup>. At the absolute level, the decline of the hazardous level of criminal law means that the lawmakers will eliminate the criminal liability of an offense by decriminalizing that crime<sup>4</sup>. On the other hand, we can understand this term as replacing a penalty imposed on a crime with a less severe one<sup>5</sup>, increasing conditions to apply a punishment, or adding rules that exempt or reduce the criminal liability. According to this definition, it can be seen that decriminalization narrows the scope of enforcement of the criminal law. In contrast, depenalization narrows the level of coercion on the crimes specified in the criminal law.

*The relationship between decriminalization, depenalization, and the elimination of the death penalty*

The relationship between decriminalization, depenalization, and the abolition of capital punishment in Vietnam is demonstrated through the following aspects:

*(1) Decriminalization or depenalization is the only legitimate method to eliminate the death penalty*

A correct acknowledgment of the roles and functions of decriminalization and depenalization plays an essential role in promoting the abolition of capital. As mentioned above, crime is a social-legal phenomenon. Depending on each stage circumstances, the danger towards the community of certain types of crime changes. As a result, some crimes may no longer jeopardize or become harmless to the community. The imposing of the death penalty on these crimes becomes too severe and unnecessary<sup>6</sup>. In this

---

1 Злобин, *Основания уголовно-правового запрета: криминализация и декриминализация* (Наука 1982) 220.

2 Adda, J., McConnell, B., & Rasul, I. 'Crime and the Depenalization of Cannabis Possession: Evidence from a Policing Experiment, *Journal of Political Economy*' (2014) 122(5) *Journal of Political Economy* 1131.

3 Le Cam, Vu Dinh Hoang, 'Penalization and depenalization in Vietnam: a study from the practice of legislation in 20 years period (1999-2009)' (2019) 05 *The procuracy Journal* 27-38.

4 Ho Trong Ngu, 'Some issues about the penalization and depenalization of illegal acts in the economic field in current criminal policy' (Hochiminhcitygov, 2010) <<http://www.hids.hochiminhcity.gov.vn/>> accessed: 01 December 2020.

5 Donohue, Ewing, and Peloquin, *Rethinking America's Illegal Drug Policy*. In *Controlling Crime: Strategies and Tradeoffs* (Chicago Press 2012) 216.

6 Le Cam, Vu Dinh Hoang, 'Penalization and depenalization in Vietnam: a study from the practice of legislation in 20 years period (1999-2009)' (2019) 05 *The procuracy Journal* 27-38.

case, less harsh punishments may still lead to positive outcomes<sup>1</sup>. In this perspective, sometimes, the death penalty is not as effective as other punishments that leads to the need to replace capital punishment. In such cases, decriminalization and depenalization play an indispensable role. By these legislative actions, the lawmakers make criminal law become compromising and cope with requirements on preventing and combating crimes.

In Vietnam, socialist legality is one of the two most essential principles of criminal law. This principle stipulates that the Criminal Code is the only legal document that sets out the crime and criminal liability to the individual or legal entities committing such crime. The codification of the criminal law through the legislative processes of decriminalization or depenalization *is the only method* that can abolish the death penalty for one or all crimes.

The elimination of the death penalty can only be put into effect by decriminalization and depenalization. By decriminalization, the lawmakers remove the criminal liability of an offense. Consequently, the dangerous act is no longer considered a crime, and the death penalty imposed on it is also dismissed. With the concept of depenalization, we can conclude that there are three ways to abolish the death penalty:

(a) Replacing capital punishment with another less severe one such as life imprisonment, imprisonment, or a fine;

(b) Increasing conditions to apply the death penalty makes it harder to impose this penalty on the offenders.

During 1985 - 2015, in the general provisions of 1985, 1999, and 2015 criminal code, the lawmakers have dismissed the death penalty imposed on five crimes via decriminalization and twenty-four others via depenalization. In the period when the 1999 Penal Code was enacted, by depenalization, the death penalty in four crimes in Articles 154, 156, 158, 324 was converted to imprisonment with a term of ten years (Article 154), fifteen years (Article 156, 158), twenty years (Article 324). In the remaining seven offenses (Article 81, 90, 138, 143, 200, 230, 280), life imprisonment is the highest penalty for offenders. Since 2009, the death penalty in all crimes has been replaced by life imprisonment.

---

<sup>1</sup> Le Van Cam, *The basics of criminal law science - General (Postgraduate Curriculum)* (Vietnam National University of Hanoi 2019) 42.

**Table 1: The abolition of the death penalty by decriminalization and depenalization since 1985**

Period	Number of death penalty dismissed	Via depenalization	New punishment	Via decriminalization
1985 - 1999	0	0		0
1999 - 2009	16	11	<p><b>Life imprisonment (7)</b>            Infringing upon territorial security (Article 81); Destroying detention camps (Article 90); Stealing property (Article 138); Destroying or deliberately damaging property (Article 143); Forcing, inducing other persons into the illegal use of narcotics (Article 200); Illegally manufacturing, stockpiling, transporting, using, trading in or appropriating military weapons and technical means (Article 230); Abusing positions and powers to appropriate property (Article 280).</p>	5 Obtaining socialist property by fraud (Article 129); Corruption of socialist property (Article 133); Abusing positions and powers to appropriate socialist property (Article 134a); Obtaining socialist property by fraud (Article 134); Destroying or deliberately damaging socialist property (Article 138); along with other violations of socialist property.
			<p><b>Imprisonment (4)</b>            Illegal cross-border transportation of goods and currencies (Article 154); Fake goods not being food, foodstuffs, curative medicines, preventive medicines manufacture and trading (Article 156 and 158 - the 1985 Criminal Code regulates as one crime); Abandoning combat positions (Article 324)</p>	
2009 - 2015	8	8	<p><b>Life imprisonment (8)</b>            Rape (Article 111); Appropriating property through swindling (Article 139); Smuggling (Article 153); Making, storing, transporting, and circulating counterfeit money, treasury bills, and bonds (Article 180); Organizing the illegal use of narcotics (Article 197); Hijacking aircraft, ships (Article 221); Offering bribes (Article 289); Destroying military weapons, technical means (Article 334).</p>	0

2015 - now	7	7	<b>Life imprisonment (9)</b> Plundering property (Article 168); Manufacturing and trading counterfeit food or food additives (Article 193); Illegal possession of narcotic substances (Article 249); Appropriation of narcotic substances (Article 252); Destruction of work, facility, equipment essential for national security (Article 303); Insubordination (Article 394), and Surrendering to the enemy (Article 399).	0
<b>Total</b>	29	24		5

Besides, as mentioned above, the lawmakers have abolished the death penalty via depenalization by increasing conditions to apply this punishment that makes it harder to impose it on the offenders. During the period 1999 - 2009 and 2009 - 2015, the lawmakers made some changes in the general provisions of the Criminal codes, thereby setting out conditions to limit the imposition of the death penalty on specific subjects. With the enactment of the 2015 Criminal Code, there are four types of offenders that do not have to bear capital punishment. They are pregnant women, women nursing their children under thirty-six months old, offenders who are seventy-five years of age or older at the time of committing crimes or being tried, and offenders who committed a crime on embezzling property, receiving bribes but actively surrendering and returning at least three-quarters of embezzled properties, receiving bribes, and actively cooperating with the authorities in detecting and investigating crimes or contributing substantially.

**Table 2: Types of offender do not have to bear capital punishment**

Period	Types of offender do not have to bear capital punishment
1985 - 1999	<i>None</i>
1999 - 2009	<i>None</i>
2009 - 2015	(1) Pregnant women; (2) Women nursing their children under thirty-six months old.
2015 - now	(1) Persons who are seventy-five years of age or older at the time of committing crimes or being tried. (2) Offenders who committed the crime on embezzling property, receiving bribes but actively surrendering and returning at least three-quarters of embezzled properties, receiving bribes, and actively cooperating with the authorities in detecting and investigating crimes or contributing substantially.
<b>Total</b>	<b>4</b>

(2) *The abolition of the death penalty is implemented based on specific factors of decriminalization and depenalization.*

Since the 90s of the twentieth century, Vietnamese legal scientists have paid much attention to the construction and completion of criminal law. Based on legal science learned from socialist countries such as the Soviet Union, East Germany, Czechoslovakia, and more. Vietnamese lawmakers have studied and proposed to build a system of scientific bases of criminalization, decriminalization, penalization, and depenalization.

According to Prof. Dr. Le Van Cam, one of the four most outstanding criminal law scientists in Vietnam, affirms that the implementation of decriminalization and depenalization must be based on the following scientific grounds (1) Legal bases; (2) Criminology; (3) Psychology - morality; (4) Culture; (5) Social-economic; (6) History - tradition; (7) International integration<sup>1</sup>.

It is essential to take into consideration many scientific grounds of the process of decriminalization and depenalization when abolishing capital punishment. Based on inheriting, acquiring, and developing the views of Prof. Sci. Dr. Le Van Cam, we can redistribute the abovementioned scientific grounds that need to be evaluated when eliminating the death penalty.

(a) *The danger brought to the society of the offense:* A decriminalized crime must be an offense that is no longer dangerous to society; Or the social jeopardy of such acts has decreased significantly, making it unnecessary to use criminal law to deal with these illegal acts. In the case of depenalization, when considering replacing the death penalty imposed on an offense, the lawmakers must acknowledge that the social danger of that crime has decreased, making it deterrent enough to impose less severe punishment.

(b) *The relative popularity of the illegal act:* When a crime no longer exists in society, the lawmakers dismiss it by the process of decriminalization. Besides, decriminalization and depenalization of a crime arise when such behavior becomes uncommon in society<sup>2</sup>.

(c) *The ability to effectively prevent and combat dangerous behaviors by civil and administrative legal sanctions in case of decriminalization:* Decriminalized crimes may remain unlawful as defined in other laws. Therefore, before dismissing an offense, it is necessary to examine the effectiveness of preventing and combating such illegal acts by the civil and administrative legal sanctions. If those remedies can control and prevent the offense effectively, lawmakers can initiate decriminalization of the crime.

---

1 The basics of criminal law science - General (Postgraduate Curriculum) (Vietnam National University of Hanoi 2019) 47-51.

2 Le Cam, *Policy fundamental issues in the period of building the rule of law state* (Legal Science Information: Institute of Legal Science - Ministry of Justice 1999) 53.

(d) *The potential for the positive effect of other punishments and judicial remedies that are less severe than the death penalty in case of depenalization:* In the process of depenalization, a less severe penalty will replace capital punishment. This dismissal will reduce the strictness of the sanctions and affects the effectiveness of its imposition. Therefore, the lawmakers need to consider the necessity and efficiency of the replacement penalty to ensure that the crime is well-controlled.

(e) *The economic - cultural - social - political basis:* Crime is a social and legal concept, so the process of decriminalization and depenalization must be done based on requirements arising from the economic, cultural, social, and political situation. If the legislators do not consider this basis, it can lead to the risk of criminal neglect. It makes the deterrence of the regulations decrease that negatively impact society.

(f) *The criminology basis:* This basis requires the lawmakers to consider comprehensive factors before deciding to apply decriminalization or depenalization. These factors include<sup>1</sup>:

- The identity of offenders;
- The causes and conditions of the crime;
- The developments, dynamics of crime situation;
- The identity of the victim, and more.

For example, by studies of criminology, scientists have shown that there is not any apparent relationship between the imposition of the death penalty and the decline in the number of serious crimes committed. The study of criminal factors will describe the crime situation scientifically. Besides, the criminology factor shows the relationship between crime and other elements in society. Thereby, it reflects the nature and level of danger of the offense, causes, and conditions of the crime accurately. On that basis, lawmakers objectively evaluate a crime and decide whether to eliminate the death penalty for that crime.

(g) *The international integration basis:* The process of decriminalization or depenalization must be based on international standards consistently with conditions in Vietnam. For example, although having not fully implemented the abolition of the death penalty, Vietnam still recognizes this progressive idea. It introduces appropriate clemency policies to dismiss capital punishment gradually in criminal law.

By applying these grounds, in abolishing the death penalty, lawmakers avoid the risk of negative influences from other factors such as the social, the media, individual

---

<sup>1</sup> Trinh Tien Viet, Nguyen Khac Hai, *The Criminology Curriculum* (National University of Hanoi Press 2020) 25-33.

experiences, philosophical attitudes, and more. Based on thoroughly scientific grounds, lawmakers will consider whether an offense has all the factors that committed a crime. If they found that that illegal act does not need to be considered a crime, they would decriminalize it and remove its criminal liability. As a result, the death penalty imposed on that crime is also eliminated by decriminalization.

However, lawmakers need to apply these scientific bases flexibly. A crime does not need to meet all the above bases to eliminate the death penalty of it. These criteria are the basis for lawmakers to examine in the process of considering and evaluating a crime. In some cases, to encourage offenders to correct their mistakes, the severe consequences they have caused, lawmakers can remove the death penalty for that crime. Sometimes, the best way to maximize the effectiveness of crime prevention is to abolish the most severe punishment<sup>1</sup>.

The practice in Vietnam is very different from that of developed countries. The construction of a socialist state under the rule of law and a market economy has complicated the crime situation. Besides, the people's knowledge is still limited. The majority of Vietnamese still support the imposition of the death penalty, which makes the abolition of this punishment face much pressure. In a survey conducted in 2014 of 1000 random people belonging to two groups of prisoners serving punishment in prison and those studying law post-graduate degrees, about 43% of respondents still considered it necessary to retain the death penalty in criminal law. Surprisingly, up to 55.6% of inmates said that this penalty should be kept in the Vietnamese legal system<sup>2</sup>. Therefore, on the one hand, to ensure and protect human rights, on the other hand, to protect the safety of society from crime, the abolition of the death penalty in Vietnam is carried out with caution. It is this prudence that has been clearly shown in the system of bases for decriminalization and depenalization.

#### **4. ELIMINATING THE DEATH PENALTY BY DECRIMINALIZATION AND DEPENALIZATION THROUGH SEVERAL SPECIFIC CASES**

*The elimination of the death penalty for pregnant women or women nursing children under thirty-six months old committed a crime*

From the 1980s to the beginning of the XXI century, Vietnam had started to participate in international integrations. The Communist Party of Vietnam understood the importance

---

1 Nguyen Dang Dung, Pham Hong Thai, Vu Cong Giao, La Khanh Tung, Things to know about the death penalty (The Labor Press 2010) 26.

2 Le Van Cam, Nguyen Thi Lan, 'The death penalty in Vietnam's criminal law: Retain or eliminate?' (2014) Vietnam National University Journal of Science 2014 30 (3) 13.

of applying advanced ideas to developing the Fatherland, including abolishing capital punishment. The Party had made many important decisions on the reformation and refinement of the legal system include Resolution No. 08/NQ-TW on January 2, 2002, of the Politburo on some principal responsibilities of the judicial body<sup>1</sup>, Resolution No. 48/NQ-TW on May 24, 2005, of the Politburo on the strategy of building and completing the Vietnamese legal system to 2010, with an orientation to 2020<sup>2</sup>, and Resolution No. 49/NQ-TW on June 2, 2005, of the Politburo on the Judicial reform strategy to 2020<sup>3</sup>. These Resolutions have stated the proposal of restricting the death penalty<sup>4</sup> in Vietnam. The spirit of the Resolutions above matches with the content of The International Covenant on Civil and Political Rights (ICCPR) 1966. It showed the common understanding of Vietnam of abolishing the death penalty and the responsibility as a member state of the Covenant.

The 1999 Criminal Code was a stepping stone for Vietnamese criminal justice policy towards the process of depenalization that narrowing and determining the scope and conditions of imposing this kind of punishment<sup>5</sup>. In this criminal code, for the first time in Vietnamese criminal law history, the death penalty is dismissed with convicted women nursing children under thirty-six months old (including adopted children). In this case, the Court will convert the sentence into life imprisonment. The abolition of capital punishment with these subjects mainly bases on (1) The economic - cultural - social - political basis, (2) The criminology basis, (3) The international integration basis.

When analyzing the economic - cultural - social - political basis, Vietnam is a country that is heavily affected by the Worship of Mother goddesses. Vietnamese has established this religion during the 1500s from the very characteristic of wet rice agriculture. It upholds the vital role of the mothers<sup>6</sup> due to their privilege of giving birth to maintain society. As a result, they have more priority and protection in many aspects.

From the perspective of criminology, the elimination of capital punishment on

1 The Politburo, *Some principal responsibilities of the judicial body*, (Resolution No. 08/NQ-TW on January 2, 2002) sec B part 1 point đ.

2 The Politburo, *The strategy of building and completing the Vietnamese legal system to 2010, with an orientation to 2020* (Resolution No. 48/NQ-TW on 24 May, 2005) sec II para 5.

3 The Politburo, *The Judicial reform strategy to 2020* (Resolution No. 49/NQ-TW on June 2, 2005) sec 2 para 2.1.

4 Phuong Thao, '*Narrowing the scope of applying the death penalty in the Criminal Code 1999*' (Central Internal Affairs Committee, 2013) <<https://noichinh.vn/nguyen-cuu-trao-doi/201312/thu-hep-pham-vi-ap-dung-hinh-phat-tu-hinh-trong-bo-luat-hinh-su-nam-1999-293434/>>, assessed: 22 December 2020.

5 Trinh Quoc Toan, '*The death penalty in Vietnam Criminal Law – Recommendations*' (Ministry of Justice, 2016) <<http://www.moj.gov.vn>>, assessed: 22 December 2020.

6 Vu Hong Van, *Mother worship belief in the spiritual life of the Vietnamese people* (The People's Police Press 2020) 69.

pregnancy or women nursing children under thirty-six months old (including adopted children) can deliver many positives in crime prevention. It creates opportunities for the females convict to re-educate themselves to become good citizens and bring up their children. The mothers will teach, look after, protect their children from becoming the victim of criminals. Besides, they also prevent their children from committing illegal offenses that harm society. As a result, the effectiveness of crime prevention increases significantly.

In both theoretical and practical, executing a mother when a child is heavily dependent on her for its survival<sup>1</sup> or a pregnant woman is inhumane. To prevent this inhumanity, abolishing the death penalty imposed on these subjects has become a global standard of international humanitarian law<sup>2</sup> since the 60s of the XX century. The 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1969 American Convention on human rights speak only of pregnant women; ECOSOC safeguards three states that a death sentence shall not be carried out on new mothers. The Article 30(e) of the 1990 African Charter on the Right and Welfare of child requires states to prohibit passing the death sentence on mothers of infants and young children (Without specifying the age); Article 4(2)(j) of the 2003 Protocol to the African Charter on Human and Peoples' rights of Women in Africa forbids the execution of "nursing women." The EU guideline on the Death penalty state that "capital punishment may not be imposed on new mothers, with new mothers being considered ones who are still breast-feeding<sup>3</sup>. Based on absorbing the advancement of the views of humanity on the abolition of the death penalty with pregnant women and women nursing their children under thirty-six months old has been stipulated by Vietnamese lawmakers in the 2015 Criminal Code. In this case, to ensure the principle of fairness of the criminal law, the death penalty is replaced by life imprisonment.

*The elimination of the death penalty for offenders who are over seventy-five years old*

In the third codification, the legislators have demonstrated the idea of The Communist Party on judicial reform. They restrict the imposition of the death penalty by adding many clemency statutes.

In General provision, Article 40 affirms the definition of the death penalty as an unusual punishment that only applies to offenders who committed the most severe crimes. This article has fully recognized the group of crimes that have to bear the death penalty compared to the previous one. Accordingly, certain crimes in the group of violating

---

1 Oliver Robertson (Ed), *Strengthening death penalty standards* (Penal Reform International 2015) 9.

2 ICCPR 1966, 6(5); Additional Protocol I 1977, 76(3); Additional Protocol II 1977, 6(4).

3 Oliver Robertson (Ed), *Strengthening death penalty standards* (Penal Reform International 2015) 8-9.

national security<sup>1</sup>, human life<sup>2</sup>, drug-related crimes<sup>3</sup>, corruption<sup>4</sup>, and other serious crimes, such as Fake goods not being food, foodstuffs, curative medicines, preventive medicines manufacture and trading<sup>5</sup>; Terrorism<sup>6</sup>; Undermining peace, provoking aggressive wars<sup>7</sup>; Crimes against Humanity<sup>8</sup>; and War crimes<sup>9</sup>. Article 40.2 and 40.3 of the Criminal Code 2015 added cases of not applying capital punishment on seventy-five years of age or older at the time of committing crimes or being tried; not applying capital punishment on offenders who are seventy-five years of age or over. The narrowing of the range of statutes regulated the death penalty in the 2015 Criminal Code by depenalization shows clemency of criminal justice policy in Vietnam. Moreover, it also demonstrates the fulfillment of international human rights standards on eliminating capital punishment.

For those whose age from seventy-five years old, it is necessary to take into account the following grounds to abolish the death penalty via depenalization: (1) The danger brought to the society of the crime; (2) The relative popularity of the illegal act; (3) The economic - cultural - political - social basis; (4) The criminology basis.

It shows that criminal cases committed by seventy-five years old and above offenders are not popular. The severity of crimes committed by this target group is not high due to the physical and mental characteristics of the person aged seventy-five and above has decreased significantly. Statistics from the Central Population and Housing Census Steering Committee Office show that the average life expectancy of Vietnamese is 73.6 years old. The proportion of Vietnamese people over seventy-five years old is not high, accounting for less than 3% of the population<sup>10</sup>. Furthermore, the elderly are often subject to many social constraints and morality. They often think that they must be an example for their descendants to follow. Vietnamese elderly believe that violating principles, regulations of law, and social ethics is taboo to avoid for them. Consequently, the rate of severe crimes committed by people of this age group in Vietnam is rare. It is so few that the documents and statistics of the Supreme People's Procuracy and the Supreme People's Court submitted to the National Assembly for years are not mentioned related figures.

---

1 The 2015 Criminal Code, s 2(XIII).

2 Ibid, s 2 (123).

3 Ibid, s 2(XX).

4 Ibid, s 2(XXIII).

5 Ibid, s 2 (194).

6 Ibid, s 2 (299).

7 Ibid, s 2 (421).

8 Ibid, s 2 (422).

9 Ibid, s 2 (424).

10 The Central Population and Housing Census Steering Committee Office, *The 2019 Population and Housing Census* (HelpAge International in Vietnam 2020) < <https://helpagevn.org/blogs/tin-du-an/nguoi-cao-tuoi-viet-nam-theo-ket-qua-tong-dieu-tra-dan-so-va-nha-o-nam>>, assessed: 18/4/2021.

Moreover, base on the cultural and social basis, since the beginning of A.D, the Chinese feudal dynasties had dominated Vietnam for nearly 1000 years. This period is called the Northern colonial period and lasted until the year 938. Due to this geopolitical factor, Confucianism (儒教) has affected almost all aspects of Vietnam<sup>1</sup>. It creates a tradition and duty of respecting and tolerating the elderly in this country<sup>2</sup>. Besides that, the person whose age from seventy-five years old is a unique group of subjects who have reached longevity. They are entitled to longevity programs; have the privilege to enjoy the social protection policy<sup>3</sup>. The above reasons and the practice of prevention, combating crime show that the application and execution of the death penalty for the elderly over seventy-five years old is not highly educated. That is why, until the 2015 Penal Code, to implement the humanitarian policy, lawmakers have to dismiss capital punishment for those whose age from seventy-five years old via the process of depenalization.

*The elimination of the death penalty for corrupted officers who return three quarter corrupted property*

Clause 3, Article 40 of the 2015 Criminal Code marked the first time in history that the lawmakers applied the exemption of the death penalty for people sentenced to death for embezzlement, receiving bribes. Considering the scientific factors of decriminalization and depenalization, nearly all of these bases assert that the death penalty should be maintained for these serious crimes. However, a careful examination based on the economic, cultural, political, and social grounds shows that abolishing the death penalty can bring many positive aspects for overcoming the consequences caused by the crime of embezzlement and receiving the bribe.

The practice of Vietnam in the past ten years shows a complicated situation of corruption crime. By the process of investigation, prosecution, and trial, the authority has discovered many critical cases. It involved many high-ranking officials with the amounts of corrupted assets can up to millions of dollars in each one. A typical example is the case of Nguyen Bac Son - Former Minister of Information and Communication with corrupted assets of up to three million dollars; the case of Ha Van Tham - Former Chairman of Ocean Commercial Joint Stock Bank - OceanBank with the corrupted property of up to four million dollars, and more. However, it is very challenging to force the offenders to return the asset recovery in these cases. In the condition that Vietnam's economy is still Vietnam's economy is poor, corrupt assets are considerable, making the consequences of this crime even more

---

1 Tho Nguyen Ngoc, 'Confucianism and humane education in contemporary Vietnam' (2016) International Communication of Chinese Culture 3(4) 645, 652.

2 Woodhead, Linda; Kawanami, Hiroko; Partridge, Christopher H. (eds.), *Religions in the Modern World: Traditions and Transformations (3rd ed.)* (London: Routledge 2016) 143-172

3 The Ministry of Justice, *Proposal on the Criminal Code Project (amended)* (Government No 186, 2015) 15.

severe. Therefore, to encourage offenders to be aware of their mistakes, to overcome the consequences caused by crimes, Vietnamese lawmakers have set out Clause 3, Article 40 of the 2015 Penal Code. This new regulation shows the idea of clemency in the Criminal Code. Also, it reassures the corrupted officers to return the corrupted property to reduce the burden on the Vietnamese economy. However, it should be noted that not all cases of surrendering the full three-quarters of the wealth acquired through corruption are exempt from the execution of the death penalty. To enjoy this clemency policy by law, offenders must meet two requirements (1) Return three-quarters of property obtained from embezzlement, receiving bribes; (2) Actively cooperate with authorities in detecting, investigating, and dealing with crimes or committing great publicity<sup>1</sup>.

## 5. CONCLUSION

In the past 30 years, Vietnam has actively and persistently implemented a constant policy in criminal law. Accordingly, since 1985, the death penalty rate in the Penal Code has decreased to 59%. By 2015, there are only 18 crimes that have to bear the death penalty. It accounts for 5.7% of the regulations in the criminal code. The death penalty abolition is the process of actively absorbing the progressive and clemency ideas of humanity. It shows the great attempt of the Vietnam government to dismiss the death penalty. On that sentiment, the abolition of this severe penalty demonstrates the role of decriminalization and depenalization. Despite its essential, there is limited awareness of decriminalization and depenalization in legal science. Consequently, it delays or reduces the effectiveness of dismissing the death penalty and confounds states. It makes them fall into a debate about the necessity of abolishing this penalty in their national criminal law.

Based on Vietnamese practice, the article has analyzed and pointed out the role and the close relationship of the correct perception of these two legislative concepts in abolishing the death penalty. In particular, to abolish the death penalty, lawmakers must consider the scientific basis of the process of decriminalization and depenalization of a crime. It contains the following seven bases:

- (1) The danger brought to the society of the offense;
- (2) The relative popularity of the illegal act;
- (3) The ability to effectively prevent and combat dangerous behaviors by civil and administrative legal sanctions in case of decriminalization;

---

1 Nguyen Thi Hong Loan, '*Discussing the death penalty is regulated by the Criminal Code 2015, amended and supplemented 2007*' (The investigation institution of The Supreme Procuracy, 2019) <<https://coquandieu.travkstc.gov.vn/ban-ve-hinh-phat-tu-hinh-duoc-quy-dinh-blhs-nam-2015-sua-doi-bo-sung-nam-2017/>>, accessed: 23 December 2020.

(4) The potential for the positive effect of other punishments and judicial remedies that are less severe than the death penalty in case of depenalization;

(5) The economic - cultural - political - social basis;

(6) The criminology basis;

(7) The international integration basis.

Through a comprehensive review of the seven scientific bases of decriminalization and depenalization, the process of abolishing the death penalty will be less affected by emotional, subjective, and relevant factors. As a result, the criminal law will match the need for combatting against crimes of a country. Through its analysis, the article hopes to contribute to a different scientific perspective, thereby promoting the abolition of the death penalty in Vietnam and other countries.

## REFERENCES

### Books, journal, and reports

1. Adda, J., McConnell, B., & Rasul, I. 'Crime and the Depenalization of Cannabis Possession: Evidence from a Policing Experiment, *Journal of Political Economy* (2014) 122(5) *Journal of Political Economy* 1131.
2. Le Van Cam, *The basics of criminal law science - General* (Postgraduate Curriculum) (Vietnam National University of Hanoi 2019) 41.
3. Le Cam, Vu Dinh Hoang, 'Penalization and depenalization in Vietnam: a study from the practice of legislation in 20 years (1999-2009)' (2019) 05 *The procuracy Journal* 27-38.
4. Le Cam, *Policy fundamental issues in building the rule of law state* (Legal Science Information: Institute of Legal Science - Ministry of Justice 1999) 53.
5. Corey Daniel, Burton, *Families of murder victims' perceptions of capital punishment: a content analysis of what family members say following executions* (Electronic Theses and Dissertations 2012) 184 31.
6. Nguyen Dang Dung, Pham Hong Thai, Vu Cong Giao, La Khanh Tung, *Things to know about the death penalty* (The Labor Press 2010) 40.
7. Donohue, Ewing, and Peloquin, *Rethinking America's Illegal Drug Policy. In Controlling Crime: Strategies and Tradeoffs* (Chicago Press 2012) 216.
8. Duff et al., *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014) 2.

9. Pham Manh Hung, 'Criminalization and decriminalization cases in the Criminal Code 2015' (2016) 1 Procuracy Journal 14.
10. Jeffrey Fagan, 'Deterrence and the death penalty in the International perspective' in UNHRC, *Moving away from the death penalty: Argument, trend, and perspectives*, (United Nation 2015) 98.
11. Ngo Sy Lien, *Complete Annals of Đại Việt* (Hong Duc Press 2020) 229.
12. Luke Namara (Ed), 'Theorising Criminalisation: The Value of Modalities approach' (2018) 7(3) Crime Justice Journal 92.
13. Nina Peršak, *Criminalising Harmful Conduct* (Springer, 2020) 23.
14. Matthew Rousu, 'The Death Penalty vs. Life Incarceration: A Financial Analysis' (2016) 7(4) Susquehanna University Political Review 25.
15. Mayr, Ernst, *The Growth of Biological Thought: Diversity, Evolution, and Inheritance* (Harvard University Press 1982) 485.
16. Michelle Madden Dempsey, 'Processes of Criminalization in Domestic and International Law: Considering Sexual Violence' (2017) 4 Crim Law and Philos 4.
17. The Ministry of Justice, *Proposal On the Criminal Code Project (amended)* (Government No 186, 2015) 15.
18. MOJ, UNDP & EU, *Report on the possibility for Vietnam to join The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)* (EUJULE 2019) 7-8.
19. Oliver Robertson (Ed), *Strengthening death penalty standards* (Penal Reform International 2015) 9.
20. Truong Huu Quynh, Dinh Xuan Lam, Le Mau Han, *Overview of Vietnamese history* (The Education Press 2008) 127-129.
21. Samuel R. Gross, Barbara O'Brien, Chen Hu, and Edward H. Kennedy, 'Rate of false conviction of criminal defendants who are sentenced to death (2014) 111 20 PNAS 7230, 7235.
22. Son, B. N. 'Confucian constitutionalism in imperial Vietnam' (2013) NTU L. Rev. 8 373.
23. Thomas Sobirk Petersen (Ed), *Why Criminalize? New Perspectives on Normative Principles of Criminalization* (Springer 2020) 17-110.
24. The Politburo, *Some principal responsibilities of the judicial body*, (Resolution No. 08/NQ-TW on January 2, 2002) sec B part 1 p đ.

25. The Politburo, *The strategy of building and completing the Vietnamese legal system to 2010, with an orientation to 2020* (Resolution No. 48/NQ-TW on 24 May 2005) sec II para 5.
26. The Politburo, *The Judicial reform strategy to 2020* (Resolution No. 49/NQ-TW on June 2, 2005) sec 2 para 2.1.
27. Ngo Duc Thinh, 'The Cult of the Female Spirits and the Mother Goddesses 'Mẫu'' (1996) *Vietnamese Studies* 121 no.3 83-96.
28. Tho Nguyen Ngoc, 'Confucianism and humane education in contemporary Vietnam' (2016) *International Communication of Chinese Culture* 3(4) 645, 652
29. Trinh Quoc Toan, *Punishments in Vietnamese criminal law, under the perspective of human rights protection* (The National Political Press 2015) 127
30. Vu Hong Van, *Mother worship belief in the spiritual life of the Vietnamese people* (The People's Police Press 2020) 69.
31. Trinh Tien Viet, *Social control theory on crimes and its application in Vietnam* (Ministry Press 2016) 13.
32. Trinh Tien Viet, Nguyen Khac Hai, *The Criminology Curriculum* (National University of Hanoi Press 2020)
33. Злобин, *Основания уголовно-правового запрета: криминализация и декриминализация* (Наука 1982) 220.
34. Woodhead, Linda; Kawanami, Hiroko; Partridge, Christopher H. (eds.), *Religions in the Modern World: Traditions and Transformations (3rd ed.)* (London: Routledge 2016) 143–172.

## Law

1. Additional Protocol I 1977.
2. Additional Protocol II 1977.
3. ICCPR 1966.
4. The 1985 Criminal Code.
5. The 1999 Criminal Code.
6. The 2015 Criminal Code.

**Website**

1. Maria Donatelli, '117 countries vote for a global moratorium on executions' (World Coalition, 19 December 2014) <http://www.worldcoalition.org/united-nations-resolution-moratorium-death-penalty-executions-general-assembly.html>, accessed: 21 December 2020.
2. Amnesty International, 'Does it give victims justice?' (Amnesty International 08 January 2016) <<https://www.amnesty.org/en/what-we-do/death-penalty/death-penalty-your-questions-answered/>> accessed: 21 December 2020.
3. Amnesty International, 'Death penalty in 2019: Facts and figures' (Amnesty International, 21 April 2020) <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures>, accessed: 21 December 2020.
4. Death Penalty Information Center, 'History of the death penalty, The early history of the death penalty (Death Penalty Information Center 07 February 2019), <<https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty>> accessed: 21 December 2020.
5. Nguyen Thi Hong Loan, Discussing the death penalty is regulated by the Criminal Code 2015, amended and supplemented 2007 (The investigation institution of The Supreme Procuracy, 2019) <<https://coquandieutravkstc.gov.vn/ban-ve-hinh-phat-tu-hinh-duoc-quy-dinh-blhs-nam-2015-sua-doi-bo-sung-nam-2017/>>
6. Ho Trong Ngu, 'Some issues about the penalization and depenalization of illegal acts in the economic field in current criminal policy' (Hochiminhcitygov, 2010) <<http://www.hids.hochiminhcity.gov.vn/>> accessed: 01 December 2020.
7. Phuong Thao, 'Narrowing the scope of applying the death penalty in the Criminal Code 1999' (Central Internal Affairs Committee, 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/>>, assessed: 22 December 2020.
8. The Central Population and Housing Census Steering Committee Office, *The 2019 Population and Housing Census* (HelpAge International in Vietnam 2020) <<https://helpagevn.org/blogs/tin-du-an/nguoi-cao-tuoi-viet-nam-theo-ket-qua-tong-dieu-tran-dan-so-va-nha-o-nam>>, assessed: 18/4/2021.
9. Trinh Quoc Toan, 'The death penalty in Vietnam Criminal Law – Recommendations' (Ministry of Justice, 2016) <<http://www.moj.gov.vn>>, assessed 22 December 2020.

# DEATH PENALTY IN FEUDAL LAW OF CHINA AND VIETNAM

A/Prof. Dr. Do Duc Minh<sup>1</sup>

**Abstract:** The harsh and brutal penalty system, typically *the death penalty* 死, is one of the basic features of Vietnamese feudal law, strongly reflecting the political-political ideology and identity of the Chinese legal system that Vietnam has influenced. Therefore, the study to understand the death penalty and its execution in the feudal history of Vietnam is meaningful in terms of scientific awareness and contributes to providing more legal basis and historical practice to consider the death penalty issue in modern social life.

**Keywords:** Death penalty, execution, feudalism, Vietnam.

## I. PENALTIES IN CHINESE FEUDAL LAW

### 1. Chinese feudal law (China legal system)

#### 1.1. China and "Legal China."

Ancient *China* 中國 is a major cultural center with many unique lines of thought. It is one of the brightest stoves of the world and the East, the emitting center of the Aurore de la civilization humane. As the cradle of Eastern philosophy, "Political philosophy in ancient China has a great influence on the political life of many countries in the East such as Vietnam, Japan, and Korea, especially the influence of *Confucianism* 儒家 and *Legalism* 法家," thereby forming the arc of influential Chinese culture known as *Oriental Despotism*.

Ancient China is a relatively long period from the appearance of the first state (21st century BC) to the reunification of the Qin Dynasty (221 BC), marking the continuous development and improvement of states from *Xia* 夏 - *Shang* 商 - *Zhou* 周. The historical period of Chinese feudalism was determined from 221 BC to 1840, starting with the historic milestone of Qin Shihuang unification and ending with the *Sino-English Opium War event* 英鴉片戰爭, China became a half feudal colonial country. The law of the Zhou dynasty (1122-249 BC) includes two components: *Ceremonial Code* 禮<sup>2</sup> and *Criminal*

---

<sup>1</sup> School of Law, Vietnam National University, Hanoi.

<sup>2</sup> Ceremony: In the narrow (original) sense, the ceremony is just rituals of sacrifice and offering, and then includes the customs and practices such as mandarins, marriage, funerals ... In the broad sense, the

*Code 刑*, in which the former is superior, the latter inferior; *Ceremonial Code should not be applicable on the laypeople, Criminal should not be forcible to the royal officers 禮不下庶人, 刑不上大夫*; the criminal code specializes in suppressing the people, focusing on suppressing the crime and riots, and protecting the kingdom. In the legal field, inheriting the initial ideas of *rule by virtue* and *rule by punishment* appeared very early in ancient Chinese society, throughout more than 2000 years of feudalism, the process of combining the *rule by virtue 德治* (with *ceremonial code* dominated) and *rule by punishment 法治* (with *criminal code* dominated) was constantly maintained, developed with adjustments, inheritance; From the *Book of Law 法經* in the Warring States period (403 - 221 BC) to *Law of Qing dynasty 大清律例* (enacted in 1740) form a legal system with specific characteristics, called “*Chinese legal system*” 中華法系<sup>1</sup> by the modern the jurists. “This legal system not only occupies a dominant position in China but also has a great influence on East Asian countries (Korea, Japan, Vietnam). In the history of feudal China, the standards of *rule by punishment* and *rule by virtue* have penetrated each other to create a close combination between the *ceremony* and the *criminal* according to the motto: *Ceremony leading to law 以禮入律, Virtue first, then the Punishment 德主刑附, Virtue expressed, the law comes 出禮入刑* and the law comes from the ceremony, the ceremony is the complement to the national law. *Ceremony above, law below 陽儒陰法* as a very unique, clever and sophisticated solution drawn from the Chinese feudal political practice and became the basic feature of the models with cultural influence Chinese. The product from the combination of the ceremony - the punishment is the harmony of morality and law, without clear boundaries. The ceremony works to prevent things that have not happened. The law is to treat what has happened; The ceremony is for prevention from the inside and the outside law. The ceremony-law combination created the optimal mechanism in social management and human management under feudalism. “The laws of the Chinese feudalism, whether the Tang Dynasty, Song Dynasty, Yuan Dynasty, Ming Dynasty or Qing dynasty are in the name of being according to the” destiny “of the Confucian Dynasty, but in essence, they express themselves from of the school of ruling by law.”<sup>2</sup>

In ancient Chinese, *punishment, penalty, and law* all meant kinds of punishment or regulation. *Punishment 刑* is a method of brutal slaughter that existed in primitive society. *Punishment* includes the meaning of killing and punishing. According to Theory

---

ceremony indicates chapters and regulations. as the meaning of law), covers ethical norms in human-to-human relationships and also in the forms and activities of the Ceremony.

1 Dam Gia Kiem (1993), *Chinese Cultural History*, Social Science Publishing House, Hanoi, pg. 44.

2 Dao Duy Anh (Translation), *Chinese history from ancient times to the present day*, Publisher. Customs Mail, Hue, 1992, p.161.

of Literature: 1 / *Punishment* is to punish a crime, including the letters *Tinh* 井 (a well) and *Dao* 刀 (a blade); 2/ *Penalty* 法 includes the letter *Thuy* (water) and *Khu* 去 (elimination): It means the *penalty application* must maintain the balance and fair like water, avoiding the application of improper punishment or unfair judgment. The meaning of *Penalty* is changed from time to time: In ancient times, the *Penalty* is synonymous with “*punishment*,” so “*punishment*,” “*penalty*,” and *code* 辟 can be used as alternatively; “Punishment” and “penalty” merge into one, it is difficult to distinguish. In the legal reform of the Qin country (900-221 BC), Thuong Uong revised the rule of “punishment,” “penalty,” which is called law 律 collectively. Since then, the “*law*” was considered by the dynasties to be the legal form of the principal criminal laws. Nevertheless, the Chinese feudal law took the main form of criminal law, civil law was only written in addition to the criminal law, and independent civil law was difficult to be born in ancient China. The most fundamental and essential part of ancient Chinese law is the criminal law 刑律 - an essential legal tool for the ruling class to oppress class and manage society.

### **1.2. Characteristics of the legal model of the “China legal system.”**

- Law is characterized by caste, privilege, influenced by religious ideas (*Heaven will* 天命 of Confucianism), brutal and barbarian punishment (law of punches), incompletely develops (heavy in criminal, light in civil; heavy in the law, light in judicial), showing gender inequality. Since the rulers of the dynasties emphasized “agriculture being more important than the industry,” “collectiveness being more important than privateness,” so the history of Chinese law has hardly any significant commercial or civil law, even without the concept of public law or judiciary, even procedural law seems to be just zero. Laws and ceremonies are the ruler’s secret weapons and symbols of the prerogatives of the ruling power.

- This legal system is established/identified by three primary institutions, namely: (i) *Eight Considerations* 八議: the legal reform of the Wei Dynasty 魏 has taken the *Eight Royal Considerations* 八籍 of the *Ceremony of Zhou*, officially regulating the regime of eight royal considerations, including friends of king 議親, supporters of king 議故, men with great virtues 議賢, men with great talents 議能, men with excellent services 議, men in high positions 議貴, men with hardship in their government work 議勤, offspring of previous dynasties 議賓. “Those eight classes of people when committing crimes are not allowed to let the government directly condemn the crime as an ordinary person but must submit to the Emperor for judgment; except for the felony without pardon, there is mercy <sup>1</sup>. “ (ii) *Ten evils* 十惡: in Northern Qi period 北齊 (550 - 577) stipulates ten serious crimes 十條重罪 cannot be forgiven, namely: treason, king murder planning, king treason,

<sup>1</sup> Chinese cultural history, *ibid*, p.57.

surrender, evil, immorality, disrespect, unfilially, unrighteousness, rebellion<sup>1</sup>. Until Sui dynasty 隋 (581-619), “ten serious crimes “was renamed to “*ten abominations*,” including treason 謀反, great adversity strategy 謀大逆, treason plan 謀叛, great disrespect 大不敬, evil crime 惡逆, immorality 不道, unfilially 不孝, disrespectfulness 不睦, unrighteousness 不義, coup d'état 內亂 - acts that are considered disloyal, immoral, disrespectful, a direct violation of the order of domination and kingship, or violation of morality (unforgivable ten evils 十惡不赦). (iii) *Five punishments* 五刑: Tang dynasty 唐 (618 - 907) stipulates five types of punishment from low to high defined in the code: *xuy* 笞, *truong* 杖, *do* 徒, *luu* 流, *tu* 死 (including two kinds of *beheading* and *body cutting*). Khai Hoang Law 開皇律 officially defines five types of punishment (five forms) of feudalism and divides the Punishment penalty: death, exile, prison, beat with staff, beat with a whip into 20 levels.

- Due to the influence of the rule of law, Eastern feudal law is basically a criminal law, has widespread criminal nature, and wide scope of criminal punishment based on a broad concept of crime. From the *Book of Law* 法 to the specific laws of feudal China are comprehensive laws consisting of many laws (criminal, civil, marriage and family, proceedings). The rules in the law, regardless of the field, are built-in criminal law. Criminal punishment is applied to criminals subject to criminal law, and violations in administrative activities, rituals, families, civil and modern society often apply only non-punitive sanctions. Not only that, but strict criminal law is also applied to punish issues of consciousness and ideology. “Thanks to the amalgamation of the many main and secondary factors of personal contempt, society has been formed in many ways, unlike Europe. In Europe, it is all about individualism, and even the Christian ideal can become a reason to blame it for individualism. In China, personal dissolution has reached a maximum, so much so that there is nothing of its own for one to hide from the family or tribe. In Europe, VGBeslinski declared: “The fate of the subject, of the individual, of the individual is more important than the whole world, more than the health of the Emperor of China,” and in China, the touch the graves of a member of the royal family will be removed from the whole family until the 4th generation. In more severe cases, the offender will be removed from the three families: father, mother, and wife, from the elderly to the new baby. Thus, the person who directly committed the crime in the eyes of the law and the public opinion has been agreed with hundreds, thousands of people with blood. Furthermore, speaking in today’s language is to eradicate the “genes” of that person. For the Chinese, it is logical because the family has a “common virtue, so

1 These ten crimes from Qin Han onwards were gradually formed, Bac Qi officially introduced into law, called “Crime of the Cross”. Those who commit the 10 of these evils are not allowed to apply the mercy according to the eight royal considerations (十惡不赦 the unforgivable ten evils).

there must be a collective responsibility.” So, brutality is justified by the point of view of traditional thinking.

### 1.3. The death penalty system

- In the *Qin Dynasty* (221 - 206 BC), the punishment was gathered from the Spring and Autumn Period of the Warring States period, countless numbers, very complicated and brutally brutal, such as:<sup>1</sup> (i) *Nhuc hinh* 辱刑: humiliating the criminal in public, then beheading. (ii) *Trach hinh* 磔刑: the punishment of tearing the punishment “tearing the body by five horses.” *Qin Er Shi Ho Hoi*, when executing ten princesses, used this punishment. (iii) *Khi thi* 弃市: executes the inmate in a crowded market (died in the middle of the market). (iv) *Dinh sat* 定殺: force the inmate to drown in water to die. (v). *Sinh mai* 活埋: i.e., buried alive. (Because). *Tu tu* 四死: is a kind of death penalty for the officials in the dominant corporation, expressing the emperor’s favor toward them. Before death, prisoners must face the North to thank the emperor, then commit suicide. After the death of Qin Shihuang, the eldest son of Tan Thuy Hoang, Phu To, and general Mong Diem were all executed by this punishment. (vii). *Kieu thu* 梟首: beheaded inmates and hung them from the pole to denote them. Tan Thuy Hoang once executed 12 people of *Lao Ai* clan 嫪毐 (? -238 TCN) with this penalty. (viii) *Yeu tram* 腰斬: cut off the back of the criminal in two slices. This penalty later executed by Tu. (ix) *Tac dien* 鑿顛: chisel the top of the head, *truu lac* 肋骨 remove ribs, *hoach hoan* 鑊亨 put in a cauldron to cook, *giao* 絞 hang, *nang phoc* 囊撲 and put in bags and beat. (x) *Cu ngu hinh* 具五刑: First, use corporal punishment, then execute. (xi) *Toc hinh* 族刑: a person commits the crime, the whole family must be guilty; a sinner died, killing them all. *Di tam toc* 夷三族: kill all three of generations.

- From the *Han* 漢 - *Tang* 唐 (202 BC - 907 AD): depending on the political situation at the time of postponement, the ruling class will add or decrease, adjust some harsh penalties, such as Han Van De and Han Canh De ordered the exclusion of corporal punishment, using the punishment of whipping, sending exile to replace face tattoo, nose cut, right and left leg amputation; Five penalties before that, only remaining *Cung hinh* 宮刑. In the Cao Wei period 曹魏 (220 - 266), Three Kingdoms 三國 (220-280), the form was excluded from the law. In the Sui Dynasty (581 - 618), the death penalty had two types of hanging and slashing, and each had to ransom 120 pounds of copper. Tang Dynasty abolished all cruel penalties such as *lang tri* 陵遲 (slicing the body), *liet* 磔 (tearing body off), and somewhat lighter charges. The penalty regime of later dynasties had changed but basically still followed the Tang law. Detail:

<sup>1</sup> *Vietnamese Encyclopedia*, Hanoi, 1995, p.275.

+ The *death penalty* 死: the Five Great Period 五代十國 (907 - 979) China was rebellious, with a cruel punishment outside the law of mausoleum (mutilation); to the Lieu 遼 period (907 / 916-1125), it officially established the name and recorded it in the law. The Second Song 宋 (960 - 1279) often had this kind of punishment. In the Yuan Dynasty 元 the mausoleum was classified as one of the death penalties. According to the Ming rule 明, the death penalty has no mausoleum, but for those with grave offenses who still use the mausoleum of death, there are 13 different things. According to Du Chinh Tiep's book *Quy ty loi cao*: the *lang tri* takes place in three days, with about 4700 or 3600 slices of the body. The Qing law 清 stipulated that the death penalty included slashing, hanging immediately and slashing, hanging awaiting surveillance, but there was also a mausoleum penalty. In addition, the punishment for criminal bodies (*luc thi* 戮尸: stabbing, cutting off the criminal's body), all generations have.

+ *Khoc hinh* 酷刑 (cruel punishment) and *Tu hinh* 私刑 (punishment outside the law, not regulated by the state). In the *Tang* dynasty, they said: "The Law must take the exact penalty to punish the crime." That is, whatever crime is committed, according to the law, that penalty is strictly imposed, but there are still many penalties in addition to the law. During the reign of Vo Tac Thien, "using stringent punishment," because tyrannical mandarins appeared everywhere, many talented and talented servants rushed to the prison, "people in the country were terrified, looking at the streets. together". When interrogating prisoners, without heavy consideration, "most of them pour vinegar into the nose, confine it in prison or put it in a big room, set fire around." There are substantial types of shackles such as the order of the circuit, the reluctance of the sudden, the sudden the earth, the loss of courage, the depth of sadness, the request of death, the request of the family.

During the Ming dynasty, Chu Yuan Chuong wrote the *Dai Cao* (Great Prospectus) 大誥 "the urgent orders are beyond the law," stipulating that the death penalty has thousands of things, with cruel penalties such as mausoleum, stigmatization, and killing them; skin peeling; the rule from "discarding the body in the middle of the market" has more than one thousand things; corpse with a stamp on the face, tattoo on body, tendon, finger tightening, disassemble of the patella, draw intestine to cleanse, cut hands, cut leg, cut off real life, be a servant; The rest are: slapping the heels of orders, often sending orders, shackles going far, arresting elephants... are rare ways of criminal justice in feudal times. In particular, with the autocracy of the eunuchs, the deadly punishments of Guangdong, Guangxi, and the brocade guards "suffered dozens of times the punishment of the state." The case of Duong Lien Ta Quang Dau, because "transporting gold on time" is subject to all penalties, such as handcuffs, iron shackles, beat with sticks, finger clamps, body clamps full of five tools: Cruel, loud breathing, slimy blood and flesh,

struggling to die. At the beginning of the Qing Dynasty (1644-1912), it allowed mandarin families to set up their own private streets to use separate punishment for servants and peasants for their minor mistakes, even beating them to death. By the year of Ung Chinh, it was only brought down: if the owner condemns, it may be customary not to discuss their responsibility. The legal reform of the late Qing dynasty (4/1910) issued *Applicable law of Qing* 大清現行刑律, setting alternative punishments to the feudal five formations while drastically removing the mausoleum. The corpse of the inmate (*Luc thi*). Next, the *New law of Qing* 大清新刑律 reformed the penalty regime again, specifying that the hanging was the master of the penalty (main penalty).

+ *Some typical (brutal punishment) penalties*

(i) *Tru di tam toc* (誅夷三族)<sup>1</sup>: *tru* 誅 and *di* 夷 mean to a massacre, *tam toc* means three families. “*Tru di tam toc*” is a catastrophic feudal punishment in Asian countries (China, Vietnam) for those who rebel against the king (committing crimes against the army, treason), killing both his three surnames. Under this penalty, the three families of the offender: the father side, the mother side, and the wife side (or the husband side) will be executed all. When a person is sentenced to *tru di tam toc*, all of his or her three families, all members of them are eliminated from young to old. In this case, the mother’s family side and the wife’s side, including the stepmother’s relatives and concubines, were also killed. In cases where the person’s mothers, stepmothers, and concubines have passed away before the sentence is sentenced, their relatives still have to bear the sentence. Therefore, in history, when the sentence of a trinity exclusion occurs, there are often hundreds, even thousands of people with many families killed at once. Many people who had quite an extended kinship with the offender were also killed. Fortunately, the people of the inmate’s family escaped far away, hiding anonymity, changed to another family. The feudal courts wanted for these people lasted for many years and stopped only when there was an official order to reform by the court. So, some people are still caught and killed after years of hiding.

(ii) *Elephant treading*<sup>2</sup>: This is one of the cruelest punishments from thousands of years in Southeast Asian and South Asian countries (especially in India). Elephants used for execution are usually well-trained Asian elephants. The executed victims were often stomped on the body by elephants, used their trunks to roll up high, and slammed to the ground. One can manipulate the elephant to cause the victim to die quickly or slowly die to torture. This penalty applies to death row inmates, often for a serious crime with the

1 [http://vi.wikipedia.org/wiki/Tru\\_di\\_tam\\_toc](http://vi.wikipedia.org/wiki/Tru_di_tam_toc)

2 [http://vi.wikipedia.org/wiki/Voi\\_giay..](http://vi.wikipedia.org/wiki/Voi_giay..)

court or used as a means of revenge by the king against those who support the faction against the king.

(iii) *Lang Tri* 陵遲<sup>1</sup> (also known as *tung xeo, ba dao*): It is one of the barbaric punishments widely used in China during feudal times (officially abandoned in 1905). This death penalty is also known as “torture beyond the torture,” which is “the obsession of both death row inmates and executioners.” This is also one of the cruelest, cruel, gruesome forms of punishment in the Middle Ages and in human history. Although it has been removed from civilized society for hundreds of years, its horror is still imprinted in literature and human memory. The mausoleum was known from the *Five kingdoms* 五代十國 (907 - 960) and spread during the *Song Dynasty* (960 - 1279). It first appeared in the criminal code of the *Lieu* 遼 dynasty (907 - 1125), a non-Chinese at that time) and continued to exist under the Manchu until it was abolished in 1905. In Chinese, mausoleum means “encroach slowly.” This is also the most frightening form of the death penalty; the inmate will be extremely painful because they cannot die quickly. There were cases where half of the body was peeled off, but the criminal was still screaming. Its level of brutality is unmatched: in addition to taking every single piece of flesh on the deceased, the executioner also has to keep the deceased from dying quickly, that is, after how many puffs. Unfortunately, the victim can die. The mausoleum is sometimes used as corporal punishment to execute a living person or as a form of insulting a prisoner after death. Those who commit crimes such as treason, rebellion against the king, murder, or murder of their parents are all subject to a dissertation and trial.

The practice of *lang tri*: at present, there is no exact document to describe how the mausoleum method works, but based on the old paintings and books rewritten, the offender will often be tied to the column after They were cut off all hands and feet by the executioner and then used a knife to sharpen each piece of meat to death. It is also documented that, sometimes, when the execution lasts up to three days, inmates will have small parts (eyes, nose, ears, tongue, fingers, and toes removed) before their parts are cut. Large (e.g., limbs, shoulders, thighs). The chopped meat will be displayed in a public place to command them. In more humane places, inmates will be able to use opium before execution to alleviate pain. This penalty applies to both the living and the dead for humiliating purposes. In Chinese history, many people were sentenced to a mausoleum, more than 3,000 knife strokes killed famous people like the famous general Yu Sung Hoan during the Ming dynasty, and eunuch Liu Can be suffered up to 3,357 strokes. The new knife broke the breath. In chapter 5 of the novel, *Dan huong hinh* 檀香刑<sup>2</sup> next to

1 [http://vi.wikipedia.org/wiki/Lăng\\_tri](http://vi.wikipedia.org/wiki/Lăng_tri)

2 *Dan huong hinh* 檀香刑, meaning: *penalty of sandalwood stakes*, is a famous novel by Mac Ngon 莫言. The book also tells the reader the history of all forms of death torture in China and the history of the Miao Xoang theater.

the cruelest punishment is to use the sandalwood sword to stab the criminal's anus all the way to the back of the neck and let the victim live in chaos. For many days, it was the punishment of the mausoleum that the author described meticulously with three levels: level 1 xeo to 3,357 slices, level 2 x x 2.896 slices, level 3 unlisted 1585 slices. More specifically, the work also shows that *no matter how many slices are cut, the last one must be just finished, immediately killed. Therefore, where to start cutting, what slice cut first, and how long is a slice. Each must be designed precisely based on the gender and physical condition of the criminal. If you have not broken enough slices and you have died, or you have broken enough and still have not died, then it must be considered as the executioner's fault. The minimum standard of the mausoleum is that the floors must be the same. Put on the scale is not much less than too much. This requires when executing judgments. Executioners must be calm and calm. The mind must be as detailed as hair and must be decisive when making hands like a girl embroidered flowers, and like a butcher 屠, 宰 kill donkeys.*

**(iv) *Xa liet* 車裂** (tearing the body by four or five horses)<sup>1</sup>

It is a punishment that the offender's limbs are tied to four ropes connected to four horses. A horse can be jockeyed or not. When executed, the jockeys will push the horses to run in all four directions do not. If they don't have the jibs, people will yell or hit the horses to panic and run away. From there, the four ropes will pull the offender's limbs until his body is torn into five slices, including the head, body, and limbs. Offenders will be left to die with blood. When the flesh was torn to slices one after another, the slow death was a hundred times more painful than being beheaded or drinking poison. Another variation of this penalty is the pentagram, with the fifth horse tied to the offender's neck.

## 2. DEATH SENTENCE IN FEUDAL LAW OF VIETNAM

**2.1. *Vietnam*** 越南 is a country in the geographic contact location of the Indochinese peninsula and Southeast Asia, located in the junction of the traffic flows connecting the mainland to the ocean. Thousands of years ago BC appeared the first primitive state form in history, called *Van Lang* state 文郎 - *Âu Lạc* 歐貉 (*Hung King period* 雄王 - *An Duong Vuong* 安陽王). Over a thousand years (111 BC- 938 AD), the period of independence and autonomy 自主时代 (feudalism) for nearly a millennium (905 - 1858) - is the most prolonged historical period in the development of caste social regimes. Its central ideology is Confucianism imported from China, in which *Han Confucianism* 漢儒 and *Tang Confucianism* 宋儒 are two movements that have the most profound influence on Vietnamese society. The history of Vietnamese feudalism is characterized by

<sup>1</sup> [http://vi.wikipedia.org/wiki/Tư\\_mã\\_phân\\_thây](http://vi.wikipedia.org/wiki/Tư_mã_phân_thây)

not going through a period of long-term decentralization like some other countries in the world but soon becoming a centralized system. Like most feudal countries in the East, through dynasties, the form of feudal state in Vietnam was an absolute monarchy.

## **2.2. Vietnamese feudal law**

The Vietnamese feudal monarchies recognized the role of the law as the primary means of social governance and made progress in law-making. Although promoting Confucianism, the Ly - Tran - Le - Nguyen dynasties all emphasized and cared for the construction of the law to govern the country and gain outstanding achievements in the legal heritage. Traditional. *Criminal Code* 刑書 (Ly Dynasty), *Royal Criminal Law* 朝刑律 (Tran), *Royal Criminal Law* 朝刑律 (Hong Duc Code - Le Dynasty) and *Hoang Viet Law* 皇越律例 Gia Long Law - Nguyen Dynasty) are typical legal achievements; In which, Hong Duc Law is an achievement significant value in the history of Vietnamese law, which is highly appreciated by the world today, on a par with classical laws in the East. The legal achievements in the history of Vietnamese feudal rule are the sharp law - the authoritarian tools of the class, allowing to affirm that: Vietnamese feudal legal thinking has recognized the role of the law as an instrument of political power.

In the history of feudalism, China's government system is still considered the most complete (though not necessarily the most advanced), and this is also one of the country's significant contributions leading major civilization. Treat humanity. Vietnam and China are two countries with mountains next mountains, the river following rivers 山川連通 interrelated and culturally compatible. Basically, the Vietnamese feudal dynasties organized similar state apparatus and bureaucracy—a form of feudal China. “As a Chinese colony until the tenth century, after regaining its independence, Vietnam created a military ruling regime based on the model of the Chinese government.” In the imagination of many researchers, from the perspective of political institutions (with the essential elements of authority, law, and ideology), *Dai Viet* 大越 is often considered a country in the East. Asia follows a Chinese model. The Chinese political model was Vietnameseized and developed to affirm that the throne in Thăng Long was the throne of “Emperor of the South who ruled” kingdom of the South “according to heaven. The Chinese “factor” influences the policies of Vietnamese kings on both the national and international level. Although the court remained cautious in defending the independence and sovereignty of the country, but also considered the social regime of China as a model for reference. Because the feudalism of Vietnam and China had many similarities, many articles of the Chinese feudal law were conducive to constructing the Vietnamese feudal law. Therefore, in building the law, the Vietnamese feudal states all gave themselves the task of consulting Chinese feudal laws to apply in Vietnam. The legal system is built

based on Chinese law references but has been modified and innovative to suit Vietnamese society. The Vietnamese feudal class has absorbed many achievements and legislative techniques of feudal China. The laws of Hong Duc and Gia Long are modeled after Chinese law. Researchers all believe that the legal system in monarchy Vietnam was built on the basis of Chinese law references but has been modified and creative to suit Vietnamese society.

Legislative activities to maintain social order and water discipline are always important issues for the ruling class. During the *Dinh* 丁 - *Le* 前黎 period (968-1009), due to the war situation and weak centralized power bases, the results of law construction were limited. From the *Dinh* - *Le* dynasties, the form of law was highly repressive. In the early days of the feudal monarchy, in order to defend the fledgling new rulership and forcefully suppress rival forces, the ruling class actively used powerful, violent authoritarian methods and cruel punishment for the human body. By the *Ly* dynasty (1009 - 1225), due to the development of the centralized central state, the development of legislative activities and the imprint of the Chinese legal system were reflected in this process. “The Penal Code Code was enacted to affirm the rights and status of the feudal state and bureaucratic aristocracy, as well as a tool to stabilize society, preserve discipline, and protect agricultural production”<sup>1</sup> ; protect the rule and economic interests of rulers and nobles, maintain and consolidate the power of the centralized central state, especially that of the king; protecting the domination of the central feudal state, the interests of the king, the royal family, the mandarins and the landowning class; suppress all actions against the state or violate the interests of the ruling feudal class. The safety of the king and the palace; violating an order, discipline, social ethics according to Confucian viewpoints or infringing on human life, health, dignity, and property. Defend the king’s absolute authority, uphold the status of bureaucrats and patriarchs, and brutally punish those who oppose. In order to prevent the king’s murder and treason, the *Ly* also issued orders to protect the palace. Everyone who violated was severely punished for being executed (arbitrarily entering the forbidden palace, meeting and talking there, coming near the arsenal, take the weapon near where the king is).

In order to correct the discipline that was too loose at the end of the *Ly* dynasty, to bring the society back from turmoil back to stability, *Tran Thai Tong* (1218 - 1277) established a strict law: those who commit theft 盜賊 (thieves) are must cut limbs, sometimes be executed by elephant treading elephants<sup>2</sup>. The execution is carried out in both ways, such as giving elephants and shoes and being mounted on wooden boards for walking

---

1 Tran Quoc Vuong- Ha Van Tan, *History of the Vietnamese feudal regime*, volume 1, Publisher. Education, Hanoi, 1963, p.272 - 273.

2 *History of the Vietnamese feudal regime*, Sdd, pp.278-279.

in the market before execution. Persistent penalties (cutting the flesh to death), burying it alive, and stigmatizing it after slashing, are imposed on treason charges. According to Phan Huy Chu, “the criminal justice of the Tran dynasty was fierce, thieves and fugitives were cut off their toes, handed over to their owners for treatment or death of elephants. Perhaps outside the law. More often than not, can these severe penalties be used to ban all crimes?”<sup>1</sup> The *Toan thu* has copied the 1309 case as follows: “In November, dealing with Han sins who committed great crimes. All were beheaded, Han’s name was slashed at Giang’s bridge, and the name Tru was at the gate of Van Xuan citadel. Name Han used to have great merit, so he did not confiscate his estate. Six of Le’s men had to save to the continent of Evil (Evil Water in An Bang, no one survived), Le was the last branch of The royal family should forgive the word in the face, the islanders of four people left the continent. Na sent his wife to confess first, so he was exempt from the crime. Old thing was forgiven, just the name was recorded”<sup>2</sup>. On private property, the crime of stealing was punished very seriously: “Anyone who deceives illegally will get eczema in the face, and then beaten and exiled away. The powerful must commit guillotine. Stealing, beating 80 staff for the first time, like indigo. In the face of the word “transgression.” The stolen items will be partially repaid and killed the third time. “In general, the Ly - Tran period (1009-1400) was very punishing. Harsh, cruel, and heavily barbaric in the Middle Ages.

In the *Late Le* dynasty 後黎 period (1428 -1789), under the influence of Confucianism, *Luat Hong Duc* was more or less humane but still highly punished with harsh punishment. The five-punishment system is continued to be applied and more specifically divided: each hierarchy is divided into an internal hierarchy of lightweight. The exiled person may be sent to a place near or far (sub-continent, sub-continent, or far-away). The death penalty can be executed by necking (giraffe) 絞, beheading 斬首 (slashing), public beheading 斬攏 (tribute), mausoleum. There are also harsh penalties to destroy the offender’s body, such as chopping off his hands and fingers (Le Thai instructs a traveler to be a traveler who is guilty of gambling to have his hand cut off by 5 inches, hit the palm with 2 inches) or deprived of his freedom Exile such as: confiscating human wives and children who commit several serious crimes to become slaves. The use of corporal punishment such as tying, shackling, gong to detainees, as well as torturing detainee’s legalization and regulation. In Hong Duc law, there is a section of the law for *Luat Cam ve* 禁軍律 (47 articles) to protect the safety of the palace and the body of the king. The guards who guarded the royal palace were not careful. People entering and leaving the palace were not strictly punished. Acts such as: climbing the wall of the palace, being punished from

1 Nguyen Hien Le - Gian Chi, *General Chinese philosophy*, volume 2, Publisher. Ho Chi Minh City, 1992, p.290.

2 *History of Vietnamese feudalism*, Sdd, p.278.

items to death, the security guard at the place where the king was staying, he took out his sword, then punished; Going in and out of the palace was against the rules, staying in the palace without permission, sending someone else to serve in the palace, aiming at the palace and shooting arrows were severely punished. There was no reason to break into the king's forbidden palace. "Along with the point of view of the rule of person, the Hong Duc law is significantly influenced by the Chinese rule of law and is reflected in the harsh punishment policy through the provisions of this law such as the classic five-sentence system with five barbaric penalties, collective criminal liability for some crimes in the crusades, corporal punishment even just violations of morality."<sup>1</sup>

Under the *Nguyen Dynasty* (1802 - 1945), the punishment policy was brought into full play, reflected in the ruthless regime of punishing the human body in a cruel and sophisticated way. In particular, and the Nguyen law in general, the Gia Long Law clearly demonstrated the intention of protecting the absolute authority of the king and upholding the status of mandarins and patriarchs, brutally punishing opposers. Gia Long Code includes 398 laws. There are 166 articles about criminal law. "With the meaning of punishment and suppression, the Gia Long law made and corrected almost copied the Manchu's law. This law clearly states that *it can be forgiven for those who commit the ten evils* 十惡為常赦所不原. Cruel penalties such as a mausoleum, damning, and braking were maintained. Gia Long Law has brought the harsh feudal punishment regime into meticulous regulations attached to the application instructions. The five-punishment system is concretized one more step, including (i) *Xuy*: hitting with a rattan whip from 10 to 50; (ii) *Truong*: hitting with sticks from 60 to 100 sticks; (iii) *Do*: exiled for hard labor and imprisonment of 1 to 3 years and accompanied by a beat of 60 to 100 staff; (iv) *Luu*: sentenced to an exile of between 2,000 and 3,000 reasons and beaten 100 staff; (v) *Tu* 死 is to be killed in two ways; many forms of execution of the death penalty with the nature of cruelty or cruel revenge (as stipulated in some laws) such as *Tru di tam toc*, *Tram quyet* 斬決 (immediately beheaded), *tram khieu* (public beheading), *Tram giam hau* 斬監後 (postpone the execution of the death penalty/imprisonment to wait for the court to revise), *lang tri* 戮市 (mutilating, slaughtering, blinding the inmate), *dao ma* according to the motto of *duc phat bat nhi bach* 欲罰不而百 (punish one person for deterring hundreds) or *dung hinh ky vu vo hinh* 刑其誣無刑 (apply a penalty not to need to use punishment). In the crimes of treason, the wife and the lover kill the husband. The slave beat the master. The wife intentionally kills the husband all are punished. The punishments like words are specified the number of words like for some specific crimes. The punishment with the whip and the stick is common in all laws. The essence of Gia Long law is to maintain

<sup>1</sup> Nguyen Luong Bich, *Nguyen Trai fought the enemy to save the country*, People's Army Publishing House, 1975, pp.13-14.

the protection of the majesty of the emperor. The emperor's palace is an arbitrary place. "Anyone who arbitrarily enters the Ngo Mon, Tu Cam Thanh, Dong Ba, Tay Ba, the Gate of Than Vu, and the forbidden garden without appropriate authority will be fined ten staffs arbitrarily entering the palace, a fine of 60 staffs, imprisoned for one year. If you enter the place where the king eats, and where the king resides, you will be sentenced to hang to death" (volume 10, chapter on Military Law, Article of Royal Guard). The main ideology of the Gia Long law is to protect the absolute authority of the king, restore and consolidate the outdated feudal order, straightforwardly suppress every action and protest of the people.<sup>1</sup> Because it is a copy of the Qing dynasty - a reactionary monarchy that implemented a harsh rule of law clearly reflects punishment's tyrannical nature. "Because of the sense of secession with the historical tradition of the nation, so Gia Long and the officials around the king copied the Qing dynasty's reactionary law as the law of their dynasty. Historical roles and nature are similar, so the two families Thanh and Nguyen have an immediate legal sense".<sup>2</sup>

Due to the influence of the law of the Tang Dynasty, the feudal dynasties of Vietnam divided crimes among and outside *the ten evils*. The provisions of the ten evils that must be punished very seriously in the classic cruel regime are those that infringe on the king's kingship to the social order, reflecting the absolute monarchic nature of the law. feudatory. The **Ten Evils** include: (i) *Muu phan*: usurp the throne / overthrow the king's rule, collapse/harm the commune. (ii) *Muu dai nghich*: destroying temples, mausoleums, palaces (mountain tombs, royal palace) (iii) *Muu ban*: betraying the Fatherland under the enemy. (iv) *Ac nghich*: trying to kill or fight grandparents, parents, respect. (v) *Bat dao*: killing people without cause, cutting hands and feet of living people, making poison, enchantment, cruelty, brutal (vi) *Dai bat kinh*: conduct theft of things, sacrifices in mausoleums, articles of the king, forging seals and some other acts that endanger his life, or offend the king (vii) *Bat hieu*: good accusation cursing grandparents, parents or grandparents, parents-in-law, not taking care of parents, leaving home voluntarily, distributing property voluntarily, getting married in mourning, playing during mourning, being trusted parents, grandparents died, refused to mourn or make false funerals. (viii) *Bat muc*: plotting to kill or sell relatives (up to the five elements), beat or denounce husband or religious followers (up to the three elements) (ix) *Bat nghia*: killing mandarins, soldiers kills generals/commanders, students kill teachers, wives do not mourn their husbands, play games and re-price. (x) *Noi loan*: that is incest (adultery with relatives or with the concubines of his or her father). In the decade of crimes, there are five types of crimes, which are acts against the feudal court: infringement of the safety of the dynasty, the

1 *Nguyen Trai fought the enemy to save the country*, Sdd, pp. 13-14.

2 Institute of Law (1968), *Draft history of Vietnam's rule of law*, Publisher. Social Science, Hanoi p.290.

political and economic interests of the king, life, and the safety of his body. The king, general of the court, is treason, great adversity, conspiracy, great disrespect, meaningless. From the feudal lawmaker's point of view, crucifixion is the ten most serious crimes, so it always comes with the most severe and cruel penalties. The only sign considered by the lawmaker to be the cross - the dangerous nature of the act where both the intent to commit a crime and the manifestation of criminal intent is the first stage of punishment. Those convicted of a cross-crime would be executed and would not receive any class relief. Specifically, there is no parole, no monetary atonement, no exemptions from pardon, and from a friend's scheme upwards, no criminal liability waiver is applied to loved ones. hide from each other. Tran's law stipulates that treason is the most serious crime among the ten crimes, that: (crime) treason 謀反 must kill all your family"<sup>1</sup>. In the Le dynasty, the *Ten Evils* regime continued to be exalted by expanding the regulations on treason, great treachery, conspiracy to commit friends in the most dangerous crimes, and the cruelest punishment; criminal law of the Lê Dynasty gives criminal responsibility to his wife, children and other relatives for the crimes of great treason, treason; to parents for the crime of stealing children. Article 411 of the National Dynasty is punished by law: "Those who conspire to trespass and do great evils against shall be charged with beheading, the perpetrators and the pro-party members know that this must be the crime of guillotine, the wife and the estate are confiscated... Those who know well, but deliberately tolerate hiding, harboring and slashing; those who know (though not intentionally tolerating but not giving up charges) punish 100 sticks, exiled 3,000 miles away." Showing the extreme tyranny towards the people. The Gia Long and the Nguyen law abolished some of the positive and progressive provisions of the Hong Duc Code and continued to uphold the punishment of extreme cruelty. The reactionary and harsh nature of the law is concentrated in the expansion of the scope of punishment, a ruthless, cruel regime. Article 223 of the Gia Long Code states: "Those who conduct treason, conspiracy, regardless of whether the perpetrator or the perpetrator (practiced or not) are committing death (killing, braking, mutilating). the same house offenses, those of whom are not mourning (relatives, maternal grandfather, father-in-law, son-in-law), irrespective of surname and uncle, or brother-in-law (for committing mourning for a year), not counting whether living separately or not, the same or different nationality (majority of the perpetrators' other male relatives) aged 16 or older, regardless of disability, disability, slash; (son) who is 15 years of age or younger, together with his mother, daughter, first wife, concubine, sister, as well as the first wife and concubine of the son (of the righteous) will grant the house of the princess as slaves. Property (main) confiscated. Anyone who knows the matter without denouncing it will also be guessed". The law has been regulated since the Gia Long dynasty, but the level of

---

1 *History of the Vietnamese feudalism*, Sdd, p.278.

enforcement depends on the serious crime, the misdemeanor that increases. “During the Phien An uprising, Le Van Khoi, although dead, was also demolished to the mausoleum of the first mausoleums, generals Nguyen Van Nheo and his son Le Van Khoi and six assistant generals were returned to the court of the Ngo Mon Gate. As for the generals and people in the city (except for 545 people who were killed during the attack), 1,137 people, including men, women, the elderly, and children, took them to the four provinces outside Phien An, each of which has two the leader in bringing the mausoleum to tear the meat before the people, and then put his head there. In Session An, also a mausoleum to execute two people. Furthermore, 1,123 people were then cut off for a while outside the city and then buried in a place called “*ma nguy*.” Meat fragments of those who have been tortured are brought into the river to feed fish or to feed dogs, and the bones and heads (to be heard for a while) are small and poured into the toilet. In the case of Nong Van Van, although Nong Van Van was already burned to death, he also had to behead and bring back the experience of crimes. Nong Van Van’s eldest wife, mother, and daughter were all persecuted. In the My Duc uprising, Cao Ba Quat was brought back to the mausoleum and beheaded in a coconut tree on the bank of Hoan Kiem Lake (Hanoi). As for those involved in small riots, when caught, they were all exiled far away”.<sup>1</sup>

Together with defending the absolute power of the king and the court, Vietnamese feudal laws reflect their nature as tools to protect the interests of the ruling class, to exploit and suppress the rival classes; manifested in many unequal and unfair regulations. In order to suppress the people’s opposition to aristocratic bureaucracy, the law stipulates that killing people with officials should be considered high or low to pay for the ransom, but they were beaten, 80 staff. The “*Eight Royal Considerations*” law allows the great nobles and high-ranking officials to be granted relief or forgiveness of crimes, except for crimes. The law states that those condemned when committing crimes with a retention penalty or less will receive a penalty reduction of one frame. If the criminal is sentenced to death, the judge must testify the charges raised. In the Le dynasty, the imperial court of law stipulated that the Eight Priesthoods included: (i) *Nghi than*: the king’s relatives; (ii) *Nghi co*: those who have helped the king for a long time. (iii) *Nghi hien*: people with great virtue. (iv) *Nghi nang*: people with groutstandingalent. (v) *Nghi cong*: those with great merit. (vi) *Nghi quy*: people with great titles. (vii) *Nghi can*: people who undertake hardship in the position. (viii) *Nghi ton*: descendants of the previous dynasties. These people enjoy many favors, such as a / The king allows a trial to be tried, and the king decides the condemnation. b / When interrogating, they are not interrogated like civilians. c / If they are convicted of more minor less, they are reduced by one level. If these eight

1 Phan Huy Le, Chu Thien, Vuong Hoang Tuyen, Dinh Xuan Lam, *History of the Vietnamese feudal regime*, volume 3, Education Publishing House, Hanoi, 1960, pp.502-503.

types of people receive a severe crime, the king's permission must be obtained before the trial, and when he is convicted, he must raise it for the king to decide.

Outstanding features of Vietnamese feudal law: (i) Uphold the ideology of absolute monarchy; protect the feudal privilege, national sovereignty. Protect and develop agricultural productivity. The laws of the dynasties all have strict regulations that strictly protect the king's life and punish those who have infringed upon territorial sovereignty and national security. Promote the role of a tool to protect the interests of the king-headed ruling class and protect the state's political and economic power. The king's absolute power was asserted to be immutable, becoming an elemental spirit, covering the entire feudal Vietnamese legislative process derived from the goal of building a monarchy. Trung specializes in high regime according to the Chinese legal system model. (ii) Consistent application of the principle of collective criminal liability in some cases. In order to promote effective combat and prevent law violations, the Vietnamese feudal dynasties all adopted the idea of solidarity from the rule of law and developed into the principle of collective criminal responsibility. According to this principle, for some crimes, the offenders are punished, and those who have a family relationship, a kinship, or in the same business or organization living with that person. For crimes against the king, the collective punishment was even crueler. The idea of joint responsibility of Chinese law has been used and promoted by the Vietnamese feudal dynasties during law building and social management practice. (iii) Consistent expression of the ideology of promoting punishment with the heavy and cruel punishment regime is the legal nature of feudalism in Vietnam. The Vietnamese dynasties generally applied the classical five-pattern regime of feudal China with five penalties: xuy, scepter, map, save, death and become one of the Chinese elements in the legal system. Feudal Vietnam. The death penalty is the heaviest one, usually slashing (slashing) or hanging (hanging). In order to promote deterrence, the five criminals were specified in Article 1 of both the Imperial Court law and the Hoang Viet law. The common feature of the above punishments is hitting the human body and being fiercely repressive; identified the leading group of penalties in the feudal legal system applied to criminal groups and punished both ideological ethical-moral violations. In addition, the feudal state also supplemented with several other punishments that were destructive, deprived of the body. It humiliated, such as cutting limbs, cutting toes, liking words to the face, in hands, making slaves of other people's homes. With a system of regulations and sanctions for brutal, brutal, openly defending the interests of feudal landlords, feudal law is genuine with the name "punch" law.

### **2.3. Some typical executions**

\* *Tru di tam toc*: The most famous case in Vietnamese history is the Le Chi Vien case 荔枝園 where Nguyen Trai, the mandarin of the Hau Le dynasty, was sentenced to

kill King Le Thai Tong. On July 27 - 1442 (the year of Nham Tuat), King Le Thai Tong patrolled in the East, inspecting the mandarins of Chi Linh city, Hai Duong. Nguyen Trai welcomes the king to live at Con Son Pagoda 崑山寺, the residence of Nguyen Trai. On 4-8, the king returned to Le Chi Vien in Gia Dinh district (now Gia Luong district, Bac Ninh). Accompanying the king was Nguyen Thi Lo 阮氏路, a concubine of Nguyen Trai, who was in his 40s, loved by Le Thai Tong for his beauty, good writing, permanently joined the king's side. When he reached Le Chi Vien, the king stayed up all night with Nguyen Thi Lo and died (just 20 years old). The officials secretly brought back, August 6, to the Buddhist scriptures in the middle of the night to the new palace to mourning. The court charged Nguyen Thi Lo with the murder of the king. Nguyen Trai and his family were sentenced to three tributaries. Later, although the Tay Son family died in 1802 and was sentenced to Tru di trinity, father and son Nguyen Van Duc and Nguyen Van Dau (children and grandchildren of King Thai Duc Nguyen Nhac) in hiding after many years were still under the Nguyen dynasty. Arrested and executed in 1831.

**Nguyen Anh applied (ii) Treading by elephant Typically, the case of female general Bui Thi Xuan of Quang Trung.** In the history of Vietnam, Bui Thi Xuan was a heroic female general who lived a heroic life and died a glorious death. The book says that: After the last fierce battle, the heroic general Bui Thi Xuan was tied up in front of Nguyen Anh. Lord Nguyen proudly asked her: Who better to Nguyen Hue and me? She replied: "Our God, the sword hand that makes a career. While the family went to a foreign hospital, from Siam to China, the whole mountain was crushed, and all of them were beaten to no armor by our princess. Compared to my princess, your house is nothing but a pool of water and water." She directly defeated Nguyen Anh. Now she is insulted extremely hatred. When she was executed, wrapped around her body in a crimson cloth, she stood sideways, shouting, making the elephants jump back in fear. Soldiers were ordered to firecrackers and stab spears and spears at the elephant, causing them to panic and crush her to death.<sup>1</sup>

**(iii) Lang Tri:** This penalty was also widely applied under the feudalism of Vietnam, which was called *tung xeo* (after a drum sound, cut a slice of the body). Due to the influence of classical Chinese law, the feudal period of Vietnam also used the punishment of mausoleum. The ancient capital Hoa Lu still has Tung Xeo - the place where the criminals of the Dinh and Tien Le dynasties were executed. A mausoleum is a formidable punishment of "taking the legal punishment." The criminal will be tied to the pole. When hearing the command signal emanating steadily like a drum sound, the executioner will

1 The truth of the death of female general Bui Thi Xuan (Ky 2): heaven pool and earth water

<https://danviet.vn/su-that-cai-chet-cua-nu-tuong-bui-thi-xuan-ky-2-ao-troi-nuoc-vung-7777964367.htm>

take a piece of meat off the offender's body and then stop to wait for the next signal. Inmates are extremely painful because they have every single piece of flesh on their bodies. The executioner has to keep the dead from dying quickly in order to know the pain according to each and sufficient number of paths before the sinner can die. This method of death was also practiced by the kings of Gia Long, Minh Mang, and Tu Duc dynasties against rebels, missionaries, and Christians. The trial of the tomb, the most shocking of the elephant shoes is the case of King Gia Long "taking the legal punishment" of Tay Son ruler at the ceremony of *hien phu* 獻扶 (the ceremony of offering prisoners) in November of Nham Tuat year (1802). In the *Collection of Dai Nam Official History* 大南寔錄正編 said: Quang Toan and other children of Nguyen Nhac, Nguyen Hue, Quang Duy, Quang Thieu, and Quang Ban, were torn apart by five elephants, their heads were tortured and imprisoned. Quang Tu, Quang Dien, Nguyen Van Tri, and Nguyen Nhac's children (including Thanh, Han, Dung) were killed immediately after being arrested, not to mention 31 people related by blood to Nguyen Hue were all sentenced to a mausoleum. The tombs of Tay Son Dynasty, like the tombs of King Thai Duc 泰泰 and King Quang Trung 光, 中 were thrown up. The remains were crushed and thrown away, the heads of the three kings of Tay Son (Thai Duc, Quang Trung, and Canh Thinh), and the post-Nguyen Hue and his wife were detained in a dungeon. General Bui Thi Xuan and her daughter suffered from an elephant's shoe. The letter from cleric Bissachère gives quite a detailed description of Gia Long King's steps executed and humiliated Tay Son ruler during the Sacrifice as follows: "I would like to start with the story about the young king Tay Son. First of all, the king was arrested for a traumatic scene. The remains of the king's parents have been dead for ten or twelve years, and the remains of the king's immediate relatives are scrapped. The bones of Quang Trung, that king's father, and the bones of the king's mother were arranged, and then they cut their necks outwardly to humiliate, and especially so that those bones would no longer be blessed for children and grandchildren. The superstition of people in the land. All bones were then put in a large basket for soldiers to urinate in. After that, the bones were crushed into powder, placed in another basket in front of the young king of Tay Son to make him suffer. At that time, they served him a solemn party, according to the custom of the country. Who is about to be executed? The king's brother (i.e., Quang Thieu) was more courageous than the king, and when he saw the king's food, he blamed it, and because the tray where the food was delivered there had characteristics that were meant to respect the position of the king, so he said: tray, we need to eat a tray." After eating, people put rags in the king's mouth and many others to keep them from cursing the new king and then tying hands and feet to four elephants for the elephant to tears. An elephant had pulled the king's thighs and tendons out, but the king also returned to the basket containing the king's parents' bones. Li Xing uses a knife to break the remaining parts together into four parts, plus the thigh that has

been torn apart for five. At the top of a tall pole, the parts were brought up in the five more crowded markets in the city. Those stakes were guarded day and night, and heavy fines were threatened with those who lost them, but let it rot or feed the crows.” According to the *National History* 國史館 Nguyen Dynasty, King Gia Long, after having manipulated “take the punishment” on the remains of Nguyen Nhac, Nguyen Hue and the body of Nguyen Quang Toan left three skulls of 3 to usurp Nguyen Nhac, Nguyen Hue, Nguyen Quang Toan, put in 3 jars, cover carefully, seal, wrap iron chains, amulets to permanently imprison criminals in the Foreign House (later changed to Vu Kho) in May 11 years Nham Tuat (1802). There was another famous mausoleum during the Ming Dynasty period: in 1835, the rebel party leaders of Phien An 藩安 consisted of six people being executed.

## REFERENCES

1. Dao Duy Anh (translated), *Chinese history from ancient times to the present day*, Publishing House. Customs Mail, Hue, 1992.
2. Nguyen Luong Bich, *Nguyen Trai fought the enemy to save the country*, Publisher. People's Army, 1975.
3. Dam Gia Kiem, *Chinese Cultural History*, Publishing House. Social Science, Hanoi, 1993.
4. I.S. LISEVICH, *Ancient Chinese Literary Thought* (Prof.Dr. Tran Dinh Su translated), Publisher. Ho Chi Minh City University of Education, 1993.
5. Nguyen Hien Le - Gian Chi, *General Chinese philosophy*, volume 2, Publisher. Ho Chi Minh City, 1992.
6. Phan Huy Le, Chu Thien, Vuong Hoang Tuyen, Dinh Xuan Lam, *History of the feudalism of Vietnam*, Volume 3, Publisher. Education, Hanoi, 1960.
7. Quang Man (China), *On China's outdated rule of law culture*, 半开化的华夏文化, Beijing Spring Magazine (*Beijing Spring*) November 10, 2018 (translated by Doan Duc Thanh ).
8. Do Duc Minh, “China legal system” - *The unique product of the combination between the two doctrines of Germany and the Law of the rule of law in feudal history of China*, State and Law, no.3 (263) / 2010.
9. *Vietnamese Encyclopedia*, Hanoi, 1995.
10. Tran Quoc Vuong- Ha Van Tan, *History of the Vietnamese feudal regime*, volume 1, Publisher. Education, Hanoi, 1963.

11. Institute of Law, *Draft State history of the law of Vietnam*, Publisher. Social Science, Hanoi, 1968.
12. Bui Ngoc Son, *Ancient Chinese political philosophy and the rule of law State issue*, Publisher of Justice, Hanoi, 2004.
13. Yoshiharu Tsuboi, *Dai Nam Country facing France and China*, Social Science Department of Ho Chi Minh City Party Committee, 1990.

# DEATH PENALTY IN THE LAW OF FEUDAL DYNASTIES OF VIETNAM

Hoang Dinh Duyen<sup>1</sup>

**Abstract:** Capital punishment in Vietnam's feudal history is heavily influenced by China's feudal law, representing the social context's objectivity and identical features. The death penalty in Vietnam's feudal criminal law is exceptionally severe and applied to different crimes, including corruption; furthermore, there is no distinction between crime and ethical violations. The capital sentence is conducted by different methods such as lingchi (slow slicing), the most brutal execution in the death penalty. Some provisions mitigate the criminal liability by considering the accused's relatives and the disadvantaged. High-profile people's prosecution requires the majesty's authority before standing trial and after sentencing the accused.

## 1. CAPITAL PUNISHMENT IN VIETNAM'S FEUDAL CRIMINAL LAW

Through the feudal dynasties of Ngo - Dinh - Tien Le - Tran - Hau Le - Nguyen, the death penalty was gradually improved to suit the social context.

### 1.1. The Ngo, Dinh, and Early Le Dynasty

#### *Ngo Dynasty*

In 938, Ngo Quyen was the people's leader to defeat the Southern Han army in the battle of Bach Dang River, officially ending nearly a thousand years of Chinese domination, opening a long period of Vietnam's independence.

From 938 to 965, during the period between 944 and 950, there was another King called Duong Binh Vuong (Duong Tam Kha). Unlike the later monarchic dynasties of Vietnam, the Ngo emperors still proclaimed the title of King but not yet proclaimed the role of Emperor in the whole territory they ruled. People living in this period did not record the death penalty.

---

<sup>1</sup> Ph.D. Candidate, School of Law, Vietnam National University.

### *Dinh Dynasty*

It was beginning in 968 after Dinh Tien Hoang finished the rebellion to reunify the country. He decided that the national title was Dai Co Viet, moved the citadel to Hoa Lu. The Dynasty ended in 980 when Dinh Phe De gave the throne to Le Dai Hanh.

*The death penalty:* The King wanted to use the authority to overpower the people, so he put a large cauldron in the courtyard and raised a ferocious tiger in the grave, ordered that “anyone illegally will be charged with leaving the cauldron to cook or give away for tigers. People are afraid of submission.”<sup>1</sup>

### *Tien Le Dynasty*

**This period** started after Le Dai Hanh took the throne to replace the Dinh in 980 and ended in 1009 when Le Long Dinh died.

*The death penalty:* During the reign of King Le Long Dinh (1005 - 1009), the King killed others to rob the throne. The King had a reputation for being exceptionally brutal. Methods of execution included wrapping the accused in tangled grass and setting fire the areas surrounding them; ordering Lieu Thu Tam to take a short knife and slash the knife to pieces to die slowly, that person screamed. Thu Tam said that he was not used to dying, the king laughed.

If they captured the enemy, they would send them to the riverbank. When the tide receded, sent workers to plunge under the water, or forced to climb up to a high tree, then cut the stump for fallen trees, people fell to die. The King came to see and enjoyed the scene. He was used to going to the Ninh river (today is the Day river part of Chuong My district, Hanoi city). The river was full of snakes, and the King ordered people condemned to death be tied to the side of the boat to be killed by snake bites.

## **1.2. The Ly Dynasty**

The Ly Dynasty’s feudalism began when Ly Cong Uan took the throne in October 1009 after gaining power from the Tien Le Dynasty. This dynasty passed through nine emperors and ended when Ly Chieu Hoang, then only seven years old, was forced to abdicate to give the throne to her husband Tran Canh in 1225.

The Ly dynasty existed for more than 200 years. It was identified as the first state in Vietnam to officially have a legal system since independence after the Northern colonial period, other than the Ngo, Dinh, and Tien Le dynasties<sup>2</sup>.

1 *Đại Việt Sử ký toàn thư*, Nxb. Hồng Đức, 2020, tr. 155.

2 Trương Hữu Quýnh, Đinh Xuân Lâm, Lê Mậu Hãn, *Đại cương lịch sử Việt Nam*, Nxb Giáo dục, 2008, tr.127-129.

In 1042, Ly Thai Tong promulgated the book called 'The Letter,' and this was the first law book of a feudal dynasty of Vietnam. The birth of 'The Letter' and the Ministry of Justice and the Penalties body was considered a step forward State management organization of the Ly Dynasty, although its effectiveness is still limited.

*The death penalty:* The "Ten Crimes" institution in the Ly Dynasty began to be recognized. The origin of the "Ten Crimes" is based on the death penalty law of China (550-577). The Ten Crimes were called "Ten Abominations," later inherited and developed by the Sui Dynasty. However, not until the Tang Dynasty was the "Ten Abominations" institutionalized into written law, including 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<sup>1</sup>

For the crime of anti-rebellion: In 1150, King Ly Anh Tong adopted the Edict: Prohibit eunuchs from entering the palace arbitrarily, whoever commits it will be guilty of death, if not careful to let others enter the palace, it is also guilty as so. Prohibit the court officials from traveling to the princes' house: In the palace, it is forbidden to gather together five or three people to discuss disparagingly, guilty of the violation. Those who commit crimes outside the armory garrison of Do Phung national defense will punish 80 staff and criminals; If anyone comes in that gable, he/she will be executed. The army guard in the garrison had an edict and was only allowed to hold a weapon. Without the edict, he would arbitrarily carry it beyond the ground; then, he would be executed<sup>2</sup>.

Under China's Tang Dynasty's influence, criminal law for the Ly law is not a complete copy. The Law of the Ly Dynasty, due to the profound influence of the Buddha's history, included a profound humanitarian spirit by not imposing the death penalty on the elderly aged 70 years and over, children under 15 years old and the sick, and the King's relatives. If they have sinned, they will atone for sin. If they commit one of the ten crimes above, the King will not attend to order the death penalty. It is a significant feature in the criminal law of the Ly Dynasty.

The death penalty under the Ly dynasty was not as severe and cruel as the feudal Chinese dynasties, which is reflected in the following facts: King Ly Thanh Tong granted clemency to the King of Champa, Che Cu. The latter was at law eligible to be executed.

Those who commit treason against the "Ten Abominations" by law must be executed. In the case of "Dam Dam Lake" in 1095, King Ly Nhan Tong also once forgiven Le Van Thinh. In this incident, Ngo Sy Lien discussed that the ordinary people

1 *Đại Việt Sử ký toàn thư*, Nxb. Hồng Đức, 2020, tr.229.

2 *Đại Việt Sử ký toàn thư*, Nxb. Hồng Đức, 2020, tr.300.

try to usurp the throne to kill the King and be exempt from death is wrong in the King's crime of Buddhist devotion<sup>1</sup>.

There were other crimes where the prisoner was eligible to be executed, but the offender was granted clemency, such as this case: In 1158, Prince Long Workshop committed adultery with the king's palace concubine. King Ly Anh Tong still spared Long Workshop's death, and he became a civil servant.

Under Ly Thai Tong, the murderer was fined only 100 staff; he liked to face 50 words, he was used as armor. There are even cases of intentional death that are still not considered a crime. It can be said that with immense tolerance, the criminal law of the Ly dynasty created a feature that the feudal law at that time did not have that was intensely focused on the reform of prisoners. Based on this advanced feature, we can observe that, under the Lý dynasty, the death penalty used was only reluctantly used because it was a penalty that did not give the offender a chance to rehabilitate<sup>2</sup>. Moreover, "killing" is also a Buddhist taboo, the root foundation of the Ly law.

### 1.3. The Tran Dynasty

The Tran Dynasty was a feudal monarchy in Vietnamese history, from Tran Thai Tong (1225 - 1258) to Tran Thieu De (1398 - 1400) was 12 kings with 175 years. The dynasty is famous for its glorious victories in Vietnamese history, with three victories over the invading Nguyen Mong.

The death penalty in this period was very severe, considered a valuable tool for Tran rule.

In 1230, to amend the law of ceremonies, including 20 volumes; In 1244, King Thai Tong intended to re-establish the laws, the Tran's permission was that every person who committed theft must cut off his hands or be tortured by an elephant<sup>3</sup>.

The death penalty method of "Lingchi" was applied for the first time. Lingchi, also known as slow slicing, was a brutal feudal punishment, killing offenders by cutting off limbs like pieces of meat to die gradually.

In 1283, the King punished the High Priest serving Tran Lao and allowed Lao to atone to exchange 1,000 mandarins and soldiers. The trial of the mausoleum of the name Mãnh's being Lao's slave in the East market is due to the anonymity that defames the state<sup>4</sup>.

---

1 *Đại Việt Sử ký toàn thư*, Nxb Hồng Đức, 2020, tr. 254.

2 Phạm Văn Beo, *Về hình phạt tử hình trong Luật hình sự Việt Nam*, Nxb. Chính trị Quốc gia, 2010, 106.

3 *Việt Nam lược sử*, Nxb. Văn Học, 2015, tr. 130.

4 *Đại Việt Sử ký toàn thư*, Nxb. Hồng Đức, 2020, tr. 377.

In the case of Đấng Long, he was a close relative of the King, a brilliant literary man noted for promotion. The king wanted to be an academic, but the emperor prevented it. Long had a discontent in his heart and surrendered to the enemy. When he lost, he was arrested and slashed in public to deter everyone from similar treason<sup>1</sup>.

The Tran law prohibited gambling. In 1296, Senior Lieutenant Nguyen Hung gambled and was punished with staff to die. In 1347 Bao Uy Vuong Hien was guilty, sent out as an adventurous general in Vong Giang town, and then sent someone to kill him at Van Nu river, Truong Yen highway<sup>2</sup> (now in Yen Mo, Ninh Binh province).

The death penalty of Tran feudalism was very harsh; in addition to crimes that traditionally could be executed, such as “Ten Abominations,” murder, robbery, counterfeit money would also be executed. Therefore, the application of the death penalty was so widespread that not even the King or royal family were exempt if convicted of a relevant crime.

In addition, the implementation process is still humane: In 1289, after the 3rd victory over the Nguyen Mong army invaded the third time, they punished the enemy soldiers. As a palace to atone for sin, the officer commits a severe offense and handles it. Like when the defeated enemy caught the boxes of the enemy’s goods, the King sent them to burn to calm the traitors.

It can be said that the death penalty under the Tran dynasty had a rigorous application and was considered the most effective tool for government rule. In addition to the execution forms used during the Tran dynasty, such as elephant thickening, necking, and bestowing to suicide with poison, “lingchi” was first used in our country at this time.

Justification for the severity and the brutal execution of the death penalty, because the Tran conquered the Ly king’s throne, it was impossible to set the rules of division. Each court changed each way. Furthermore, the law is often very harsh<sup>3</sup>.

#### 1.4. The Later Le Dynasty

The Hau Le Dynasty (1427-1789) was founded by Le Thai To, distinguished from the Tien Le Dynasty (980-1009), founded by Le Dai Hanh at the end of the 10th century.

The Hau Le Dynasty consists of 2 phases:

- The Le Dynasty (1428-1527): Lasting for 100 years, starting from the victory of the Lam Son uprising, Le Loi established a new dynasty and ended when Mac Dang Dung’s power abolished King Le Cung Hoang and established the Mac Dynasty.

1 *Đại Việt Sử ký toàn thư*, Nxb. Hồng Đức, 2020, tr. 398.

2 *Đại Việt Sử ký toàn thư*, Nxb. Hồng Đức, 2020, tr. 472.

3 Phạm Văn Beo, *Về hình phạt tử hình trong Luật Hình sự Việt Nam*, Nxb. Chính trị Quốc gia, 2010, tr.107.

- Le Trung Hung Dynasty (1533-1789): Lasted for 256 years, starting when Lieutenant General Nguyen Kim established Le Duy Ninh's throne room, Le Trang Tong, in Ai Lao to restore the Hau Le Dynasty; ended when Le Chieu Thong fled to China.

- *Death penalty before Quoc Trieu high luat's adoption*

During the Le dynasty, the punishment imposed by Le Thai To was based on the Tang law with a system of five forms: Xuy, cane, map, save, death. For capital punishment, it is divided into three steps corresponding to each type of crime: strangling and slashing; Crime of beheading, and lingchi. In 1428 ordered: Roads, anyone who saw the puppet officials of the ground troops and the people escaping from the cities without explanation would cut. Again, ordered the revealing revelations for the deformed people back and forth, whoever dared to tolerate the deformities and the puppet army to escape, the revealing and the guard would behave. The king is a strictly forbidden sight. Anyone who hides a Ming mandarin of one or more people will kill without forgiveness<sup>1</sup>.

Although the law only provides for the three above forms there is a case of crime is executed by poison. Trần Cảo was given poison when he attempted to commit treason in 1428.

Besides, the issues related to the case of "Eight Deliberations" were considered under King Le Thai To. Those who belong to the "bowl of recommendation" that commit a crime must first ask for deliberation. When the recommendation is finished, they must first ask for a review by the king. Those who commit offenses or less than that can be exempt from the penalty. However, those who commit the death penalty are not entitled to the provisions of the "eight decree."

"Eight Deliberations" includes 1. Relatives of the king; 2. Old acquaintances of the king; 3. Individuals with great virtue; 4. Individuals with extraordinary ability; 5. Meritorious individuals; 6. High officials; 7. Individuals exceptionally zealous at their government duties; 8. Guests of the king (i.e., the descendants of preceding imperial families).

- *Le Chi Vien case:*

On July 27, 1442, King Le Thai Tong patrolled in the East, approved troops in Chi Linh city, Hai Duong. Nguyen Trai welcomed the King to live at Con Son pagoda, where Nguyen Trai lives. On August 4 (lunar calendar), the King returned to Le Chi Vien in Gia Dinh district (now Dai Lai village, Dai Lai commune, Gia Binh district, Bac Ninh province). Nguyen Thi Lo, the concubine of Nguyen Trai, is a beauty that is often literate. The king heard the voice, had previously invited and conferred a ceremony of study, day and night for most of the party.

<sup>1</sup> *Đại Việt Sử ký toàn thư*, Nxb. Hồng Đức, 2020, tr. 658.

During the tour to the East, Thai Tong returned to Vai camp in Dai Lai village, Gia Dinh district, suffered from malaria, Nguyen Thi Lo spent the whole night, the king died, the officials secretly returned to Kinh, everyone saying that Nguyen Thi Lo killed the king, arrested and killed Nguyen Thi Lo, drowned in the Red River.

On August 16, 1442, the court arrested and killed Nguyen Trai, exorcised the three clans; a total of approximately 400 people were killed after the tragedy. In 1464, King Le Thanh Tong justified Nguyen Trai<sup>1</sup>. It can be said that the Le Chi Vien case is a shocking tragedy in the history of feudalism in Vietnam.

- The death penalty provided in *Quoc Trieu hinh luat*

The imperial court of law was promulgated by King Le Thanh Tong in 1483, the kings of the LeMat dynasty supplemented more or less promulgated in 1777, the Ministry of National Court of Criminal Law included six volumes, 722 articles.

The criminal dynasty, also called the Le Dynasty Criminal Law or Hong Duc Law is the most necessary orthodox criminal code of the post-Le feudal dynasty (1428 - 1789), the most considerable legalization work in Vietnamese feudal history systematized the provisions of case law and several legal norms that have reflected the traditional oriental values of the Vietnamese people.

Due to the influence of the rule of law, a common feature of the ancient Eastern legal systems, the Criminal Kingdom had lost the line between morality and law. The consequence of this reality was the criminal regulation of even acts that today are only morally condemned, but at that time, the group "Crimes" and executed.

*Quoc trieu hinh luat* also imposes hefty penalties; out of the 660 laws that regulate crimes of the Ministry of Justice, 144 regulating criminal acts with the death penalty (about 22%).

The death penalty has three levels: Hanging, slashing is the first order; beheading is a step; slow slicing is a level, depending on the crime's seriousness.

Determining the principle of the death penalty for the group of people in the "Eight Deliberations": Before deciding to die, the judges must clearly state the crime and the punishment, what to do, make a copy, and present it to the king for the king to judge (Article 4).

Most of the death penalty offenses are related to the safety of the commune, the safety of the king and the royal family, the dignity of the royal lineage, such as whoever freely climbed over a wall is condemned to slashing. The Guardians (the soldiers guarding the

<sup>1</sup> *Đại Việt sử ký toàn thư*, Nxb. Khoa học Xã hội Hà Nội, 1993, tr. 405.

palaces in the Imperial City) took someone who was not a guard instead of their name and was also substituted for the palace<sup>1</sup>.

“Ten Abominations,” the ten capital offenses, are:

1. Rebellion: to overthrow the current regime.
2. Great sedition: to damage or destroy royal temples, tumuli, or palaces.
3. Treason: to defect to an enemy state, usually carrying out national secrets.
4. Parricide: to harm or murder one’s own parents and grandparents; to murder one’s own or husband’s elder relatives.
5. Depravity: to murder three or more innocent people; to disembowel a victim’s body after committing a murder; to produce poison and use it.
6. Great irreverence: to show disrespect to the Emperor or his family.
7. Lack of filial piety: to maltreat one’s parents or grandparents or to procure entertainment during periods of mourning (up to three years for one’s parents).
8. Discord: to harm or sue one’s husband or elder relatives.
9. Unrighteousness: to murder one’s superiors, mentor, or local government officials.
10. Incest: to have affairs with the wives or concubines of one’s father, grandfather, or other elder male relatives<sup>2</sup>.

In addition, some other offenses were also subject to the death penalty, such as robbery, rape, beheading, stealing, stabbing (Article 428), and stealing with a weapon with intent to rob and murder, and murder (Article 429).

The provision of criminal liability to the collective for treason, great treachery, conspiracy to oppose is an act that can cause the safety of society or the safety and dignity of the King and the royal family. This is subject to joint responsibility - the practitioner is executed, as in article 411: Those who conspire to trespass, who plots to do great things are condemned to beheading, the culprit and the pro-party know it must be guilty of slashing, his wife and children are confiscated as public. The bureaucracy that deliberately tolerates or hides it behaves like a criminal. Article 412: Those who plotted to betray the enemy against the enemy were executed; If he acted, then condemned the offense, those who know it are also guilty.

---

1 Article 52; 53 *Quốc triều hình luật*, Nxb. Tư pháp, 2013, 60.

2 Article 2 *Quốc triều hình luật*, Nxb. Tư pháp, 2013, tr. 41.

- *The death penalty applied for corruption-related crimes*

Quoc trieu Hinh luat, with more than 40 articles related to anti-corruption, including local officials harassing people, buying and selling cheaply, demanding ample or bribery, they demote or dismiss them and pay double compensation, Article 138 “If a mandarin violates the law, but bribes 20 mandarins (one mandarin is equal to 600 dong<sup>1</sup>) or more, he shall be charged with slashing.”

- *Criminal liability exemption for the elderly and children*

If the offenders are aged 80 or over or ten years or younger, they were not held to be criminally liable. Additionally, disabled people who committed death penalty crimes were also exempted. If a person aged 90 or over or seven years old or younger commits a crime subject to the death penalty, they cannot be executed (Article 16). In addition, women who commit a death penalty offense could not be executed if pregnant or if having given birth within 100 days (Article 680). Women could also have their criminal liability reduced, or in the case of servants stealing from their masters, they receive reduced sin if they are “maidservants.”

- Exemption from criminal liability for justified defense

The landlord who beat the thief right away is not a crime (Article 450).

- Mitigation of penalties for ethnic minorities:

Man Lieu people (an ethnic minority) rob each other, kill each other, commit crimes less than robbery, murder one level if interpreted together then (Article 451).

The time of the crime to benefit the criminal when applying the law, according to which “when committing the crime is not old, disabled. When they are old or disabled, they will be judged on the crime according to the law of old age, disability. When they are young, they commit crimes; when they are old, they will be judged according to the law of young age” (Article 17).

Born in the mid-fifteenth century, in addition to the draconian provisions of the death penalty, the Criminal Kingdom has achieved outstanding value and achievements, has advanced features, and is more dominant than the previous laws and after it. With the rules to protect the rights of the people, the lower class, the servant, the aunt, the disabled. The most outstanding progress that researchers mentioned the most is the concern about the status of women, care for their rights, giving them relative equality with men in society and the husband in the family, exempting criminal responsibility for the case of primary

<sup>1</sup> <<http://thoibaotaichinhvietnam.vn/pages/xuan-binh-than-2016/2016-02-04/ngay-xuan-doc-lai-bai-ca-dao-di-cho-tinh-tien->> accessed 28 January 2021.

defense worth. That is the factor that contributes to the specialness and progress ahead of the time of this law<sup>1</sup>.

### 1.5. The Nguyen Dynasty

The Nguyen Dynasty was the last monarchic dynasty in Vietnamese feudal history, established after Nguyen Anh ascended the throne in 1802 and ended ultimately when Emperor Bao Dai abdicated in 1945 143 years. The Nguyen Dynasty is a dynasty that marked many ups and downs in Vietnamese history, especially the French invasion in the mid-19th century.

Under the Nguyen Dynasty, after ascending the throne, King Gia Long conducted the legalization of laws to create, on the one hand, the renewal of laws, on the other hand, to demonstrate the power of the new government. In 1811, the Hoang Viet laws were built and completed in 1812, and in 1818 were widely applied throughout the country. Hoang Viet's law is an approximate copy of the original Dai Thanh law without criticism or modification to suit Vietnamese conditions at that time. Hoang Viet rules were used during the Nguyen Dynasty and then continued in Trung Ky during the French occupation of Vietnam.

#### *The death penalty provided in Hoang Viet luat le*

Hoang Viet Luat with 353 articles, of which 122 stipulates the death penalty framework, with over 35% of the total number of laws on crime. In addition, the Code also stipulates a number of other acts in the indirect form that, when applied to specific offenses, the death penalty can also be used.

Under the Confucian influence, most of the offenses that could be executed were related to the safety and dignity of the King and the royal family, with regard to the relationship of the army, father, and wife. In addition, the usual offenses were subject to the death penalty, such as murder, robbery of property, recidivism, embezzlement, prostitution, robbery, and grave digging.

#### *- The forms of capital punishment*

The Hoang Viet rules stipulated that the death penalty had two steps: hanging and slashing. There are two types of hanging: hanging right away and waiting for the autumn to hang (hold the decision (hang now) and then hold the back (lock up and wait for the day to hang)). Slashing is also divided into two categories, namely, decisive slaying (beheading immediately) and post-mortem (imprisonment waiting for the slash).

<sup>1</sup> 'Tính nhân đạo của Bộ luật Hồng Đức với sự hoàn thiện Bộ luật Hình sự năm 2015' (*Kiểm sát Online*, 22 March 2017) <https://kiemsat.vn/tinh-nhan-dao-cua-bo-luat-hong-duc-voi-su-hoan-thien-bo-luat-hinh-su-nam-2015-46745.html> (accessed 25 January 2021).

Hoang Viet's law does not stipulate the form of death by mausoleum, in accordance with the additional explanation of this Code: Die of the tomb is the most terrible of the horrible penalties today forever permanently abolish the corporal punishment, permanently abandon the clan (killing three families, including the father, mother and wife's family or also known as chu di trinity). Just keep the worst punishment out of all this by slashing the unfaithful and filial. However, some specific regulations on the crime still stipulate the sanction level is the execution of the mausoleum, such as the wife beat the disabled husband, immediately choked, killed, immediately beheaded, intentionally killed, executed mausoleum. It is also stipulated in Articles 223, 253, 254, 256, 257. This is a severe defect of Hoang Viet's law. The death penalty was carried out for Le Van Khoi when the rebellion against Minh Mang took place from 1833 to 1835.

In addition, in Article 223, Muu Dai reversed, officially recognized the institution "nine familial exterminations" (family execution).

In deciding the death penalty, Hoang Viet rules also used the rule of "Eight Deliberations." For those who commit offenses up to the death penalty line, if they belong to the "Eight Deliberations" category as well as the grandparents of those who belong to the "deliberation" category, they must first appeal to the king and wait for the ultimate decision. If they commit a crime under the "Crusaders," they can also be prosecuted. However, they must be submitted to the king with a "sealed letter" (Article 4, Article 5).

*- Death penalty for corruption-related crimes:*

As stipulated in Book 17, The Penal Code includes 9 Articles to punish evil, violating human morality in the country's rule, such as Article 312, bureaucrats receiving money with 80 charges of hanging (hanging and hanging). Do not abuse the law, receive bribes from many owners, collectively a half of them, with 120 or more hanging penalties (hanging for hanging). If the person does not receive the State salary, abuses the law (such as helping, allowing to work, tolerating) 120 amounts of hanging penalties (imprisonment pending hanging)<sup>1</sup>.

Case: In December 1854, foreign businessmen reported that many court officials were greedy by foreign merchant boats in Quang Nam. Knowing the news, King Tu Duc immediately sent the governor to lead the court inspection team to Quang Nam to investigate. As a result, the accusations as found to be accurate, the sentence was submitted; according to the Hoang Viet law, 17 people were sentenced to post-mortem imprisonment (forced death but still in temporary detention awaiting orders), 25 people were charged with exile, twelve people were charged with forced labor, eight were punished with a stick beat and dismissed. Many of the major players involved were severely punished.

<sup>1</sup> *Lược khảo Hoàng Việt Luật lệ*, Nxb. Văn hoá Thông tin, 2002, tr. 120.

According to historical documents, this is the largest bribery trial in our country during the feudal period.

*Provisions show the humane policy of death sentence in Hoang Viet luat le*

*For people and children*, Article 21 stipulates: Those who are 80 years old or older or ten years old or younger or who are seriously ill and commit murder must be guilty of death, then apply for clemency from the King and wait for the King's decision. If treason is committed, this law does not apply. No penalty is imposed for those aged 90 years or older or children seven years old and younger, even if they commit a death offense.

*For women*, Article 12 stipulates: For women committing crimes, except for adultery and murder, they will be imprisoned, while other crimes are punished and then assigned to their husband to take care of. If a pregnant woman is committed to death row, she should be allowed to take care of the midwife; she also gives permission 100 days after giving birth to death.

*For astronomers*: Because during the Nguyen dynasty, it was vital to consider astronomy because they were considered to know the movement of celestial bodies, meaning that they could know heaven and earth. Astronomical bureaucrats, if they commit crimes, are permanently reduced to the penalty rank. When they commit a crime worth the death penalty, they will not be punished. However, they can only punish them with the highest penalty of "saving," even when they commit treason (Article 18).

Thus, due to the influence of the ideology of the person's rule in the Eastern criminal law, the Hoang Viet law set does not distinguish between criminal acts and those that violate ethics. The "Ten Abominations" still include "parricide," "lack of filial piety," "depravity," "incest," these acts are equated with "treason," "rebellion," "great irreverence," and "discord" must be executed if they violate. Besides, regulations on reduction and exemption of criminal liability for women and vulnerable people continued to be recognized.

### **1.6. French colonial rule**

The French invasion of Vietnam took place from 1858 to 1884. The war ended with the victory of the French colonial empire. The French invaded the entire territory of Dai Nam and established the ruling apparatus, starting the period.

*French colonial in Vietnamese history*

On 6 June 1884, the Patenôtre treaty was signed in Hue capital, dividing Dai Nam into three countries: Tonkin, Trung Ky, and Cochinchina under three different regimes. Each period has its own rule of law, such as three separate countries. Cochinchina was a French colonial land. Tonkin and Trung Ky were protected by the French, but the Nguyen court was still nominally controlled.

Accordingly, a series of acts considered “against the French government” is a “felony” and must be “executed.” Article 75, the figure of the reform law, stipulates that if France’s colonists or the protector of France, who hold weapons to act against the French, they will be executed. In addition, acts of murder, assassination, murder to commit other crimes, or to evade the law are also executed under this law.

Article 12, The Reformed Penal Code regulates the execution of the death penalty: The death penalty is executed by slashing; however, it does not stipulate what slashing is allowed. Notably, the An Nam and Hoang Viet criminal law do not provide for the form of execution.

However, based on the actual situation, the criminal law applied in our country at that time was just a copy of the French Penal Code, modified to suit the colonial situation, can quickly confirm the death penalty form in our country during this period was done by guillotine.

## **2. CAPITAL SENTENCE IN VIETNAM’S FEUDAL CRIMINAL LAW’S CHARACTERISTICS**

The death penalty institution in Vietnam’s feudal criminal law has gradually formed and developed and bears the imprint of historical ups and downs. The culmination of that development was the Ministry of the Imperial Court of Criminal Law. It can be said that the Law of the National Court of Criminal Law in the Le dynasty and the Hoang Viet law still circulated until today are the ones representing criminal law during the feudal Vietnam period<sup>1</sup>.

Study provisions on the death penalty in feudal Vietnamese criminal law from 938 to 1945, through different feudal dynasties, feudal criminal law provisions on the death penalty are an objective requirement to punish criminals, protect, reinforce the safety of the king and the royal family, the dignity of the royal lineage, demonstrates the absolute power of the king, national security, maintaining the rule of the feudal state apparatus.

The death penalty institution in feudal Vietnamese criminal law bears the mark of historical periods, depending on the conception of the ruling class about the social order that should be protected by criminal law, criminal legislative methods, and legislative qualifications of each period. Therefore, when considering the institution of the death penalty, it is impossible to separate the concrete historical situation and recognize the dialectical movement of this institution in the process of the social movement. The historical mark of this period is reflected in the influence of Confucian thought, the concept of the social order of feudalism.

---

<sup>1</sup> Trần Thị Quang Vinh, “Các tình tiết giảm nhẹ trách nhiệm hình sự trong pháp luật phong kiến Việt Nam”, (2002) 5, Tạp chí *Luật học*.

The process of formation and development of the death penalty institution in feudal Vietnamese criminal law is a development process with selective inheritance, which is the recognition of the correspondence between the nature and the level of danger for the society of crime is carried out with the degree of criminal liability that the offender must bear.

The crimes of applying the death penalty in the Vietnamese feudal law are deeply influenced by the Chinese feudal laws, which were supplemented and completed to suit the economic and social circumstances, the customs and practices in each period with a harsh nature were applied to many crimes, in which the provisions on “Crimes” inherited through the feudal dynasties, irrespective of a crime or a violation of common morality.

The execution of death was stipulated in the Vietnamese feudal criminal law with popular forms such as hanging, slashing, mausoleum. The death penalty is specified in the final definite form of punishment, corresponding to each criminal case.

The death penalty regime in the Vietnamese feudal criminal law is harsh. It demonstrates humanity, when not applying, executing the death penalty for the vulnerable in a society like the elderly, pregnant women, children, ethnic people, or people with knowledge valued in society. The circumstances of reducing criminal responsibility in feudal criminal law are shown in reducing crime for people who belong to the eighth and for people with positions in society and family.

Regarding the death penalty for corruption in feudal law in Vietnam, all of the dynasties’ ideologies and views are pretty clear. It is always upholding measures to prevent corruption, considering prevention as one of the critical measures of decisive significance in constructing and maintaining a clean feudal state apparatus, an essential public-official system of integrity, and no room for visitors umbrellas. The spirit and ideology of administrative reform set up a fair and reasonable salary regime for bureaucrats, set up accurate and effective supervisory agencies, and promoted corruption denunciation institutions. These are issues that need to be studied to perfect the anti-corruption law in the current period.

Stemming from the socio-economic development and international integration process, at the same time with the requirement of improving judiciary, building and perfecting the current socialist rule of law State in Vietnam, asked to apply progressive ideas and viewpoints in Vietnam’s feudal criminal law in general. Regulations on the death penalty, in particular, to continue perfecting Vietnam’s criminal law with the guarantee of human rights and humanize criminal sanctions, following the development and ethical conditions of Vietnamese people.

**REFERENCES**

1. *Đại Việt sử ký toàn thư*, Nxb. Khoa học xã hội, 1998.
2. *Đại Việt sử ký toàn thư - Tập II*, Nxb. Khoa học xã hội, 1998.
3. *Đại Việt sử ký toàn thư*, Nxb. Khoa học xã hội, 1993.
4. *Đại Việt Sử ký toàn thư*, Nxb. Hồng Đức, 2020.
5. Nguyễn Quyết Thắng, *Lược khảo Hoàng Việt Luật lệ*, Nxb. Văn hoá thông tin, 2002.
6. Nguyễn Văn Thành, Vũ Trinh, Trần Hựu, *Hoàng Việt luật lệ - tập 1*, Nxb. Văn hóa - thông tin.
7. *Lịch sử Việt Nam giản yếu*, Nxb. Chính trị Quốc gia, 2000.
8. *Lược khảo Hoàng Việt Luật lệ*, Nxb. Văn hoá thông tin, 2002.
9. *Việt Nam lược sử*, Nxb. Văn Học, 2015.
10. Trương Hữu Quýnh, Đinh Xuân Lâm, Lê Mậu Hãn, *Đại cương lịch sử Việt Nam*, Nxb. Giáo dục, 2008.
11. Viện Lịch sử, *Quốc Triều hình luật*, Nxb. Tư pháp, 2013.
12. Viện sử học, *Lịch sử Việt Nam –tập 3*, Nxb. Khoa học xã hội, 2007.
13. Lê Cẩm, “Luật Hình sự Việt Nam trước thế kỉ XV 5”, Tạp chí *Dân chủ và Pháp luật*.
14. Phạm Văn Beo, *Về hình phạt tử hình trong Luật hình sự Việt Nam*, Nxb. Chính trị Quốc gia, 2010.
15. Trần Thị Quang Vinh, “Các tình tiết giảm nhẹ trách nhiệm hình sự trong pháp luật phong kiến Việt Nam” (2002) 5, Tạp chí *Luật học số*.
16. Phạm Thị Huệ, “Phòng chống tham nhũng trong pháp luật phong kiến Việt Nam” (*Thanh tra Chính phủ*), <<http://truongcanbothanhtra.gov.vn/nghien-cuu-khoa-hoc/nghien-cuu-trao-doi/1968-phong-chong-tham-nhung-trong-phap-luat-phong-kien-viet-nam.html>>
17. <<http://thoibaotaichinhvietnam.vn/pages/xuan-binh-than-2016/2016-02-04/ngay-xuan-doc-lai-bai-ca-dao-di-cho-tinh-tien->>
18. “Tính nhân đạo của Bộ luật Hồng Đức với sự hoàn thiện Bộ luật Hình sự năm 2015” (*Kiểm sát Online*, 22 March 2017), <https://kiemsat.vn/tinh-nhan-dao-cua-bo-luat-hong-duc-voi-su-hoan-thien-bo-luat-hinh-su-nam-2015-46745.html>

# NOT THERE YET, BUT GETTING THERE DEATH PENALTY FOR DRUG OFFENSES IN INTERNATIONAL AND VIET NAM'S LAWS

Tran T. Thu Thuy<sup>1</sup>, Nguyen Tien Duc<sup>2</sup>

**Abstract:** The twenty-first century has witnessed a robust trend towards death penalty abolitionism worldwide. The trajectory quickly spreads to even Asia, a die-hard supporter of this practice and “the next frontier” for abolitionist enthusiasts. Nevertheless, controversies revolving around applying the death penalty for drug offenses still trigger Southeast Asian countries, given their divergent understanding. On the one hand, in justifying the zero-tolerance punishment on drug criminals, Southeast Asian countries often invoke the spillover impacts of narcotic drugs on human beings and social order. On the other hand, international human rights law has reshaped the punitive approach to drug crimes. Relevantly, this paper argues that drug crimes do not meet the threshold of the term “most serious crimes” in light of international standards. The Human Rights Committee’s interpretation of this term is refined and developed in an evolving manner, limiting the application of the death penalty for drug offenses. This paper documents the dynamic understanding of drug crimes within Viet Nam’s criminal law at the national level. It shows that the country’s understanding of drug crimes has changed incrementally, corresponding to international standards albeit not entirely consistent. This change is mainly attributed to international integration and Viet Nam’s reputational cost-benefit analysis. The paper then presents whether any room left for a change on this matter by drawing on comparative determinants for inducing abolition of the death penalty. Given that many factors are lacking in Viet Nam’s context, the paper concludes with a cautiously optimistic view about Viet Nam’s possibility of abolishing capital drug offenses.

**Keywords:** death penalty, drug offenses, retentionist, abolitionist.

## 1. THE STATE KILLING: AN OVERVIEW OF SOUTHEAST ASIAN NATIONS

In 2008, David Johnson and Frankin Zimring identified Asia as “the next frontier” for abolitionist enthusiasts.<sup>3</sup> Asia, where the majority of humankind is residing, remains

---

1 Lecturer, Hanoi Law University

2 Researcher, Vietnam Academy of Social Sciences

3 David Johnson & Frankin Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (OUP 2008).

the slaughterhouse in the world. The future of the death penalty in this Continent will unveil whether the campaign against state killing that has gained momentum since World War II is a global phenomenon. The nations of Asia are also an essential laboratory for learning about the significant influences on death penalty policy and the impact of policy changes on society and government. Most knowledge of capital punishment and penal policy comes from studying a few developed nations in the West—especially the United States—over a relatively short period.

Based on official national and regional statistics, the production, trade-in, and use of some illicit drugs tend to increase or remain relatively high in Southeast Asia in recent years. According to the UNODC report, poppy cultivation in Southeast Asia was lowest in 2006, then grew steadily, and in 2014, the rate was relatively high. UNODC also points out that at least 250 million people, or about 5% of the world's population, are using drugs. There are more than 3 million people using heroin in Southeast Asia, and more than 5 million people are using synthetic drugs.<sup>1</sup>

Southeast Asia has seen a steady increase in methamphetamine<sup>2</sup> seizures over the past decade, more than any other country in the world. At present, countries in the region have confirmed the amount of drug seized up to 115 tons in 2019.<sup>3</sup> UNODC Chief Representative for the Southeast Asia-Pacific region Jeremy Douglas stressed: “While the world has shifted its attention to the COVID-19 pandemic, all indications are that production and trafficking of synthetic drugs and chemicals continue at record levels in the region”.<sup>4</sup> The Southeast Asia region has also seen a continued increase in dangerous synthetic opioids.<sup>5</sup> While as of 2014, the region's illegal drug supply market detected

---

1 UNODC, “The Challenge of Synthetic Drugs in East and South-East Asia: Trends and Patterns of Amphetamine-type Stimulants and New Psychoactive Substances”, A Report from the Global SMART Program (2017), [https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/The\\_Challenge\\_of\\_Synthetic\\_Drugs\\_in\\_East\\_and\\_South-East-Asia.pdf](https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/The_Challenge_of_Synthetic_Drugs_in_East_and_South-East-Asia.pdf) accessed 30 Jan 2021.

2 Methamphetamine is a powerful, highly addictive stimulant that affects the central nervous system. Also known as meth, blue, ice, and crystal, among many other terms, it takes the form of a white, odorless, bitter-tasting crystalline powder that easily dissolves in water or alcohol, <https://www.drugabuse.gov/publications/research-reports/methamphetamine/what-methamphetamine> accessed 30 Jan 2021.

3 Bảo Yến, Trọng Quỳnh, “AIPACODD 3: Biến lời nói thành hành động hướng tới một cộng đồng ASEAN không ma túy” (Công thông tin điện tử Quốc hội Việt Nam, 29/06/2020), <http://quochoi.vn/tintuc/pages/tin-hoat-dong-cua-quoc-hoi.aspx?ItemID=46710> accessed 31 Jan 2021.

4 UNODC, “Report on East and Southeast Asia: continued growth in the supply of methamphetamine while synthetic opioids spread” (2020), <https://www.unodc.org/southeastasiaandpacific/en/2020/05/regional-synthetic-drugs-report-launch/story.html>, accessed 31 Jan 2021.

5 Synthetic opioids are a class of psychoactive drugs that relieve pain like opiates. They're produced in laboratories, and they're made to have an internal structure that's similar to natural opioids. All the compounds that make up synthetic opioids are man-made and produced in a pharmaceutical lab. They're not naturally occurring substances, but they have the same effect as drugs created from the opium poppy

only three types of synthetic opioids. By 2019, this figure had reached 28. Also, the total consortium was seized in new locations as the organized crime states continuously boosted the size of the business.<sup>1</sup>

In Southeast Asia, 8 out of 11 countries impose the death penalty for drug-related offenses,<sup>2</sup> as these countries consider such acts as the most severe crime. The table below shows the policy perspectives and the application of the death penalty in this region.

**TABLE 1. Southeast Asian countries and the death penalty:  
Policy positions and how the law is applied**

Abolitionist for all crimes (3)	Cambodia, Philippines, Timor-Leste
De facto abolitionist (3)	Brunei Darussalam, Lao PDR, Myanmar
Retentionist (5)	Indonesia, Malaysia, Singapore, Thailand, Viet Nam
Mandatory death sentence for drug offenses (4)	Brunei Darussalam, Lao PDR, Myanmar, Singapore
Discretionary death sentence for drug offenses (4)	Indonesia, Thailand, Viet Nam, Malaysia

Eight Southeast Asian countries currently maintain that drug-related offenses are the most severe crimes in light of international law for which the death penalty may be imposed. As argued in the next section, international law norms do not support this claim.<sup>3</sup> Brunei Darussalam, Lao PDR, Myanmar, Singapore provide for a mandatory death sentence for drug-related crimes.

Below is a table of figures on the number of death penalty cases in general, the death sentence cases related to drug crimes, and the number of death penalty executions from 2015 to 2019 in 8 Southeast Asia countries.

---

plant species, which are used to produce popular opiates like morphine, heroin and codeine, at: <https://baartprograms.com/what-are-synthetic-opioids/>, accessed 31 Jan 2021.

1 Nhật Anh, “Sản xuất và mua bán ma túy tổng hợp tại khu vực Đông Nam Á vẫn ở mức kỷ lục” (*Nhân dân điện tử*, 15/05/2020), <https://nhandan.com.vn/tin-tuc-the-gioi/san-xuat-va-mua-ban-ma-tuy-tong-hop-tai-khu-vuc-dong-nam-a-van-o-muc-ky-luc-458389/>, accessed 31 Jan 2021.

2 Includes: Brunei Darussalam, Indonesia, Lao PDR, Malaysia, Myanmar, Singapore, Thailand, Viet Nam.

3 Office of the United Nations High Commissioner for Human Rights Regional Office for South-East Asia, “*Drug-related Offenses, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia*” (2018), <https://bangkok.ohchr.org/wp-content/uploads/2020/01/Drug-Related-Offenses-2018.pdf> accessed 31 Jan 2021.

**TABLE 2. Recorded death sentences and executions in South-East Asian countries, 2015-2019 and other last known years<sup>1</sup>**

States	Last known execution	Recorded executions in 2019	Recorded executions in 2018	Recorded executions in 2017	Recorded executions in 2016	Recorded executions in 2015	Recorded death sentences in 2019	Recorded death sentences in 2018	Recorded death sentences in 2017	Recorded death sentences in 2016	Recorded death sentences in 2015	
Brunei Darussalam	1957	Abolitionist in practice					0	0	0	0	0	1
Indonesia	2016	0	0	0	4	14	At least 80 (60 for DO <sup>2</sup> )	At least 48 (39 for DO)	At least 47 (33 for DO)	At least 60 (40 for DO)	At least 46 (29 for DO)	
Lao PDR	1989	Abolitionist in practice					0	0	At least 1 (for DO)	At least 3 (3 for DO)	At least 20	
Malaysia	2017	0	0	4	9	N/A	At least 26	190 (136 for DO)	At least 38 (21 for DO)	At least 36 (17 for DO)	At least 39 (24 for DO)	
Myanmar	1988	Abolitionist in practice					4	At least 9	At least 2	At least 3	At least 17	
Singapore	2019	4	13	8	4	4	12 (2 for DO)	17 (11 for DO)	15 (12 for DO)	At least 7	At least 5	
Thailand	2018	0	1	0	0	0	At least 16	At least 33 (3 for DO)	75 (86 out of 192 finalized death sentences were for DO)	216 (213 out of 427 on death row convicted of DO)	At least 7	
Viet Nam	2018	Insufficient information	85	N/A			At least 76	At least 122	At least 35 (31 for DO)	At least 63 (54 for DO)	At least 47	
	TOTAL	At least 4	At least 99	At least 12	At least 17	At least 18	At least 214	At least 419	At least 214	At least 388	At least 182	

According to the data, Brunei Darussalam, Lao PDR, and Myanmar have abolished the death penalty practice, but these countries still sentenced the offenders to death in

1 The data in table 2 are compiled from Amnesty International's annual global report series Death Sentences and Executions for the years 2015 (<https://www.amnesty.org/en/documents/act50/3487/2016/en/>); 2016 (<https://www.amnesty.org/en/documents/act50/5740/2017/en/>); 2017 (<https://www.amnesty.org/en/documents/act50/7955/2018/en/>); 2018 (<https://www.amnesty.org/en/documents/act50/9870/2019/en/>); 2019 (<https://www.amnesty.org/en/documents/act50/1847/2020/en/>), and the databases of the Cornell Center on the Death Penalty Worldwide and the World Coalition Against the Death Penalty (<https://deathpenaltyworldwide.org/database/>).

2 DO: drug offenses.

recent years. In particular, in Indonesia, the death penalty in general and drug crimes tend to increase gradually from 2016 to 2019. However, since then, Indonesia has not executed any death sentences. In its recent universal periodic report, the Government of Indonesia “emphasized that the death penalty was still applied, but only after all legal procedures had been exhausted and provided the legal rights of the convicted had been respected,”<sup>1</sup> and “Indonesia highlights the decision by the Constitutional Court that drug-related offenses were one of the most serious crimes, which had led to the maximum punishment, including the death penalty. In the ongoing revision of the Criminal Code, the death penalty was to be restricted as a last resort, with the possibility of commutation”.<sup>2</sup> A similar development has also been witnessed in Malaysia 2018. Yet, the number of people sentenced to death remains high (190 people, including 136 drug-related crimes). Singapore, after the actual suspension from 2011 to 2013, in 2014, Singapore continued to carry out the executions. Thailand has been considered an abolitionist for drug offenses since 2019.

In Southeast Asia, data and information related to the execution of the death penalty are not widely, transparently, regularly, and fully disclosed. Some countries such as Lao PDR, Malaysia, Singapore, and Vietnam still regard the execution of the death penalty as state secrets and are not publicly reported. Consequently, international human rights mechanisms still recommend retentionist countries in Southeast Asia to make publicly available data regarding the execution of the death penalty.

Thus, countries in Southeast Asia can be divided into three main groups: (1) countries that have abolished the death penalty (including Cambodia, the Philippines, Timor-Leste), (2) countries that have abolished in practice (including Brunei Darussalam, Lao PDR, Myanmar), (3) retentionist countries (including Indonesia, Malaysia, Singapore, Thailand, Viet Nam). For retentionist countries, especially for drug crimes, they often argue to defend their views: drug crime is a most severe crime, threatening to public security, causing great harm to society; the death penalty is a deterrent to crime, especially drug crime. However, reality shows no reliable evidence to prove that the death penalty is a deterrent and preventive more effective than long-term imprisonment. Countries that maintain the death penalty do not have a lower rate of drug crime than countries that do not. Florence Bellivier, International Federation for Human Rights (FIDH) Deputy-Secretary General, said: “The pretext of using the death penalty to fight wars on drugs and terrorism are merely a quick fix for governments who are eager to show they are tough on crime. The reality is that the death penalty has no deterrent effect on the commission of crimes,

---

1 United Nations General Assembly, Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Indonesia* (2017), para 22, <https://undocs.org/en/A/HRC/36/7>, accessed 1 Feb 2021.

2 Ibid, para 79.

particularly those that are drug-related or alleged acts of terrorism”.<sup>1</sup> United Nations General Assembly emphasized in December 2007 resolution that “there is no conclusive evidence of the deterrent value of the death penalty and that any miscarriage or failure of justice in the implementation of the death penalty is irreversible and irreparable.”<sup>2</sup>

On 17 Nov 2020, the United Nations General Assembly voted on a resolution calling for a moratorium to use the death penalty.<sup>3</sup> It passed convincingly: a total of 120 states voted for the resolution, which called for nations to restrict the use of to eliminate it eventually eliminate it. Only three ASEAN states (includes: Cambodia, Malaysia, Philippines) voted to support the resolution. Singapore and Brunei voted against it, while the remaining five nations abstained. The General Assembly’s vote indicates an increasingly widespread international consensus against the use of However, death penalty. But the vote also highlighted ASEAN’s continued use of - and defense of - the death penalty, despite the tireless efforts of the region’s abolitionists.<sup>4</sup> The vote result suggests that it will be some time before ASEAN moves toward complete abolitioHoweve death penalty. And yet, despite divergent trajectories, surprisingly, Viet Nam, as observed by Tim Lindsey and Pip Nicholson, is one of the Southeast Asian countries with the most willingness in limiting the application of the death penalty.<sup>5</sup>

## 2. DRUG OFFENSES PUNISHABLE BY DEATH IN INTERNATIONAL LAW

To begin with, Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life. It serves as an authoritative basis for the International Covenant on Civil and Political Rights of 1966 (ICCPR) to elaborate on the right as much as legal limits on the general application of the death penalty in the national justice system. Article 6 of the ICCPR begins with a robust guarantee of the inherent right to life and that “[n]o one shall be arbitrarily deprived of his life.” During the lengthy drafting process of the ICCPR, some countries were of the opinion that the death penalty should be

1 International Federation for Human Rights, “Going backwards: the death penalty in Southeast Asia” (10/10/2016), <https://www.fidh.org/en/issues/death-penalty/going-backwards-the-death-penalty-in-southeast-asia> accessed 1 Feb 2021.

2 United Nation General Assembly, A/RES/62/149, *Moratorium on the use of the death penalty* (30/10/2020), <https://undocs.org/en/A/RES/62/149> accessed 1 Feb 2021.

3 United Nation General Assembly, A/C.3/75/L.41, *Moratorium on the use of the death penalty* (26/02/2020) <https://undocs.org/A/C.3/75/L.41> accessed 1 Feb 2021.

4 Sebastian Strangio, “Explaining southeast Asia’s addiction to the Death Penalty” (The Diplomat, 25/11/2020), <https://thediplomat.com/2020/11/explaining-southeast-asias-addiction-to-the-death-penalty/> accessed 1 Feb 2021.

5 Tim Lindsey and Pip Nicholson, *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam*, (Bloomsbury Publishing, 2016), p.11.

abolished in its entirety.<sup>1</sup> Although they failed to muster enough support for the proposal, their attempt had somewhat effects on other countries at the time, thus resulting in a compromise between the abolitionist and retentionist camps.<sup>2</sup>

To be clear, despite the broad scope of “arbitrary deprivation” of the right to life,<sup>3</sup> the application of the death penalty is not considered arbitrariness in circumstances where the national authority has ascertained that legal thresholds for its application are met. Paragraphs 2, 4, 5, and 6 of Article 6 ICCPR deals extensively with the applicable scope of the death penalty as follow:

2. In countries that have not abolished the death penalty, a sentence of death may be imposed only for the most severe crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out according to a final judgment rendered by a competent court.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon, or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Readers of article 6 have been split into two directions. At the end of the spectrum, death penalty supporters argue that the Covenant gives way to life, and therefore, the right to life is irrelevant in limiting its application. On the other end, opponents of the death penalty regrettably admit its *status quo* as a temporary compromise but are deeply convinced that abolitionism is the utmost means to ensure compatibility with the fundamental right to life. In his dissenting opinion, Human Rights Committee member Bertil Wennergren took pain to recognize that the death penalty was a “necessary evil” in retentionist States. Nonetheless, its application shall be subject to “absolute necessity.”<sup>4</sup> Wennergren concluded that “in one form or another, the rule of necessity is inherent in all legal systems; the legal system of the Covenant is no exception.”<sup>5</sup> The necessity test

---

1 For example, Uruguay and Colombia, see UN Doc. A/C.3/L.644.

2 William A. Schabas, *The Abolition of The Death Penalty in International Law* (CUP, 2002) at 96.

3 *Van Alphen v. the Netherlands* [1988], UN Doc. A/45/40, para. 5.8.

4 *Kindler v. Canada* [1991], UN Doc. A/48/40, Vol. II, p. 138, 14 HRLJ 307, 6 *Revue universelle des droits de l'homme* 165, p. 157.

5 *Ibid.*

presents the question of when the death penalty is applicable to crimes, more relevant to the focus of this paper, those related to drugs. In other words, whether drug-related offenses may be regarded as of the most severe nature and thus punishable by death.

The die-hard *status quo* of the death penalty was foreseen in Article 6 (2) ICCPR at the time of its adoption. Although Article 6 recognizes the fact that some countries “have not abolished the death penalty” yet, the abolitionist trend was favored in the view of the Covenant drafters.<sup>1</sup> In its General Comment, the Human Rights Committee (HRC) refers to the significance of “all measures of abolition,” showing that even partial abolition or limitation of capital punishment should be considered within the gamut of ‘abolition’.<sup>2</sup> Importantly, Article 6 (2) provides that the death penalty shall only be imposed on “the most serious crimes. “This is a critical starting point to shed light on whether drug-related crimes fit in this category. This categorization is considered an innovation compared to the European Convention on Human Rights of 1950 and also finds its presence in Article 4 (2) of the American Convention on Human Rights of 1969. It bears noting, however, that this term was subject to criticisms because of its generic yet ambiguous scope. It has made much leeway for the State’s arbitrary use of the death penalty, with little compelling effect on the propensity for abolitionism.<sup>3</sup> In its response to Amnesty International’s criticism, although Singapore recognized the death penalty should only be applied to “the most serious crimes,” it vigorously rejected the narrow interpretation of the Organization, which excluded drug offenses.<sup>4</sup> Singapore is not the only country viewing drug crimes that meet the threshold of this category.<sup>5</sup>

The wording of Article 6 (2) ICCPR ostensibly drew aspiration from other sources of international law. In particular, the fourth Geneva Convention prescribes crimes punishable by death may apply to non-combatants in occupied territories, including espionage, severe crimes of sabotage of military installations, and intentional murder.<sup>6</sup>

1 In General Comment 6 (Right to Life) (1982), the Human Rights Committee states that Article 6(2) suggests that ‘abolition is desirable’, See also Manfred Nowak. *UN Covenant on Civil and Political Rights. CCPR Commentary* (2nd rev. ed.) (Kehl am Rhein: Engel, 2005), p.134.

2 UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, para 6, <https://www.refworld.org/docid/45388400a.html>, accessed 16 February 2021.

3 Daniel Nsereko, *Arbitrary Deprivation of Life: Controls on Permissible Deprivations*, in *The Right to Life in International Law* 248 (Bertrand Ramcharan, ed., 1985), pp. 254–255; See also Manfred Nowak, *supra* note 24, p. 141.

4 Ministry of Home Affairs, Press Release, “Singapore-The Death Penalty: A Hidden Toll of Executions” (30 January 2004), <http://www2.mha.gov.sg/mha/detailed.jsp?artid=990&type=4&root=0&parent=0&c at =0>, accessed 1 Feb 2021.

5 For a list of countries retain the imposition of the death penalty for drug offenses, see.

6 Article 68 of Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949.

The phrase “pseverecrime” is featured in Article 33 of the Convention of the Status of Refugees as a limiting-refoulment principle. Atle Grahl-Madsen has posited that this category includes “any offense for which the maximum penalty in the majority of countries of Western Europe and North America is imprisonment for more than five years or death.” His observation thus rejects the narrow interpretation which limits capital punishment to offenses against life or limb.<sup>1</sup> This view resonated with the result of the 1990 survey conducted by Roger Hood, in which he asked 41 state representatives about their definition of “the most serious crimes.” The responses diverged significantly as some “offenses aimed at the domination of a social class or at overthrowing the basic economic and social orders (as reported by Turkey), and theft in aggravated circumstances, sexual intercourse with a female relative under 15 or arousing of religious and sectarian feelings and propagation of Zionist ideas (as reported by Cuba), may not stand the test of a “most serious crime” in the sense of article 6 of the Covenant.”<sup>2</sup>

In considering the term, the HRC suggested that “most serious crimes” must be interpreted in a restrictive manner, and the application of the death penalty was only justifiable in an exceptional circumstance.<sup>3</sup> Drawing from the HRC’s jurisprudence, William Schabas suggests that the Committee’s interpretation of the term is confined to intentional killings and intentional infliction of grievous bodily harm.<sup>4</sup> In *Lubuto v. Zambia*, the Committee found a violation of Article 6(2) because the member State had imposed a mandatory death sentence on the petitioner for aggravated robbery in which firearms were used. The Committee observed that “use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence.”<sup>5</sup>

In terms of drug-related offenses, at the outset, the HRC’s view was vague and ambiguous. In addressing the country report, it sporadically implied that the death penalty for drug trafficking was congruous with Article 6(2) ICCPR.<sup>6</sup> In its relatively brief General Comment 6 (1982) on the right to life, the HRC left the term “most serious

---

1 A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. I, [Leyden: Sijthoff, 1966], p. 284. See also: Guy S. Goodwin-Gill, *The Refugee in International Law*, [Oxford: Clarendon Press, 1983], pp. 69–100.

2 United Nations, Economic and Social Council, *Resolutions and decisions of the economic and social council* (1990), UN Doc. E/1990/38, para. 41.

3 See Manfred Nowak, *supra* note 24, p. 141.

4 William Schabas, *The Abolition of the Death Penalty in International Law* (CUP 2002), pp. 107-109.

5 *Lubuto v. Zambia* [390/1990], UN Doc. CCPR/C/55/D/390/1990/Rev.1, para. 7.2.

6 See HRC, Consideration of Initial Report of Bolivia, UN Doc. A/44/40, p. 95; See also: With regards to Mauritius, UN Doc. A/44/40, paras. 507-8. The HRC merely sought for information regarding Mauritius’s reintroduction and application of the death penalty for drug trafficking without explicitly raising any concerns about its potential incompatibility with international standards.

crimes” open without offering any guidance to delimit this category, particularly relating to drug offenses.<sup>1</sup> This “neglect” paved the way for State’s zero-tolerance approach to drug crimes.

However, drug offenses have recently been given more attention in the HRC’s outputs. In considering Iran’s second periodic report, the Committee stated that crimes not resulting in loss of human life were at odds with the ICCPR, which included drug crimes.<sup>2</sup> On various occasions, the HRC also repeated its view that “drug-related offenses” were not “serious crimes” within the ambit of Article 6(2).<sup>3</sup> The UN Special Rapporteur also holds this view on extrajudicial, summary, or arbitrary executions, who has on many occasions reminded states that international law “requires that capital punishment for drug trafficking is abolished and that death sentences already imposed for drug trafficking be commuted to prison terms.”<sup>4</sup> In 2008, in its letter to the Commission on Narcotic Drugs (the UN drug policy-making body), the Special Rapporteurs on torture and on the right to health indicated that the “weight of opinion indicates clearly that drug offenses do not meet the threshold of ‘most serious crimes to which the death penalty might lawfully be applied.’”<sup>5</sup> To put the controversy to rest, in its latest General Comment 36 (2019) on the right to life, the HRC has made explicit that the interpretation of the term “the most serious crimes” must be highly restrictive and appertain only to crimes of extreme gravity involving intentional killing.<sup>6</sup> While recognizing the seriousness of drug crimes, the Committee maintains that such crimes not resulting directly and intentionally in loss of human life do not constitute “the most serious” nature and can never be punished by death.<sup>7</sup> The application of the death penalty for drug offenses is thus irrelevant to Article 6 ICCPR.

1 See HRC, General Comment 6 (Right to Life) (1982).

2 United Nations, Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant* (03/8/1993), UN Doc. CCPR/C/79/Add.25, para. 8.

3 See e.g., ‘Concluding Observations, Sri Lanka’, CCPR/C/79/Add.56 (1997), para. 14; ‘Concluding Observations, Thailand, CCPR/CO/84/THA (2005), para. 14; Also: CCPR/C/THA/CO/2 (2017), para. 17.

4 UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, (29/05/2009), A/HRC/11/2/Add.1, pp. 188.

5 Special Rapporteur on the prevention of torture and cruel, inhuman, or degrading treatment or punishment, and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Letter to Ms. Selma Ashipala-Musavyi, Permanent Representative of Namibia to the United Nations at Vienna and Chairperson of the fifty-second session of the Commission on Narcotic Drugs (10 December 2008). Available at: <https://www.hrw.org/news/2008/12/10/un-human-rights-experts-call-upon-cnd-support-harm-reduction>, accessed 5 Feb 2021.

6 See HRC, *General comment 36 (Right to Life)*, 3 September 2019, CCPR/C/GC/35, para. 35, <https://www.refworld.org/docid/5e5e75e04.html> accessed 5 February 2021; See also *Kindler v. Canada*, para. 14.3.

7 *Ibid.*

Why did the Committee change its course of interpretation? We suggest that the term “most serious crimes” should be understood as an evolving concept. The Committee’s interpretation of the Covenant is subject to various factors at the time when a provision is construed. In this sense, the Covenant is a living document developed alongside the needs of the international community. The Committee should occasionally revisit its earlier interpretation in order to ascertain the relevance of the Covenant to new circumstances. Apparently, the drug offenses in the past were conceived against the backdrop of the rampant drug trade and its adverse impacts. However, as scientific evidence on this matter has been extensively unfolded and gathered, proponents of capital drug offenses have been in dire straits in justifying its deterring use. It is beyond doubt that the drug trade in many retentionist States remains on the rise, albeit with the presence of mandatory death sentences for these crimes.<sup>1</sup> For example, in Malaysia, citing the persistently high number of executions of drug offenders, the International Narcotics Control Board suggested that the punishment did not deter drug offenses due to the high demand for narcotics.<sup>2</sup> This point was actually admitted in a report of the Malaysian Inspector General of Police published in 1985, noting that the death penalty was considered to be an ineffective deterrent on narcotic traffickers, evidenced by the increasing number of drug traffickers entering the market. In a similar vein, Colman Lynch has indicated that the effect of capital punishment is limited in deterring illicit drug traffickers in Indonesia, given its high profitability.<sup>3</sup> Besides, there is always a grave concern that drug traffickers are couriers and mules, rather than the kingpins pulling strings from behind.<sup>4</sup> This is likely to leave those vulnerable even more vulnerable to abuses while the criminal masterminds stay unharmed. According to the Human Rights Council, the imposition of the death penalty on drug offenses is disproportionately punitive with little effect on achieving the aim of deterring drug-related crime.<sup>5</sup> If the punishment is short of the deterring effect, perhaps many of death penalty supporters might well consider it, in Roger Hood’s words, “useless cruelty”.<sup>6</sup>

---

1 Sidney Haring, “Death, Drugs and Development: Malaysia’s Mandatory Death Penalty for Traffickers and the International War on Drugs”, *Columbia Journal of Transnational Law* 29 (1991), p.365-401.

2 Ibid; International Narcotics Control Board (INCB), *Report of the International Narcotics Control Board for 1994*, New York: United Nations (1995).

3 Colman Lynch, “Indonesia’s Use of Capital Punishment for Drug Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Nine Case”, *Columbia Human Rights Law Review* 40 (2009), p. 523–527.

4 Michael Hor, “Misuse of Drugs and Aberrations in the Criminal Law” (2001), 13 *Singaporean Academy of Law Journal* 54.

5 A/73/260, para. 60. See also A/HRC/33/20, para. 62; General Assembly resolution 71/187, seventh preambular paragraph; and Roger Hood, “The question of the death penalty and the new contributions of the criminal sciences to the matter: a report to the United Nations Committee on Crime Prevention and Control” (1988).

6 Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (OUP, 2008), p. 7.

.”e “evolving concept” argument is buttressed implicitly in light of the international framework of narcotic drug regulations, including three documents: The Single Convention on Narcotic Drugs of 1961, the Convention on Psychotropic Substances of 1971, and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. These documents play an instrumental role in “establishing [sic] a system of international criminal drug control law that uses criminalization and penalization to combat global drug trafficking.”<sup>1</sup> These three treaties allow member States to adopt “more strict or severe measures” than those prescribed therein.<sup>2</sup> In explaining the term, the Commentaries for the 1961 and 1971 drug conventions exhibit the death penalty as “permissible substitute controls” under the relevant provisions.<sup>3</sup> In contrast, the Commentary for the 1988 Convention does not mention the death penalty to illustrate a “permissible sanction” in Article 24 thereof.<sup>4</sup> This implicit “neglect” shows opinion shifting under the international framework of drug controls concerning the application of the death penalty for such offenses.

Besides international human rights law, there is scant evidence in other international treaties to suggest drug offenses amount to “the most serious” nature. For example, international criminal law falls short of characterizing drug offenses as the most severe crimes by William Schabas, “international crimes” are so heinous that they touch upon the international community’s concerns. This category includes genocide, crimes against humanity, war crimes, and the crime of aggression and shall be subject to the International Criminal Court’s jurisdiction (ICC). To be sure, during the drafting process of the Rome Statute, the backbone document of the ICC, there were various attempts to include drug offenses within the ICC’s jurisdiction.<sup>5</sup> However, such attempts failed to garner support from the international community, and the insertion was eventually set aside. This failure indicates a lack of consensus on the definition of drug offenses and their seriousness in international criminal law.

It is safe to say that State practice and *opinion Juris*, two constitutive elements of customary international law, on capital drug offenses are far from coherent and clear to

---

1 Martin Gottwald (2006), “Asylum Claims and Drug Offenses: The Seriousness Threshold of Article 1F9B) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions”, 18 *International Journal of Refugee Law*, p. 93.

2 Art 39 Single Convention on Narcotic Drugs of 1961; Art 23 Convention on Psychotropic Substances of 1971; Art 24 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

3 Commentary on the Single Convention on Narcotic Drugs of 1961, UN Doc E.73.X.1 (1962), p. 449-450; Commentary on the Convention on Psychotropic Substances of 1971, UN Doc. E.76.XI.5 (1971), p. 370.

4 Commentary on the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, UN Doc Doc E/CN.7/590 (1988), pp. 390-392.

5 William Schabas, “An Introduction to the International Criminal Court”, 4<sup>th</sup> edition (CUP, 2011), p. 69.

produce a customary binding norm.<sup>1</sup> The definition of drug offenses diverges considerably even in retentionist countries' legislations. For example, the death penalty is applicable for trafficking in 100 grams of heroin under Viet Nam's law, while in Singapore and Malaysia, 15 grams and Thailand 20 grams carry death sentences. In Indonesia, the quantity that attracts capital punishment is 1 kilogram of plants or 5 grams of non-plant substances. Rick Lines has concluded that the divergent thresholds for a capital drug offense in national legislations reflect the disagreement and incoherence among retentionist countries on whether drug offenses are of the most serious nature severe suggests a lack of general consensus at best, and arbitrariness at worst, in making drug-related laws and policies at the national level.

### 3. THE DYNAMIC OF VIET NAM'S LAW ON CAPITAL DRUG OFFENSES

#### 3.1. A Glance of the Death Penalty in Vietnam

Albeit efforts to limit its application, Vietnam has remained a stalwart supporter of the death penalty. Its practice was dated back to the medieval time when offenders were executed in cruel and savage forms such as being thrown into tigers' cages or boiling cauldron of oil, dismemberment.<sup>2</sup> The death sentence could extend as far as to the close relatives of the offenders, "chu di tam toc" (three exterminations). The harshest punishment is aimed at setting an example, "duc phat bat nhi bach" (punishing a person for warning others).<sup>3</sup> Crimes attracting death sentences included murder, high treason, corruption, and embezzlement. Capital offenses are rampant in various medieval Codes, including The Le's Code of the fifteenth century or the Hoang Viet Luat le of the Nguyen dynasty of the nineteenth century.<sup>4</sup>

The draconian penal system had persisted until the 19<sup>th</sup> century when the French colonized the feudal Viet Nam. Also, the French colonization brought with it a new idea of criminal justice on a deeper theoretical basis, helping reshape the instrumental view of the death penalty in the country.<sup>5</sup> Crimes are categorized into three groups based on

---

1 Ann H. Geraghty (2004), "Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems", 16 Florida Journal of International Law, pp. 374-388.

2 Vu, T.P. *Giao trình Lịch sử nhà nước và pháp luật Việt Nam (Textbook on the History of State and Law of Vietnam)* (Vietnam National University Press: Hanoi, Vietnam, 2007).

3 Bui Xuan Dinh, "Hình phạt và việc áp dụng hình phạt thời Nguyễn giai đoạn 1802 - 1858" (Situation on crimes and the application of penalties under Nguyen Dynasty in the period of 1802 - 1858), State Law J. 2000, p.8.

4 Ibid.

5 Tran Kien & Vu Cong Giao, "The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry" (2019), Societies, p. 16.

their severity, namely minor, severe, and grossly serious offenses.<sup>1</sup> Correspondingly, each category will invite fixed types of penalties. This categorization is a “revolutionary” device to restrict arbitrariness in dictating an offender’s life, thus contributed to a significant plunge in the number of death sentences in colonial times.<sup>2</sup>

In 1945, Vietnam Communist Party’s Revolution successfully toppled the French colonial administration and the puppet monarch. At the outset, amidst the volatile independence war, the nascent State of Viet Nam was predetermined to keep all French-made legal documents in place, including the Criminal Code, because of a lack of resources for building a brand-new comprehensive criminal system. Moreover, as the class-driven struggle intensified, the State adopted a zero-tolerance approach to suppress counterrevolutionary elements and bourgeois class so as to ascertain the ruling power of the proletariat and a crime-free communist ideal. Thus, the introduction of the death penalty seemed a “necessary evil” for that end.<sup>3</sup> Against that backdrop, the number of capital crimes from 1945 to 1959 rose to 53.<sup>4</sup> Between 1959 and 1985, this number dropped to 35 due to the suspension of colonial law.

In 1985, the very first comprehensive Criminal Code since Viet Nam’s reunification was approved and took effect on 1 January 1986. It consisted of 280 provisions in total divided into 20 chapters. The adoption of the Code was characterized as a landmark transformation of Viet Nam’s criminal law.<sup>5</sup> However, still bearing the strong imprint of class struggle together with considering socio-economic changes, the 1985 Criminal Code provided for 44 crimes that might trigger death sentences. This is an increase of 25 percent compared to 1959-1985 and accounts for 20.5 percent of the total 216 articles in the 1985 document.<sup>6</sup> As suggested by John Quigley, the death penalty practice in Viet Nam during this period continued to be extensively informed by its political ideology and economic circumstances.<sup>7</sup>

1 Đắc Lập. *Hoàng Việt Hình luật*, (Đắc Lập: Huế, Vietnam, 1933).

2 Tran Kien & Vu Cong Giao, *supra* note 59.

3 Gillespie, J, *Changing Concepts of Socialist Law in Vietnam*, In *Asian Socialism Legal Change: The Dynamics of Vietnamese and Chinese Reforms*; (Gillespie, J., Nicholson, P., Eds.); (Australian National University E Press: Canberra, Australia, 2005); Los, M. *Communist Ideology, Law and Crime: A Comparative View of the USSR and Poland*; (Macmillan Press: London, UK, 1988).

4 Tran Kien & Vu Cong Giao, *supra* note 59.

5 John Quigley (1988), “Vietnam at a Legal Crossroads Adopts a Penal Code”, 36 *American Journal Comparative Law*, pp. 351-357. Phuong-Khanh, T. Nguyen, “The Criminal Code of the Socialist Republic of Vietnam”, *Rev. Soc. Law* 1987, 13, 103-105.

6 In the 1985 Criminal Code, capital punishment was specified in 29 articles, accounting for 15% out of the total 195 articles on crimes. However, after four amendments (1989, 1991, 1992, and 1997), the number of articles providing for the death penalty under the 1985 Criminal Code had grown considerably.

7 John Quigley (1988), “Vietnam’s First Modern Penal Code”, 9 *Journal of International Comparative Law*, pp. 143-193.

However, since the Doi Moi (Renovation) era, there has been a consistent trend towards abolitionism, at least partially, in Viet Nam. With the introduction of the concepts of the market economy, the rule of law, human rights, Viet Nam's criminal law has found itself on a new theoretical ground that showed more tolerance towards capital offenses. To mingle with the international community and ensure its regime durability, Viet Nam is required to play by international rules, including human rights standards. These norms found their way into the debates on the amendment of the Criminal Code. Therefore, as argued by Tran Kien & Vu Cong Giao, the underlying foundation of the death penalty has been shifting towards a more humane, rather than retributive, stance.<sup>8</sup>

As a result, the 1999 Criminal Code replacing the 1985 document comprised 24 chapters and 267 provisions. Amongst which were 29 articles attracting capital punishment, which accounted for 11% of the total crimes. This is a significant reduction. The reductionist trend gained momentum in the later amendment of the Criminal Code. In 2015, a new Code was introduced with 18 capital crimes. The death penalty is now reserved for the worst types of crimes, mainly in relation to national security, murder humankind crimes, crimes against mankind, and drug-related crime.

### 3.2. The Death Penalty for Drug Offenses in Vietnam

Illegal production of and trafficking in narcotic drugs have been a perennial woe in developing countries, including Vietnam. Since the Doi Moi era, Vietnam has struggled to deal with narcotic drug trafficking given the fact that the country resides in the vicinity of the Golden Triangle, an intersection among Myanmar, Laos, and Thailand. The opium poppy is suggested to have reached Vietnam via Laos between 1600 and 1660.<sup>9</sup> Afterward, its production and use spread exponentially, touching upon concerns of every household and jeopardizing social stability and order. As early as 1965, Vietnamese authorities forbid opium cultivation.<sup>10</sup> Also, consumers and traffickers of this forbidden fruit were faced with severe penalties.<sup>11</sup> And yet, despite the presence of the death penalty, the drug regulations at the time focused mainly on "rehabilitative-based education" rather than retribution.<sup>12</sup> The drug restrictions were lifted during the French colonization. The

---

8 Tran Kien & Vu Cong Giao, *supra* note 59.

9 Hoa Phuong T. Nguyen & Gregory L. Rose, "Criminalization of Drug Trafficking in Vietnam: Developments and Challenges" (2016), *Columbia Journal of Asian Law* 146-177.

10 Hoa Phuong T. Nguyen, *Các tội phạm về ma túy: đặc điểm hình sự, dấu hiệu pháp lý, các biện pháp phát hiện điều tra* (Drug-Related Crimes: Criminal Characteristics, Legal Constituents, Measures to Discover and to Investigate) (Ha Noi: Nxb. Công an nhân dân, 1998).

11 N. B. Vu, *Phòng chống ma túy trong nhà trường* (Narcotic Drug Prevention in Education Institutions) (HaNoi: Nxb. Công an nhân dân, 1997).

12 Hoa Ngoc Nguyen (2001), *Textbook on the Criminal Law of Vietnam*, University Law of Hanoi Press; See also Tiep, Quang Tran (2003), *The History of Criminal Code of Vietnam*, Hanoi, Vietnam, National Politics Publication.

country's reunification in 1975 marked a new chapter as the administration aggressively tightened control on opium cultivation and use.

At the outset, the 1985 Criminal Code reserves death sentences exclusively for "severe cases." This category, however, does not extend to drug crimes. In particular, the 1985 document provides only one drug-related crime: organizing the illegal use of narcotic drugs (Article 207). However, in response to rampant criminal drug-related activities, the first amendment to the Criminal Code supplementing capital crimes concerning narcotics was introduced in 1989. These include illegally producing, stockpiling, transporting, trading narcotics (Article 96a). In 1997, another amendment introduced two more capital drug crimes, namely illegally appropriating narcotics (Article 185e) and forcing, inducing other persons into the illegal use of narcotics (Article 185m). Also, according to the 1997 Amended Criminal Code, the penalty for organizing the illegal use of narcotics is aggravated to death (Article 185i).

Since Doi Moi reform initiatives took root in Vietnam, the authority doubled down its effort to bring its laws closer in line with international standards in various aspects. The promulgation of the 1992 Constitution signifies a rupture from the country's "closed-door isolated" past, in which many novelties were introduced, such as a customized market economy, promotion of international integration, and multilateralism. The Vietnam Communist Party issued two important normative documents, Resolution No. 08 of the Political Bureau on Forthcoming Principal Judiciary Tasks (2002) and Resolution No. 49 of Political Bureau on Judiciary Reform up to 2020 (2005,) with a view to gradually reduce the practice of the death penalty in the country. It bears noting that this development is seen in the light of international human rights treaties as Vietnam expressed its willingness to be bound by such documents, particularly the international bill of rights in 1982.<sup>1</sup>

Although total abolitionism was arguably nowhere within sight,<sup>2</sup> the 1999 Criminal Code was observed as a move towards partial reduction of capital crimes, at least those related to narcotic drugs. The 1999 document abandons the death penalty for the crime of forcing, inducing other persons into the legal use of narcotics (Article 200). In 2009, the NA approved the Law amending and supplementing the 1999 Criminal Code. A law-maker even posited that the abolition of the death penalty for drug crimes was a "retrogression" given the shifting sands of the new context.<sup>3</sup> Citing the perils and the interwoven nature of drug crimes, many legislators also rejected the motion to separate

---

1 Hai Thanh Luong, "The application of the Death penalty for Drug - Related Crimes in Vietnam: Law, Policy and Practice" (2014), 17 (1) Thailand Journal of Law and Policy.

2 Tim Lindsey and Pip Nicholson, *supra* note 18, p. 273.

3 Minh Thúy, "Đại biểu Quốc hội tranh luận về án tử hình" (VnEconomy, 14/11/2008), <https://vneconomy.vn/doanh-nhan/dai-bieu-quoc-hoi-tranh-luan-ve-an-tu-hinh-2008111402395241.htm> accessed 7 Feb 2021.

the illegally stockpiling, transporting, trading in, or appropriating narcotics capital crimes into two provisions: the illegally stockpiling, transporting narcotics crime,s and the trading in or appropriating narcotics.<sup>1</sup> However, the NA did abolish one more capital drug offense, namely organizing the illegal use of narcotics, given the State's refined understanding of "most serious crimes" in light of international human rights law.<sup>2</sup> In justifying the proposal, a Ministry of Justice delegate stated before the NA that the abolition is based on a thorough study and assessment of three factors: the seriousness of the crime, deterring effect, and the global trend towards abolitionism and reduction of the use of the death penalty.<sup>3</sup> It bears noting that the non-retroactivity of the Amended 1999 Code prevented the imposition of the death penalty to the accused of such crime committed prior to 1 January 2010. Those affected by the newly introduced provision will have their sentences commuted by the People's Supreme Court President to life imprisonment.<sup>4</sup> Hence, capital drug crimes under the Amended 1999 Criminal Code are reduced from 7 to 5.

The reductionist trend becomes more apparent with the promulgation of the 2015 Criminal Code. Instead of lumping stockpiling, transporting, trading in, and appropriating narcotic drugs altogether in one provision as in the 1999 document, the 2015 Criminal Code sees the different levels of seriousness of each act. It thus splits these commissions into three separate provisions. Accordingly, the death penalty is applicable for illegal production of narcotics (Art 248 (4)), illegal transport of narcotics (Art 250 (4)), and illegal trade in narcotics (Art 251 (4)). Meanwhile, illegally stockpiling and appropriating narcotic drugs are now free from the death penalty. Therefore, capital drug crimes in Vietnamese criminal law are reduced to 3.

Tracing the drafting process of the 2015 Criminal Code, it is observed that the abolition of the death penalty for the two drug crimes was predominantly informed by the rule of law and human rights,<sup>5</sup> whether rhetoric or not. In its explanatory report for the amendment of the 1999 Criminal Code, the Government has expressed the willingness to renovate its perception of crime and justice policy with a view to striking a balance between crime deterrence and protection of citizens and human rights as guaranteed in the 2013 Constitution and international human rights treaties to which Viet Nam is a party. Thus human rights argument has gained increasing prominence in the debate against the death penalty. It was widely acknowledged among the drafters and law-makers that in

---

1 Tran Kien & Vu Cong Giao, *supra* note 59, p. 16.

2 <https://thuvienphapluat.vn/tintuc/vn/thoi-su-phap-luat/thoi-su/-9588/tham-o-hoi-lo-se-khong-con-an-tu-hinh>

3 Ibid.

4 Art 1(2)(a) of the Amended 1999 Criminal Code.

5 Chính phủ, "Tờ trình về dự án Bộ luật Hình sự sửa đổi", <https://www.bqllang.gov.vn/142-du-thao-bo-luat-hinh-su-sua-doi/4093-to-trinh-ve-du-an-bo-luat-hinh-su-sua-doi.html>, accessed 7 Feb 2021.

order to comply with Viet Nam's international human rights obligations and the Party's lines and direction, criteria for the application of the death penalty should be tightened in a more precise and stricter manner while the new Code should narrow down offenses entailing the death penalty.<sup>1</sup> Moreover, those not subject to the death penalty should reflect betterer reflect the humanitarian principle in Vietnam's criminal law.<sup>2</sup>

**TABLE 3: The Dynamic of Capital Drug Crimes in Vietnam's Criminal Codes**

No.	1985 Criminal Code (Amended 1997)	1999 Criminal Code (Amended 2009)	2015 Criminal Code
1	Illegally producing narcotics Art 185 (b)	Illegally producing narcotics Art 193 (4)	Illegally producing narcotics Art 248 (4)
2	Illegally stockpiling narcotics Art 185 (c)	Illegally stockpiling, transporting, trading in, or appropriating narcotics Art 194 (4)	Illegally transporting narcotics Art 250 (4)
3	Illegally transporting narcotics Art 185 (d)		Illegally trading in narcotics Art 251 (4)
4	Illegally trading in narcotics Art 185 (đ)		
5	Illegally appropriating narcotics Art 185 (e)		
6	Organizing the illegal use of narcotics Art 185 (i)		
7	Forcing, inducing other persons into the illegal use of narcotics Art 185 (m)		

#### 4. MAPPING THE ROAD TO ABOLITIONISM FOR CAPITAL DRUG OFFENSES IN VIET NAM

Section 2 has provided us a starting point from the perspective of international law. It is suggested that the application of the death penalty is subject to very rigorous safeguards. Of which, drug offenses do not meet the thresholds of the "most serious crimes." Of course, this is a dynamic process of learning and opinion shifting rather than a short moment. It took international actors some time to refine their understanding before explicitly ruling out the application of capital punishment for drug offenses.

It is worth noting that the HRC's output has a normative value.<sup>3</sup> Like other human rights treaty bodies, the HRC plays the interpretative role that is usually assumed by States under international law. Its interpretation has dual roles: on the one hand, it recognizes State

1 Ibid.

2 Ibid.

3 Many scholars attach particular normative significance to General Comments because they represent an important body of experience in considering matters from the angle of the respective treaty. Some even accept the legal weight of General Comments. For a discussion, see Kerstin Mechlem (2009), "Treaty Bodies and the Interpretation of Human Rights", 42 *Vanderbilt Journal of Transnational Law*, pp. 905-946.

practice on the (non) application of the death penalty for drug offenses. So far, there are only 37 countries that punish drug offenses by death, while the majority have abandoned such a punitive approach<sup>1</sup>. In so doing, the HRC crystallizes the death penalty-related norms to which paramount importance and authority are attached. There are also rare cases where the views of a treaty body and of states parties differ yet, any direct or indirect rejection of a treaty body's views requires a detailed analysis of how convincingly each side has argued its case and how widely other states endorse the objecting state's views.

On the other hand, through its output, the Committee also acts as the principal generators of "subsequent practice" in the sense of Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaty. The subsequent practice has been understood as states' realizations of rights and their participation in the supervisory mechanisms, where they have the opportunity to express their views on the interpretation of a treaty by a committee.<sup>2</sup> The HRC's activism has, to a certain extent, signified a consensus on the abolitionist trend and drug offenses.

Section 3 has shown some incremental changes in limiting the death penalty for drug offenses in Vietnam's criminal law. Also, it has been suggested that the change was made possible during the process of Vietnam's mingling with the international community with its willingness to play by international rules. This section will probe the second research question of whether any room left for a change towards abolitionism in Vietnam's in terms of drug crimes. The first subsection will expound on factors spurring such a change, while the next will contextualize these determinants corresponding to Vietnam's to test out this possibility. It concludes that many catalysts lack in Viet Nam's climate, thus impeding the abolitionist trajectory at least shortly.

#### **4.1. Catalysts for Abolitionism**

Why must/should a country abandon the death penalty? Relevant comparative scholarship has suggested that there is an agreement among prominent scholars on the relation between abolitionism and the presence of certain factors.<sup>3</sup> These include democratization, political leadership, economic development, the omnipresence of human rights, external pressure, regional dynamics, and existing low execution rates.

First, democratization seems to be a reasonable answer to the struggle against the death penalty. As observed by David Johnson and Franklin Zimring, States are likely to rid of capital punishment as they begin the democratization process in an attempt to

---

1 See more at annex 1 below.

2 Kerstin Mechlem, *supra* note 79, p. 920.

3 Dave McRae (2017), "Indonesian Capital Punishment in Comparative Perspective", *Bijdragen tot de Taal-, Land- en Volkenkunde* 173, pp. 1-22.

distance themselves from the deplorable past.<sup>1</sup> In this sense, the death penalty is seen as an arbitrary tool at the disposal of the ruling class to suppress opposition. South Africa is a textbook example of the abolition of capital punishment during the early stage of democratization and with the hope to distance itself from the Apartheid nevertheless and yet, the United States and Japan, two long-standing democracies, stand out as an exception to this factor.

The second factor is political leadership. Those with progressive agendas are expected to reform the criminal justice penalty regardless of prevailing public opinion.<sup>2</sup>

Third, economic development is seen as a force driving countries away from the death penalty.<sup>3</sup> This often associates with the development of education within the community. It thus equates education with the “civilized” and humane treatment of people. However, quantitative studies have found no strong correlation between economic development and the death penalty.<sup>4</sup>

The fourth recurring factor is framing the death penalty as a human rights issue rather than a matter of criminal justice. This way of putting it makes the death penalty a reputational issue. As the jurisprudence of UN-based and treaty-based bodies has become crystal clear with concerning offenses, States are faced with the dilemma of abiding by international law or coming under fire in international forums.

A fifth and relevant factor is external pressure. As observed by Roger Hood and Carolyn Hoyle, the European Union has been highly active in exerting political pressure.<sup>5</sup> Sangmin Bae has made similar remarks about the role of the European Union in simultaneously persuading and compelling countries, such as Poland, Ukraine, to drop the death along the way to its membership and total integration.<sup>6</sup>

---

1 David Johnson & Franklin Zimring, “The next frontier: National development, political change, and the death penalty in Asia” (OUP 2009).

2 Eric Neumayer (2008). “Death penalty: The political foundations of the global trend towards abolition”, 9 Human Rights Review, pp. 250-1; David F. Greenberg & Valerie West (2008). “Siting the death penalty internationally”, 33 Law & Social Inquiry, pp. 295-343.

3 Johnson & Zimring, *supra* note 83.

4 David F. Greenberg & Valerie West (2008). ‘Siting the death penalty internationally’, 33 Law & Social Inquiry, p. 320); Eric Neumayer, *supra* note 84, p. 259.

5 Roger Hood & Carolyn Hoyle (2009), “Abolishing the death penalty worldwide: The impact of a ‘new dynamic’”, 38 Crime and Justice, pp. 1-63.

6 Sangmin Bae (2009). “South Korea’s De Facto Abolition of the Death Penalty”, 82 Pacific Affairs, pp. 407-425; Sangmin Bae, ‘When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment’ (SUNY Press, 2007).

A sixth factor is regional dynamics. This is a learning process in which States are likely to mimic their neighboring countries with similar circumstances where they face similar policy choices.<sup>1</sup> The increasing likelihood of abolition may reflect the enactment of binding, regional human-rights charters or through the diplomatic channel.<sup>2</sup> Relevantly, the absence of intra-regional pressure in Asia is seen as a catalyst for retentions.<sup>3</sup>

Finally, existing low execution rates indicate a State's reluctance to kill its citizens. As observed by Johnson and Zimring, the majority of full abolitionism was able to do so at "practically no pecuniary cost and without the need to refashion their systems of criminal justice or crime control" owing to their low rates of execution.<sup>4</sup> In a similar vein, Hood and Hoyle opine that abolition is possible if the death penalty can no longer prove its functional role in the criminal justice system.<sup>5</sup> This may be facilitated further by a change in the criminal context, such as crime rates drop sharply.<sup>6</sup> However, other commentators remain suspicious of the effect of low execution rates as they that at argue few executions trigger little attention and opposition and thus little incentive to abolish.<sup>7</sup>

All of these factors have a contributory impact on spurring a State to abandon the death penalty. However, it does not necessitate all of them to be present in a particular circumstance. In some instances, some factors are robust enough to compel a country to relinquish its claim for the death penalty. In contrast, the presence of the majority of these factors does not guarantee a cease of the state killing. To be sure, as observed by Dave McRae, Indonesia experienced almost all of these factors to a certain extent, and yet its execution of 14 narcotics prisoners in 2015 dealt a blow to the abolitionist camp. These catalysts are an indicator for a *possible* change in the foreseeable future.

#### 4.2. Contextualize Vietnam's Abolitionist Trajectory of Capital Drug Offenses

Putting these factors in Vietnam's perspective, it can be observed that many factors do not take shape yet or bear little relevance to Vietnam. First, although the democratization process is witnessed in the country, its understanding of democratization and democracy is different from the Western viewpoint.<sup>8</sup> Democratic centralism practiced within the State

---

1 Eric Neumayer, *supra* note 84.

2 Sangmin Bae, "Human security, capital punishment, and East Asian democracies", in: Benny Teh Cheng Guan (ed.), *Human security: Securing East Asia's future* (Springer 2012), pp. 217-30.

3 Johnson & Zimring, *supra* note 83; Sangmin Bae, *Ibid.*

4 David Johnson & Franklin Zimring, *supra* note 83.

5 Roger Hood & Carolyn Hoyle, *supra* note 84.

6 Sangmin Bae (2007), *supra* note 88.

7 Greenberg & West, *supra* note 88, p. 335.

8 See more John Gillespie, Albert H.Y. Chen (eds), "Legal Reforms in China and Vietnam A Comparison of Asian Communist Regimes" (Routledge 2011).

power structure is informed heavily by Marxist-Leninist principles. On many occasions, its leaders implicitly rule out the application of the Western-style democracy, claiming the latter does not match Vietnam's idiosyncratic cultural and political climate.

Second, the exercise of State power places much emphasis on the role of the Communist Party and its coordination with the State, although the two entities' spheres are often overlapping. It is not that public opinion does not matter; it just matters not as much as in other democracies since the State is less responsive to the public. Tracing the debate on the drafting of the 2015 Criminal Code, many lawmakers still hold a strong view that the death penalty for drug crimes is of deterring effect from preventing its prevalence despite unsubstantiated evidence.<sup>1</sup> A retributive stance still bears a strong imprint as they often claim death sentence is the proportionate punishment for heinous crimes, including those related to narcotic drugs.<sup>2</sup> On top of it, the practice and statistics of the death penalty in Viet Nam remain a state secret. The disclosure of information on this matter is forbidden. It thus speaks volumes to the outsiders that this is solely the business of the State. This, in turn, impedes efforts to discuss the nature and effectiveness of the death penalty for drug crimes in the country.

Third, there is no need to boast about the economic fruits that Viet Nam has reaped since its bolds Doi Moi reform in 1986, together with surprisingly outstanding records of poverty alleviation and decent education. The open-up policy has made increasingly potent impacts on the country's legal system. With easier, more accessible education, Vietnamese people are better equipped to meet the world's needs in various sectors. However, it is debatable if people are shifting away from the death penalty. As indicated in some surveys, public opinion on the death penalty is mixed and even conflicting.<sup>3</sup> In one of the rare surveys on this topic, Vu Thi Thuy found that in 2006 91% of respondents expressed support for the death penalty; this percentage rose to 94% in 2016.<sup>4</sup>

Vietnamese people were actually inspired by the idea of human rights and fundamental freedom, especially in the fight for national independence. In his extensive study, Bui Ngoc Son argues that despite the international criticisms of Viet Nam's human rights record, human rights have secured a solid footing in its four constitutions over the past 60 years.<sup>5</sup> With the State gradually loosens its control on many forums, the country

---

1 <https://vov.vn/chinh-tri/quoc-hoi/dai-bieu-quoc-hoi-tranh-luan-ve-de-xuat-bo-an-tu-hinh-voi-7-toi-danh-403629.vov>

2 Ibid.

3 Tran Kien & Vu Cong Giao, *supra* note 59, pp. 21-23.

4 Vu Thi Thuy, *Limiting the Death Penalty in Vietnamese Criminal Law: Changes from the Criminal Code 1999 to Criminal Code 2015*; Ho Chi Minh City Law University: Ho Chi Minh, Vietnam, 2017.

5 Bui Ngoc Son (2017), "The Global Origins of Viet Nam's Constitutions: Text in Context", *University of Illinois Law Review*, p. 525.

has seen a considerable rise in human rights discourse among policy-makers, scholars, and ordinary people. Therefore, framing an argument against the death penalty in human rights language has a potent effect in redirecting the State's attention. However, the impact of this factor should not be overstated since public, and elite opinions remain nuanced. Although the naturalist camp has gained currency, the statist view of human rights remains strong within Vietnam's culture.<sup>1</sup>

It bears noting that Vietnam remains a strong supporter of Asian Values in countervailing the influence of the global human rights movement.<sup>2</sup> And yet, the claim that Asian Values, particularly Confucianism, promotes the death penalty is a fallacy or misinterpretation of such doctrine. As argued by Sangmin Bae, traditional Confucian doctrine actually deems the death penalty neither necessary nor desirable in countries that govern benevolently and virtuously.<sup>3</sup> "If excellent people managed the state for a hundred years, then certainly they could overcome cruelty and do away with executions' - how true this saying is," wrote Confucius.<sup>4</sup>

External pressure seems to be a relevant factor in the climate of Viet Nam. In becoming a middle-power country, Vietnam has committed itself to abide by international rules, a. As a result, various legal reforms have ensued. To be sure, policy-makers are acutely aware of State obligations under international law. For example, during the drafting of the 2013 Constitution, the international bill of rights was heeded thoroughly. Some constitutional drafters even used international human rights treaties to which Vietnam is a party as the benchmark to ensure its compatibility with international obligations.<sup>5</sup> Following three cycles of the universal periodic report of Viet Nam (2009, 2014, 2019), the progress towards lessons could be observed. During its third cycle, the delegation stated:

"... [G]iven the country's particular circumstances, the death penalty remained a necessary measure to prevent the most serious crimes, in line with article 6 of the International Covenant on Civil and Political Rights... Vietnam was currently studying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty."<sup>6</sup>

---

1 For a discussion, see Bui Ngoc Son (2017), "Globalization of Constitutional Identity", 26(3) Washington International Law Journal, pp. 463-533.

2 See Ngo T.M Huong, Vu Cong Giao, Nguyen Minh Tam (2018), "Asian Values and Human Rights: A Vietnamese Perspective", 2(1) Journal of Southeast Asian Human Rights, pp. 302-322.

3 Sangmin Bae (2008), "Is the Death Penalty an Asian value?", 39 Asian Affairs, pp. 47-56.

4 Confucius, Confucius's Analects, trans. Edward Slingerland, (Hackett Publishing Company, 2003), p. 144, cited in Sangmin Bae, *ibid.*

5 Interview with a National Assembly officer in Hanoi, Vietnam conducted by Bui Ngoc Son, see Bui Ngoc Son, *supra* note 98, p. 505-506.

6 Report of the Working Group on the Universal Periodic Review: Viet Nam, A/HRC/41/7 (2019), para. 22.

However, the effect of external pressure remains challenging to gauge. Vietnam stands out from Poland or Ukraine because there is no regional or international mechanism with teeth that could compel it into one single direction. So far, Vietnam has ratified 7 out of 9 core international human rights treaties, yet it always puts forward reservations on dispute settlement mechanisms entailing a binding decision. These claw-back clauses serve as a face-saving provision to shield Vietnam from harsh criticisms, and detrimental consequences mechanisms might produce. It, therefore, signifies that while the country pushes hard for international integration, this process also has its limit. In a recent report sponsored by UN Development Program and the European Union, the Vietnamese authors are skeptical of the possibility of Vietnam's accession to the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty, at least for the time being.<sup>1</sup>

That situation could be worsened against the backdrop of regional inertia. As shown in Section 1, Southeast Asian nations are staunch advocates of capital punishment. Singapore appears to be the most vocal in invoking the sovereignty principle to ward off external intervention in its policy-making.<sup>2</sup> Ironically, "regional dynamic" seems to be an impeding factor, rather than facilitating abolishing the death penalty in Vietnam.

Finally, as Tran Kien and Vu Cong Giao observed, Vietnam's number of executions is presumed high, mostly reserved for cofounder and drug-related offenses.<sup>3</sup> This is a source of criticisms labeling Vietnam as one of the world's biggest executioners. The country is located at the intersection of the Golden Triangle, among Myanmar, Laos, and Thailand, a hyperactive hub for drug trade and trafficking. During 2007 and 2017, there were 151,570 drug-related cases (19.29% out of 785,542 criminal cases) with 192,577 drug offenders (15.92% out of a total of 1209,391 defendants).<sup>4</sup> Amongst all drug-related crimes, they were s illegally transporting and trading narcotics substances. This crime is likely to be punished by the death penalty above a certain amount of drug, as featured as the most prevalent crime throughout this period, with 143,878 cases and 182,411 defendants, accounting for 99.35% of the number of drug-related cases and 99.12% of the suspects.<sup>5</sup> Worse yet, these numbers

1 Nguyen Thi Thanh Hai, Nguyen Van Hoan, Nguyen Minh Khue (2019), "On the possibility of Viet Nam ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty", [https://www.vn.undp.org/content/vietnam/en/home/library/democratic\\_governance/on-the-possibility-of-viet-nam-ratifying-the-second-optional-pro.html](https://www.vn.undp.org/content/vietnam/en/home/library/democratic_governance/on-the-possibility-of-viet-nam-ratifying-the-second-optional-pro.html).

2 Singapore's letter to the Special Rapporteur on extrajudicial, summary or arbitrary executions of 27 June 1997, UN Doc. E/CN.4/1998/13.

3 Tran Kien & Vu Cong Giao, *supra* note 59, pp. 21-22.

4 Do Thanh Truong, "Một số vấn đề về tình hình tội phạm ma túy trên toàn quốc (2007 - 2017)" (Phần 1), <https://www.vksndtc.gov.vn/thong-tin/mot-so-van-de-ve-tinh-hinh-toi-pham-ma-tuy-tren-to-d12-t7697.html>.

5 Do Thanh Truong, "Một số vấn đề về tình hình tội phạm ma túy trên toàn quốc (2007 - 2017)" (Phần 2), <https://vksndtc.gov.vn/thong-tin/mot-so-van-de-ve-tinh-hinh-toi-pham-ma-tuy-tren-to-d12-t7698.html>

are just “the tip of the iceberg,” given the fact that cunning traffickers always have their way to evade the law enforcement agencies.<sup>1</sup> Saturated in this volatile drug environment, the Vietnamese Government is standing between a rock and a hard place in striking a balance between crime prevention and international law compliance.

## 5. CONCLUSION

The twenty-first century has witnessed a robust trend towards death penalty abolitionism worldwide. The trajectory quickly spreads to even Asia, a die-hard supporter of this practice and “the next frontier” for abolitionists. Nevertheless, enthusiasts. Yet controversies revolving around applying the death penalty for drug offenses still trigger Southeast Asian countries given their divergent understanding. On the one hand, in justifying the zero-tolerance punishment on drug criminals, Southeast Asian countries often invoke the spillover impacts of narcotic drugs on human beings and social order. On the other hand, international human rights law has reshaped the punitive approach to drug crimes.

This paper has argued that drug crimes do not meet the threshold of the term “most serious crimes” in light of international standards. The Human Rights Committee’s interpretation of this term is refined and developed in an evolving manner, thus limiting the application of the death penalty for drug offenses. This paper also documents the dynamic understanding of drug crimes within Vietnam’s criminal law at the national level. It shows that the country’s understanding of drug crimes has changed incrementally, corresponding to international standards albeit not entirely consistent. This change is mainly attributed to international integration and Viet Nam’s reputational cost-benefit analysis in the international community’s eye.

This paper then presents whether any room left for a change on this matter by drawing on comparative determinants for inducing the abolition of the death penalty. Given that many factors do not take shape yet or bear little relevance to Vietnam, it concludes with a cautiously optimistic view about Vietnam’s possibility of abolishing capital drug offenses. Over 35 years of reform, the country has definitely drive reductionism or perhaps partial abolitionism. However, various militant factors that are likely to stay in that place will overstretch its penalty reform. A change is still possible if a discourse on applying the death penalty for drug offenses can be generated in an open and frank manner. More importantly, elite opinion matters a great deal. Hence, if the course of action persists at the top, the change is unlikely to materialize at all. A continuing process of learning and acculturation is imperative for the road to abolitionism for drug offenses in Vietnam.

---

1 Hai Thanh Luong (2021), “Why Vietnam continues to impose the death penalty for drug offenses: A narrative commentary”, 88 *International Journal of Drug Policy* 88 (2021), pp. 5-6.

**ANNEX 1**  
**RETENTIONIST COUNTRIES WITH DRUG OFFENCES<sup>1</sup>**

NO.	STATES	THE EXTEND OF THE DEATH PENALTY APPLICATION FOR DRUG OFFENCES	THE DEATH SENTENCE OF DEATH PENALTY FOR DRUG OFFENCES
1	Bahrain	Low application <sup>52</sup>	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> <li>- Storing (for trafficking)</li> <li>- Financing drug crimes</li> </ul>
2	Bangladesh	Symbolic application <sup>2</sup>	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession</li> <li>- Trafficking</li> <li>- Storing</li> </ul>
3	Brunei Darussalam	Symbolic application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession</li> <li>- Trafficking</li> </ul>
4	China	High application <sup>4</sup>	<ul style="list-style-type: none"> <li>- Production</li> <li>- Trafficking</li> <li>- Aiding/abetting</li> </ul>
5	Cuba	Symbolic application	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> <li>- Storing</li> <li>- Involving minors in drug crimes</li> </ul>
6	Egypt	Low application	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> <li>- Aiding/abetting</li> <li>- Financing drug crimes</li> <li>- Involving minors in drug crimes</li> </ul>
7	India	Symbolic application	<ul style="list-style-type: none"> <li>- Production (if recidivist)</li> <li>- Possession (if recidivist)</li> <li>- Trafficking (if recidivist)</li> <li>- Aiding/abetting</li> <li>- Financing drug crimes</li> <li>- Involving minors in drug crimes</li> </ul>

1 The figures are extract from Harm Reduction International's report: "*The Death Penalty for Drug Offences: Global Overview 2019*", available at: <https://www.hri.global/death-penalty-2019>, accessed 4 Feb 2021.

2 Low Application States are those where executions for drug offences are an exceptional occurrence, although executions for drug offences may have been carried out, while death sentences for drug offences are relatively common.

3 Symbolic Application States are those that have the death penalty for drug offences within their legislation but do not carry out executions, or at least there has not been any record of executions for drug offences in the past ten years; although some of these countries occasionally pass death sentences for drug offences.

4 High Application States are those in which the sentencing of those convicted of drug offences to death and/or carrying out executions is a regular and mainstream part of the criminal justice system.

8	Indonesia	High application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> <li>- Storing (as organized crimes)</li> <li>- Involving minors in drug crimes</li> </ul>
9	Iran	High application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession</li> <li>- Trafficking</li> <li>- Storing</li> </ul>
10	Iraq	Low application	<ul style="list-style-type: none"> <li>- Trafficking</li> </ul>
11	Jordan	Symbolic application	<ul style="list-style-type: none"> <li>- Trafficking</li> </ul>
12	Kuwait	Low application	<ul style="list-style-type: none"> <li>- Trafficking</li> <li>- Involving minors in drug crimes</li> </ul>
13	Lao PDR	Low application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession</li> <li>- Trafficking</li> </ul>
14	Libya	Insufficient data	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Trafficking</li> </ul>
15	Malaysia	High application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> <li>- Storing</li> <li>- Aiding/Abetting</li> </ul>
16	Mauritania	Symbolic application	<ul style="list-style-type: none"> <li>- Production (if recidivist or aggravated)</li> <li>- Possession (if recidivist or aggravated)</li> <li>- Trafficking (if recidivist or aggravated)</li> </ul>
17	Myanmar	Symbolic application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> <li>- Aiding/abetting</li> <li>- Financing drug crimes</li> <li>- Involving minors in drug crimes</li> </ul>
18	North Korea	Insufficient data <sup>1</sup>	Sources not available
19	Oman	Symbolic application	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Trafficking</li> <li>- Financing drug crimes</li> <li>- Involving minors in drug crimes</li> </ul>
20	Pakistan	Low application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession</li> <li>- Trafficking</li> <li>- Financing drug crimes</li> <li>- Involving minors in drug crimes</li> </ul>
21	Palestine	Symbolic application	<ul style="list-style-type: none"> <li>- Trafficking</li> </ul>
22	Qatar	Symbolic application	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Trafficking</li> </ul>
23	Saudi Arabia	High application	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Trafficking</li> <li>- Aiding/Abetting</li> </ul>

<sup>1</sup> Insufficient data, is used to denote instances where there is simply not enough information to classify the country accurately.

24	Singapore	High application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> </ul>
25	South Korea	Symbolic application	<ul style="list-style-type: none"> <li>- Production (for-profit or habit)</li> <li>- Trafficking (for-profit or habit)</li> <li>- Aiding/Abetting (for-profit or habit)</li> </ul>
26	South Sudan	Symbolic application	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Trafficking</li> <li>- Storing</li> <li>- Aiding/Abetting</li> <li>- Involving minors in drug crimes</li> </ul>
27	Sri Lanka	Low application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession</li> <li>- Trafficking</li> <li>- Storing</li> <li>- Aiding/Abetting</li> <li>- Financing drug crimes</li> </ul>
28	Sudan	Symbolic application	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> <li>- Involving minors in drug crimes</li> </ul>
29	Syria	Insufficient data	Sources not available
30	Taiwan	Symbolic application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Trafficking</li> </ul>
31	Thailand	High application	<ul style="list-style-type: none"> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> <li>- Involving minors in drug crimes (if heroin)</li> </ul>
32	United Arab Emirates	Symbolic application	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> </ul>
33	USA	Symbolic application	- Trafficking (as a part of continuing criminal enterprise)
34	Vietnam	High application	<ul style="list-style-type: none"> <li>- Production</li> <li>- Possession (for trafficking)</li> <li>- Trafficking</li> </ul>
35	Yemen	Symbolic application	<ul style="list-style-type: none"> <li>- Production (for trafficking)</li> <li>- Possession</li> <li>- Trafficking</li> </ul>

# **DEATH PENALTY OF DRUG - RELATED CRIMES: CASE STUDY IN CENTRAL PROVINCES IN VIETNAM**

**A/Prof.Dr. Dinh Thi Mai<sup>1</sup>, Ha Thi Hong Tham<sup>2</sup>**

## **INTRODUCTION**

Vietnam's new Penal Code 2015 specifies 317 crimes, of which 13 crimes are drug-related. There is three (03) death penalty among thirteen (13) drug-related crimes (accounting for 23%). This particular severe drug-related crime is also expressed in the high rate of the death penalty imposed for drug-related crimes in Vietnam today. This paper will examine the application/non-application of the death penalty for three types of drug-related crimes, including illegal drug-producing (Article 248), illegal drug transporting (Article 250), illegal drug trading (Article 251). We first conduct a survey and assessment of practice and mistakes of law application for drug-related crimes from 2015 to 2019 in twelve central Vietnamese provinces comprising of Quang Binh, Quan Tri, Hue, Da Nang, Quang Nam, Quang Ngai, Binh Dinh, Phu Yen, Khanh Hoa, Dak Lak, Gia Lai, Kon Tum, then recommends solutions for minimizing application and mistakes in death penalty application. The article will point out a common trend in death penalty application and contextualize the death penalty of drug-related crimes in Vietnam. The authors compare the practice of death penalty application (for drug-related crimes and all other crimes) across Vietnam 2006 - 2010 and 2001 - 2010.

The paper studies the three following principal contents:

- Provides evaluation and comments on the definition, properties of the death penalty for drug-related crimes, and viewpoints of Vietnam State on the death penalty for drug-related crimes.

Points out the influencing factors, criminal law policies, and some mistakes in applying the death penalty for a drug crime.

- Proposes and emphasizes two solutions to reduce the death penalty, significantly to limit injustice, wrong in applying the death in Vietnam.

---

1 Faculty of Law, Graduate Academy of Social Sciences GASS.

2 Ho Chi Minh City University of Technology (HUTECH).

## RESEARCH METHODS

This research will apply law interpretation methodology to analyze the current law, Vietnamese Criminal Law 2015, on drug-related crimes, especially three drug-related death penalties, and then compare to those in Vietnamese Criminal Law 1999. The paper also analyzes secondary data officially reported by the twelve provincial people's courts about drug-related death penalties in central Vietnamese provinces from 2014 to 2019. The case study method is also applied in the third section of this paper to examine specific drug-related crimes with the death penalty in central Vietnamese provinces from 2015 to 2019. The comparative methodology is also used in examining and comparing a number of drug-related criminal cases, drug-related death penalties, and other death penalties all around Vietnam.

## RESEARCH FINDINGS

### **1. Vietnam's perspective on the death penalty in general and the death penalty for drug-related crimes in particular**

The death penalty is a unique and most severe punishment in the penalty system in Vietnamese Criminal Law. This penalty is the deprivation of the offender's life declared by courts. This penalty is imposed only for particularly serious offenses, and situations in a group of crimes with the death penalty impose recorded by Criminal Law and are following strict procedures.

As a special penalty in the penalty system, the death penalty has common properties of a penalty such as a coercive measure of the State, specified in the Criminal Law, applied by the Court according to a strict, severe, and fair proceeding for the offender to ensure social peace. The death penalty also has its characteristics. As it deprives the offender's life, it is only imposed to particular serious offenders and situations. The death penalty is intended to prevent re-offending, deprive offender's opportunity to reintegrate into their community. The death penalty is possibly and highly effective in the fight against crime in general. The death penalty is unchangeable as it deprives of the ability to take a judicial remedy<sup>1</sup>. This penalty is essentially the expression of the State's highest response to a severe crime, and it is historic. It has significance in both legislature and practice. In Vietnam and around the world, there are two theoretical approaches to this penalty: maintain or abolish it. The debate between these two approaches has become critical. Maintaining or abolishing the death penalty is a criminal legal issue and a matter of politics, society, culture, morality, religion.

---

<sup>1</sup> Associate, Dr. Trinh Quốc Toàn (2015), *Living rights and death penalty (Monographs)*, National Politics Publisher, Hanoi, p.138.

Within the two above streams of approaches, the Vietnam State still advocates maintaining the death penalty, which is reflected explicitly in the general provisions in Article 40 and regulations on the death penalty for specific crimes recorded in the current Criminal Law.

Out of the total of 317 crimes specified in the current Criminal Law, there are 18 crimes with the death penalty (accounting for 5.7%), which is significantly lower than Criminal Law 1999 with 29 types of crime and then 22 crimes after amendment. This figure change indicates a decreasing trend in the death penalty in Vietnam. In addition, these 18 types of crime with the death penalty are not evenly distributed in chapters of the Criminal Law, specified in the below table:

**Table 1: Types of crimes with death penalty specified in Vietnam Criminal Law 2015**

No.	Chapter	Number of Articles recording death penalty	Specific types of crimes
1	Chapter 13: Offences against national security	6	Article 108. High treason Article 109. Activities against the people's government Article 110. Espionage Article 112. Rebellion Article 113. Terrorism to oppose the people's government Article 114. Sabotaging facilities of Socialist Republic of Vietnam
2	Chapter 26: Disruption of peace, crimes against humanity, and war	3	Article 421. Disruption of peace provocation of war of aggression Article 422. Crimes against humanity Article 423. War crimes
3	Chapter 20: Drug-related offenses	3	Article 248. Illegal manufacturing of narcotic substances Article 250. Illegal transport of narcotic substances Article 251. Illegal deal in narcotic substances
4	Chapter 14: Offences against the person and reputation	2	Article 123. Murder Article 142. Rape of a person under 16
5	Chapter 18: Economic offenses	1	Article 194. Manufacturing and trading of counterfeit medicines for treatment or prevention of diseases
6	Chapter 21: Offences against public order and public safety	1	Article 299. Terrorism
7	Chapter 23: Offences related to abuse of power	2	Article 353. Embezzlement Article 354. Taking bribes.

*(Source: Authors)*

As shown in Table 1, seven chapters out of 14 chapters in Vietnam Criminal Law specifies the death penalty to 18 types of crimes with the implication of the death penalty. There is one chapter on drug-related crimes, which specifies three types of crimes (accounting for 16,6% of the total types of crimes with death penalty implication). Three types of drug-related crimes include illegal drug-producing (Article 248), illegal drug transporting (Article 250), illegal drug trading (Article 251). The high percentage of the death penalty for drug-related crimes in the total of crimes with death penalty implication indicates the State of Vietnam's evaluation of the particular severe drug-related crimes in Vietnam.

The particular severe drug-related crimes are also expressed in the high rate of the death penalty imposed for drug-related crimes. There is three death penalty among thirteen drug-related crimes (accounting for 23%). This is a significant contribution. Of the seven chapters specifying the death penalty, the chapter on drug-related crimes is ranked as the second for its number of crimes with the death penalty, which is only after the number of national security-related crimes (chapter XIII) and equals to that of crimes related to disruption of peace, crimes against humanity, and war (Chapter XXVI).

Specifically, the chapter on offenses against national security includes 15 crimes. There are six crimes with the death penalty (accounting for 40%). The chapter on crimes related to disruption of peace, crimes against humanity, and war has 03 out of 05 types of crimes with the death penalty provision (accounting for 60%). The other three chapters that are Chapter 14 on offenses against the person and reputation; Chapter 18 on Economic offenses; Chapter 21 on offenses against public order and public safety; Chapter 23 on offenses related to abuse of power, all have the lower number (one or two) of types of crimes with death penalty provision in comparison with that of drug-related crimes. This difference refers to evaluating possible severe and damage caused by each type of crime to society and social life.

To illustrate, the chapter on offenses against the person and reputation specifies only two types of crimes with the application of the death penalty, namely murder (Article 123 in Criminal Law) and rape persons under 16 years of age (Article 142 in Criminal Law). The number of crimes with the death penalty provisions in this chapter is lower than the three chapters on offenses against national security; disruption of peace, crimes against humanity, and war; and drug-related crimes. This is because, types of crimes in the two chapters on offenses against national security; and disruption of peace, crimes against humanity, and war are hazardous and impact critically on the existence of regimes and human society and are classified as the highest level of danger and having the most death penalty. Although drug-related crimes are not as dangerous as those crimes, it has a higher number of the death penalty. While in the order specified in the Vietnam Criminal Law, the chapter on offenses against the person and reputation comes well ahead before

the chapter on drug-related crimes. This arrangement provides the assessment of the enormous dangers of these types of crimes, such as offenses against human life, health, dignity, and honor. In the period of a state of law construction, the fundamental rights of humans and citizens are entirely protected. Because of this, this chapter comes right after the chapter on offenses against national security. However, the number of the death penalty for this crime is less than those in drug-related crimes. This is because, drug-related crimes could cause a higher level of damage, more severe consequences, and effects on social life.

Criminal acts of murder or other crimes in Chapter XIV on infringing upon the right to life, the right to protect human life, health, dignity, or honor affect one or several specific persons. These acts cause physical damage such as death, health, or mental damage such as insulting the honor, dignity of one or several specific persons. Through this, they affect the general social order and safety.

The drug-related crimes, especially 03 crimes: illegally manufacturing, transporting, and illegal trading drugs, cause damage and influence at a broader scale. They violate the State's monopoly on drug management, social order, safety, human health, and the standard and healthy development of the national race, the violation of the property of the State and people. A drug offense can affect an entire community, not just one person or a specific number of people, through drug-related crimes, especially the illegal production, sale, and transportation of drugs. Drugs can creep into the community and society. Drug entering the human body will change the mood, consciousness, intelligence of the person, make the person dependent on those substances, causing damage to individuals, families, and communities, becoming an issue of the community, the country in general, and humanity in particular.

It can be said that drugs, drug-related crimes and their consequences on socio-economic life as well as order and safety, social safety have been a concern of humanity, not only in Vietnam. Especially in the current globalization trend, the consequences of this type of crime are increasing severely in terms of both economy, social culture, and morality. They are causing acute anxiety and pressure in people. The dangerous nature and broader level of a consequence of this crime are assessed to be more serious. Therefore, the State evaluates drug-related crimes are particularly dangerous to society and should be strictly banned, with more death penalty imposing on more types of drug-related crimes.

## **2. TYPES OF DRUG-RELATED CRIMES IMPOSED THE DEATH PENALTY IN VIETNAM CRIMINAL LAW 2015**

In the chapter on drug-related crimes, there are 03 drug-related crimes with the death penalty, including manufacturing drugs (Article 248), illegally transporting drugs (Article 250), and illegal trading drugs (Article 251).

These crimes are all imposed the death penalty in Clause 4 of Article (Clause 4 Article 248, Clause 4 Article 250, Clause 4 Article 251) with the death penalty as the highest penalty frame. The aggravating circumstances specified in these Clauses are mostly the same. There are only 03 additional details applied to the crime of illegal transportation and trafficking of the drug.

Specifically, any person commits an act of illegally manufacturing, transporting, or trading drug equal to or exceeding the specified volume (or size), the highest penalty shall be imposed death:

- A quantity of  $\geq 05$  kg of opium poppy resin, cannabis resin, or coca glue;
- A quantity of  $\geq 100$  g of heroin, cocaine, methamphetamine, amphetamine, or MDMA;
- A quantity of  $\geq 300$  g of other solid narcotic substances;
- A quantity of  $\geq 750$  ml of other liquid narcotic substances;
- Involving  $\geq 02$  narcotic substances whose total quantity is equivalent to the number of narcotic substances specified in Point a through d of this Clause 4, Article 250, 251 and Point a through d Clause 4, Article 248 in Vietnam Criminal Law.

The determination of the total amount of narcotic substances is in accordance with the provisions of the Joint Circular No. 01/1998/TTLT/ TANDTC-VKSNDTC-BNV dated February 2, 1998, of the Supreme People's Court, The Supreme People's Procuracy, and the Ministry of the Internal Affairs guide the application of a number of provisions of the Law amending and supplementing a number of articles of the Penal Code. The determination of the total amount of narcotics is carried out in the spirit Regulations of Joint Circular No. 01/1998 / TTLT / TANDTC-VKSNDTC-BNV dated February 2, 1998, of the Supreme People's Court, the Supreme People's Procuracy, and the Ministry of Home Affairs about the application of a number of provisions of the Law amending and supplementing a number of articles in Criminal Law.

- A quantity of  $\geq 05$ kg of opium poppy resin, cannabis resin, or coca glue. "Opium is a liquid white plastic extracted from the poppy fruit by hand and then dried and caked <sup>1</sup>.
- However, the amount of opium resin does not distinguish whether the resin is liquid or concentrated. Besides, "for opium leftover, it is not considered as opium resin.

<sup>1</sup> Dinh Van Que (2010), 1999 Criminal Code Comment (Crime Section), Chapter XVIII: drug-related crime, Ho Chi Minh City General Publisher, page 28.

It is necessary to determine the morphine in opium leftover to calculate the weight of the opium”<sup>1</sup>.

- “In case of offenders are arrested when they have recently injected opium poppies to get diluted white plastic which has not been concentrated yet, still using the dilute opium weight to prosecute criminal liability, and in the similar circumstances, the amount of opium concentrated has higher danger level than the amount of opium which is not concentrated yet.”<sup>2</sup>;

- Cannabis resin is a resin extracted from the cannabis plant (leaves, stem, bark, flower, fruit) by drying method, then pressed or extracted”<sup>3</sup>. Cannabis resin usually has a very high concentration of addictive substances, which can be 8 to 10 times more than the cannabis plant that has not been pressed or extracted into a resin. However, as with opium resin, the amount of cannabis resin does not distinguish whether the resin is liquid or concentrated; “Cocoa’s extraction is a cream that is extracted from the leaves of the cocoa tree by various methods, but necessarily by chemical methods.”<sup>4</sup>.

- Cocoa’s cream is the raw material for the production of cocaine through the chemical reaction steps. Offenders of manufacturing, transporting, or trading opium resin, marijuana resin, or coca plasma weighing 5 kilograms or more may be subject to the death penalty.

- Heroin, Cocaine, Methamphetamine, Amphetamine, MDMA, or XLR-11 with a quantity of  $\geq 100g$ . Heroin is a drug made from Morphine. It comes in a variety of forms but mostly in powder; Cocaine is a natural substance extracted from the coca leaves.

- Offenders of production, transportation, and sale of Heroin, Cocaine, Methamphetamine, Amphetamine, MDMA hoặc XLR-11 with a quantity of  $\geq 100g$  can be subjected to the death penalty.

- Other solid narcotic substances with a quantity of  $\geq 300g$ . Other narcotics are non-opioids, neither marijuana nor coca, nor Hêrôin or cocaine, Methamphetamine, Amphetamine, MDMA or XLR-11, not in liquid but solid form.

- Other narcotic substances currently identified are those on the list of substances specified in Decree No. 73/2018 / ND-CP dated May 15, 2018, of the Government regulating the lists of narcotics and drug precursors and according to the provisions of the Drug Convention to which Vietnam is a party. This list includes up to 247 different narcotics.

---

1 Point b, subsection 1.1, Document No. 08 / VBHN-BCA dated December 31, 2015 consolidating Joint Circulars guiding the application of a number of provisions in Chapter XVIII “drug-related crimes” of the Criminal Law 1999.

2 Dinh Van Que (2010), 1999 Criminal Code Comment (Crime Section) Chapter XVIII: drug-related crime, Ho Chi Minh City General Publisher, page 28.

3 Dinh Van Que (2010), 1999 Criminal Code Comment (Crime Section) Chapter XVIII: drug-related crime, Ho Chi Minh City General Publisher, page 28.

4 Dinh Van Que (2010), 1999 Criminal Code Comment (Crime Section) Chapter XVIII: drug-related crime, Ho Chi Minh City General Publisher, page 28.

In addition, the regulation of lawmakers on other drugs also aims to meet the requirements of this crime prevention in the current period.

In addition to opium resin, marijuana resin, coca plasma, heroin and cocaine, methamphetamine, amphetamine, MDMA, and XLR-11, the rest of the other narcotics in solid form are all criminal cases. At this time. Offenders of manufacturing, transporting, or trading these drugs weighing 300 grams or more may be subject to the death penalty.

- Other narcotic substances in liquid form with a volume of 750 milliliters or more. Other drugs are similarly identified. The only difference is that the other narcotics, in this case, are in liquid form and measured in milliliters. Offenders of manufacturing, transporting, or trading these drugs with a volume of 750 milliliters or more may be subject to the death penalty.

- For general narcotic substances in a solid form dissolved into liquid or narcotic in liquid form, including opium resin, marijuana resin, which has been diluted, the complete solution or diluent is not considered narcotic in liquid form. It is necessary to determine the amount of narcotic substance in the solution to calculate the weight of that drug. All narcotic substances and drug weight must be determined through inspection by the authorities.

- In addition, for 02 offenses which are illegal transportation of narcotics and illegal trading of narcotics, there are 03 framing circumstances with the highest penalty level as the death penalty specified in Clause 4 of the Law, they are:

+ Cocoa leaves; *Catha edulis* leaves; leaves, roots, stems, branches, flowers, and fruits of the cannabis plant or parts of other plants containing narcotic substances prescribed by the Government weighs 75 kilograms or more. Offenders transporting, trading narcotics in these forms with a volume of 75 kilograms or more may be subject to the death penalty.

+ Dried opium poppy weighs 600 kilograms or more. The unripe poppy fruit on the tree is cut for resin. Poppy resin comes from an unripe poppy fruit on a tree. Although after the resin is harvested and the poppy fruit is left to dry or dried, and opium resin cannot be obtained, the morphine content remains not as much as the fresh poppy. Because of the lower morphine content, offenders transporting, buying, and selling dried poppy with a volume of 600 kilograms or more may be subject to the death penalty.

+ Fresh poppy fruit weighs 150 kilograms or more. The fresh poppy fruit must be the poppy fruit that has been separated from the poppy plant and still fresh, with a high morphine content. When determining the opium poppy that the offenders illegally possess, transport, trade, or appropriate is fresh or dried poppy. It is necessary to solicit expertise. Offenders transporting, buying, and selling fresh poppy weighing 150 kilograms or more may be subject to the death penalty.

Although the law specifies the number of narcotics as a basis for applying the penalty in general and the death penalty in particular, in reality, the death penalty applied to offenders is usually based on an integrated assessment of all factors, including the number of drug substances, the aggravation, and mitigation of the criminal liability of each offender in each specific case.<sup>1</sup>

The death penalty does not apply to:

The death penalty is not applied to the offenses as mentioned above (as prescribed in Article 40 of the Vietnam Criminal Law 2015) includes:

- A person under 18 years old, when committing an offense.
- Pregnant women, women, nursing children under 36 months old when committing crimes.
- Persons aged full 75 years or older when committing an offense or in a trial.

In these cases, the death penalty is converted to life imprisonment. This regulation demonstrates the humanity of the State of Vietnam.

### **3. PRACTICE OF DEATH PENALTY ON DRUG-RELATED CRIMES IN TWELVE VIETNAM CENTRAL PROVINCES, PERIOD OF 2015 - 2019**

#### **3.1. Comparison of data on death penalty cases on drugs in Vietnam between 1996 - 2001, 2001 - 2010, and 2015 - 2019 period**

Vietnam is located near the “Golden Triangle”<sup>2</sup> and “Golden Crescent”<sup>3</sup> - drug crime hot spots- and drug crime activities greatly influence it in these regions. With unique geographical location, Vietnam’s Central region is also primarily affected. Over the past years, the drug crime situation in Vietnam in general and the central provinces, in particular, has been complicated and has tended to increase in both quantity and severe, and a tendency of transnational drug offenses. However, with the general trend of the world, Vietnam has also been reducing regulations and applying the death penalty to offenders. This is shown in the death penalty data for drug-related crimes.

*a) Period of 1996 - 2001* (data on offenders imposed the death penalty in 54 provinces in Vietnam)

From 1996 to 2001, the number of offenders who imposed the death penalty related to drug crimes was relatively high, as shown in the below table:

1 More details in Decree No. 01/2001/NQ-HĐTP dated 15/3/2001 on guiding application of some Articles 139, 193, 194, 278, 279 and 289 in Vietnam Criminal Law 1999.

2 Area between borders of Lao, Thái Lan, Myanmar.

3 The mountainous area is located at the intersection of three regions of Central Asia and South Asia and West Asia.

**Table 2: Number of offenders imposed death penalty related to drug crimes at Vietnam's first-instance People's Court**

Year	1996	1997	1998	1999	2000	2001	Total	The average number of drug crimes imposed death penalty per year	The average number of drug crimes imposed death penalty/ province/year
Number of persons who applied death penalty (54 provinces)	7	28	57	137	87	60	376	62,6	1,15

(Source: Report of Court sector in 2001)

Thus, in the six years from 1996 to 2001, the total number of defendants sentenced to death for drug crimes was 376. In particular, this number has not been stable over the years. From 1996 to 1999, this number increased rapidly, peaking in 1999 with 137 defendants, but from 1999 to 2001 the number decreased. However, in general trend for the whole period, from 1996 to 2001, the number of defendants subjected to the death penalty for drug-related crimes tended to increase (from 07 to 60 cases).

b) *Period 2001 - 2010* (data on offenders imposed the death penalty in 54 provinces across the country)

**Table 3: Number of offenders imposed death penalty at Vietnam's first-instance People's Court from 2001 to 2010**

2001 - 2010	Offenders imposed death penalty (all types of crimes)	Offenders imposed death penalty (drug-related crimes)	An average number of drug crimes related death penalty per year.	The average number of drug crimes related to the death penalty/ province/year
Number the of the death penalty (54 provinces)	1.421	569	51.7	0.95

(Source: Report of Court sector in 2010)

In the period 2001 - 2010, out of a total of 1,421 accused of the death penalty nationwide (for all crimes), the total number of drug offenders sentenced to death was 569 (accounting for 40,04%)<sup>1</sup>. The average number of defendants subjected to the death

1 The death penalty in the Vietnam Criminal Law - Some recommendations" by Trinh Quoc Toan, <https://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/79/691>.

penalty for drug-related crimes has decreased over the years. In the 1996 - 2001 period, there were 62.6 defendants, what in the 2001-2010 period, only 51.7 defendants remained. This is consistent with reducing the death penalty in Vietnam in particular and the world in general.

c) *Period of 2015 - 2019* (only data about offenders with the death penalty in twelve Vietnam Central Provinces)

When comparing the period of 1996 - 2001, 2001 - 2010, and 2015 - 2019, we did not have enough data statistics of the number of defendants sentenced to death during these periods nationwide (54 provinces/cities of Vietnam), but only data of 12 central provinces of Vietnam (including Quang Binh; Quang Tri; Thua Thien - Hue; Da Nang; Quang Nam; Quang Ngai; Binh Dinh; Phu Yen; Khanh Hoa; Dak Lak; Gia Lai; Kon Tum), as showed in the below table:

**Table 4: Number of the case and the defendants applied the death penalty in the People's Court of Central provinces, Vietnam in the period 2015-2019**

No.	Province	Number of case	Number of defendants	Types of crimes	Penalty at the first-instance	Penalty at the Appeal level
1	Quang Binh	1	1	<i>Illegal transporting drugs</i>	Death penalty <sup>1</sup>	Death penalty <sup>2</sup>
2	Quang Tri	1	1	Murder	Death penalty	Suspension of appellate trial
		1	1	Murder	Death penalty	Death penalty
3	Thua Thien - Hue	1	1	Murder	Death penalty	Suspension of appellate trial
4	Da Nang	1	1	Murder	Death penalty	Life sentence
		1	1	Murder	Death penalty	Death penalty
		1	1	Murder	Death penalty	Death penalty
		1	1	Murder	Death penalty	Death penalty
5	Quang Nam	1	1	Murder	Death penalty	Death penalty
		1	1	Murder	Life sentence	Death penalty
6	Quang Ngai	1	1	Murder	Death penalty	Death penalty
7	Bình Định	0	0			
8	Phú Yên	0	0			

1 Judgment of first instance record No. 23/2019/ HSST dated 28/08/2019 of Provincial Court of Quang Binh (defendant X Vang, Death penalty at the First instance level).

2 Judgment No. 311/2019/ HSPT dated 24/10/2019, Supreme Court in Da Nang (defendant X Vang, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-3112019hspt-ngay-24102019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-125219>

9	Khanh Hoa	1	1	Murder	Death penalty	Death penalty
		1	1	Murder	Death penalty	Life sentence
10	Dak Lak	1	1	Murder	Death penalty	Death penalty
		1	1	Murder	Life sentence	Death penalty
		1	1	Murder	Life sentence	Death penalty
		1	1	<i>Illegal transporting drugs</i>	Life sentence <sup>1</sup>	Death penalty <sup>2</sup>
		1	1	Murder	Death penalty	Death penalty
11	Gia Lai	1	1	Murder	Death penalty	Death penalty
		1	1	Murder	Death penalty	Death penalty
		1	1	Murder	Death penalty	Death penalty
12	Kon Tum	0	0			
	Total 12 provinces	21	21		17 Death penalties	17 Death penalties

(Source: Office of Superior People's Court in Da Nang).

From 2015 to 2019, there were 21 defendants out of 21 cases prosecuted with the highest sentence of death in the Vietnam central provinces. Data showed:

In a total of 21 cases, although there were some defendants brought to trial with the highest penalty of death, up to 02/21 defendants were withdrawn and suspended at the appellate trial (02 cases, 02 the defendant accounts for 9.52%).

Only 13 cases out of 21 cases are appellate levels keeping the same judgment as of the first instance (13 cases, 13 defendants: 61.9%)

Worryingly, there were 4 cases that the Appellate level pronounced and amended the first instance judgment in the direction of increasing from life to death (4 cases of 4 defendants accounted for 19.04%).

It is also noteworthy that there were two cases that the Appellate level pronounced and amended the judgment of the first instance from death to life (2 cases of 2 defendants account for 9.52%).

Particularly for drug-related crimes, in 5 years (2015 - 2019) in 12 central provinces of Vietnam, there were only 2 cases with 02 defendants prosecuted and tried for drug crimes (out of 17 defendants subjected to the death penalty for crimes in general).

1 Judgment of first instance record No. 24/2019/ HSST dated 17/05/2019 of Provincial Court of Dak Lak (defendant Phan Thị Đ, Life sentence at the First instance level).

2 Judgment No. 264/2019/ HSPT dated 17/09/2019, Supreme Court in Da Nang (defendant Phan Thị Đ, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-2642019hspt-ngay-17092019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-108658>

**Table 5: Data of drug-related defendants subjected to the death penalty at People's Courts of Central provinces, in the period 2015 - 2019**

The year 2015-2019	Death penalty (all types of crimes)	Death penalty (drug-related)	The average number of drug-related death penalty/Vietnam/ per year	The average number of drug-related death penalty/per Province/ per year
Number of persons imposed the death penalty (12 provinces in Central of Vietnam)	17	02	1.41	0.28

(Source: Office of Superior People's Court in Da Nang).

Regretfully, we did not have data on drug-related defendants who imposed the death penalty in the whole country from 2015 to 2019 to compare with 569 drug-related defendants who imposed the death penalty from 2001 to 2010. However, when we used data of twelve provinces of Vietnam Central, it can be seen there was a significant decrease:

- Period of 1996 - 2001: Average number of drug-related defendants imposed death penalty/province/year was 1.15.

- Period of 2001 - 2010: Average number of drug-related death penalty/province/year was 0.95

- Period of 2015 - 2019: Average number of drug-related death penalty/year was 0.28.

### 3.2. Practice of the death penalty application for drug-related crimes in central provinces of Vietnam in the period 2015 - 2019

The specific analysis of a case of defendants who imposed the death penalty in 05 years showed that applying the death penalty in drug cases in the central provinces followed the general downward trend of the country. In particular, this penalty applies to the following types of drug-related crimes as in the below table:

**Table 6: Data of types of drug-related crimes subjected to the death penalty at People's Courts of Central provinces, in the period 2015 - 2019**

No.	Types of crimes	Number of case	Number of defendants
1	Illegal trading drugs	0	0
2	Illegal producing drugs	0	0
3	Illegal transporting drugs	2	2

(Source: Office of Superior People's Court in Da Nang).

As shown in the above table, of the 03 drug-related crimes with the death penalty in the past five years, the court of the central provinces has only applied the death penalty

to 01 types of crime, illegally transporting drugs. The other two types of crimes were not imposed with the death penalty, although there are provisions for the death penalty for these types of crimes. Two defendants in 02 cases were subjected to the death penalty were in two different provinces, as shown in the below table:

**Table 7: Number of the drug-related death penalty in People's Courts of Central provinces from 2015 to 2019**

No.	Province	Number of cases	Number of defendant's	Types of crimes	Punishment at the first instance level	Punishment at the appellate level	Appeal reason to correct the judgment	Note
1	Quang Binh (Case Quang Binh) <sup>1</sup>	1	1	Illegal transporting drugs	Death penalty	Death penalty		Reject the defendant's appeal
2	Dak Lak (Case Dak Lak) <sup>2</sup>	1	1	Illegal transporting drugs	Life sentence	Death penalty	The court of the first instance improperly assess graves nature of the case	Acceptance of the Procuracy's Appeal

(Source: Office of Superior People's Court in Da Nang)

As shown in the above table, of 02 drug offenses subjected to the death penalty, 01 cases were retained the first-instance judgment of the death penalty by the Appellate level. This retainment of the Appellate Court proved the quality of the provincial court of Central provinces. The court properly correctly the particularly grave case, the identity of the offender, aggravating circumstances, mitigating criminal liability, correct evidence assessment, and violation identification of crime, the legal regulation application, crime determination, penalty decision, commensurate with the offense and the consequences of the case.

1 Case Quang Binh: Judgment of first instance record No. 23/2019/ HSST dated 28/08/2019 of Provincial Court of Quang Binh (defendant X Vang, Death penalty at the First instance level).

Judgment No. 311/2019/ HSPT dated 24/10/2019, Supreme Court in Da Nang (defendant X Vang, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-3112019hspt-ngay-24102019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-125219>.

2 Case Dak Lak: Judgment of first instance record No. 24/2019/ HSST dated 17/05/2019 of Provincial Court of Dak Lak (defendant Phan Thị Đ, Life sentence at the First instance level).

Judgment No. 264/2019/ HSPT dated 17/09/2019, Supreme Court in Da Nang (defendant Phan Thị Đ, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-2642019hspt-ngay-17092019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-108658>

**The specific case in Quang Binh** (Case Quang Binh)<sup>1</sup> is described as below:

*On October 9, 2018, X Vang and Hang A. C traveled by plane from Vientiane - Laos, to Ho Chi Minh City. After completing immigration procedures at Tan Son Nhat airport, X Vang and Hang A. C took a taxi to the bus termination to catch a bus to Hang A. C's house.*

*At around 4:00 am on October 12, 2018, X Vang drove Hang A.C and drugs on the vehicle with number 86C-091.02 from a hotel in Ha Tinh city to Da Nang city National Highway 1A. When they were driving along Highway 1A in commune H, district L, Quang Binh, the traffic police force of Quang Binh stopped their vehicle to check. When asked to open the cargo compartment behind the vehicle, Hang AC and X Vang escaped. On October 13, 2018, X Vang was arrested for 308.6 kg of methamphetamine.*

*X Vang declared that the above drug amount was prepared by Hang A.C and available on cars with a number of 86 C- 091.02. Because A Vang A.C has not been arrested yet, there was no evidence for clarifying the above declare of X Vang.*

*At the first instance Criminal Judgment No. 23/2019 / HS-ST dated August 28, 2019, the People's Court of Quang Binh Province decided: Defendant X Vang committed: "Illegally transporting narcotics drug"; Application of Point b, Clause 4, Article 250; Point s Clause 1 Article 51, Clause 2 Article 51; Article 40, Article 5 of the Criminal Law, the death penalty was imposed on defendant X Vang.*

*On September 4, 2019, Defendant X Vang had an appeal to alleviate the penalty.*

*On October 24, 2019, the People's Court of Quang Binh had an appealing hearing about defendant X Vang on charges of "Illegally transporting narcotics" due to the defendant's appeal against the criminal justice men of the First Instance No. 23/2019/HS-ST.*

*At appellate criminal judgment No. 324/2019 dated October 24, 2019, People's Court of Quang Binh declared: The appeal of the defendant X Vang was rejected. The first instance judgment was upheld. The defendant X Vang was implied to the death penalty.*

---

<sup>1</sup> Case Quang Binh: Judgment of first instance record No. 23/2019/ HSST dated 28/08/2019 of Provincial Court of Quang Binh (defendant X Vang, Death penalty at the First instance level).

Judgment No. 311/2019/ HSPT dated 24/10/2019, Supreme Court in Da Nang (defendant X Vang, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-3112019hspt-ngay-24102019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-125219>

However, for 01 remaining cases, the appellate level had revised the first-instance judgment and aggravated from life to death penalty. This is because the first-instance trial panel incorrectly determined the seriousness of the violation of the crime, assessed the defendant's identity, so the penalty decision was incorrect.

**The specific case in Dak Lak** (Case Dak Lak)<sup>1</sup> is described as below:

*At noon on August 11, 2018, Phan Thi D, who lived in Bac Can, went to Laos to meet a man named Say to receive some drugs to transport to Vietnam under the agreement of Hoang Thi Hien. At around 21:00 on August 13, 2018, Phan Thi D brought drugs into the bus 37B-02203 driven by Ngo Anh Tuan to return to Vietnam. At about 2 o'clock on August 14, 2018, when Mr. Tuan's car arrived at the Krong But traffic police station, he was arrested with 22 rectangular cakes of the drug hidden in the car tire. These 22 drug cakes were then inspected. They were a hero and weighed 7.73 kg. The first-instance judgment applied Point b, Clause 4, Article 250; Point s Clause 1, Clause 2 Article 51 of the Penal Code 2015, punish Phan Thi D for life imprisonment for "Illegally transporting narcotics." The first-instance judgment applied Point b, Clause 4, Article 250; Point s Clause 1, Clause 2 Article 51 of the Vietnam Criminal Law 2015, and imposed Phan Thi D life imprisonment for "Illegally transporting narcotics."*

*After obtaining the appellate appeal decision of the People's Procuracy of Dak Lak province, the Superior People's Court in Da Nang has appealed the trial for the above case. At the appellate trial, the Trial Panel accepted the appeal, correcting the first instance judgment<sup>2</sup>. This trial applied Point b, Clause 4, Article 250; Point s Clause 1, Clause 2 Article 51 of Vietnam Criminal Law and penalized Phan Thi D to death for "Illegally transporting narcotics."*

The Appellate trial panel stated that: The case is particularly severe Heroin transported by the defendant, which was at 7.73 kg, is particularly considerable 100 grams of heroin specified at Point b, Clause 4, Article 250 of Vietnam Criminal Law). The defendant

1 Case Dak Lak: Judgment of first instance record No. 24/2019/ HSST dated 17/05/2019 of Provincial Court of Dak Lak (defendant Phan Thị Đ, Life sentence at the First instance level).

Judgment No. 264/2019/ HSPT dated 17/09/2019, Supreme Court in Da Nang (defendant Phan Thị Đ, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-2642019hspt-ngay-17092019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-108658>

2 Judgment of first instance record No. 24/2019/ HSST dated 17/05/2019 of Provincial Court of Dak Lak (defendant Phan Thị Đ, Life sentence at the First instance level).

Judgment No. 264/2019/ HSPT dated 17/09/2019, Supreme Court in Da Nang (defendant Phan Thị Đ, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-2642019hspt-ngay-17092019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-108658>

had a lousy deficiently, has been repeatedly sentenced to prison for gambling, gambling organizing. Hence, the death penalty had to be imposed for discouragement, general and separate prevention.

The life imprisonment applied by The Court of First Instances was not incompatible with the crime level of the defendant. According to the author, the amount of Heroin illegally transported is considerable, many times higher than the level specified at Point b, Clause 4, Article 250 of Vietnam Criminal Law. In addition, the offender had a lousy identity, so the execution is correct. The Court of First Instance mistakenly overemphasized the extenuating circumstances to apply the death penalty to the defendant while forgot the decisive role of a considerable amount of Heroin in applying the death penalty application. The Court of First Instance did not fully consider other aggravating circumstances that were decisive in applying the death penalty. The Court of First Instance also had the inadequate assessment of the defendant's identity and criminal circumstances and the considerable amount of heroin which was a decisive consideration for the death penalty application. Although the author's opinion is that it is necessary to abolish the death penalty for this offense in the future, with the provisions of the criminal law at this time and with a particularly hazardous crime, the application of the death penalty to this defendant was completely utterly enough for deterrence, general and separate prevention.

When comparing the situation of applying penalties for drug-related crimes of equivalent danger level in other localities, it can be seen that the life penalty imposed by the first-instance court was too light, not in accordance with the law. The details of the case, as well as the crime's identity, were not fully considered. The acceptance of the appeal and increase the penalty for the defendant from life to death penalty by The appellate court were appropriate. This can be shown by comparing the application of the law in case 115/2019 / HSPT (case Hai Duong).

***Case in Hai Duong*** (case Hai Duong)<sup>1</sup> is described as below:

*At 17:00 on December 21, 2017, the traffic police of Hai Duong province stopped and checked a car of 15A-118.41 and found that Ngo Tuan A was caught in the back seat with the act of illegal transporting drugs. The backpack of Ngo Tuan A was inspected with 16 blue plastic bags, 054 pink plastic bags containing blue and pink tablets, and 02 rectangular cakes. The authorities' assessment concluded that the substance discovered and seized were 2,353.97 grams of methamphetamine; 708.72 grams of Heroin, a total of 3,062.69 grams. After being arrested, during the investigation and trial process, Ngo Tuan A confessed to transporting drugs to a man*

---

<sup>1</sup> Case Hai Duong: Judgment 115/2019/HSPT date 13/3/2019 of Superior Court in Hanoi (defendant Ngo Tuan A, Death penalty at the First instance level).

*named Hung with an unknown address from Thanh Hoa city to Hai Phong to get a salary of 8,000,000 VND. The Court of First Instance imposed the death penalty against Ngo Tuan A. The sentence was appealed.*

When considering the defendant's appeal, the appellate judge stated that the criminal of the defendant Ngo Tuan A sanctioned by the court of the first instance for his illegal transportation of narcotics was right person, right crime, and right law. The goods of the defendant's offense are parole State has prohibited the illegal transport of narcotics. The Vietnam Criminal Law has prescribed a very strict a stringent the defendant was aware of. However, he defied the law and transported a particularly considerable for unrighteous profit. The defendant's acts enabled drug evils in the society to arise, develop, cause bad consequences in harmful life, infringe on the social order and security. These acts were discontented and condemned by public opinion. Because of this, the law has to strictly sanction this crime to deter and prevent this type of crime. The first-instance court assessed the part gravure of the defendant's criminal acts, the weight of the drug transported, identity, extenuating circumstance, and death penalty implication of this court was well-grounded and legal. Therefore, the appellate court rejected the appeal and kept the death penalty for the defendant.

The first instance court of Dak Lak<sup>1</sup> and Hai Duong<sup>2</sup> made two different judgments for the similar act of illegally transporting narcotics with the same identity of exact defendants. The case in Dak Lak with a larger number of more significant transported (22 Heroin cakes with a weight of 7.73kg) was applied life imprisonment, not while the case in Hai Duong with the less weight of the drug transported by the defendant (3,062.69g or more than 3kg) was applied death penalty.

Thus, if considering the rigor and consistency in the application of the law, it is clear that the application of laws on similar crime cases in localities has not been consistent. Therefore, the appellate court's acceptance of the Procuracy's appeal to increase the penalty from life to death for the defendant in the Dak Lak<sup>3</sup> case complied with the law

1 Judgment of first instance record No. 24/2019/ HSST dated 17/05/2019 of Provincial Court of Dak Lak (defendant Phan Thị Đ, Life sentence at the First instance level).

Judgment No. 264/2019/ HSPT dated 17/09/2019, Supreme Court in Da Nang (defendant Phan Thị Đ, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-2642019hspt-ngay-17092019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-108658>

2 Judgment 115/2019/HSPT date 13/3/2019 of Superior Court in Hanoi (defendant Ngo Tuan A, Death penalty at the First instance level).

3 Judgment of first instance record No. 24/2019/ HSST dated 17/05/2019 of Provincial Court of Dak Lak (defendant Phan Thị Đ, Life sentence at the First instance level).

Judgment No. 264/2019/ HSPT dated 17/09/2019, Supreme Court in Da Nang (defendant Phan Thị Đ, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-2642019hspt-ngay-17092019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-108658>

and ensured the correctness of the law maintained the consistency in the application of the law among localities for this type of crime.

The above practice shows that, despite the decreasing trend, the death penalty in the central provinces and the whole country, there are needs considering and applying it correctly to ensure law compliance, injustice avoidance or omission of criminals and consistency with the nature of the danger level of the crime; effective fighting against crime and consistency in law awareness and application among localities. We need to review the quality of adjudication for crimes imposed by this special penalty, identify solutions to the causes of mistakes and omissions.

In our opinion, these mistakes and shortcomings stem from both subjective and objective factors.

Regarding subjective reasons, the trial panel has not considered and comprehensively evaluated evidence documents and details related to the case, which are meant to determine the exact nature of the case before deciding life imprisonment or death sentence. In other words, the awareness of evaluating evidence was not high in judgment. The trial panel's determination on the criminal act was not in accordance with the actual level of such an act. The panel excessively emphasized extenuating circumstances, which were not extenuating circumstances to eliminate the death penalty. The panel did not consider sufficiently other aggravating circumstances that were decisive to applying the death penalty. The defendant's identity and criminal circumstances had not been thoroughly evaluated. There are also cases where the Trial Panel lacks bravery or limits capacity in framing the penalty in declaring the death penalty for offenders.

Regarding the objective factors, Article 40 of the current Criminal Law stipulates the application of death penalty travels offenses belonging to one of the groups of defined crimes, i.e., crimes infringing upon national security; and there are no regulations or instructions in defining "crimes severe cases" in particularly grove unified basis for the application of the death penalty. This makes the Trial panel confused when choosing between the application of imprisonment, life imprisonment, or the death penalty. This confusion is because not all cases of particularly serious crimes are imposed grave

In order to ensure that the death penalty for drug offenders in general and drug-related offenders, in particular, is applied correctly to minimize mistakes and shortcomings, the above reasons need to be overcome promptly and thoroughly. The solution could be to improve the legal knowledge and awareness of authorities who apply the law on the death penalty. It is necessary to train and build of a contingent of judicial officers (especially judges and jurors) with strong bravery in both action and mental, without intense or shaken by pressure, impacts from outside (such as fear of revenge, idealism); resolutely fight against

corruption related to running judgment, accepting bribes, bending justice; Application of the law of the death penalty in judicial activity is a very sensitive activity because it relates to the compassionate tech tends to be abolished in criminal law for humanity.

Therefore, we believe that those who have the authority to apply the death penalty law should only consider the application of it as the last choice (there is no other option). In addition, the judge must have good professional skills, strong political and professional character, good moral character, and a high level of social knowledge (for example, criminology, psychology, sociology). They need a wide and broad range of general knowledge to properly apply the comprehensive law of the death penalty. The errors in the death penalty application are unacceptable because this mistake is irreversible.

Therefore, it is necessary to strictly deal with those who have the authority to apply the law and make serious mistakes and cause particularly serious consequences severe as for the offenders themselves, i.e., imply death penalty to innocent people, and do not apply the death penalty to those who deserve to be executed. Depending on the severity and the cause of the violation, the law should strictly handle those violations.

In Vietnam, a judge is stopped trial if that judge has more than 3% of the sentences and decisions canceled over the total number of resolved cases/working year<sup>1</sup>. There are no separate regulations on the wrong application of the death penalty. This is a major loophole in the law.

We recommend that: “a significant is stopped trial if that judge has more than 3% of the sentences and decisions canceled over the total number of resolved cases/working year or one wrong application of death penalty”.

Overcoming the above subjective and objective reasons together by offering strict sanctions for the case of misapplication of the death penalty would help the application of the death penalty in general and for drug-related crimes in specific be corrective and in accordance with the law, ensuring the strictness of the law as well as the right to life, the most sacred right of human.

## **CONCLUSION**

Vietnam still maintains that the heavier punishment is, the more effective the deterrent more influential it would be. Therefore, the most severe punishment, the death penalty, is necessary to deter and stop drug-related crimes - due to its such “super” profits, many people are willing to defy everything, including their life, to manufacture, transport, or

---

<sup>1</sup> Regulation on handling violations of judges, civil servants, public employees, and workers in the People’s Court industry.

trade drug illegally. So, out of a total of 13 drug offenses, there are 03/13 drug-related crimes applied, the highest penalty that is the death penalty.

The data in this paper indicates that the number of defendants sentenced to death for drug crimes has significantly decreased from 1,15 defendants/province/year (period of 1996-2001) to 0.95 (period of 2001 - 2020) and then 0.28 (period of 2015 - 2019). However, when assessing specific cases of the death penalty for drug-related crimes in twelve Vietnam central provinces (02 drug-related cases/17 defendants applied the death penalty from 2015 to 2019), it can be seen that there are a variety of mistakes in the death penalty application. Two cases were reduced from death to life penalty at the Appellate Court level, accounting for 9.52%, an acceptable rate in our opinion. Arguably, the Judge in these two cases has not been suspended from the death penalty trial.

The paper, thus, proposes and emphasizes that the Judge considers imposing the death penalty when it is the only or the last choice; and that for Judge who commits a mistake in a penalty death trial (canceled by the Appellate Court level after that) has to receive a suspension from the trial forever.

## REFERENCES

1. *Judgment of first instance record No. 23/2019/ HSSST* dated 28/08/2019 of Provincial Court of Quang Binh (defendant X Vang, Death penalty at the First instance level).
2. *Judgment No. 311/2019/ HSPT* dated 24/10/2019, Supreme Court in Da Nang (defendant X Vang, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-3112019hspt-ngay-24102019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-125219>
3. *Judgment of first instance record No. 24/2019/ HSSST* dated 17/05/2019 of Provincial Court of Dak Lak (defendant Phan Thị Đ, Life sentence at the First instance level).
4. *Judgment No. 264/2019/ HSPT* dated 17/09/2019, Supreme Court in Da Nang (defendant Phan Thị Đ, Death penalty at Appeal level), <https://thuvienphapluat.vn/banan/ban-an/ban-an-2642019hspt-ngay-17092019-ve-toi-van-chuyen-trai-phep-chat-ma-tuy-108658>
5. *Judgment No. 115/2019/HSPT* dated 13/3/201 of Supreme Court in Hanoi (defendant Ngo Tuan A, Death penalty at the First instance level).
6. *Dinh Van Que* (2010), 1999 Criminal Code Comment (Crime Section), Chapter XVIII: drug-related crime, Ho Chi Minh City General Publisher, page 28.
7. *Criminal Law 1999* (amended and supplemented in 2009).

8. *Criminal Law 2015* (amended and supplemented in 2017).
9. *Law on drug prevention* 2013.
10. *The Supreme People's Court (2001)*, Resolution No. 01/2001 / NQ-HDTP dated March 15, 2001, guiding the application of a number of provisions of Articles 139, 193, 194, 278, 279, and 289 Criminal Law 1999.
11. *Joint Circular No. 01/1998/TTLT/ TANDTC-VKSNDTC-BNV* dated February 2, 1998, of the Supreme People's Court, the Supreme People's Procuracy, and the Ministry of the Interior guiding the application of a number of provisions of Law amending and supplementing a number of articles of the Criminal Law.
12. *Vu Ngoc Bung* (1994), Types of narcotics, People's Public Security Publisher, page 48.
13. *Tran Van Luyen & et.* (2017), Scientific commentary on the 2015 Criminal Law (amended in 2017), Criminals section, People's Public Security Publisher, Hanoi, page 488.
14. *Trinh Quoc Toan*, "The death penalty in the Vietnam Criminal Law - Some recommendations" by Trinh Quoc Toan, <https://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/79/691>.
15. *Supreme Court*, Report of Court sector 2001.
16. *Trinh Quoc Toan*, (2015), Living rights and death penalty (Monographs), National Politics Publisher, Hanoi, p.138.
17. *Nguyen Thai Phuong Trang* (2020), Applying the death penalty from the practice of Central provinces, Vietnam, Master's thesis in Law, Academy of Social Sciences, 2020.
18. *Ho Chi Minh City University of Law*, (2015), Vietnam Criminal Law Textbook (Criminals Section - volume 1), Hong Duc Publisher - Vietnam Lawyers' Association, page 373.
19. *Document No. 08 /VBHN-BCA* dated December 31, 2015, consolidating Joint Circulars guiding the application of a number of provisions in Chapter XVIII "drug-related crimes" of the 1999 Criminal Law.

# WHAT ARE THE SPECIFIC ACTIONS IF VIETNAM STILL RETAINS THE DEATH PENALTY FOR DRUG-RELATED OFFENCES?

Dr. Hai Thanh Luong<sup>1</sup>, Jack Ta LLM<sup>2</sup>

**Abstract:** In recent responses at the United Nations' highest dialogues, Vietnam still confirms its persistence to retain the death penalty in the criminal code system. Most of capital punishment and its related executions have been applied to drug-related contravention. What are the outcomes, and what action should Vietnam adopt if it continues to use capital punishment for drug-related offenses? Genuine and trustworthy statistics relating to the death penalty application in Vietnam are scarcely found, albeit this is a legal matter and an indicator of political and social attitudes. Ironically, though Vietnamese researchers can comprehend and collect relevant data, it remains unclassified. There is the fact that Vietnamese scholars seem apprehensive about researching death-penalty policies. Researchers are unlikely to share their findings without official permission from the authorities because they fear reprisals for investigating the data. Rather than empirical studies without direct fieldwork's observation in the spreading of COVID-19 pandemic, using grey literature, reports by international observers, and informal interviews with colleagues, this article explores the policies and provisions of Vietnam's Party-State in regulating capital punishment for drug offenses. This paper expects at least two primary goals. First, it will assist readers to understand Vietnam's perspectives in its retainment of the death penalty for drug-related offenses while still revoking or at least de facto abolishing for others. Second, this article makes recommendations in policy readjustment and research about whether there should be a reduction and abolishment of the death penalty for drug-related offenses.

**Keywords:** Death penalty, drug-related offences, abolishment, retention, Vietnam.

## INTRODUCTION

Death penalty is a significant concern in the legal and humanitarian subjects. It can be the most severe in the history of a country's penal system's formation and development.<sup>3</sup>

---

1 Associate Research Fellow, RMIT University.

2 Fellow, the Migration Institute of Australia.

3 Nicholson P, *The Death Penalty and Its Reduction in Asia: An Overview* (Briefing Paper, 2017); Johnson D and Zimring F, *The Next Frontier: National Development, Policy Change, and the Death Penalty in Asia* (Oxford University Press 2009).

In addition to being the most severe penalty in the criminal law system for convicted persons, the death penalty is intended to prevent offenders' recidivism completely. It is not designed to educate or provide the convicted the opportunity to reintegrate into the community.<sup>1</sup> In other words, the death penalty does not allow judicial authorities to change or correct mistakes in the course of law enforcement. Since its establishment in 1961, Amnesty International has been trying to call and re-call many countries worldwide to abolish. However, the four most crowded populations (China, India, Indonesia, and the United States) have continued to maintain it as one of the most critical tools for prosecutors and deemed necessary for an effective criminal justice system.

In Vietnam, the death penalty has been recorded as one of the harshest punishments in the legal system since the feudal regimes. However, there was not much official evidence, both written law (*ius scriptum*) and unwritten law (*ius non-scriptum*) to identify objectively when the first one happened. Nonetheless, as noted in Vietnam's encyclopedia historical documents, since the Ngo – Dinh – Pre-Le dynasties regulated this punishment with many cruel forms, including throwing the offenders into tiger's cages, boiling cauldrons of oil as well as head-cutting or garrotting.<sup>2</sup> These formats have continued on, and even officially formalised into, what is known as: the 'Five Penalties' (*Ngu hình* in Vietnamese), including 'flogging' (*xuy*), 'cudgel penalty' (*truong*), 'servitude' (*do*), 'exile' (*luu*), and 'death' (*tu*). Accordingly, all these regulations with its related executions were recorded officially in the 'National Penal Code' (*Quoc Trieu Hinh Luat* or *Bo luat Hong Duc* in Vietnamese) in 1483 and the 'Gia Long Code' (*Hoang Viet Luat Le* in Vietnamese) since 1483 and 1815, respectively. While the former issued at least 149 death's articles out of 722 offences, the latter covered 105 capital punishment's crimes among 398 articles.<sup>3</sup> These high volumes of death's criminal code regulations were likely to confuse the ideological orthodoxies (Confucianism and Buddhism) and traditional culture's values regarding benevolence and humanity. Although requests to reduce and limit these brutal death's forms have urged the feudal regimes, regulations capital punishment with inhumanities approaches maintained until the last governments in the 1940s when moving in the colonial period. Moreover, after the Revolution time in 1975 and the Renovation period in 1986 (known as *Doi Moi* in Vietnamese) Vietnam has changed both political and social formats, there is still no official regulation for the death penalty without the penal code. Until the early 2000s,

---

1 Hood R and Hoyle C, *The Death Penalty: A Worldwide Perspective* (4<sup>th</sup> edn, Oxford University Press 2008).

2 Tran Kien and Vu Cong Giao, 'The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry' 9 *Societies* 1; Ho TN, *Some Issues Related to Death Penalty Judiciary in Vietnam* (International Association of Democratic Lawyers (IADL) 2009).

3 *Supra* n 3.

stemming from socio-economic development and international integration, the process of judicial reform requested to change based on the rule of law to ensure human rights in criminal justice. Accordingly, a complete study of the death penalty with its related abolishments, have taken on a table as an official request. As the first documents of the Communist Party of Vietnam (CPV), the Resolution No. 08 / NQ-TW (dated 2 January 2002) of the Politburo requested to limit death penalties in criminal code of Vietnam (CCV), which reinitiated officially in the Resolution No. 49/NQ-TW later three years in 2005 on the Judicial Reform Strategy to 2020. Accordingly, after 30 years, from 44 articles in the 1985 CCV reduced to 18 articles in the 2015 CCV.

The current paper will not re-discuss controversial opinions between abolishment and de facto, which the first author has analysed as specific details as possible in his previous publications.<sup>1</sup> Instead, it discuss main reasons to maintain the death penalty for drug offences at retentionists before explaining why Vietnam is one of those countries continuing to apply this harshest punishment in the current CCV. The last section will introduce some practical recommendations when Vietnam remains their most offensive policies to drug offences to both policymakers and scholars.

## RETENTIONISTS FOR DRUG-RELATED OFFENDERS

Abolishing the death penalty to ensure fundamental ‘rights of life’ is ongoing and will shortly become an inevitable tendency.<sup>2</sup> However, other countries have continued to perpetuate and enforce death penalty in their criminal-law systems. Geographically, Asia remains central to the quest to abolish the death penalty worldwide: more than 90% of the world’s executions taken in Asia in the past ten years. Notably, in the previous decade, the numbers of performance in 35 countries retaining this sentence for drug offences fluctuated, with known executions peaking at 755 in 2015.<sup>3</sup> Despite the diversity of political, religious, historical, and social systems involved, Asia continues to be the region where the vast majority of executions for drug offences are performed.<sup>4</sup> At least 122 drug-

---

1 Luong TH, ‘Why Vietnam Continues to Impose the Death Penalty for Drug Offences: A Narrative Commentary’ (2021) 88 *International Journal of Drug Policy* 1; Luong TH, ‘Why Vietnam Continue to Maintain the Death Penalty with Drug-Related Crimes?’ (2019) (1st Asian Regional Meeting for Drug Policy); Luong TH, ‘Death Penalty to Drug-Related Crimes: A Vietnam Perspective’ (2018) (Drug-related Offences, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia); Luong TH, ‘The Application of the Death Penalty for Drug-Related Crimes in Vietnam: Law, Policy, and Practice’ (2014) 17 *Thailand Journal of Law and Policy*.

2 *Supra* n 1.

3 Sander G, Girelli G and Fernandez A, *The Death Penalty for Drug Offences: Global Overview 2019* (2020).

4 Nicholson P, *The Death Penalty and Its Reduction in Asia: An Overview* (Briefing Paper, 2017).

related executions were implemented in 2019, which accounted for approximately 18% of the total know and executions worldwide, excluding China, Iran, and Saudi Arabia.<sup>1</sup>

There are at least two primary arguments for those who support retaining capital punishment for drug-related crimes. One way relies on mandatory sentences when the other is including articles in criminal code that impose the death sentence for certain crimes, but allow them to commute to life imprisonment. A mandatory sentencing scheme is one where capital punishment is automatic upon conviction of a crime under their legislative regulations. Here Singapore can be cited as a notable example in Southeast Asia. According to section 17 of the Misuse of Drugs Act, those who possess, consume, manufacture, import, export, or traffic illegal drugs (above a certain amount) will be sentenced to death regardless of any mitigating factors that may apply. At least one-third of the 1,500 Singaporeans, aged between 17 and 74, support this issue when involving the national survey.<sup>2</sup> Whereas, based on specific considerations and practical contexts, some countries has decided to temporarily suspend the death penalty for drug-related offences or rarely execute those convicted.<sup>3</sup> For example, although Thailand still officially imposes the death penalty for narcotics trafficking, there were only 12 out of 281 potential executions between 1935 and 2001 for drug-related crimes; between 2009 and 2018, executions were even more infrequent.<sup>4</sup> However, this nine-year moratorium ended in 2018 with at least ten consecutive death executions, including a Myanmar female offender. After the surge, the execution number dropped back to zero in 2019.<sup>5</sup> Among other Asian countries, Thailand is one of the most typical cases in Asia has applied a *de facto* abolition of executions for drug-related crimes. However, they still regulate it in the law.<sup>6</sup> Besides that, six Asian nations have retained capital punishment, including drug offences but not conducted any executions for at least ten years, namely Maldives since 1953, Brunei Darussalam since 1957, Sri Lanka since 1976, both Myanmar and Laos since 1989, and South Korea since 1997.<sup>7</sup> Meanwhile, although there were no executions in Indonesia from 2008 till 2012, they recently resumed in 2013.<sup>8</sup> Alongside, Indonesia, Botswana, Gambia, India, Japan, and Pakistan brought the sentence back in 2012, Kuwait

---

1 *Supra* n 7, 9.

2 Cheong C and others, *Public Opinion on The Death Penalty in Singapore: Survey Findings* (the National University of Singapore 2018) xv, xix.

3 *Ibid*.

4 Leechaianan Y and Longmire D, 'The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis' 2 *Laws* 115.

5 *Supra* n 7.

6 *Supra* n 2.

7 Reggio M, *History of the death penalty* (Springer 2014).

8 Amnesty International, *Death Sentences and Executions 2012* (2013).

and Nigeria also re-started the number in 2013.<sup>1</sup> In a survey of 1,200 Filipino adults 18 years and above, 71% of respondents support the death penalty's reinstatement for drug trafficking. Filipino President Duterte still grants police permission to apply harsh measures to curb drug users and dealers, including shooting on sight.<sup>2</sup>

In short, the death penalty continues to be debated, legislated, and applied in different ways in different parts of the world. Although eliminating the death penalty is becoming more prevalent worldwide, it is not a leading propensity, particularly drug-related offences. Each country's legislative traditions, political leadership, religious history, and social norms affect how the death penalty is applied in law and practice. As Pip Nicholson states, 'countries may be reductionist without being abolitionist, and "de facto abolitionist" countries may, and indeed have, resumed executions.'<sup>3</sup> Most of them, whether abolitionists or retentionists, express the intention to apply capital punishment for severe crimes; meanwhile, other countries exemplify a dual format, either abolition and de facto abolition or retention and de facto abolition.<sup>4</sup> Currently, sixty-seven nations assert retention of capital punishment, which nearly half have laws imposing the death penalty for drug-related offences, in which sixteen are Asian countries.<sup>5</sup> Except for Cambodia and Philippines, which have adopted an abolition policy, the rest of the nations in Southeast Asia resort to various approaches to using the death penalty for those convicted of drug-related offences, among other crimes. These include de facto abolitionism (Brunei, Laos, Myanmar, Indonesia, and Thailand) and retentionists (Malaysia, Singapore, and Vietnam).

## VIETNAM'S DOCTRINE TO PUNISH DRUG OFFENCES

Drug-related crimes and its punishments have been defined in Vietnam since early time in history.<sup>6</sup> However, depending on each period, based on the economic situation-specific social state, the appropriate documents will be issued under requirements prevention of and fight against this crime. One of the first drug plants introduced into

---

1 Based on the latest updates of Amnesty International, in 2019, there are 28 abolitionists in practice and 56 retentionists (available at <https://www.amnesty.org/en/what-we-do/death-penalty/>).

2 Mangosing F, 'Pulse Asia: Most Filipinos still Support Death Penalty' (*Inquirer*, 2017) <<https://newsinfo.inquirer.net/894552/pulse-asia-most-filipinos-still-support-death-penalty#ixzz5ZXZ3dZJA>> accessed 11 December.

3 *Supra* n 8, 6.

4 Schabas W, *The Abolition of the Death Penalty in International Law* (3<sup>rd</sup> ed, Cambridge University Press 2002).

5 *Supra* n 7.

6 Nguyen TPH, 'Legislative Implementation by Vietnam of its Obligations under the United Nations Drug Control Conventions' (University of Wollongong 2008); Nguyen TPH, *Drug-Related Crimes Under Vietnamese Criminal Law: Sentencing and Clemency in Law and Practice* (the University of Melbourne 2015).

Vietnam was, opium poppy in the northern provinces since the 1600s.<sup>1</sup> Meanwhile, some South-West and Southern provinces selected to plant cannabis and coca which were introduced later than opium. Poppy flowers were initially considered and used as a cure for selective diseases such as as rheumatism, intestinal pain. The government also sees the great harm it in the villages, where many poppy cultivations are also home to many addicts, opium and has since formed the progressive ideology, condemned to struggle with this trend.<sup>2</sup> There was an early emergence of conventions and regulations in the villages to prohibit the use of drugs, albeit it was ineffective. The status of opium poppy and drug use continued to spread exponentially. Therefore, Vietnam feudal state had first issued on Prohibition Act poppy in 1665 to ban and punish anyone misusing it- notwithstanding their gender, both male and female. Misapplication of the opiate poppy as a drug included: for lustful satisfaction and/or as a tool for thieves to use in the commission of crimes in residential properties.<sup>3</sup> Furthermore, to prevent overseas' drug- antecedent into Vietnam, the King prohibited and banned all the trading ships from Jinzhou (China) arriving to domestic coastland and examined all foreign merchant ships to ports along the coast under Vietnamese authorities.<sup>4</sup> However, no death penalty applied to these opium's activities at this time until the final feudal regime in the middle years of the 1940s.

After King Tu Duc's period, Vietnam were colonised by France's regime until 1945. As such there is neither available statistics nor official data recording the numbers of death sentence under French colonial rule.<sup>5</sup> Almost death penalty cases at that time have been executed to opponents of France's regime by guillotine punish those who protested their colonial policies more than focusing on specific offences.<sup>6</sup> However, relating to drug issues, both opium cultivation and trading were expected for lucrative benefits for France colonial ambitions. Thus, there was no death penalty application for those offences.<sup>7</sup> To some extent, Ho Chi Minh (1961: 96) explained this issue that<sup>8</sup>:

---

1 Supra n 3.

2 Supra n 22.

3 Ibid.

4 Supra n 3.

5 Tran TG, 'Colonial Policies on Culture of France and Some Cultural Movements Prior 1945 in Vietnam' 2 *Journal of Cultural Research* 72.

6 Nguyen NC, 'Some Thoughts on the Death Penalty in Vietnam Criminal Law' 28 *Journal of Law* 42; Ho TN, *Some Issues Related to Death Penalty Judiciary in Vietnam* (International Association of Democratic Lawyers (IADL) 2009); Dao TU, 'Basic Information for Legal Research - A Case Study of Vietnam' in IDE (ed), *Doing Legal Research in Asian Countries*, vol IDE Asian Law Series (Institute of Developing Economies (IDE-JETRO) 2003), <[http://d-arch.ide.go.jp/idedp/IAL/IAL002300\\_008.pdf](http://d-arch.ide.go.jp/idedp/IAL/IAL002300_008.pdf)>

7 Supra n 3.

8 Nicholson P, 'The Vietnamese Courts and Corruption' in Lindsey T and Dick H (eds), *Corruption in Asia: Rethinking the Governance Paradigm* (The Federation Press 2002), 204.

Justice is represented by a good lady holding scales in one hand and a sword in the other. As the greatness of the distance between Indochina and France was so great, so excellent that, on arrival there, the scales lost their balance and the pans melted and turned into *opium pipes* and official bottles of spirits, the poor lady had only the sword left with which to strike [*emphasised highlight*].

Ending France's war by the Revolution in August 1945 and the United States' war by the Unification in 1975, Vietnam built a new regime to re-construct the country. At that time, to establish and improve society and nation, the legal system and punishment were also required to reform.<sup>1</sup> For example, in some regulations in the law dated 14 July 1960, when mentioning capital punishment, it must be reviewed by the plenary council of judges of the Supreme People's Court before executing. Noticeably, among these periods, there was no codified legal regulating death penalty and its related implementations for drug-related crimes in the total of 29 death's articles when this harshest punishment legalised in the first CCV by the Socialist Republic of Vietnam (1985). Accordingly, although narcotics crimes were stipulated in this CCV (illegal organising for drug use - article 203; illegally trading drugs in the domestic market - article 97; and illegally trading drugs across borders - article 166), the death penalty did not treat those drug offences.

Due to the changes Vietnam underwent after *Doi Moi*, the 1985 CCV was amended four times (1989-1997), just as both the supply and demand for drugs began to increase. Thus, enhancing the drug control with stricter punishments, the death penalty was codified as the harshest sentence for drug-related offences in article 96a in the first amendment and supplementation of the 1985 CCV in December 1989. These regulations were re-specialised into four separate articles in the fourth version of the amended 1985 CCV and formalised officially in the 1999 CCV.<sup>2</sup> Recently, while reprieving and commuting could be applied to economic offences (e.g., embezzled property and bribed property), reducing the capital punishment for drug-related offences and its related reprieves were not yet implemented as much as possible. Among eight death's articles abolished in the 1999 CCV, the illegal organisation for drug use (article 197) passed; meanwhile, the four death's drug-related activities (stockpiling, transporting, trading, and appropriating) merged into one article in the 1999 CCV (article 194). However, in the latest amendment of the 2015 CCV (2017), this article has re-separated as similar to the 1985 CCV with four independent articles, but illegal stockpiling and appropriating narcotics abolished. Currently, in Vietnam, there are only three capital narcotics' crimes which may be captured by the death penalty, namely: illegal producing narcotics (article 248), illegal transporting narcotics (article 250), and unlawful trading in drugs (article 251).

---

1 *Supra* n 28.

2 *Supra* n 5.

The death penalty in Vietnam is not only a legal matter but also covers political and social attitudes.<sup>1</sup> Obtaining valid and reliable data to assess the practical application and executions in Vietnam is still challenging.<sup>2</sup> Though Vietnamese scholars can understand and collect the data in Vietnamese, it does not mean to be official statistics of authorities when regulation 'secret state' for the death penalty still applicable in law. Accordingly, all court documents, records, reports, and statistics regarding the death penalty belong to the 'highly confidential level' of the People's Supreme Court (2004) and Law on Secret State (2018). Therefore, lacking the official data of death rows and its related executions relating to drug offences from 2016 until the present,<sup>3</sup> the section on executing practices in Vietnam will be excluded. Under this paper, although there were efforts to share and analyse based on secondary data with the cautious warning in some previous studies, it is confirmed that specific data on the number of executions carried out is challenging to obtain and limited by the authority.

### REASONS TO APPLY THE DEATH PENALTY FOR DRUG-RELATED OFFENCES

The maintenance or abolition of the death penalty in criminal law should be based on the specific characteristics and conditions and the requirements of each nation to fight against crime. Almost all law enforcement agencies, both policymakers and practitioners, and the national assembly delegations prefer to maintain the severest punishment when those crimes are the original sources of other various crimes.<sup>4</sup> Accordingly, it is reasonable to consider applying the death penalty for this group of crime since it violates the state's monopoly on the management and control of narcotics. This crime also contributes to society - a new class of people who are drug addicts, especially adolescents, resulting in

1 Pascoe D, *Clemency in Southeast Asian Death Penalty Cases* (Asian Law Centre 2014); Johnson D and Zimring F, *The Next Frontier: National Development, Policy Change, and the Death Penalty in Asia* (Oxford University Press 2009).

2 Luong TH, 'Why Vietnam Continues to Impose the Death Penalty for Drug Offences: A Narrative Commentary' 88 *International Journal of Drug Policy* 1.

3 During 2013 when I started my PhD journey, I have received several official and unofficial requests to update data and specific information regarding the death penalty for drug offences in Vietnam since the first paper published. Unfortunately, as I claimed officially in the latest articles (supra n 34), between 2016 and now, no more 'unveiled' database with capital narcotics in Vietnam, although someone can look for Vietnamese press or social media some anecdotal resources.

4 Nguyen DD and others, *Some Necessary Issues about the Death Penalty* (National University of Hanoi 2014); Pham VB, 'Abolishing or Retention the Death Penalty for Some Crimes?' *Journal of Legal Studies* <<http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=208505>> accessed 11 December 2017; Tran K and Vu CG, 'The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry' 9 *Societies* 1; Nguyen TTH, Nguyen VH and Nguyen MK, *On the Possibility of Vietnam Ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolish of the Death Penalty* (2019).

harmful consequences and damages of great magnitude in terms of economic development, social stability, and traditional culture.<sup>1</sup> Nevertheless, drug is the original source of other crimes, and unexpected serious consequences can take place if abolishing death penalties for these drug offences.<sup>2</sup> All these arguments have been presented and explained in basic principles to confirm why Vietnam still maintain death penalties for drug-related crimes, including in national legal policies, humanitarian treatments, the rule of law, fairness principles, and proportionality approaches. These points were shared in our previous studies, among other Vietnamese scholars in this paper's reference cited.<sup>3</sup> Therefore, this paper only focuses on the unclear points in international treaties that Vietnam is relying on to support their rights and obligations to apply the death penalty for drug-related offences.

Firstly, based on international legal standards, the use of the death penalty is neither entirely contrary to international laws nor violate the right to life. In line with the arguments of most retentionists, who point to the need for harmony between international standards and domestic legislation, the death penalty in Vietnam's legal system only applies to 'the most serious crimes', including drug-related offences under their legislative doctrine. However, in accordance with international legal standards, the right to life is the right of every human being, is universal that no-one has the right to deprive.<sup>4</sup> Based on the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), proponents point out that the death penalty violates human rights and should be eliminated. More particularly, the Article 3 of the UDHR states: 'everyone has the right to life, liberty and safety' and 'no one can suffer a cruel punishment or reduce human dignity' (Article 5, UDHR). To balance the understanding of the 'right of life' principle, some people consider the freedom of a life of human beings is the absolute right of any person. Others supporting this idea argue that this core principle protects a person from being killed by the government which has unlimited power. In other words, with the former, nations have abolished the death penalty explained that the application of the death penalty is a violation of the content of the statement above, means that human rights violations.<sup>5</sup> With the latter,

---

1 Ibid.

2 Thuy H and Minh A, 'Ministry Wants Re-Enactment of Law Imprisoning Drug Users' (*VN Express International*, 2019) <<https://e.vnexpress.net/news/news/ministry-wants-re-enactment-of-law-imprisoning-drug-users-3933487.html>> accessed 5 June.

3 *Supra* n 5.

4 This general provision as stipulated in the Universal Declaration on Human Rights, adopted on 10 December 1948 (Article 3), the American Declaration on the Rights and Duties of Man, adopted on 4 May 1948 (Article 1), and the African Charter of Human and People's Rights, adopted in 1981.

5 Edwards G and others, 'Drug trafficking: time to abolish the death penalty' 104 *Addiction* 1267; Gallahue P and others, *The Death Penalty for Drug Offences: Global Overview 2012 - Tipping the Scales for Abolition* (International Harm Reduction Association 2012); Rahman F, 'Capital Punishment for Drug Offences' in Rahman F and Crofts N (eds), *Drug Law Reform in East and Southeast Asia* (Lexington Books 2013).

supporters of the 'rule of law' in human rights can argue base on 'ever-shrinking scope' of the ICCPR's exception for 'the most serious crimes' to apply the capital punishment as one of their international standard and domestic legislative regulations.<sup>1</sup> According to this institution, in other instances, depending on their specific conditions from different countries with their distinguished criminalisation with the most serious crimes, the death penalty applies to those offenders is considered a cautious approach with national following non-abolishing punishment in law practice.<sup>2</sup> According to Jiang Na, the non-reintroduction's principles in Article 6(2) and (6) of the ICCPR are limitations of legislative agenda that led to 'the vague formulation' to define precisely and clearly the term 'the most serious crimes' between nations. Additionally, in the 2<sup>nd</sup> Optional Protocol of ICCPR (1989) also allows States to reserve the right to apply the death penalty in time of war pursuant to a conviction for the 'most serious crime' of a military nature committed during wartime (article 2).<sup>3</sup> Logically, it also seems to create the perception that 'States are completely free to qualify a crime' as 'serious' or 'the most serious.'<sup>4</sup> In 2019, the UN Human Rights Committee noted the term "the most serious crimes" must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing, and that crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, and drug and sexual offences.<sup>5</sup> In 17 November 2020, the United Nations General Assembly voted on a resolution calling for a moratorium on the use of capital punishment which called for nations to restrict the use of the death penalty, with the aim of eventually eliminating it altogether.<sup>6</sup> However, 96 members out of 120 votes, including Vietnam, requested an amendment to this UN Resolution that asserts 'the sovereign right of all countries to develop their own legal systems, including determining

---

1 Jiang N, 'The Death Penalty and International Human Rights Law' in *China and International Human Rights* (Springer 2014).

2 Trevasques S, 'China's Death Penalty: The Supreme People's Court, the Suspended Death Sentence and the Politics of Penal Reform' 53 *British Journal of Criminology* 482; Thao P, 'To Reduce the Death Penalty's Applications in the 1999 Criminal Code of Vietnam' Research and Discussion <<http://www.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/>> accessed 20 September 2017.

3 Desert P, 'Second Optional Protocol: Frequently Asked Questions' (*World Coalition against the Death Penalty*, 2008) <<http://www.worldcoalition.org/Second-Optional-Protocol-Frequently-Asked-Questions.html>> accessed 11 Decemeber 2018.

4 Sapienza R, 'International legal standards on capital punishment' in Ramcharan BG (ed), *The Right to Life in International Law* (Martinus Nijhoff Publishers 1985).

5 United Nations International Covenant on Civil and Political Rights, *General Comment No.36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life* (United Nations 2019).

6 United Nations General Assembly, *Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms* (United Nations 2020).

appropriate legal penalties.<sup>1</sup> In other words, they have been universally authorised to stipulate the death penalty to any criminal behaviours in line with their domestic law, with no exceptions for drug-related offences.<sup>2</sup> Of course, even when executing this argument for the death penalty, including drug-related crimes, these nations must be obligated for the primary criterion of the UDHR and ICCPR, that is: the non-application of the capital punishment towards juvenile offenders and pregnant women.<sup>3</sup>

Secondly, in turn, with vulnerable groups such as children and women, in Vietnam, according to official information and report of authorities, there are not any death penalty cases applied to both of those objectives, involving drug-related crimes.<sup>4</sup> For example, ages subject to penal liability is sixteen or older for all crimes they commit. If persons aged top 14 or older but under 16 shall have to bear penal liability for severe crimes intentionally committed or particularly serious crimes (section 2, Article 12, the 2015 CCV). However, the current criminal code declared officially that capital punishment should not apply to juvenile offenders, even where they commit among three illegal narcotics' articles (Article 248, 250, and 251). By doing this, Vietnam exposes their respectful attitudes to abide by international laws to guarantee children's civil, political, economic, social, health, and cultural rights. Notably, Vietnam is considered one of the first States in the Asian region that has signed and ratified the United Nations Convention on the Rights of the Child (UNCRC), adopted on 20 November 1989.<sup>5</sup> Furthermore, Vietnam has ratified the United Nations Convention on Elimination of All Forms of Discrimination against Women (CEDAW) since 1982. As one of the permanent promises of the official member, Vietnam shall not execute the death penalty to women who are pregnant and nursing

---

1 United Nations General Assembly, *Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms* (United Nations 2020).

2 Strangio S, 'Explaining Southeast Asia's Addiction to the Death Penalty' (*The Diplomat*, 2020) <<https://thediplomat.com/2020/11/explaining-southeast-asias-addiction-to-the-death-penalty/>>, accessed 11 December.

3 Loyal A, 'The Decline of the Death Penalty: As seen through a Legislative Perspective' (University of North Carolina 2013); Jiang N, 'The Death Penalty and International Human Rights Law' in *China and International Human Rights* (Springer 2014).

4 Amnesty International, *Death Sentences and Executions 2012* (2013); World Coalition against the Death Penalty, *The Death Penalty Facts and Figures* (2013).

5 The Government of Vietnam ratified the UNCRC in 1990, establishing the Committee for the Protection and Care of Children in 1991, with branches extending to district and commune levels. In the same year, it enacted the law on the Protection, Care and Education of Children. It adopted a National Programme of Action for the Survival, Protection and Development of Children. It is a source of considerable national pride that, in 1992, Vietnam was the first nation in Asia to report to the Committee on the Rights of the Child, under the obligations of the UNCRC (re-cited by Khanh in Burr, 2002); see more detail at Burr R, 'Global And Local Approaches to Children's Rights in Vietnam' 9 *Childhood* 49.

children under 36 months old when committing crimes or being tried.<sup>1</sup> Furthermore, this commutation will be applied with a drug-related female inmate if their pregnant situation is clarified and examined by authorities.<sup>2</sup> All of these circumstances, under Vietnam's policy, prisoners will convert the death penalty into life imprisonment. It is different comparing to other states continuing to execute as legal requirements (Saint Kitts and Nevis). In contrast, other countries delay execution until after delivery (Morocco with 40 days, Egypt with two months, Bahrain with three months, even longer three years in Thailand and the Central African Republic).<sup>3</sup> Also, apart from pregnant women committing a crime shall not be applied capital punishment, women having babies during imprisonment will be converted from death to life imprisonment.<sup>4</sup> It is not rare, but is one of the exciting points in the criminal law of Vietnam, particularly with drug-related offences, such as drug females at Ha Nam prison and others at Chi Hoa prison.<sup>5</sup> Under Vietnam's strict regulations for the death penalty's holders at the prison, there is no chance for them to be pregnant unless direct contacts coming some correctional officers or seduction from female inmates together with males in jail. After all, however, both of these unique cases shall be commuted to life imprisonment instead of the death penalty as one of the humanity's policies of the current criminal law of Vietnam. Furthermore, their babies will be delivered to the prison health centre and will be allowed to stay with their mothers until age three, after breastfeeding has finished. The mother can then decide whether to keep the child or have the child being looked after outside. It is proven the humanity in a criminal legal institution with children and women. It affirms that even when Vietnam maintains the death penalty with drug-related offences, it is not contrary to the international law on human rights.

For the past ten years (2009-2019), responding to at least 46 out of 611 recommendations from other nations, from the UN's Human Rights Council, Vietnam has consistently affirmed its commitment to ensuring human rights, including those of drug traffickers (e.g., their access to justice), when applying the death penalty. Recently, in the Report of the Working Group on the Universal Periodic Review at the 41st Session of the Human Rights Council, Vietnam confirmed officially that 'though Viet Nam did not publish statistics on the death penalty, all verdicts and executions were announced in the media.'<sup>6</sup> Perhaps, as Pip Nicholson suggests, most abolitionists and activists want

---

1 Supra n 2.

2 Lam DTT, 'Death Penalty: Pregnant Woman Execution in Vietnam' (*IPS*, 2006) <<http://www.ipsnews.net/2006/10/death-penalty-pregnant-woman-escapes-execution-in-vietnam/>>, accessed 30 October.

3 Death Penalty Worldwide, *Death Penalty and Women* (2012).

4 Supra n 2, 195.

5 Supra n 46.

6 United Nations General Assembly, *Report of the working group on the Universal Periodic Review* (28 March edn, United Nations 2019), 4.

to introduce ‘reductionist methods as inevitably culminating in abolition [which] may obscure other trends.’<sup>1</sup> Opponents of the death penalty may be making exaggerated claims of success in their efforts to reduce the scope of capital punishment while ‘ignoring country-specific nuances, disregarding negative repercussions.’<sup>2</sup> Of course, three current articles in the 2015 CCV still impose capital punishment for drug offences, and these have not been changed by the work of any activists or by human rights protests. Yet at least the rule of law in Vietnam cannot be compromised so long as Hanoi continues to apply this harsh punishment based on international permissions and conditions. The death penalty application does not mean that Vietnam is an arbitrary Party-State executing all convicted drug offenders or applying capital punishment as a mandatory approach when the drugs involved exceeding a certain quantity, as in Singapore. Instead, having already created part of the roadmap that leads to reduction and abolition, Vietnam does not apply capital punishment to juveniles, elderly offenders, or pregnant women who commit crimes, including drug-related offences.

#### **WHAT VIETNAM SHOULD DO IF THEY STILL REMAIN THE DEATH PENALTY FOR DRUG-RELATED OFFENCES**

In contrast with recent arguments by scholars and non-government organisations who rank Vietnam among the top non-humanitarian states with the highest applications of the death penalty, Vietnam has implemented many changes reducing capital punishment since the first CCV in 1985, with their reductions exceeding those of other current retentionists. It may be that analysts are making those arguments lack information about legislative actions, practical applications, international reviews, and humanitarian policies in Vietnam regarding the use of the death penalty for drug offences. As one of the rare scholars to support abolishing the death penalty for those narcotics crimes, Nguyen argued that<sup>3</sup>

Although almost capital punishment in Vietnam was applied for drug-related crimes, these offences’ rate did not control and reduce as much as possible. It increased considerably with more complicated trends and patterns. The severe coercive measure of punitive application does not work for it, and even, the rate of drug-related crimes still rises. Only applying capital punishment will not practical; we have to implement synchronised measured combinations... Thus, we should not maintain capital regulations for those drug-related crimes in the CCV.

---

1 *Supra* n 8, 5.

2 Akers K and Hodgkinson P, ‘A Critique of Litigation and Abolition Strategies: A Glass Half Empty’ in Hodgkinson P (ed), *Capital Punishment: New Perspectives* (Routledge 2013), 29.

3 Nguyen NC, ‘Some Thoughts on the Death Penalty in Vietnam Criminal Law’ 28 *Journal of Law* 42, 47.

That said, many experts have highlighted that Vietnam needs a more detailed roadmap, with accurate assessments, to build up a comprehensive framework that will enable the VPS to make suitable progress towards abolishing the death penalty entirely after 2020.<sup>1</sup> Likely, Vietnam will not abolish capital punishment for all crimes, including drug offences, until the fourth cycle of the national report for the Universal Periodic Review of the Human Rights Council, scheduled for 2024. In any case, the roadmap leading to abolition will need to be synchronised with a one-term meeting of the National Assembly period in the new term (2021-2026). Doing this will allow for a review and re-balancing of international standards with national priorities, further facilitating the abolition or continued reduction of articles involving death sentences.

We close by proposing some basic recommendations for drawing the necessary roadmap leading to abolition for drug offences' groups, if applicable for Vietnam:

+ Firstly, regarding scientific evidence, only one national survey had conducted by the School of Law-National University of Hanoi since 2011 alongside some internal research (if so, not public). Yet, this survey is a general assessment - '*Survey on Impacts of Some Sentences in the Penal Code*', which did not design and focus on the death penalty as an independent issue. Furthermore, these findings with some statistics relating to surveyors' attitudes, either pros or cons, have not yet reflected the trend and patterns of public opinion to assess objectively abolish or retain the death penalty for drug-related crimes accordingly. Therefore, we call for a national survey focusing on drug-related crimes, if applicable.

+ If approved, this survey should be referred to and learned in both design and conduct as professional and academic approaches in the Asia region as possible.<sup>2</sup> The survey should be also designed and delivered by the independent scholars in universities/institutions rather than criminal justice sectors to ensure the objectives and to avoid state-bias directions. To do it, we can look carefully for the public opinion with each drug-related offence itself, both pros and cons. These findings should also be compared to the rest of capital crimes in the current CCV (15 articles) to understand capital punishment's trend and pattern in general.

1 In June 2019, a group of Vietnamese scholars worked with the Ministry of Justice and the Ho Chi Minh National Academy of Politics, with support from the EU Justice and Legal Empowerment Program in Vietnam, as well as UNDP and UNICEF, to organise a national workshop. A 30-interview was conducted with government agencies, law enforcement officers, criminal justice officials, lawyers, and legal scholars. Also, they discussed how the appropriate ways for Vietnam to enter into the Second Optional Protocol of the ICCPR and abolish the death penalty.

2 We suggest kindly to look at the recent survey public opinion on the death penalty in Singapore, particularly at the section of drug-related offences, see more detail at *Supra n 10*.

• Additionally, although the death penalty is still frequently applied, its effectiveness in deterring drug-related crimes is still questionable, as Nguyen's proposed above statement since the 2010s. At the first national survey, a design of three separate sections with each relevant article in the 2015 CCV is in need to collect and analyse data more objective and accurate what, how, and why Vietnam should or not maintain capital punishment for those offences.

+ Furthermore, some specific circumstances and scenarios relating to drug activities should be included and explained for surveyors. For example, with illegally transporting drugs (article 250), if drug mule belongs to some circumstances such as 1) the first time to commit a crime; 2) vulnerable groups including homeless with poor economic, ethnic minorities, disabled persons or mental health; and 3) people who are seduced, forced or coerced to join trafficking networks.

+ Secondly, there is a need for an open-access workshop or seminar among experts in the field of drug-related offences, including policymakers, law enforcement agencies, and scholars. Such a workshop or conference will allow participants to discuss the use of the death penalty for drug offences in Vietnam and how Vietnam can reduce and abolish it in the future.

+ Thirdly, we still support further data collection and analysis relating to the three current drug offences for which capital punishment remained applicable after the 2015 CCV took effect on 1 January 2018. Perhaps a target for a report could be set in five years, on 31 December 2023. This first step should be conducted by Vietnam's authorities, particularly those working in the context of the criminal justice system. Although Vietnam still classifies the database of cases involving the death sentence as national confidential level' and therefore non-public, internal exchanges among those agencies should clarify the trends and patterns of the drug offences and the application rate of the death penalty for each violation. Taking this step can help Vietnam re-consider and re-scale the best pathway forward concerning these three articles.<sup>1</sup>

+ Finally, Vietnam should assess objectively and analyse three de facto abolitionists' procedures and values in the Golden Triangle—the second-largest drug-producing area in the world. Precisely, Laos, Myanmar, and Thailand have not executed any offenders for drug-related offences for at least the past ten years. A key question is why the drug

---

<sup>1</sup> Based on some informal conversation between the first author and anti-narcotics police officers in recent years, we can confirm that some of the officers are against imposing the death penalty for illegally transporting substances (article 250, the 2015 CCV), particularly with minority groups. Other officers confessed that implementing the death penalty, either by shooting or injecting prisoners with poison, could lead to adverse psychological effects for themselves, including chronic stress after participating in executions.

trafficking situation in the Southeast Asia region, including Vietnam and these three countries, continues to expand? Furthermore, these countries are recognised as primary sources, international hubs, and potential destinations for drugs, although they remain the death penalty for drug-related crimes in place? As a first step toward reductionism, Vietnam can follow these three countries by allowing capital punishment to stay in law but without practising executions, to achieve physical and economic benefits. Doing so is likely to provide evidence for the argument that Vietnam should end killings for drug offences by taking the second step – namely, abolishing capital punishment.

If applicable, in 2024, we are expecting Vietnam will re-consider supporting the 75<sup>th</sup> Session United Nations General Assembly (30 October 2020) and also join the 2<sup>nd</sup> Optional Protocol ICCPR before deciding officially retention or abolishment of the death penalty.

## REFERENCES

1. Gallahue P and others, *The Death Penalty for Drug Offences: Global Overview 2012 - Tipping the Scales for Abolition* (International Harm Reduction Association 2012).
2. Hood R and Hoyle C, *The Death Penalty: A Worldwide Perspective* (4<sup>th</sup> edn, Oxford University Press 2008).
3. Johnson D and Zimring F, *The Next Frontier: National Development, Policy Change, and the Death Penalty in Asia* (Oxford University Press 2009).
4. Nguyen DD and others, *Some Necessary Issues about the Death Penalty* (1st edn, The Social Labor Publishing 2010).
5. Schabas W, *The Abolition of the Death Penalty in International Law* (3<sup>rd</sup> edn, Cambridge University Press 2002).
6. Akers K and Hodgkinson P, 'A Critique of Litigation and Abolition Strategies: A Glass Half Empty' in Hodgkinson P (ed), *Capital Punishment: New Perspectives* (Routledge 2013).
7. Dao TU, 'Basic Information for Legal Research - A Case Study of Vietnam' in IDE (ed), *Doing Legal Research in Asian Countries*, vol IDE Asian Law Series (Institute of Developing Economies (IDE-JETRO) 2003) <[http://d-arch.ide.go.jp/idedp/IAL/IAL002300\\_008.pdf](http://d-arch.ide.go.jp/idedp/IAL/IAL002300_008.pdf)>
8. Hao VL, 'Child Rights and Duties. Laws on Child Protection in Vietnm' in Clarke S-J and others (eds), *Positive Discipline Training Manual Vietnam* (Plan in Vietnam 2009).
9. Jiang N, 'The Death Penalty and International Human Rights Law' in *China and International Human Rights* (Springer 2014).

10. Nicholson P, 'The Vietnamese Courts and Corruption' in Lindsey T and Dick H (eds), *Corruption in Asia: Rethinking the Governance Paradigm* (The Federation Press 2002).
11. Rahman F, 'Capital Punishment for Drug Offenses' in Rahman F and Crofts N (eds), *Drug Law Reform in East and Southeast Asia* (Lexington Books 2013).
12. Luong TH, 'Death Penalty to Drug-Related Crimes: A Vietnam Perspective' (Drug-related Offences, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia).
13. —, 'Why Vietnam Continue to Maintain the Death Penalty with Drug-Related Crimes?' (1st Asian Regional Meeting for Drug Policy).
14. Ho TN, *Some Issues Related to Death Penalty Judiciary in Vietnam* (International Association of Democratic Lawyers (IADL) 2009).
15. Thao P, 'To Reduce the Death Penalty's Applications in the 1999 Criminal Code of Vietnam' Research and Discussion <<http://www.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/>> accessed 20 September 2017.
16. Reggio M, *History of the Death Penalty* (Springer 2014).
17. Burr R, 'Global And Local Approaches to Children's Rights in Vietnam ' 9 *Childhood* 49.
18. Chi NN, 'Một số suy nghĩ về hình phạt tử hình trong Luật hình sự Việt Nam' 28 *Tap chi Luật học* [trans: Chi, Ngoc Nguyen 2012, 'Some thoughts on the penalty of death in Vietnam criminal Law' 22 *Journal of Law* 42] 42.
19. Edwards G and others, 'Drug trafficking: time to abolish the death penalty' 104 *Addiction* 1267.
20. Leechaianan Y and Longmire D, 'The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis' 2 *Laws* 115.
21. Luong TH, 'The Application of the Death Penalty for Drug-Related Crimes in Vietnam: Law, Policy, and Practice' 17 *Thailand Journal of Law and Policy*.
22. —, 'Why Vietnam Continues to Impose the Death Penalty for Drug Offences: A Narrative Commentary ' 88 *International Journal of Drug Policy* 1.
23. Tran K and Vu CG, 'The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry' 9 *Societies* 1.

24. Tran TG, 'Colonial Policies on Culture of France and Some Cultural Movements Prior 1945 in Vietnam' 2 *Journal of Cultural Research* 72.
25. Trevaskes S, 'China's Death Penalty: The Supreme People's Court, the Suspended Death Sentence and the Politics of Penal Reform' 53 *British Journal of Criminology* 482.
26. Thu tuong Chinh phu, *Quyết định của Thủ tướng Chính phủ về Danh mục Bi mat Nha nuoc do Toi mat của Ngành Toan an nhan dan* (2004).
27. United Nations General Assembly, *Report of the working group on the Universal Periodic Review* (28 March edn, United Nations 2019).
28. —, *(Amendment to Draft): Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms* (United Nations 2020).
29. —, *Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms* (United Nations 2020).
30. United Nations International Covenant on Civil and Political Rights, *General Comment No.36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life* (United Nations 2019).
31. Amnesty International, *Death Sentences and Executions 2012* (2013).
32. Death Penalty Worldwide, *Death Penalty and Women* (2012).
33. Nicholson P, *The Death Penalty and Its Reduction in Asia: An Overview* (Briefing Paper, 2017).
34. Sander G, Girelli G and Fernandez A, *The Death Penalty for Drug Offences: Global Overview 2019* (2020).
35. World Coalition against the Death Penalty, *The Death Penalty Facts and Figures* (2013).
36. Cheong C and others, *Public Opinion On The Death Penalty In Singapore: Survey Findings* (the National University of Singapore 2018).
37. Nguyen TPH, *Drug-Related Crimes Under Vietnamese Criminal Law: Sentencing and Clemency in Law and Practice* (the University of Melbourne 2015).
38. Pascoe D, *Clemency in Southeast Asian Death Penalty Cases* (Asian Law Centre 2014).
39. Loyal A, 'The Decline of the Death Penalty: As seen through a Legislative Perspective' (University of North Carolina 2013).

40. Nguyen TPH, 'Legislative Implementation by Vietnam of its Obligations under the United Nations Drug Control Conventions' (Law, University of Wollongong 2008).
41. BBC News, 'Vietnam Death Row Inmate Pregnant' (*BBC News*, 2006) accessed 13<sup>th</sup> October.
42. Desert P, 'Second Optional Protocol: Frequently Asked Questions' (*World Coalition against the Death Penalty*, 2008) <<http://www.worldcoalition.org/Second-Optional-Protocol-Frequently-Asked-Questions.html>> accessed 11 Decemeber 2018.
43. Lam DTT, 'Death Penalty: Pregnant Woman Execution in Vietnam' (*IPS*, 2006) <<http://www.ipsnews.net/2006/10/death-penalty-pregnant-woman-escapes-execution-in-vietnam/>> accessed 30 October.
44. Mangosing F, 'Pulse Asia: Most Filipinos still Support Death Penalty' (*Inquirer*, 2017) <<https://newsinfo.inquirer.net/894552/pulse-asia-most-filipinos-still-support-death-penalty#ixzz5ZXZ3dZJA>> accessed 11 December.
45. Strangio S, 'Explaining Southeast Asia's Addiction to the Death Penalty' (*The Diplomat*, 2020) <<https://thediplomat.com/2020/11/explaining-southeast-asias-addiction-to-the-death-penalty/>> accessed 11 December.
46. Thuy H and Minh A, 'Ministry Wants Re-Enactment of Law Imprisoning Drug Users' (*VN Express International*, 2019) <<https://e.vnexpress.net/news/news/ministry-wants-re-enactment-of-law-imprisoning-drug-users-3933487.html>>, accessed 5 June.

# ABOLITION OF THE DEATH PENALTY FOR DRUG - RELATED CRIMES IN VIETNAM: OPPORTUNITIES AND CHALLENGES

Dr. Pham Hong Hanh, Ha Thanh Hoa<sup>1</sup>

**Abstract:** In the Vietnamese Criminal Code, the death penalty is the most severe punishment. It shall apply to severe and cruel crimes, including drug crimes. The number of drug crimes sentenced to the death penalty in the 2015 Criminal Code, amended and supplemented in 2017, has reduced compared to previous criminal codes. Regarding drug crimes, this penalty shall be applied for three kinds of crimes (Illegal production, illegally transporting, and illegally trading narcotics). According to the Supreme People's Procures report, most of the offenders who are sentenced to the death penalty by the Court are drug crimes.

As a retentionist country, especially with drug-related crimes, abolishing the death penalty is one controversial topic in Vietnam. Therefore, human rights mechanisms of the United Nations, including Universal Periodic Review and Treaty-based mechanisms, often recommend to Vietnam.

The content of this article is analyzing the compatibility of the current provisions of Vietnamese law, including those on applying the death penalty for drug crimes in the Criminal Code. Besides, the article will evaluate the possibility of abolishing the death penalty for drug crimes in Vietnam today. Based on this, some recommendations would be made towards death penalty abolition for these kinds of crimes in the future.

**Keywords:** drug crimes, drug addicts, an illegal drug user.

## INTRODUCTION

According to the Report of Amnesty International statistics, as of December 31, 2019, globally, 142 countries have legally and practically abolished the death penalty, 106 countries have abolished the death penalty for all types of crimes, eight have abolished the death penalty for ordinary crimes, and 28 have abolished the death penalty in practice. Moreover, according to this organization's report, there are only 56 countries that maintain the death penalty in their legal systems, including Vietnam<sup>2</sup>.

---

<sup>1</sup> Faculty of International Law, Hanoi Law University.

<sup>2</sup> Amnesty International report, *Death sentences and execution 2019, Annex II -Abolitionist and retentionist countries as of 31 December 2019* (2020), <https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF>, accessed at 2 January 2021.

According to the 2015 Criminal Code, drug-related crimes are one of the eighteen crimes subject to the death penalty. The trial practice also shows that drug-related crimes are one of the crimes which are often sentenced to the death penalty.

Nowadays, Vietnam is a member of many treaties on human rights, including the International Covenant on Civil and Political Rights (ICCPR). Under Article 6 (2) of ICCPR, the death penalty is only applied to the most severe crimes. In concluding observations on the third periodic report of Viet Nam in 2019, Human Rights Commission recommended Vietnam to reduce the number of crimes subject to the death penalty and retain the death penalty only for the most severe crimes. Besides, this body also recommended Vietnam ratify or accede to Second Optional Protocol to the Covenant to abolish the death penalty<sup>1</sup>.

This article aims at assessing Vietnam's possibility to abolish the death penalty for drug crimes based on an analysis of Vietnam's laws and the drug crimes situation in Vietnam.

## 1. PROVISIONS OF CRIMINAL LAW CURRENTLY ON THE DEATH PENALTY FOR DRUG CRIMES

In the 1985 Criminal Code, the first criminal code in Vietnam, there was only one drug-related crime, including organized drug use (Article 203), and the highest penalty for this offense was ten years imprisonment,

The 1985 Criminal Code, amended and supplemented in 1989, has added a new offense on drugs as "Crime of illegally manufacturing, storing, trading, and transporting narcotics" (Article 96). Moreover, Vietnam regulated the death penalty for this crime for the first time. Expressly, Clause 3, Article 96 stipulated that "committing the crime in severe cases, shall be sentenced between 10 and 20 years of imprisonment, life imprisonment or death penalty". The number of crimes and the death penalty for drug offenses continued to have remained in the revisions of the 1991 Criminal Code and the 1992 Criminal Code.

The revised Criminal Code in 1997 retains the death penalty for illegal production of narcotics offense (Article 185b), illegal possession of narcotics (Article 186c), and illegal transportation of narcotics, drug (Article 185d), illegal trading in narcotics (Article 185d) as the Criminal Code amended in 1989. Besides, the amended Criminal Code in 1997 added three other crimes subject to the death penalty, including the crime of using narcotics (Article 185e), organizing the illegal use of narcotics (Article 185i), the crime of coercing, inducing others to illegally use narcotics (Article 185m).

---

1 Human Rights Committee, *Concluding observations on the third periodic report of Viet Nam*, para.23 (2019), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fCO%2fVN%2fCO%2f3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fCO%2fVN%2fCO%2f3&Lang=en), accessed 2 January 2021.

The 1999 Criminal Code stipulated the death penalty for Illegally producing narcotics (Article 193), illegally possessing, transporting, trading, or appropriating narcotics (Article 194), an organized crime of illegal use of narcotics (Article 197). 1999 amended and supplemented Criminal Code only stipulated the death penalty for the following crimes: Illegally producing narcotics (Article 193) and illegally possessing, transporting, trading, or misappropriating substances drug (Article 194).

According to the provisions of the 2015 Criminal Code and The 2015 Criminal Code amended and supplemented in 2017 (from now on referred to as The 2015 Criminal Code) of Vietnam, the death penalty is a special penalty only imposed upon people committing severe crimes that infringe national security, human life, drug-related crimes, corruption-related crimes, and some other severe crimes defined by this Code. (Article 40). Accordingly, for drug-related crimes, the death penalty is prescribed for three crimes, including Illegally producing narcotics (Article 248), and illegally transporting narcotics (Article 250), and illegally trading narcotics (Article 251). In Specifically,

+ For the offense of illegally producing narcotics, committing the crime in one of the following circumstances shall be sentenced to 20 years, life imprisonment, or death penalty: a) The offense involves a quantity of  $\geq 05$  kg of poppy resin, cannabis resin, or coca glue; b) The offense involves a quantity of  $\geq 100$  g of heroin, cocaine, methamphetamine, amphetamine, MDMA or XLR-11; c) The offense involves a quantity of  $\geq 300$  g of other solid narcotic substances; dd) The offense involves a quantity of  $\geq 750$  ml of other liquid narcotic substances; d) The offense involves  $\geq 02$  narcotic substances the total quantity of which is equivalent to the number of narcotic substances specified in Point a through d of this Clause (Clause 4, Article 248).

+ For the offense of illegally transporting narcotics, committing the crime in one of the following circumstances shall be sentenced to 20 years, life imprisonment, or death penalty: a) The offense involves a quantity of  $\geq 05$ kg of poppy resin, cannabis resin, or coca glue; b) The offense involves a quantity of  $\geq 100$ g of heroin, cocaine, methamphetamine, amphetamine, MDMA or XLR-11; c) The offense involves  $\geq 75$ kg of coca leaves, khan leaves (*Catha edulis* leaves); leaves, roots, stalks, branches, flowers, fruits of the cannabis plant or parts of other plants that contain narcotic substances prescribed by the Government; d) The offense involves a quantity of  $\geq 600$ kg of dried opium poppy fruits; dd) The offense involves a quantity of  $\geq 150$ kg of fresh opium poppy fruits; e) The offense involves a quantity of  $\geq 300$ g of other solid narcotic substances; g) The offense involves a quantity of  $\geq 750$ ml of other liquid narcotic substances) The offense involves  $\geq 02$  narcotic substances, the total quantity of which is equivalent to the number of narcotic substances specified in Point a through g of this Clause.”(Clause 4, Article 250).

+ For the offense of illegally trading narcotics, committing the crime in one of the following circumstances shall be sentenced to 20 years, life imprisonment, or death penalty: a) The offense involves a quantity of  $\geq 05\text{kg}$  of poppy resin, cannabis resin, or coca glue; b) The offense involves a quantity of  $\geq 100\text{g}$  of heroin, cocaine, methamphetamine, amphetamine, MDMA or XLR-11; c) The offense involves  $\geq 75\text{kg}$  of coca leaves (*Catha edulis* leaves); leaves, roots, stalks, branches, flowers, fruits of the cannabis plant or parts of other plants that contain narcotic substances prescribed by the Government; d) The offense involves a quantity of  $\geq 600\text{kg}$  of dried opium poppy fruits; dd) The offense involves a quantity of  $\geq 150\text{kg}$  of fresh opium poppy fruits; e) The offense involves a quantity of  $\geq 300\text{g}$  of other solid narcotic substances; g) The offense involves a quantity of  $\geq 750\text{ml}$  of other liquid narcotic substances; h) The offense involves  $\geq 02$  narcotic substances, the total quantity of which is equivalent to the number of narcotic substances specified in Point a through g of this Clause.” (Clause 4, Article 251).

## 2. THE APPLICATION OF THE DEATH PENALTY FOR DRUG CRIMES IN VIETNAM

The regulation of the penalty for a crime depends on the dangerous level of this crime to society. This explains why in criminal law, different crimes will have different penalties, even the same crime. However, the punishment can be regulated differently from time to time.

In our opinion, at present, Vietnam has not yet abolished the death penalty for all drug-related crimes.

The abolition of the death penalty in general and the death penalty for a specific crime depends on many factors. However, one of the most important factors is the danger of crime to society in the specific conditions and circumstances in the country.

The reality of drug crime prevention and fighting of the authorities shows that these are still extremely dangerous crimes to society because of the complex development of these crimes in many aspects.

*Firstly*, the number of drug cases and defendants has increased.

According to the statistics of the Supreme People’s Procuracy, in 2007, 10,901 cases and 14,955 defendants were prosecuted for drug-related crimes; in 2017, 16,905 cases (an increase of 55% compared to 2007) and 20,619 defendants (an increase of 37.9% compared to 2007) were prosecuted.

**Table 1: Number of drug offenses and defendants prosecuted  
(out of the total number of cases and defendants prosecuted) from 2007 to 2017**

Year	The prosecuted cases			The prosecuted defendants		
	The total number of prosecuted cases	Number of prosecuted cases relating to drugs	Rate (%) of prosecuted cases relating to drugs compared to the total number of prosecuted cases	The total number of prosecuted defendants	Number of prosecuted defendants relating to drugs crimes	Rate (%) of prosecuted defendants relating to drugs crimes compared to the total number of prosecuted defendants
2007	80,301	10,901	13.58	124,855	14,955	11.98
2008	70,880	11,474	16.19	108,945	14,799	13.57
2009	62,842	10,958	17.44	96,771	13,961	14.43
2010	62,226	12,160	19.54	96,490	15,205	15.76
2011	71,599	15,079	21.06	114,660	18,815	16.41
2012	74,134	15,222	20.53	120,561	19,549	16.22
2013	76,245	15,266	19.44	122,465	19,757	16.13
2014	77,503	15,069	18.32	119,602	19,379	16.20
2015	70,852	12,983	22.38	106,870	16,250	15.20
2016	69,481	15,553	24.33	100,147	19,308	19.28
2017	69,479	16,905	19.29	98,025	20,619	21.03

*Source: Supreme People's Procuracy of Viet Nam.*

The report of the Supreme People's Procuracy in 2012 summarizing the implementation of The 1999 Criminal Code has shown that drug-related crimes are one of the three types of crime that are often subject to the death penalty, of which, most of them are the crimes of possession, transportation, illegal trafficking or appropriation of narcotics-related to drug dealers in large quantities, organized activities<sup>1</sup>.

*Secondly*, the number of arrested cases, offenders, and the mass of drugs substances have increased each year

In 2008, the authorities discovered and arrested 12,850 cases, 20,268 offenders, seized 156,163 kg Heroin, 18,796 kg of opium, 27.95 kg of synthetic drug, and 44,054 synthetic drug tablets, 8 tons of marijuana.

In 2019, the authorities discovered and arrested 22,814 cases (an increase of 77% compared to 2008), 35,151 offenders (up 73% on 2008), seized 1,494.29kg of Heroin (up 857% on 2008); 5,500.55kg of synthetic drug (up 19,580% on 2008) and 987,913

<sup>1</sup> Report No. 144 / BC-VKSTC-V8 dated December 5, 2012 of the Supreme People's Procuracy on the Review of Implementation of The Criminal Code 1999.

synthetic drug tablets (up 2,142.5% on 2008); 585.99kg of marijuana; 120.54kg of cocaine and many other vehicles and properties.

From 2015 to 2019, the average number of arrested cases and offenders was about 20,000 and 30,000.<sup>1</sup>

**Table 2: Number of arrested cases relating to drug crimes from 2015 to 2019**

Year	Number of cases	Number of offenders	Number of seized Heroin	Number of seized synthetic drug tablets
2015	17,821	27,675	988.71kg	631.17kg and 421,867 tablets
2016	19,333	31,001	607,813kg	839.63kg and 427,655 tablets
2017	22,346	34,494	906.67kg	856.9kg and 979.487 tablets
2018	24,552	37,842	1584.36kg	1755.74kg and 1363.495 tablets
2019	22,814	35,151	1,494.29kg	5,500.55kg and 987,913 tablets

*Source: Report of the Minister of Public Security 2020 in submitting to the Government on the draft Law amending and supplementing the Law on drug prevention.*

In 2020, the Customs force has chaired and coordinated with the police forces, the Border Guard to arrest 137 cases, 170 offenders, seized 56.60kg and 181 heroin units; 663.31kg of synthetic drugs in powder and crystal form; 369,870 synthetic drug tablets; 0.17 kg of cocaine, 20.42kg of marijuana; 13.43kg of opium, 25.65kg of ketamine. In the South area alone, within the first ten months of 2020, the Anti-Smuggling Drug Control Team in the South area belongs to the Anti-Smuggling and Investigation Department, the General Department of Customs, based on coordination with other functional units, has arrested 34 cases, confiscated 5,018.2g of marijuana; 202kg of synthetic narcotics in stone form; 19,333 synthetic drug tablets; 27,251.8g of MDMA synthetic drug; 124.6g of cocaine and 19 heroin units<sup>2</sup>.

In addition, the offenders have manufactured synthetic drug production from several drugs containing narcotic substances and precursors, which have not been governed by law. As of 2019, there are 44 cases of illegal production of narcotics nationwide, including a case of Heroine production, 43 cases of synthetic drug production, 15 cases of synthetic drug production from traditional medicines (accounting for 35%)<sup>3</sup>.

1 Report of the Minister of Public Security 2020 in the submission to the Government on the draft Law amending and supplementing the Law on drug prevention.

2 Report on results of detection, arrest and handling from January to October 2020 of the Southern Anti-Smuggling Control Team under the Anti-Smuggling and Investigation Department, General Department of Customs.

3 Report of the Minister of Public Security 2020 in the submission to the Government on the draft Law amending and supplementing the Law on drug prevention.

*Thirdly*, the modes of drug transportation into Vietnam are increasingly diversified and sophisticated, causing difficulties in the inspection and supervision of the authorities.

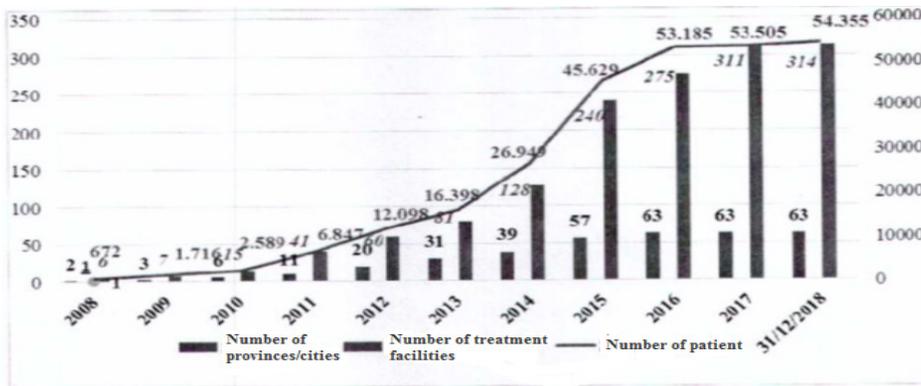
Previously, drugs were smuggled into Vietnam by two main routes: Heroin and synthetic narcotics in the form of ecstasy from the Golden Triangle were transported across the border of the Northwest and North Central provinces into Vietnam, and then they were transported to China; Meth, ketamine and some other synthetic narcotics from China were transported across the border of the northern provinces to be brought back to Vietnam. However, recently, drug bosses have brought technology, machinery, and equipment to the Golden Triangle to manufacture drugs instead of manufacturing meth in China. In the southwestern borderline, many “hot spots” have appeared, such as Bo Y border gate (Kon Tum), Tay Ninh, An Giang. From here, drugs are quickly transported to Ho Chi Minh City and other neighboring provinces for consumption or transportation to other countries. There have appeared criminal groups in organizing drug transportation from Cambodia to Vietnam led by foreigners. They use modern communication equipment, often change modes of operation, create fake situations, organize and operate transportation in a well-organized manner to avoid and deal with the authorities. Currently, the situation of illegal trading and transporting drugs is complicated on all routes. In addition to drug trading through the land border, due to our country’s open import and export policy to promote economic development, expand trade in the region and the world, the crimes also transport drug through official channels. The authorities also seized cocaine from Brazil and African countries, South America, meth, synthetic narcotics from Europe, transported to Vietnam via air, post, courier, by sea.

In the coming time, according to the assessment of the United Nations Office on Drugs and Crime (UNODC) as well as the Standing Agency of the Government Steering Committee 138 (Ministry of Public Security), the situation of drug crimes will continue to develop complicatedly. The operations of drug crimes will be increasingly sophisticated. The recently discovered and arrested cases of cocaine from Latin American countries show that the drug offenders are targeting the Southeast Asian market, including Vietnam.

The complex of drug offenses in Vietnam stems primarily from its geographic location. Vietnam has a complete system of seaports, airways, roads, and railways and is bordered by many countries. The borderline between Vietnam and neighboring countries, such as Laos, China, and Cambodia, is stretched, mainly in rugged mountainous terrain, with many border gates and trails. Hence, it causes difficulty for the authorities to control drug crimes. In particular, Vietnam is just away from the Golden Triangle, the second-largest manufacturing center globally, with a reasonably close distance of 500 kilometers. They are natural conditions that make the offenders use Vietnam to transport drugs and then continue to send them to other countries for consumption.

In addition, the increase in the number of drug addicts and illegal drug users in recent years contributes to the increase in drug crime. In 2009, Vietnam had 146,731 drug addicts with managing records. By December 2019, Vietnam had 235,314 drug addicts with managing records, an increase of 160%. While the detoxification was not effective, the rate of drug relapses high<sup>1</sup>. Drug addicts are found in all localities, in all sectors, all ages, but mainly in young people (0.1% under 16 years old; 76% are under 35 years old)<sup>2</sup>.

**Diagrams of patients receiving compulsory treatment in detoxification facilities**



Source: Report of the Ministry of Public Security in 2019 Summary of 10 years of implementation of the Law on Drug Prevention and Control.

In addition, the situation of using drugs tends to increase and be complicated, significantly since the 1999 Criminal Code (amended in 2009) did not regulate the Illegal use of narcotics as a crime. Mainly drugs are Heroin, synthetic drugs, opium, cannabis, in which the trend of using synthetic drugs increases. There are various forms to use drugs, such as smoking, inhaling to injecting, drinking, and sucking. The explosive development of conditional businesses such as discotheques, bars, restaurants, discos has a significant impact on synthetic drugs. According to the Police Department of Drug Investigation in 2019, Vietnam had 3,879 conditional business establishments (discotheques, bars, motels, hotels, restaurants, clubs) showing signs of crime and drug abuse.

In the economic aspect, the higher the drug demand, the more drug crimes increase to meet the drug demand.

Moreover, huge profits from drugs make the offenders willing to find all tricks to commit criminal acts. A heroin unit in Laos costs about 4,500 USD. In Vietnam, the price

1 Report of the Minister of Ministry of Public Security 2020 in the submission to the Government on the draft Law amending and supplementing the Law on drug prevention.  
 2 Report of the Ministry of Public Security in 2019 Summary of 10 years of implementation of the Law on Drug Prevention and Control.

increases to about 8,000 to 12,000 USD (an increase of 78% to nearly 170%). If a heroin unit is moved to China, it costs about 18,000 to 20,000 USD, more than three times the original price in Laos. One kg of meth (ketamine) in border provinces is only 230 million VND. However, in Vietnam, they are sold for up to 500 million VND<sup>1</sup>.

Reality shows that drugs are directly associated with criminal acts and are an additional source of crime. Drug addicts are without hesitation to fulfill their constant demand by money, drugs, even murder, and robbery. Drug crime is one of the causes leading to other types of crimes in society. In addition, the fight against drug crime is extremely fierce and dangerous when offenders are very reckless, aggressive when they were ready to use “hot weapons” to fight back.

The above factors have shown that currently, drug crime in Vietnam has remained severe, threatened social stability, human life, and health. In a study on “Vietnam’s ability to join the Optional Second Protocol on the Abolition of the Death Penalty under the International Covenant on Civil and Political Rights (ICCPR)” co-ordinated by UNDP, UNICEF in coordination with the Vietnamese Ministry of Justice, the research team has conducted a number of short interviews with legal experts working in a number of ministries and branches; officers directly engaged in investigation, prosecution and adjudication in a number of localities; Lawyers and staff working in research and teaching at law training and research institutions include Ministry of Public Security, Supreme People’s Court, Central Committee of Vietnam Fatherland Front, Dong Thap People’s Procuracy, Vinh Long Provincial People’s Court, High Court in City. Ho Chi Minh City, An Giang Bar Association, Ben Tre Bar Association, Hanoi Law University on abolishing the death penalty in Vietnam. Interview results showed that most of the respondents revealed their disagreement toward eliminating the death penalty in Vietnam due to the complicated criminal situation in Vietnam. Also, Vietnam has not yet practiced effective measures capable of deterring and preventing crimes to replace the death penalty.<sup>2</sup> Although there is a lack of studies to evaluate the effectiveness of the death penalty compared to other penalties in the prevention and fight against crime, the results of the above study show that, in the minds of many people, the Death penalty is still considered necessary measures to be maintained to meet the requirements crime-fighting thing and prevention activities, including drug crimes. In other words, the possibility of abolishing the death penalty for drug offenses in Viet Nam does not seem feasible at present.

---

1 Report of Drug -related crime investigation Police Department (C04), Ministry of Public Security in 2019 on drug crimes in Vietnam.

2 Vietnamese Ministry of Justice, European Union, UNDP, *Study on “Vietnam’s ability to join the Optional Second Protocol on the Abolition of the Death Penalty under the International Covenant on Civil and Political Rights (ICCPR)”*, 2019.

The possibility and challenges of abolishing the death penalty for drug crimes in the future in Vietnam

Although Vietnam's criminal law currently maintains the death penalty for drug offenses, in our opinion, the death penalty for these crimes should be abolished in the future. Since the motivation of drug crimes is for economic reasons, not despicable motivation such as crimes against human life and health such as murder and pedophile. This is the significant difference between drug crimes and crimes against human life and health. Huge profits from drugs made offenders defy subreptions to commit such crimes, including the risk of suffering the most severe punishment, the death penalty. On the contrary, when committing wrongdoers such as murder, pedophilia, and despicable motivation, offenders lack humanity that no society can be intolerable.

The question is: "Does Vietnam ensure a ground to eliminate the death penalty for drug crimes in the future?"

*Firstly*, following guidelines and policies, Vietnam has implemented a policy of restricting the application of the death penalty. Specifically,

The policy of limiting the death penalty was introduced in 2002 in Politburo's Resolution No.08/NQ-TW dated January 2, 2002, on some of the keys judicial missions in the coming time. The content of this Resolution was the research on the limitation on the application of the death penalty in the Criminal Code. Next, Politburo's Resolution No.49/NQ-TW dated June 2, 2005, about Judicial Reform Strategy to 2020 affirmed the policy "Limiting the application of the death penalty in the direction of applying for a few severe crimes." Conclusion No. 92, dated March 12, 2014, of the Politburo on the continued implementation of Resolution No.49/NQ-TW, continued to confirm the content of Resolution 49 as above. In other words, Conclusion No. 92, 2014 re-affirms the policy of restricting the application of the death penalty in Vietnam. Recently, the Prime Minister's Decision No. 1252 / QD-TTg dated September 26, 2019, approved the plan to enhance the effective implementation of the International Covenant on Political Civil Rights and the recommendations of The United Nations Human Rights Commission. It noted that one of the measures to implement the ICCPR Convention and the HRC Recommendation is "to continue studying the reduction of crimes that may be subject to the death penalty" (Section 3.3).

*Second*, legally the number of crimes in general and the number of drug-related crimes in particular subject to penalties as prescribed by the criminal code have tended to decrease in recent years.

**Table 3: The Summary table of a number of drug-related offenses stipulates the death penalty (concerning total the number of drug-related crimes specified in the Criminal Code)**

	The 1985 Criminal Code	The 1985 Criminal Code, amendment, supplement in 1989	The 1985 Criminal Code, amendment, supplement in 1991, 1992	The 1985 Criminal Code, amendment, supplement in 1997	The 199 Criminal Code	The 1999 Criminal Code, amendment, supplement in 2001	The 2015 Criminal Code, amendment, supplement in 2017
The number of drug-related crimes	01	02	02	12	09	09	13
The number of crimes stipulates the death penalty	00	01	01	07	03	02	03

Considering the correlation between the number of crimes that are subject to the death penalty and the total number of drug crimes prescribed in the Criminal Code, we can see that the number of crimes subject to the death penalty has been mainly reduced.

Specifically, the 1999 Criminal Code abolished the death penalty for the offense of coercion and manipulation to illegally use narcotics as stipulated in the revised 1997 Criminal Code. The death penalty for six drug offenses was recognized in 3 articles: Illegal production of narcotics (Article 193), possession, transportation, illegal trafficking or appropriation of narcotics (Article 194), organizing the illegal use of narcotics (Article 197). The 1999 Criminal Code, amended and supplemented in 2001, continued to abolish the death penalty for organizing the illegal use of narcotics.

In particular, the 2015 Criminal Code changed the way to build the regulations on drug-related crimes. It divided drug-related crimes into many offenses and regulated them in many different provisions instead of combining many crimes into one provision. Hence, if we compare it with the 1999 Criminal Code, it can be seen that the number of offenses that are subject to the death penalty has been decreased. Expressly, the 1999 Criminal Code, amended and supplemented in 2001, stipulated the death penalty for five offenses, including illegal production of narcotics, illegal possession of narcotics, illegal transportation of narcotics, Illegally buying and selling narcotics, and appropriating narcotics, while the 2015 Criminal Code only stipulates the death penalty for three offenses, including illegal production of narcotics, Illegally transporting narcotics and trading in narcotics.

It can be seen that the provisions of Vietnam's criminal law related to drug-related crimes are gradually being completed in the direction of narrowing the scope of the application of the death penalty.

The policy of limiting the application of the death penalty and the practice of reducing the number of crimes subject to the death penalty, including drug crimes in the process of amending and supplementing the 1999 Penal Code and the Act of the Criminal Code 2015, can be considered as the basis for the abolition of the death penalty in general and the death penalty for drug crimes in particular in the future.

In other words, the abolition of the death penalty for drug offenses is possible. The application of the death penalty in criminal law should gradually be reduced. In fact, some countries have moved to abolish the death penalty under this roadmap instead of immediately enacting the provision not to apply the death penalty in national criminal laws. Take the UK as an example. In 1965, the death penalty for murder in England, Scotland, and Wales was abolished under the Murder (Abolition of Death Penalty) Act 1965<sup>1</sup>. This Act replaced the death penalty with a mandatory sentence of life imprisonment. However, The 1965 Act only abolished the death penalty for capital murder as defined in the Homicide Act 1957. Death remained an available penalty for high treason, piracy with violence, arson in the Royal Dockyards, and capital offenses under military law. The death penalty for arson in the Royal Dockyards was abolished by the Criminal Damage Act 1971. The death penalty was finally wholly abolished in the United Kingdom in 1998, with the Crime and Disorder Act 1998, s.36<sup>2</sup> and the Human Rights Act 1998, s. 21(5)<sup>3</sup>.

Another example is Canada. Canada did abolish the death penalty for offenses under the Criminal Code in 1976.<sup>4</sup> However, the death penalty remained lawful under the *National Defence Act*.<sup>5</sup> It permitted the death penalty for members of the Armed Forces found guilty of cowardice, desertion, unlawful surrender, or spying for the enemy. And finally, the death penalty for military service offenses under the National Defence Act was abolished in 1999.

---

1 Murder (Abolition of Death Penalty) Act 1965.

<https://www.legislation.gov.uk/ukpga/1965/71>, accessed on 5 April, 2021.

2 Crime and Disorder Act 1998.

<https://www.legislation.gov.uk/ukpga/1998/37/contents>, accessed on 5 April, 2021.

3 Human rights act 1998.

<https://www.legislation.gov.uk/ukpga/1998/42/contents>, accessed on 5 April, 2021.

4 Criminal Code 1976.

<https://www.constancebackhouse.ca/fileadmin/website/1976.htm>, accessed on 5 April, 2021.

5 National Defence Act.

<https://laws-lois.justice.gc.ca/eng/acts/N-5/>, accessed on 5 April, 2021.

Reality shows that the gradual elimination of the immediate elimination of the entire death penalty in one country's criminal law depends on the characteristics of each country, such as the evolution of the situation, crime rate, public/ruling party's opinion, or relevant international treaties to which the country is a member.

In other words, there is a country that immediately enacts the abolition of the death penalty in its criminal law. Conversely, some countries only eliminate the death penalty for one or more crimes at a given time. After some time, the death penalty for remaining crimes such as the United Kingdom or Canada cases.

The following case is the gradual reduction of the death penalty application before the remaining offenses subject to the death penalty. Thus, it can be considered that the gradual reduction of the death penalty in the policies, as well as the provisions of the Vietnamese criminal law, is a transitional step in the roadmap to abolish the death penalty in the future.

Therefore, in terms of policy and law, Vietnam has grounds to abolish the death penalty for drug crimes. The most crucial concern is the appropriate time for Vietnam to abolish the death penalty for drug crimes while maintaining the death penalty?

Will Vietnam abolish the death penalty for all three crimes, including illegal production of narcotics, illegal transportation of narcotics, and illegal trafficking in narcotics? Will the death penalty be eliminated first for only one or two of the three crimes and then for the remaining?

It is not simple to answer these questions because they depend on many factors such as the drug crime situation, the possibility of substitution of the death penalty by other penalties or other measures to prevent or punish the crimes, or other relevant factors.

Vietnam is cautious in considering the abolition of the death penalty. The abolition of the death penalty in general and the death penalty for drug offenses, in particular, is a severe political-legal issue that can affect the effectiveness of crime prevention. Then it can affect the stability, safety of society, stability, and national security. Therefore, to eliminate the death penalty for drug crimes, it is necessary to implement a lot of comprehensive solutions in many aspects, both economically, socially, politically, and legally. As analyzed above, profit is the root of drug crime. Besides, ignorance is also one of the causes leading to criminal acts. Many drug cases show that the subjects who illegally transport drugs are mainly the poor, the employees, with limited knowledge of the law.

Within the scope of this article, the authors will approach a legal approach to make several recommendations to facilitate the abolition of the death penalty for drug crimes in Vietnam.

*Firstly*, improving the legal documents system on prevention, fighting, and controlling drugs is a reality and compatible with other relevant legal documents.

From an economic perspective, the fight against drug crimes is a battle between “supply” and “demand” for drugs. The increase in drug demand due to the recent increase in the number of drug addicts and illicit drug use is one reason leading to the increase in drug crimes. Therefore, from the legal perspective, it is necessary to have adequate legal documents in preventing, combating, and controlling illegal drug use activities.

Over the past years, the legal documents system governing drug prevention has been gradually improved. It has created a legal basis for drug prevention. However, the current legal provisions still have some limitations, such as:

+ The 2000 Law on Prevention and Combat Drug, amended and supplemented in 2008, conflicts with other Laws, such as contradictions with the Law on the handling of administrative violations regarding the competence to send the drug addicts who are from full 12 years old to under 18 years old into detoxification establishments or contradictions with The Criminal Procedure Code and the Law on Organization of the Criminal Investigation Agency on investigating competence of the Border Guard. Moreover, the number of new acts have been specified in the 2015 Criminal Code, such as “Violations of regulations on temporary import, re-export, delivery, management, control, storage, allocation, and permission for the use of narcotics and addictive drugs or psychotropic drug.” However, they have not been regulated yet in The Law on Prevention and Combat Drug.

+ The illegal use of narcotics is only subject to a warning or a fine of 500,000 VND to 1,000,000 VND. This fine is too low, so it is not adequate enough to deter a person from using narcotics.

Therefore, it is necessary to continue to improve the legal provisions on drug prevention and control, according to a number of contents below: (i) Supplementing regulations on the competence of the specialized agency and amending regulations on the competence of Border Guards, Coast Guard and Customs to ensure the consistency with the Criminal Procedure Code and the Law on Organization of the Criminal Investigation Agency; (ii) Supplementing regulations on the management of illicit drug users to prevent them from continuing to use drugs, such as regulations on supervision and strict management of illegal users of narcotics; (iii) Amending and supplementing regulations on drug addictions treatment in order to overcome the shortcomings in detoxification and ensure the consistency with the law on handling of administrative violations; (iv) Amendment of stricter sanctions against illegal use of narcotics.

*Secondly*, continue to reduce the number of drug crimes subject to the death penalty in the Criminal Code.

The reality of the drug crimes situation in Vietnam and the practice of applying the death penalty to drug crimes show that the abolition of the death penalty should continue to be carried out according to the current gradual reduction schedule instead of immediately deleting. Therefore, the legislatures will determine which crime(s) can continue to be abolished the death penalty, depending on the actual situation of each drug-related crime at a particular time.

*Thirdly*, researching alternative measures to the death penalty in accordance with the general trend of the world in abolishing the death penalty and the requirements of fighting and preventing crimes in Vietnam.

According to the Report of Penal Reform International, a non-governmental organization that aims to develop and promote appropriate, effective, and commensurate responses to criminal justice issues worldwide, many countries have adopted life imprisonment as an alternative to the death penalty. Now, there are two main types of life imprisonment. The first type is life imprisonment without parole. The law does not provide for parole, so a prisoner will serve a prison sentence until that person dies. The second type is pardoned, meaning that the law will set a minimum number of years in which a prisoner must serve a prison sentence. After that time, he can be considered for release if necessary conditions are met. For example, under German law, prisoners serving a life sentence will be considered for release only after they have served a minimum of 15 years. Where there is release, the offender may subsequently be subjected to supervision for a limited or lifelong period. Failure to comply with supervision conditions can lead to the convicted person being returned to prison, serving a prison sentence until the end of natural life, or later, successful review<sup>1</sup>.

In Vietnam's criminal law, life imprisonment and the death penalty are the two most severe punishments, in which the severity of the life imprisonment in the penalty system ranks the second. People sentenced to life in prison may have to spend the rest of their lives in prison without parole. Under Vietnam's criminal law, life imprisonment is the only penalty in the penalty system that can replace the death penalty. Specifically, according to Article 40 of the 2015 Criminal Code, "In the case specified in Clause 3 of this Article or the person sentenced to death receives a concession, the death penalty is converted to life imprisonment".

Based on the current provisions of the Vietnamese criminal code as well as the experience of many countries, Vietnam can consider the application of life imprisonment

---

<sup>1</sup> Penal Reform International, *Alternatives to the death penalty information pack, PRI's project "Progressive abolition of the death penalty and implementation of humane alternative sanctions"*, 2015.

[https://cdn.penalreform.org/wp-content/uploads/2015/03/PRI\\_Alternatives\\_to\\_death\\_penalty\\_info\\_pack\\_WEB.pdf](https://cdn.penalreform.org/wp-content/uploads/2015/03/PRI_Alternatives_to_death_penalty_info_pack_WEB.pdf), accessed 3 January 2021.

with no concession as an alternative. We offer this solution for the following reasons: *First*, life imprisonment is the only punishment so far in the system of punishment that can replace the death penalty because of its severity. *Second*, with the life imprisonment without reduction, the offender still retains his life. However, the offender will have to spend the rest of his life in prison. The person's activities are strictly controlled according to the provisions of law. As a result, the severity of life imprisonment without reduction is also stricter than life imprisonment with a reduced sentence. However, it is not as strict as the death penalty. In terms of the seriousness of the crime, the act of being sentenced to death or the criminal law stipulates that the death penalty is more severe than the act of being sentenced to life imprisonment. In other words, these two penalties have shown a differentiation in the severity of the offenses. In the case of the abolition of the death penalty, life imprisonment becomes the most severe punishment. Suppose the law does not classify life the penalty into life with reduced sentences and life without reduction. In that case, the penalty does not guarantee the segregation of severity between offenses like the differentiation between the death penalty and the life penalty. On the contrary, the application of life imprisonment without being reduced as a substitute for the death penalty can meet the requirements of differentiating the severity of the crime and ensure the purpose of punishment, prevent recidivism, and ensure educational purposes for offenders.

## CONCLUSION

Although The Convention on International Covenant on Civil and Political Rights 1966 does not require countries to abolish the death penalty, most countries' trend is to gradually abolish it. The United Nations has also adopted a series of Resolutions calling on member states to take measures to suspend the execution of the death penalty with the ultimate goal of abolishing the death penalty in all nations.

Nowadays, Vietnam has joined the general trend of gradually reducing the death penalty. This is considered a legal premise for the progress to abolish such a penalty. However, as analyzed above, the drug crimes situation in Vietnam is very complicated, and the death penalty has been practically applied or executed. Therefore, the abolition of the death penalty in Vietnam in general, as well as the abolition of the death penalty for drug crimes in particular, can only be carried out under a roadmap with many synchronous solutions. The appropriate time to abolish the death penalty must be counted based on careful consideration of factors affecting the crime-fighting activities.

**REFERENCES**

1. The 2015 Criminal Code (Bộ luật hình sự 2015).
2. Law on amendments to the 2015 Criminal code in 2017 (Luật sửa đổi Bộ luật hình sự 2015 năm 2017).
3. The 1985 Criminal Code (Bộ luật hình sự 1985).
4. Laws on amendments to the 1985 criminal code in 1991, 1992, 1997 (Luật sửa đổi Bộ luật hình sự 1985 năm 1991, 1992, 1997).
5. The 1999 Criminal Code (Bộ luật hình sự 1999).
6. Law on amendments to the 1999 criminal code in 2001 (Luật sửa đổi Bộ luật hình sự 1999 năm 2001).
7. Human Rights Commission, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*.35.
8. [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf), accessed 1 January 2021.
9. Human Rights Committee, *Concluding observations on the third periodic report of Viet Nam*, para.23 (2019).
10. [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fVNM%2fCO%2f3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fVNM%2fCO%2f3&Lang=en), accessed 2 January 2021.
11. Amnesty International report, *Death sentences and execution 2019, Annex II -Abolitionist and retentionist countries as of 31 December 2019* (2020).
12. <https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF>, accessed 2 January 2021.
13. Minister of Ministry of Public Security, *Report to the Government on the draft Law amending and supplementing the Law on drug prevention and control* (2020). - Bộ trưởng Bộ Công an, *Báo cáo trình Chính phủ về dự thảo Luật sửa đổi, bổ sung Luật Phòng, chống ma túy* (2020).
14. Southern Anti-Smuggling Control Team under the Anti-Smuggling and Investigation Department, General Department of Customs, *Report on results of detection, arrest and handling from January to October 2020* (2020). - Đội kiểm soát chống buôn lậu ma túy khu vực miền Nam thuộc Cục Điều tra chống buôn lậu, Tổng cục Hải quan, *Báo cáo kết quả phát hiện, bắt giữ, xử lý từ tháng 1 đến tháng 10 năm 2020* (2020)
15. Ministry of Public Security, *Report on Summary of 10 years of implementation of the Law on Drug Prevention and Control* (2019). - Bộ Công an, *Báo cáo tổng kết 10 năm thi hành Luật Phòng, chống ma túy* (2019).

16. Drug-related crime investigation Police Department (C04), Ministry of Public Security, Report on drug crimes in Vietnam (2019). - Cục Cảnh sát điều tra tội phạm ma túy (C04), Bộ Công an, *Báo cáo về tội phạm ma túy tại Việt Nam* (2019).
17. Supreme People's Procuracy, *Report No. 144 / BC-VKSTC-V8 on the Review of Implementation of The Criminal Code 1999* (2012). - Viện Kiểm sát nhân dân tối cao, *Báo cáo số 144/BC-VKSTC-V8 về Tổng kết việc thi hành Bộ luật Hình sự năm 1999* (2012).
18. Penal Reform International, *Alternatives to the death penalty information pack, PRI's project "Progressive abolition of the death penalty and implementation of humane alternative sanctions"* (2015).
19. [https://cdn.penalreform.org/wpcontent/uploads/2015/03/PRI\\_Alternatives\\_to\\_death\\_penalty\\_info\\_pack\\_WEB.pdf](https://cdn.penalreform.org/wpcontent/uploads/2015/03/PRI_Alternatives_to_death_penalty_info_pack_WEB.pdf), accessed 3 January 2021.

# THE RIGHT TO LIFE AND THE DEATH PENALTY: REFLECTION FROM DRUG-RELATED CRIMES IN VIETNAM

Dr. Mac Thi Hoai Thuong<sup>1</sup>

**Abstract:** The right to life is the most fundamental human right. The death penalty is the most severe punishment and is commonly specified in the laws of many countries. This penalty deprives the convicted person of the right to life. Therefore, the death penalty is only applied to the most severe crimes. The application of the death penalty to drug-related crimes concerning the right to life is a controversial issue and applied differently in different countries. This paper shall analyze the relationship between the right to life and the application of the death penalty to drug-related crimes to study the application of the death penalty to drug-related crimes both internally and domestically. The legal issues studied by this paper include legal issues related to the right to life, the application of the death penalty, the legitimacy of application of death penalty to drug-related crimes, the trend of applying the death penalty to drug-related crimes in the world, and reference to the practices in Vietnam. By this paper, the author shall present the formation and development trend of Vietnamese law provisions related to the application of the death penalty to drug-related crimes and assess the compatibility between current Vietnamese regulations on this issue and international human rights standards.

**Keywords:** the right to life, death penalty, drug, legal, Vietnam.

## INTRODUCTION

The right to life is one of the fundamental human rights, defines extremely diverse content which member states need to take adequate measures to ensure. The right to life was first introduced in Article 3 of the Universal Declaration of Human Rights 1948 (UDHR). This article states that “Everyone has the right to life, liberty, and security of person.” The right to life is further emphasized and concretized in Article 6 of the International Covenant on Civil Rights (ICCPR), whereby “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life” (Clause 1). Clauses 2, 3, 4, 5, 6 of Article 6 provide the basic principles for applying the death penalty in the countries where this penalty is maintained and encourages all member states to abolish the death penalty. Article 6 can be summarized as follows: The

---

<sup>1</sup> Hanoi Law University (HLU), Vietnam

death penalty is only imposed on the most serious crimes under the excellent law at the time the crime is committed; The death penalty can only be executed by a final judgment made by a competent court; Persons sentenced to death have the right to seek for pardon; Death penalty shall not be imposed on pregnant women and children under the age of 18.

In addition to ICCPR, some other international human rights conventions also specify the right to life, including the Convention on the Rights of the Child (Article 6 of this Convention provides that the member states recognize that all children have an inherent right to life); Convention on Prevention and Punishment of the Crime of Genocide (most of the articles in this Convention is to define the acts considered genocidal crimes and punishments for the violation of the right to life; International Convention on the Suppression and Punishment of the Crime of Apartheid (Article 2 of this Convention defines the crimes of Afghanistan, which includes the murder of members of a racial group or groups).

In addition to the provisions specified in Article 6 of ICCPR, in General Comment No. 6 adopted at 16th session in 1982, Human Rights Commission (HRC) further explains some issues related to the meaning and content of the right to life that can be summarized as follows:

The right to life is “a fundamental human right that cannot be violated in any circumstance, even in the state of emergency.” Regarding the relationship between the death penalty and the right to life, although the ICCPR does not require member states to abolish it, the States are obliged to limit the use of it; specifically, this penalty can only be imposed on “the most serious crimes.” Moreover, the member states that have not abolished the death penalty are obliged to ensure that the proceedings for the cases are done most reasonably, including non-retroactivity, open trial, the presumption of innocence, guarantees of the right to justification, appeal, and seek for pardon. In addition to ICCPR and Second Optional Protocol, some treaties on the abolition of the death penalty are also adopted at the regional level, including • Protocol No. 6 to European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty; Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances; The Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

Thus, the right to life is a fundamental human right. The right to life is not absolute; in other words, while recognizing the right to life, states can still maintain the death penalty. The death penalty is the most severe one, depriving the offender of the right to life. International law clearly states that the death penalty only can be imposed on the most severe crimes. However, the current concept of “the most serious crimes” is still a controversial issue.

This study contributes to the clarification of concerned legal and practical issues, such as whether drug trafficking is one of the most severe crimes and subject to the death penalty; the tendency to abolish the death penalty; assess the practice and development trend of legal regulations in this field in Vietnam.

## RESEARCH METHODS

This conceptual paper focuses on the use of capital punishment for drug trafficking offenses in Vietnam. To study this topic, the author will use a combination of theoretical research methods such as the synthesis-analysis method, the interpretation-inductive method, the statistical method, the comparative comparison method. To go from study the actual developments to generalize and make an assessment of the general trend. Using a set of typical legal research methods, particularly legal history, doctrinal research, philosophy of law, and sociology of law, the author analyzes the change and reform of capital offenses in Vietnamese laws. The study employed content analysis of current laws and methods of interpretation of international law. There is a comparative analysis of Indonesia, Singapore cases. Indonesia's death penalty laws are similar to what exists in Singapore. The study examined both international and domestic laws. The research juxtaposed the right to life within international law with the nation's death penalty laws. In terms of the reception of international law into the domestic system, the transformation and incorporation doctrines that form the theoretical basis of the analysis apply. Conventions would need to be acceded to and incorporated as part of the domestic law.

## FINDINGS AND DISCUSSION

### **The right to life and the application of the death penalty for drug-related crimes in international law**

Until now, drugs have always been a significant threat to the international community. Drugs are the causes of social disorder and the roots of many other criminals. Drug addicts are willing to do everything to have money to use drugs, such as murder, robbery. Drugs are a significant barrier preventing drug addicts from building a civilized and modern life. According to the latest data from United Nations Office on Drugs and Crime (UNODC), about 210 million people illegally use drugs worldwide. About 200,000 people died from drugs<sup>1</sup>. Drug offenders make up most of those who are condemned to die and are executed in many retentionist countries. Although total numbers are difficult to obtain, hundreds of people are certainly executed every year for a drug-related offense (and that number

---

1 United Nations Office on Drugs and Crime (UNODC). World Drug Report 2011. Vienna: Division for Policy Analysis and Public Affairs, 2011.

would likely reach a thousand if those countries that keep their death penalty figures a secret were counted.

To consider the legitimacy of the imposition of the death penalty to drug-related crimes, we need to assess whether drug-related crime is one of “the most serious crimes” under Article 6, Clause 2 of ICCPR. Unfortunately, the term “the most serious crimes” is being understood differently by different countries and HRC - implementation monitoring body of ICCPR. This leads to the different points of view on the legitimacy of the death penalty imposed on drug-related crimes. Specifically:

The first group of views believes that drug-related crime is not the most severe crime and opposes the death penalty’s imposition. The first explanation to this point of view comes from HRC<sup>1</sup>, which states that “the most serious crime” must be explained in a limited manner and only imposed on the intentional murder or the crimes causing other grave consequences. According to HRC, in addition to intentional and unintentional murder, corruption and other political and economic crimes, such as armed robbery, piracy, abduction, drug-related crimes, and sex crimes, cannot be considered the most severe crimes to impose the death penalty as specified in Article 6 of ICCPR<sup>2</sup>. The explanation of HRC is not clear and precise.

In practice, HRC associates serious crime directly with intentional murder. *Lubuto v. Zambia* case code (390/90) is an example. “7.2 The Commission found that the author was convicted and sentenced to death under the law on imposing the death penalty to armed robbery. The issue here is to decide whether the death penalty complies with paragraph 2 of Article 6 (2) of ICCPR, which allows the imposition of the death penalty to “the most serious crimes.” Whereas, in this case, the use of a weapon did not result in death or injury to anyone; thus, the court cannot use this provision to render the judgment. The Commission found that the imposition of the death penalty in this situation is a violation of paragraph 2, Article 6 of the Convention”.

Moreover, in its Comments for Egypt, HRC expressed concern about the country’s imposition of the death penalty for terrorist crimes<sup>3</sup>. HRC believes that such an act of terrorism does not meet the criterion of causing the most severe consequences. In addition, HRC Comments are not legally mandatory for the member states of ICCPR.

Similarly, Amnesty International and some countries have arguments against the imposition of the death penalty to drug-related crimes. They argue that the imposition

---

1 Implementation monitoring body of ICCPR.

2 <https://www.ohchr.org/en/professionalinterest/pages/deathpenalty.aspx> retrieved on January 2nd, 2021.

3 United Nations Human Rights Committee, “Comments on Egypt”, United Nations Document, UN Doc. CCPR/C/79/Add.23, August 9th 1993, para 8.

of the death penalty to drug-related crimes can lead to the risk that this penalty shall be imposed on not only those who illegally buy, sell or possess drugs - the target objects of the drug law - but also drug addicts. Meanwhile, some national laws consider illegal drug use is a disease rather than a crime.<sup>1</sup> The countries are advocating this viewpoint claim that the death penalty for drug-related crimes is too heavy. Its consequence is irreversible in case of wrongful conviction and injustice during the proceedings<sup>2</sup>. Finally, these countries believe that the death penalty is not a reliable deterrent measure; the evidence is that despite the existence of the death penalty in some countries, the number of drug-related crimes does not decrease; it even increases in some countries.

The second groups argue that drug-related crime is a grave crime subject to the death penalty. The countries advocating this point of view claim that the most serious crimes under Article 6, paragraph 2, ICCPR include not only intentional murder but also the crimes causing severe consequences threatening national security, public order. For example, Indonesia imposes the death penalty on drug-related crimes under Indonesia Number 35 of 2009 on Narcotics: importing, exporting, manufacturing, distributing narcotics are the acts causing severe consequences for Indonesia's society and national security and are subject to the death penalty. Like Indonesia, Singapore believes that the right to life is not the absolute right; the Government has the right to take appropriate measures to ensure the right<sup>3</sup>. The imposition of sanctions against drug-related crimes helps to reduce crime rates and maintain a safe community. How serious a drug-related crime is sentenced to death depends on the number of drugs and the dangerous level of that crime. The more drugs are, the more harmful and dangerous consequences they will bring to the community<sup>4</sup>. With the same argument as Singapore, Malaysia - where drug-related crimes often transfer drugs through the Golden Triangle (Thailand, Laos, Malaysia) - also claims that drug-related crime is the leading cause threatening its national safety and security<sup>5</sup>. The Golden Triangle still produces a quarter of the world's heroin<sup>6</sup>. From the Golden Triangle, narcotics are then trafficked and consumed through the region.

---

1 For example, the US.

2 Tanya Hector. "The Death Penalty: No Solution to Illicit Drugs." Amnesty International. <http://www.amnesty.org/es/library/asset/ACT51/002/1995/en/ab550293-eb32-11dd-92ac-295bdf97101f/act510021995en.pdf>.

3 Amnesty International, "Singapore - The Death Penalty: A Hidden Toll of Executions", Report, January 2014, p. 4.

4 Michael Hor, "The Death Penalty in Singapore and International Law", Singapore Yearbook of International Law, Vol. 8, 2004, p. 110.

5 Yingyos Leechaianan, et al, "The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia, and Thailand: A Comparative Legal Analysis", MDPI Journal, Vol. 2, No. 2, June 2013, p. 132.

6 <https://www.lowyinstitute.org/the-interpretor/drugs-and-death-penalty-southeast-asia>.

That trade will likely become more accessible at the end of the year when the ASEAN Community is set to introduce more unrestrained movement around the region. This in itself could see a push for stricter application of death penalty laws.

Many Southeast Asian countries have authorized its use for numerous drug-related offenses. In some instances, these countries have established a mandatory death penalty for drug trafficking offenses. Vietnam and Malaysia permit the death penalty for drug trafficking. In 2005, Singapore executed Melbourne man Van Tuong Nguyen for drug trafficking. Most recently, two Singaporeans were executed for the trafficking of pure heroin in July last year. In Malaysia, drug traffickers are among the 900 currently on death row. In Indonesia, of the 133 people on death row in 2012, more than half (71) were there for drug trafficking<sup>1</sup>.

From the above analysis, the problem is that the cases where member states can impose the death penalty are not specified by the provisions in paragraph 2 of Article 6, ICCPR. This leads to different interpretations and imposition in countries around the world. Moreover, in the countries maintaining the death penalty, the imposition of this penalty on drug-related crimes is also different. The number of countries abolishing the death penalty in general and abolishing the death penalty from drug-related crime, in particular, tends to increase. Some countries still stipulate this penalty in law. However, it is not executed in practice, such as Brunei Darussalam, Lao People's Democratic Republic, and Myanmar. However, in the group of countries maintaining the death penalty for drug-related crimes, the number of offenders subject to the death penalty has increased significantly.

The problem is that the cases where member states can impose the death penalty are not specified by the provisions in paragraph 2 of Article 6, ICCPR. This leads to different interpretations and imposition in countries around the world. Moreover, in the countries maintaining the death penalty, the imposition of this penalty on drug-related crimes is also different. The number of countries abolishing the death penalty in general and abolishing the death penalty from drug-related crime, in particular, tends to increase. Some countries still stipulate this penalty in law. However, it is not executed in practice, such as Brunei Darussalam, Lao People's Democratic Republic, and Myanmar. However, in the group of countries maintaining the death penalty for drug-related crimes, the number of offenders subject to the death penalty has increased significantly.

To consider the legitimacy of the imposition of the death penalty to drug-related crimes, we need to assess whether drug-related crime is one of "the most serious crimes" under Article 6, Clause 2 of ICCPR. Unfortunately, the term "the most serious crimes" is being understood differently by different countries and HRC - implementation monitoring

---

1 <https://www.lowyinstitute.org/the-interpreter/drugs-and-death-penalty-southeast-asia>.

body of ICCPR. This leads to the different points of view on the legitimacy of the death penalty imposed on drug-related crimes. Specifically:

The first group of views believes that drug-related crime is not the most severe crime and opposes the imposition of the death penalty to them, which states that “the most serious crime” must be explained in a limited manner and only imposed on the intentional murder or the crimes causing other grave consequences. In addition to intentional and unintentional murder, corruption and other political and economic crimes, such as armed robbery, piracy, abduction, drug-related crimes, and sex crimes, cannot be considered the most severe crimes to impose the death penalty as specified in Article 6 of ICCPR<sup>1</sup>.

Amnesty International and some countries have arguments against the imposition of the death penalty to drug-related crimes. They argue that the imposition of the death penalty to drug-related crimes can lead to the risk that this penalty shall be imposed on not only those who illegally buy, sell or possess drugs - the target objects of the drug law - but also drug addicts. Meanwhile, some national laws consider illegal drug use is a disease rather than a crime.<sup>2</sup> The countries are advocating this viewpoint claim that the death penalty for drug-related crimes is too heavy. Its consequence is irreversible in case of wrongful conviction and injustice during the proceedings<sup>3</sup>. Finally, these countries believe that the death penalty is not a reliable deterrent measure; the evidence is that despite the existence of the death penalty in some countries, the number of drug-related crimes does not decrease; it even increases in some countries.

The second groups argue that drug-related crime is a severe crime subject to the death penalty. The countries advocating this point of view claim that the most serious crimes under Article 6, paragraph 2, ICCPR include not only intentional murder but also the crimes causing grave consequences threatening national security, public order.

### **The right to life and the application of the death penalty for drug-related crimes in Vietnam**

Vietnam is a member state of 7 among a total of nine core international human rights treaties, including the International Covenant on Civil and Political Rights 1966 (ICCPR), but is not a member state of the Second Optional Protocol to Abolish the Death Penalty under ICCPR 1989, which is currently the only international treaty on the abolition of the death penalty. In recent years, Vietnam has made many efforts to gradually reduce

---

1 <https://www.ohchr.org/en/professionalinterest/pages/deathpenalty.aspx> retrieved on January 2nd, 2021.

2 For example, the US.

3 Tanya Hector. “The Death Penalty: No Solution to Illicit Drugs.” Amnesty International. <http://www.amnesty.org/es/library/asset/ACT51/002/1995/en/ab550293-eb32-11dd-92ac-295bdf97101f/act510021995en.pdf>.

the number of crimes subject to the death penalty by Firstly, reducing the number of crimes subject to the death penalty from 29 crimes in the Penal Code 1985 (accounting for 14.87% of the total number of crimes specified in the Penal Code) to 22 crimes in Penal Code 1999 (amended and supplemented in 2009) (accounting for 8.09% of the total number of crimes specified in the Penal Code), and then to 18 crimes in Penal Code 2015 (accounting for 5.73% of the total number of crimes specified in the Penal Code). Moreover, the list of persons who are not subject to the death penalty is expanded.

The provisions of the Vietnamese Penal Code on the imposition of the death penalty specify that the death penalty is a special penalty and only applied in certain exceptional cases. Whether this penalty is maintained or abolished form, the penal code should be based on the specific characteristics, conditions, and requirements of fighting against crime in each country.

The group of crimes subject to the death penalty includes Crimes involving national security; Crimes of infringing upon human life and health; Drug-related crimes; Crimes of corruption, and some other severe crimes prescribed by the Penal Code, such as manufacturing and counterfeit trading of medicines; terrorism; crimes of war of aggression, crimes of peace; crimes against humanity; crimes of war.

The death penalty is not imposed on those who are: (1) juveniles (people under 18 years old); (2) woman becomes pregnant at the time of sentencing or during the trial; (3) woman who is raising a child under the age of 36 months at the time of sentencing or during the trial, and (4) persons are at the age of or above 75 at the time of sentencing or during the trial.

The drug-related crime situation continues to be complicated in Vietnam. In recent years, illegal drug trafficking has increased in the number of cases and quantity of drugs. According to the Supreme People's Procuracy of Vietnam, from 2007 to May 31st, 2018, the investigation agency prosecuted 159,924 new cases and 201,775 defendants (accounting for 20% of the total number of newly prosecuted cases in the whole country during the same period). Only in the first six months of 2018, the investigating agency prosecuted 8,969 cases, increasing by 765 cases (9.3%) compared to the same period in 2017<sup>1</sup>. Specifically:

---

1 <https://vksndtc.gov.vn/tintuc/Pages/lists.aspx?Cat=12&ItemID=7697&Page=3>, retrieved on March 1<sup>st</sup>, 2021.

**Statistics of drug-related crime and crime situation nationwide, according to trial statistics**

Year	The total number of cases, the defendants prosecuted		Whereas, drug-related crimes		Rate (%)	
	Cases (1)	Defendants (2)	Cases (3)	Defendants (4)	Cases (3/1)	Defendants (4/2)
2007	80.301	124.855	10.901	14.955	13,58	11,98
2008	70.880	108.945	11.474	14.779	16,19	13,57
2009	62.842	96.771	10.958	13.961	17,44	14,43
2010	62.226	96.490	12.160	15.205	19,54	15,76
2011	71.599	114.660	15.079	18.815	21,06	16,41
2012	74.134	120.561	15.222	19.549	20,53	16,22
2013	76.245	122.465	15.266	19.757	19,44	16,13
2014	77.503	119.602	15.069	19.379	18,32	16,20
2015	70.852	106.870	12.983	16.250	22,38	15,20
2016	69.481	100.147	15.553	19.308	24,33	19,28
2017	69.479	98.025	16.905	20.619	19,29	21,03
<b>Total</b>	<b>785.542</b>	<b>1.209.391</b>	<b>151.570</b>	<b>192.577</b>	<b>19,29</b>	<b>15,92</b>

(Source: Supreme People's Procuracy of Vietnam)

The table above shows that the total drug-related crime in the whole country (2007-2017) is 144,818 cases with 184,025 defendants. In the past decade, each year, the Court adjudicated about 14,482 cases with 18,403 defendants. Crime methods and tricks are increasingly sophisticated; the criminal characteristics are increasingly dangerous, aggressive, and reckless; armed with "hot" weapons, modern means; they fiercely resist the functional forces when detected and arrested. Drug-related crimes are mainly in the Northwest, Central, Southern borderlines and continue to go further inland. Notably, the amount of heroin transported to Vietnam in 2009 increased by 29% compared with the previous year; and the amount of methamphetamine increased by 11 times.

In particular, there is an increase in the activity of international drug cartels. Drug-related crimes are dangerous to society. Drug-related crimes in Vietnam are directly or indirectly involve with drugs; They infringe the State's monopoly on drugs management, allow drugs to enter the community, increase drug addicts, exert negative impacts on many aspects, such as economy, politics, culture, social order, and safety, seriously harm human life and health, trigger other crimes.

Based on the current situation of drug-related crimes in Vietnam, the death penalty is still considered a necessary and indispensable penalty to punish those who commit severe crimes to ensure security, social order, and safety and create a safe environment for people. Therefore, this kind of punishment still works well in preventing crimes. The practice of imposition of the death penalty over the past decades in Vietnam shows that this

penalty has specific effects in punishing those who commit severe crimes and educating others to respect the law. The public advocate the correct imposition of the death penalty. Capital punishment benefits society because it may deter violent crime. However, the death penalty is only specified as the heaviest penalty frame for crimes and always an optional penalty for life imprisonment. This means that, according to the Vietnamese Penal Code, there are no cases where the death penalty is mandatory. Penal Code also clearly and strictly provides the conditions for imposing the death penalty on the offenses subject to this penalty. Thereby, the Court can consider and impose the death penalty in a specific case. For example, the crimes of illegally manufacturing, transporting, or trading narcotics are subject to the death penalty (Clause 4 of Articles 248, 250, 251). The 2015 Penal Code was passed by the National Assembly of the Socialist Republic of Vietnam on 27/11/2015. The 2015 Penal Code comprised 18 articles stipulating capital punishment, which accounted for 7% of the total articles on crimes.

The death penalty is now reserved for the worst crimes, mostly about national security, murder, war crimes, crimes against humankind, and drug-related crime. There are five conditions used to examine which crimes should or should not be punished by the death penalty. First is the importance of protected interests. Second is the nature, seriousness of the crime, as well as personal conditions of the criminals. The third is the practical demands and needs to combat that crime. Fourth is the availability and effectiveness of other penalties other than capital punishment. And the fifth condition, the international trend concerning the crime in question. The conditions and criteria for imposing the death penalty are amended to exempt certain criminals from the list of being punished by death. At the time of trial, juvenile offenders, pregnant women, and women nursing children under 36 months old or people above 75 years old at the time of committing crimes cannot be given death sentences (Clause 1,2 of Articles 40). They also shall not be executed if, at the time of execution, they belong to one of the groups as mentioned above (Clause 3 of Articles 40). Furthermore, those who have imposed the death penalty for having committed the crime of embezzlement, receiving bribes but have returned three-fourths of the embezzled property or bribed property and cooperated with competent authorities in discovering, investigating, and handling crime shall have their death penalty changed to life imprisonment<sup>1</sup>.

## CONCLUSION

At the global level, the imposition of the death penalty is increasingly considered incompatible with the protection of the right to life - the most important of all human

---

1 Kien tran and Vu Cong Giao, *The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry*, Available online: <https://www.mdpi.com/journal/societies>, accessed on 9 April 2021.

rights. With the growing support for this issue, the trend to abolish the death penalty is increasing. International law allows the imposition of the death penalty on the most severe crimes as an exception to the right to life. However, the legitimacy of applying the death penalty to drug-related crimes is still a controversial issue. Adapting with the general trend, Vietnamese law on the death penalty has seen many positive improvements, such as reducing the number of charges subject to the death penalty, increasing the list of exceptions of the death penalty, providing the death penalty parallel to life imprisonment for the courts to consider in the specific case. In the context of complicated developments in drug-related crimes with signs of increasing both the number of cases and the number of drugs, and the collusion between Vietnamese and foreign criminals, maintaining the death penalty is necessary as required by the socio-economic situation, the requirement of preventing and fighting with crimes in Vietnam, and by the context that Vietnam has not had an effective alternative to the death penalty to deter and prevent drug-related crimes.

## REFERENCES

1. United Nations Human Rights Committee, "Comments on Egypt," United Nations Document, UN Doc. CCPR/C/79/Add.23, August 9th, 1993.
2. United Nations Office on Drugs and Crime (UNODC). World Drug Report 2011. Vienna: Division for Policy Analysis and Public Affairs, 2011.
3. Tanya Hector. "The Death Penalty: No Solution to Illicit Drugs." Amnesty International. <http://www.amnesty.org/es/library/asset/ACT51/002/1995/en/ab550293-eb32-11dd-92ac-295bdf97101f/act510021995en.pdf>. (accessed on 1 January 2021).
4. Amnesty International, "Singapore – The Death Penalty: A Hidden Toll of Executions," Report, January 2014.
5. Michael Hor, "The Death Penalty in Singapore and International Law," Singapore Yearbook of International Law, Vol. 8, 2004.
6. Yingyos Leechaianan, et al., "The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia, and Thailand: A Comparative Legal Analysis," MDPI Journal, Vol. 2, No. 2, June 2013.
7. Tanya Hector. "The Death Penalty: No Solution to Illicit Drugs." Amnesty International. <http://www.amnesty.org/es/library/asset/ACT51/002/1995/en/ab550293-eb32-11dd-92ac-295bdf97101f/act510021995en.pdf>. (accessed on 1 January 2021).
8. <https://vksndtc.gov.vn/tintuc/Pages/lists.aspx?Cat=12&ItemID=7697&Page=3> retrieved on March 1st, 2021.

9. <https://www.ohchr.org/en/professionalinterest/pages/deathpenalty.aspx> retrieved on January 2nd, 2021.
10. Kien Tran and Vu Cong Giao, The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry, Available online: <https://www.mdpi.com/journal/societies> (accessed on 9 April 2021).

# LEGAL FRAMEWORK AND PRACTICE OF THE EXCLUSION OF THE DEATH PENALTY ON PREGNANT WOMEN OR MOTHERS OF YOUNG CHILDREN IN VIET NAM

LLM. Hoang Thi Ai Quynh<sup>1</sup>, A/ Prof. Dr. Dang Minh Tuan<sup>2</sup>

**Abstract:** The exclusion of the death penalty on pregnant women or mothers of young children is recognized and protected by international law. Article 6 of the 1966 International Covenant on Civil and Political Rights states, “Sentence of death shall not be carried out on pregnant women.” Similarly, the Vietnamese Criminal Code stipulates, “The death penalty shall not be applied to pregnant women, mothers of children under 36 months old”. However, compared with international law and law of some countries, the Vietnamese Criminal law has some different provisions such as the broadest application of the exclusion of the death penalty, the determination of the child’s age, or the adoption of a child to exclude the death penalty. In practice, the exclusion of the death penalty in the above cases also raises many problems, especially in taking advantage to avoid applying the death penalty. It raises the issue of stakeholder’s responsibility. This paper examines the legal framework and practices of excluding the death penalty on pregnant women or mothers of young children in Vietnam based on comparing international law and law of some other countries.

**Keywords:** death penalty, Vietnamese Criminal Code, pregnant women, nursing young children.

## 1. INTRODUCTION

Criminal law is one of the practical tools for the State to fight crime prevention and protect the legitimate interests of citizens and organizations. The Vietnamese Penal Code provisions help remove factors that obstruct and endanger society and ensure that everyone can live in a safe and highly humane environment. Article 3 of the Vietnam Penal Code 2015 (Amendment 2017) sets out the principles for handling individuals and legal entities committing crimes, emphasizing the elements of leniency and humanitarianism. This principle is expressed throughout many names in the current Penal Code. Among

---

1 Lecturer - Hue Law University

2 VNU Hanoi School of Law

them, Article 3 of the 2015 Penal Code excludes the death penalty for pregnant or nursing women. This provision not only ensures the strictness of judgment execution but also demonstrates the leniency of the law. However, in practice, due to the existing problems or unspecified legal grounds, there have been many cases of taking advantage of this provision to “evade the death penalty.”

The article focuses on the Vietnamese Criminal Code on not imposing the death penalty on pregnant women and nursing women of young children by analyzing the legal basis, discussing the shortcomings, and propose solutions to complete it.

## **2. RESEARCH OBJECTIVE**

In the scope of this article, the author analyzes the legal basis of the provisions on the exclusion of the death penalty for women who are pregnant or nursing children. The authors aim to address the death penalty issues relative to women who are pregnant or nursing children under 36 months within the study. In this regard, the authors focus on analyzing current criminal law provisions on the death penalty. The target audience is pregnant women or nursing children under 36 months. Besides, the authors go into analyzing the shortcomings in criminal law through the analysis of actual cases. From there, the paper points out some remaining problems and recommendations to complete this regulation.

## **3. MATERIALS AND METHODS**

### *+ Analysis and synthesis*

The research mainly uses analytical and synthesized methods to clarify the provisions of the Vietnam criminal code regarding the concepts of the death penalty, which are pregnant women or nursing children. Analyze the factors, the causes of the problems, synthesize, evaluate, and then give solutions to overcome.

### *+ Case study*

In the study, the authors used several cases with problems related to the death penalty for pregnant and nursing women. By analyzing the content of the case, the authors point out the limitations and support their argument.

## **4. RESEARCH CONTENTS**

### **4.1. Legal framework of the death penalty for pregnant or nursing children under 36 months in Vietnam**

Like others penalties, the death penalty is designed to punish offenders, deter and prevent crime. However, the death penalty is different because it deprives people of a

fundamental right to life - the right to life. The execution of the death penalty against a person will cease to exist, permanently remove that person from society. The supporters of the death penalty explain that for social protection, "Some criminals must die in order for the rest to be safe, or at least safer." Therefore, despite the relentless efforts of humanitarian movements to abolish the death penalty, its validity has not been denied. It is still used in many countries around the world. Moreover, while not as expected, there are instances where the person facing the death penalty is pregnant or nursing. In this case, international law and the laws of most contemporary countries require that the application or enforcement of the death penalty be excluded. As follows:

- Article 8, International Covenant on Civil and Political Rights, of which Vietnam is a member state, "No death sentence is allowed for offenders under 18 years of age and not be safe to execute the death penalty for pregnant women".

- Clause 2, Article 40 of the 2015 Penal Code (amended in 2017), stipulates: No penalty shall be imposed on people under 18 when committing crimes, pregnant women, women raising children under 36 months old.

- Clause 3, Article 40 of the 2015 Penal Code (the 2017 amendment): No death penalty shall be imposed on the associate in case of a pregnant woman, or a woman is raising children under 36 months old.

- Clause 4, Article 40 of the 2015 Penal Code (amended in 2017): In the case specified in Clause 3 of this Article, or the person is combined with the reduced image. Then the image is converted to the general body.

Based on the above regulations, the Vietnamese law has specified the issue as follows:

*First*, the exclusion of the death penalty is understood to include both non-imposition of penalties and non-enforcement of sentences. As such, it is permitting to apply within the scope of work to exclude penalties for pregnant and nurturing women is determined at both the scope point and enforcement point. Accordingly, pregnancy or child-rearing details that appear when the woman is executed, processed, or sentenced but not yet implemented are wholly excluded from death.

*Second*, for young children, the age of that baby is precisely 36 months old.

*Third*, if the offender is a woman or is raising a child under 36 months old, the sentence cannot be executed. In this case, life imprisonment will be used as a substitute for punishment.

The provisions of Vietnamese law as above are reasonable, based on the following reasons:

*Firstly*, eliminating the death penalty for a pregnant woman, nursing a child under 36 months old is for the benefit and work of that child. The fetus or young child has a life associated with the mother. The form of the mother means deprivation of the fetus's right to life, or the child cannot receive an establishment from the mother - this is extremely important for the normal development of children.

*Secondly*, the exclusion of the penalty in the case of the right to exercise motherhood is a human right that cannot be taken away to protect motherhood and the special and exclusive human rights of women. Because of the monopoly nature, it is impossible to give up the offenders' right to perform their ministry even though they are so dangerous that they must be excluded from society.

*Thirdly*, the exclusion of the death penalty for pregnant women and nursing children under 36 months old comes from the question of calculating personnel of the law in general, the law in particular. When a woman is pregnant or raising a baby is a challenging and complex time. Pregnancy and childbirth make women exhausted and vulnerable. Thus, the imposition or enforcement of punishment for pregnant women and young children is considered more extreme than other subjects.

*Fourthly*, the exclusion of the death penalty for pregnant and nurturing women stems from the humanitarian requirements of legal policies in general and criminal law in particular. In legal science, women are identified as vulnerable groups that need to be protected. Pregnancy and childbirth make women weaker, more vulnerable, and need special protection. Therefore, acts of abuse of pregnant or childbearing women have always been identified as more brutal than regular human abuse. Likewise, the imposition of the harshest punishment on a woman in a particularly vulnerable situation would undoubtedly be very inhumane.

#### **4.2. Regulations on international laws and other countries worldwide exclude the death penalty for pregnant women and nursing children**

The international human rights law set out a particular requirement regarding eliminating the death penalty for pregnant women and nursing children. The 1966 International Covenant on Civil and Political Rights states: "The death penalty must not be executed for pregnant women" (Clause 5, Article 6); Point 3 of the warranties to protect the rights of those facing the death penalty in 1984 emphasizes: "The death penalty is not enforced for pregnant women, mothers nursing young children."

However, the United Nations conventions only prohibit the execution of the death penalty for pregnant women without prohibiting the application of the death penalty for them. This means the death penalty is still possible in judicial trials. However, the execution

will not be done while they are still pregnant or have young children. Regarding child-rearing status, the International Convention also does not specify how old it is to raise a child. Therefore, the period of child-rearing used as a basis for not implementing the death penalty will be determined differently from the perspectives of different countries.

While the new UN conventions stop at prohibiting the execution of the death penalty for nursing mothers, the African Charter on the rights and well-being of children, the Arab Charter of Human Rights, already exists a step further by the ban on the application of the death penalty to these subjects. Point e Article 30 of the African Charter of Child Rights and Welfare requires the Member States not to impose the death penalty against “expectant mothers, mothers of infants and young children.” Clause 2, Article 7 of the Arab Human Rights Charter states, “The death penalty shall not be applied to a pregnant woman until she gives birth or to a nursing mother within two years from when giving birth.”

All in, eliminating the death penalty for pregnant and nursing women is an essential human rights requirement in international law. Consistent with that requirement, the execution of the death penalty for pregnant women is not permitted in most countries in the world. 84 out of 93 countries that still maintain the death penalty have passed regulations banning the execution of the death penalty for pregnant women. In addition, although not having their regulations, eight other countries have ratified the 1966 International Covenant on Civil and Political Rights that prohibits the execution of the death penalty against pregnant women: Afghanistan, Gambia, Grenada, Guyana, Liberia, Saint Vincent, the Grenadines, and Tanzania. The execution of the death penalty against pregnant women is only legal in the only country in the world in the West Indies, the Federation of Saint Kitts and Nevis.

Provisions on excluding the death penalty for pregnant women in countries worldwide are divided into two groups. The first includes countries that delay enforcement until after the woman gives birth. The second group is the group of countries that allow replacing the death penalty with life imprisonment or less. Countries fall into the category of delaying the execution of the death penalty until after a woman has a child with very different delays. It can be as long as 40 days like in Morocco, two months in Egypt, three months in Bahrain, and three years like in Thailand and the Central African Republic. Some countries delay the execution of the death penalty for an indefinite time and allow it to be implemented after a woman gives birth to an authority to decide, such as Burkina Faso, Chad, Iran, Lebanon, Japan, and South Korea. In Japan, for example, it can only be done with a decision from the Minister of Justice.

In most countries that allow the replacement of the death penalty for a pregnant woman, the replacement is life imprisonment, such as Bahamas, Botswana, Ghana,

India, Kenya, Kuwait, Laos, Malawi, Singapore, Sri Lanka, Uganda, and Zambia. Some exceptions are Belize - life imprisonment with hard labor and Malaysia - maximum term multi 20 years. Six particular countries allow the replacement by life imprisonment; however, they provide that the Court consider a specific case to convert back to the death sentence when the woman carries the life sentence and finishes giving birth. They are Bangladesh, Eritrea, Ethiopia, Iraq, Myanmar, and Pakistan.

The exclusion of the death penalty for women having young children is also set by laws of countries worldwide because the care of the mother often has a rejuvenating effect on the child in the early stages of life. However, the length of time it takes to raise a child varies widely between countries. The time can be 40 days like in Morocco or up to 3 years in Thailand or an abstract period like until the child quits.

#### **4.2. Discussion**

The fact that the law provides for excluding the death penalty for individual offenders who are pregnant women or nursing children contributes to favorable conditions for judgment execution. It ensures that women and their children live in a safe and highly humane environment, overcoming difficult times. However, this provision creates loopholes for offenders to evade judgment execution, instead of overcoming the difficulties that women face as expected by the law:

*Firstly*, the 2015 Penal Code stipulates that the subject of the death penalty exclusion is pregnant women in all phases: violations, the trial stage, and even the sentence execution section. This provision has created a loophole that those who want to escape from the death penalty can apply if the management and supervision of the accused are not strictly implemented.

An example of this limitation is the death row inmate Nguyen Thi Hue (42 years old): At the appellate trial on June 19, 2014, this defendant and 28 others were sentenced to death in a 32,000 sale heroin cake. In waiting for the execution of the sentence in the detention center of the police detention center of Quang Ninh province, Nguyen Thi Hue tried to get acquainted with culinary criminal Nguyen Tuan Hung (27 years old, from Quang Ninh). The female inmate raised the issue of paying Hung 50 million VND to help her get pregnant. In August 2015, Nguyen Tuan Hung twice took his sperm into a plastic bag and tried to put it in the corridor of C5 prison, where Nguyen Thi Hue was held. Taking advantage of the shackles being removed to the toilet, female inmates pumped sperm into the womb. When the incident was discovered, the death row inmate Nguyen Thi Hue was more than 25 weeks pregnant and was expected to give birth in late April 2016. According to Article 35 of the 1999 Penal Code, the death penalty was not enforced against women pregnant, nursing a child under 36 months old. In this case, the death

penalty translates into life imprisonment. Thus, from a law showing the humanity of the State plus the lax management of the period of detention, many women see it as a tool to evade the execution of the death penalty.

*Secondly*, the provision for offenders of children under 36 months old to be excluded from the death penalty is not specific. The purpose of this policy is to provide the best possible care for the child. The period from 0 to 36 months is when a baby's development is closely related to the mother's care. However, the problem raised here is understanding that raising a child under 36 months means a natural or adopted child. Article 24 of the Law on Adoption 2010 stipulates as follow: "The consequence of adoption is that from the date of handover and adoption, between the adoptive parents and the adopted child have all rights and obligations of the parents and the child; Adopted children and other members of the adoptive parents' family also have rights and obligations towards each other in accordance with the law on marriage and family, civil law and other relevant laws agency."

Accordingly, the rights and obligations of adoptive children and natural children to adoptive parents and biological parents are the same. Thus, the loophole is identified here: in the case a woman committing an act of violation of the law finds it is possible to bear the death penalty with the execution of this act. Therefore, right after performing the act and the act has not been detected, she immediately adopts a child under 36 months old. Although, Article 13 of the Law on Adoption 2010 stipulates prohibited acts that prohibit the following acts: Taking advantage of adoption to take advantage of or taking advantage of adoption to violate laws and customs. The ethics, good cultural traditions of the nation; however, it is relatively difficult to determine whether or not an adoption act is to violate the law.

*Thirdly*, analyzing and comparing Vietnamese legal regulations with international laws and law of other countries worldwide on the issue of the exclusion of the death penalty for pregnant women and nursing children, the Penal Code Vietnam 2015 defines a relatively broad scope in allowing the exclusion of the death penalty for pregnant women and nursing children. A woman's pregnancy and child-rearing status are recognized both at the time of the crime and trial or judgment. Accordingly, pregnancy or child-rearing is present when a woman commits a crime, the case is at trial, or she has been sentenced but has not been executed, she will be excluded entirely from the death sentence. Although showing the humanity of the law, the above provisions are not consistent with the International Agreements that Vietnam is a member. It will make it challenging to resolve existing cases.

*Fourthly*, raising children under 36 months old, not only by the mother but can still be raised by the father. Because there are many cases, for some reason, children under 36 months old may, when the mother dies, only the foster father remains. In this case,

to ensure the child's interests, it is natural and necessary that the father directly cares for and nurtures the child. Nevertheless, in the current regulations, it is not determined that the father can apply to this beneficial institution if there is a criminal offense. If it is said that the provision of this institution is to ensure the rights of the mother, because "carrying heavy pain, giving birth" should be considered humanitarian for the mother. The nature of this institution is only to ensure that to protect the mother's interests, not for the protection of the child's interests.

The time taken for further proceedings against women who are pregnant or nursing a child under 36 months old in some cases is also inappropriate. There are many cases of miscarriage, and there are also cases where the baby can die before the age of 36 months for any reason. With the current regulations as for the case of postponement of serving a prison sentence or suspension of serving a prison sentence, enough time must be ensured, as in reality, bringing the child to entire 36 months of age (even in the case of if the woman is pregnant but has a miscarriage or the child dies before the full 36 months of age), the period of postponement or suspension of the execution of the imprisonment penalty expires. It is inappropriate; regulations are only suitable when the child becomes pregnant and born after 36 months of age, or the child is raised until the age of 36 months.

The death penalty is the severest one in the penalty system of Vietnam's criminal law, applied to particularly dangerous crimes, to punish offenders and prevent new crimes. However, with provisions on the exclusion of the death penalty for women who are pregnant or nursing children under 36 months, Vietnam's criminal law has shown leniently and humanity in the spirit of handling the right person. In other words, the provision on the exclusion of the death penalty, in this case, is to ensure the right to life and the right to care for the child of the person who commits the act. It is also a show of tolerance for the woman who commits it. However, the above loopholes have created dangerous consequences because the fact that a person has committed an offense and took advantage of loopholes in the provisions of the law to avoid the execution of a judgment above not only destroys society but also shows disregard for the law, as well as creating a bad precedent in individuals' thinking and actions.

Besides, it is this provision that gives rise to negativity in the judgment execution process. The legal consequences not only stop at the fact that an individual commits a crime evading the death penalty but also corrupt individuals, abetting the act. Because the fact shows that cases of female defendants in solitary confinement awaiting the execution of the death penalty are pregnant with the help, assistance, or neglect of correctional officers. Although supporting the accused to evade the death penalty is the individual choice of the prison officer, it is also the responsibility of the organization, demonstrating the weakness in management and operation of relevant agencies, that leads to a wrong impression on

State power agencies. It also causes consequences to the child who takes advantage of the rule to eliminate imprisonment by getting pregnant while waiting to serve their sentences. By taking advantage of the law's loophole in eliminating the death penalty by getting pregnant in prison, these women evade the punishment of the law creating an additional burden on society. Because even though they do not have to receive the death penalty, serving a life sentence also makes them unable to care for their children. Article 45 of the Law on Execution of Criminal Judgments stipulates the benefits for female prisoners who are pregnant or nursing children under 36 months old as follows:

1. If pregnant female prisoners are not temporarily suspended from serving their imprisonment sentences, they shall be provided with a reasonable accommodation, entitled to periodic or irregular pregnancy check-ups and medical care in necessary cases; they are entitled to reduce working time, enjoy a healthy diet and drink.

2. Pregnant female inmates are entitled to work leave before and after giving birth, according to the provisions of the Labor Code. During maternity leave, inmates are guaranteed the standard, the amount of food according to the instructions of doctors or doctors, and they will be provided with necessary food and supplies for the care of the newborn. Female inmates nurturing children under 36 months of age are given an appropriate time to care for and nurture their children.

3. Prisons, detention camps, criminal judgment enforcement agencies District-level police shall have to carry out procedures to request birth registration for inmates' children. The Committees of communes where inmates serve their sentences shall register and issue birth certificates.

4. Female inmates with children 36 months old or older must send their children back to their relatives for their caring. In case the offender's children do not have relatives to be adopted, the prisons or detention camps affiliated to the Ministry of Public Security, detention centers affiliated to the Ministry of National Defense, or provincial police criminal judgment enforcement agencies must request the Department Labor, War Invalids and Social Affairs where an inmate shall appoint a social protection facility to receive and nurture the child. Within 15 days after receiving the request, the Department of Labor, War Invalids, and Social Affairs shall appoint a social protection establishment responsible for receiving and nurturing. Those who have completed the imprisonment sentence are entitled to receive back their children being nurtured by the social protection establishments.

5. The prisons must organize kindergartens outside of the detention area to care for and nurture children of inmates under 36 months of age and children of prisoners aged 36 months or older pending admission procedures social welfare establishments.

### 4.3. Theoretical and practice

To ensure the leniency and humanity of the law in the matter of pregnant women or young children committing illegal acts under the death penalty framework but still ensuring the fairness of the law. In order to avoid the case of taking advantage of the loopholes of the law to “evade the death penalty,” the author of this article proposes the following:

*It first concerns* the provision that excludes the death penalty for pregnant women. To avoid abetting female convicts awaiting the execution of the death penalty to have the opportunity to commit acts leading to pregnancy, we need to improve the management of prison managers and currently seriously implementing solitary confinement against female convicts. For female accused subjects, who are being detained for crimes with a penalty of up to the death penalty, it is necessary to strictly manage and limit the facilitation in the process of visiting family members.

*It is second* concerning the provisions that exclude the death penalty for women who are nursing children under 36 months. In this case, it is necessary to have specific regulations to address adoption and natural children. If the legal rights and obligations of adoptive children and natural children are recognized are the same, there should be strict guidelines on the application of the exclusion of the death penalty. Besides, it is necessary to review legal documents with relevant regulations and adjust accordingly, to avoid different regulations among law branches, causing difficulties for applying the law.

*Third,* concerning the death penalty exclusion. The exclusion of the death penalty as provided by law in Vietnam, as analyzed above, is understood to include the non-application of the death penalty and the failure to enforce the death penalty. However, most of the International Agreements to which Vietnam is a signatory and international law stipulating that the exclusion of the death penalty for pregnant or nursing women is failure to execute the death penalty. Thus, the exclusion of the death penalty in Vietnamese law is broader. However, according to the author of the article, the provision on the scope of the exclusion of the death penalty as mentioned earlier will make it challenging to investigate, prosecute and adjudicate. Moreover, it will be easy for cases with foreign elements to cause confusion in selecting the handling plan. Therefore, to ensure humanity but still meet the needs of settlement and integration, the scope of the exclusion of the death penalty should be narrowed down to the non-execution of the death penalty.

Last but not least, the provisions that “If a woman is pregnant or nursing a child under 36 months old, she shall be postponed until the full 36 months of age” should be amended to the direction of expanding the applicable beneficiaries and further specifying the applicable conditions. The above provisions can be amended as follows: “A pregnant

woman or someone nursing a child under 36 months old is postponed until the child reaches 36 months of age. In case the fetus dies before birth, the postponement shall be full (06 months) from the date of knowledge that the fetus dies; where a child dies before the age of 36 months, postponement is full (three months) from the child's death".

## 5. CONCLUSIONS

The exclusion of the death penalty for pregnant or nursing women ensures the humanitarian principle of the law and ensures human rights for women. Women, children - are the largest group of people at high risk of human rights vulnerability. However, the reality proves that this regulation still has certain loopholes that the subjects can take advantage of to avoid the punishment of the law. It affects the respect of law, causes confusion in public opinion, and adversely affects society's thinking. Therefore, it is thought that the legislature and law enforcement agencies need to have a more multidimensional view on this issue to be able to soon come up with practical solutions and avoid missing criminals.

Regulations on applying favorable regulations to offenders who are pregnant women or women nursing children under 36 months old is one of the criminal and lenient policies of the Party and State. However, to ensure the uniform application of this institution to offenders, it is necessary to strictly regulate regulations, ensure compliance, comprehensively adjust and ensure feasibility. Therefore, regulations related to this institution need to be amended to expand the relevant subjects and ensure stricter application conditions.

## REFERENCES

1. Cao Thi Oanh, Le Dang Doanh, Scientific Comments: *Criminal Code of 2015*, Labour Publishing House, Hanoi, 2016.
2. Hanoi Law University, Vietnamese Criminal Law Text Book, People's Police Publishing House, Hanoi, 2016.
3. National Assembly of the Socialist Republic of Vietnam, *Penal Code (2015)*.
4. National Assembly of the Socialist Republic of Vietnam, *Criminal Procedure Code (2015)*.
5. National Assembly of the Socialist Republic of Vietnam, *Law on Execution of Criminal Judgments (2010)*.
6. National Assembly of the Socialist Republic of Vietnam, *Adoption Law (2010)*.
7. Nguyen Ngoc Chi, 'Some thoughts on the death penalty in Vietnam's Criminal Law', (2012) 28 (1) *VNU Journal of Science: Legal Studies* 42.

8. Nguyen Ngoc Chi, Le Lan Chi, *Vietnamese Procedure Law Text Book*, Vietnam National University Publishing House, Hanoi, 2019.
9. Nguyen Van Lam, *Institutional shortcomings apply to pregnant offenders or nursing mothers under 36 months old*, <https://tapchitoaan.vn/bai-viet/phap-luat/bat-cap-ve-che-dinh-ap-dung-doi-voi-nguoi-pham-toi-la-phu-nu-co-thai-hoac-phu-nu-dang-nuoi-con-duoi-36-thang-tuoi>, accessed 03/2021.
10. The Arab Charter on Human Rights (ACHR) (2004).
11. The African Charter of Child Rights and Welfare (1999).
12. Tran K, Vu C.G., 'The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry' (2019) 9 (56) *Societies* 2.
13. Tran Thi Hong Le (2015), *Elimination of the death penalty for pregnant women and nursing children in the world and Vietnam*, [http://noichinh.vn/nghien-cuu-trao-doi/201504 / The-pictures-images-from-pregnant-pregnant-women-on-the-world-Vietnam-297550 /](http://noichinh.vn/nghien-cuu-trao-doi/201504/The-pictures-images-from-pregnant-pregnant-women-on-the-world-Vietnam-297550/)
14. Tran Thi Hong Le (2016), *Provisions on the protection of women's rights in the Vietnam Penal Code and proposed completion*, *Journal of People's Police Education* No. 80.
15. United Nations General Assembly, *Convention on Civil and Political Rights (1976)*.

# DEATH PENALTY AND THE RELATION WITH LIMITATION OF RIGHTS UNDER VIETNAMESE LAW

Quynh Mai Le<sup>1</sup>, Thuy Hang Tran<sup>2</sup>

**Abstract:** Despite the controversy over abolishing the death penalty, it continues to be used in many Asian countries, including China, Vietnam, Singapore, Indonesia. This trend raises challenges to exercising the right to life when the Court is empowered to decide the death penalty to take a person's life when it meets the conditions required by law and in case of necessity. This article will focus on clarifying the following contents: The first part deals with an overview of the international law on the death penalty, illustrating that Vietnamese laws have similarities with international law, and briefly discusses the death penalty in Vietnam; the second part considers the death penalty approach as a measure of limiting under the 2013 Vietnamese Constitution, the death penalty is used to limit the right of life; the third part introduces recommendation to improve the Vietnamese law on the death penalty in terms of rights restriction measures.

**Keywords:** Death penalty, Rights limitation, Vietnamese criminal code, human rights.

## 1. INTRODUCTION

The death penalty is the most severe punishment in the State's punishment system, depriving a fundamental right, the right to life. In each country's criminal law, the death penalty exists as an objective phenomenon since it is the means for society to defend the common good against the violation of its existing conditions. However, in human history, there has been much debate about this particular punishment. Some countries believe that the death penalty is cruel, with no deterrent effect. Maintaining it has no effect on reducing crime, including particular serious crimes. The death penalty cannot be corrected when judicial mistake would happen. These countries have abolished the death

---

1 Lecturer, Faculty of Law, People's Security Academy)

In partial fulfilment of the requirements for the Doctor of Philosophy degree (the doctoral thesis titled "Pháp luật về giới hạn quyền con người, quyền công dân ở Việt Nam hiện nay - The law on limitation of human rights and citizens' rights in Vietnam today" that PhD. Candidate Quynh Mai LE is working on at School of Law, Vietnam National University Hanoi.

2 Lecturer, Faculty of International Law, Hanoi Law University

penalty.<sup>1</sup> In other countries, the death penalty is seen as a necessary means of punishing people who commit severe offenders.

From a human rights perspective, the death penalty is associated with two fundamental issues of human rights: the right to life and the protection against cruelty and inhumanity. However, the right to life is a non-absolute right.<sup>2</sup> Therefore, the determination of the right to life must satisfy the following conditions: required by law; applied in necessary cases; in a procedural due process; proportionality. Even though the death penalty is still kept as an exception or limitation of the right to life, it has gradually reduced its application scope in many countries laws.<sup>3</sup> The following provisions of international law show that the abolition of the death penalty is the goal of international human rights standards.

## 2. LAW ON THE DEATH PENALTY

### 2.1. The Death Penalty under International Legal Norms

In the 1948 United Nations Declaration of Human Rights (UDHR), “everyone has the right to life” and “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>4</sup> The UDHR does not address the death penalty, nor does it explicitly mention that the death penalty is an exception to the right to life.<sup>5</sup> The arguments over the adoption of the UDHR show that it should not be understood that no declaration means there is a limit to the right to life.<sup>6</sup> Although the UDHR does not establish binding obligations, it provides the International Covenant’s normative framework on Civil and Political Rights (ICCPR) and three other Regional Human Rights Conventions in Europe, the Americas, and Africa. These documents (except the African Charter) provide for the right to life and strict protections if the death penalty is applied.

---

1 From 2018, 142 countries have abolished the death penalty (in law and practice), only 56 countries still maintain and apply the death penalty in their legal systems <https://www.amnesty.org/en/latest/news/2019/04/death-penalty-facts-and-figures-2018/>.

2 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6 (1).

3 Article 6 of the ICCPR implies the death penalty as an exception to the right to life. Still, it lists detailed safeguards and limitations for applying or enforcement of the death penalty.

4 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 3, art 5.

5 The debate in the Third Committee of the United Nations General Assembly when the UDHR adopted it in 1948 clarified this matter. In the manuscript, John p. Humphrey issued in 1947 noted the right to live with the content that “can only be denied for those who have been convicted under the law on certain offenses. the death penalty” but Eleanor Roosevelt suggested that they should not be included because the movement to eliminate the death penalty was underway.

6 Williama.Schabas, *The abolition of the death penalty in International law* (2d ed, Cambridge 1997), pp. 35-40.

Article 6(1) of the Convention on Civil and Political Rights, 1966 (ICCPR) concretized Article 3 UDHR, under which “everyone has an inherent right to life. This right must be protected by law. No one can be arbitrarily deprived of his life”. However, this regulation shows that, although the right to life is supreme and protected even in the State of emergency (Article 4 ICCPR), the right to life is not absolute - the request is not restricted/limited in all circumstances). Because when it is proved that the deprivation of life was not arbitrarily, the death penalty is still considered legal. Moreover, Article 6(2) of the ICCPR also stipulates that “In countries which have not yet abolished the death penalty, only the most serious crimes are allowed...” Although the ICCPR’s Second Optional Protocol on the Elimination of the Death Penalty in 1989, although encouraged by the United Nations members (by December 2018, 86 countries ratified the Protocol), but did not have to be required, which is optional by member states. There is also some debate among scholars worldwide that Article 6 of the ICCPR imposes a Member State’s obligation to abolish the death penalty, as it is under Article 7 of the ICCPR: no one can be cruelly punished.<sup>1</sup> The debate among nations over the extent of the phrase “most serious crimes,” including what kind of crime can be sentenced to death, is still ongoing. In 1996, in the document “Safeguards guaranteeing protection of the rights of those facing the death penalty” Resolution 1996/15 of the Economic and Social Council (ECOSOC) explain the concept of “the most serious crimes” that “... *capital punishment may be imposed for only the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences*”. This regulation was narrowed down and reiterated in the General Comment No.36 of the United Nations Human Rights Commission, that “*The term “the most serious crimes” must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing...*”<sup>2</sup>. Thus, the death penalty is considered an exceptional measure but does not include economic crimes, corruption crimes, political crimes, drug crimes without causing fatal consequences.

The 1950 European Convention on Human Rights (ECHR) incorporates the death penalty and the right to life in Article 2(1) “The right of individuals to live is protected by law. No one will be deprived of his life unless there is a sentence to convict him which is regulated by law...”. By the time the ECHR was enacted, the death penalty was not considered a violation of international standards. Then, through the case of Al-Saadoon and Mufdhi suing the UK, the member states of the Council of Europe have,

1 Roger Hood, *The death penalty and human rights*, (Reference book “Right to life and the death penalty,” (National Political Publishing House, Hanoi 2015), pp. 84-108.

2 UNHRC (2019), *General comment no. 36, Article 6 (Right to Life)*, CCPR / C / GC / 35 para 35 <https://www.refworld.org/docid/5e5e75e04.html>, accessed 19 February 2021.

in fact, completely abolished the provision on the death penalty.<sup>1</sup> The member states of the Council of Europe have, in practice, completely abolished the provision on the death penalty. Through this case, the European Court of Human Rights has decided to prohibit the death penalty in all cases.<sup>2</sup> Nevertheless, ECHR also leaves space to provisions on the exploitation of the right to life in exceptional cases when it results from the use of force not exceeding the total points necessary to defend or protect another person due to the suspect's arrest fugitive or to suppress a riot.<sup>3</sup> In the 1995 *Mc Cann v. UK* case, the European Court of Human Rights also stated that this exception does not include situations where intentional murder is allowed. However, these situations allow "the use of force," which can lead to deprivation of life but not beyond "necessary cases."<sup>4</sup> After the above incident, the countries in Western Europe stopped using the death penalty (even when it is legally recognized by law); by 1980, abolishing the death penalty became the standard human right in Western Europe.

The UDHR approach is equally recognized in the 1948 American Declaration of the Rights and Duties of Man, but it does not explicitly mention the right not to torture.<sup>5</sup> The American Convention on Human Rights (ACHR) was ratified in 1969 (in effect since 1978). It used Article 6 of the ICCPR as a regulatory framework to tighten the death penalty's use and affirm that the death penalty cannot be re-applied after it has been repealed. In 1990, the Americas issued the Protocol on the Abolition of the Capital Penalty, closely resembling the Second Protocol of the ICCPR. Among American nations, the United States retains the death penalty but establishes restrictions when applying the death penalty. In 1977, the US Supreme Court determined the death penalty unconstitutional when applied to the rape of an adult woman when the victim was not killed.<sup>6</sup> In 2002, the Supreme Court determined that executing the death penalty on mentally disabled people was a violation of the 8th Amendment and required a process to assess cognitive capacity.<sup>7</sup> In March 2005, the US Supreme Court declared the death of juvenile offenders unconstitutional.<sup>8</sup>

African Charter on Human and Peoples' Rights (African Charter), adopted in 1981 (entered into force 1986), also protects the right to life but does not refer to the death

---

1 *Al-Saadoon and Mufdhi v. the United Kingdom* (App no.61498/08) ECHR 02 March 2010 pp.116.

2 *Al-Saadoon and Mufdhi v. the United Kingdom*, pp.120.

3 ECHR art 2(2).

4 *McCann and Others v. the United Kingdom* (App no 18984/91) 2 September 1995, pp. 148.

5 American Convention on Human Rights (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969) (ACHR) art 1.

6 *Oker v. Georgia* (1977) 433 US. 584.

7 *Atkins v. Virginia* (2002) 536 US. 304.

8 *Roper v. Simmons* (2005) 543 US 551 (*Supreme Court of Missouri*).

penalty as an exception or limitation to this right.<sup>1</sup> There is also little research to explain the right to life under the African Charter. From the fact that African countries still use the death penalty, such as Nigeria, Egypt, Kenya..., it can be understood that the African Charter does not prohibit its application of the death penalty. Recently, however, many countries in Africa have abolished the death penalty (in 2013, 37 out of 54 African countries were abolitionists in law or practice),<sup>2</sup> which will affect the interpretation of the right to life under the African Charter soon. The African Union is now considering an additional protocol to the African Charter on Human and Peoples' Rights on abolishing the death penalty.

## 2.2. Debates about the death penalty in Vietnam

Researching the history of the death penalty in Vietnamese criminal law from 1945 shows that Vietnam tends to gradually eliminate some types of crimes where the sentence is applicable. Suppose the 1985 Penal Code (the first Penal Code of Vietnam) provided 44/216 articles capable of applying the death penalty. In the 1999 Penal Code, there were 29 articles; The 2009 criminal revision Code eliminated eight offenses of not using the death penalty.<sup>3</sup> The 2015 Penal Code, amended and supplemented in 2017, eliminated applying the death penalty for seven crimes.<sup>4</sup> In the 2015 Penal Code: there are still 18/314 crimes of even applying the death penalty.<sup>5</sup> The death penalty is a unique sentence imposed upon people committing severe crimes.<sup>6</sup> Vietnamese Criminal Code 2015 listed the criminal groups that apply the death penalty, including crimes offenses against national security,

1 African Charter art 4.

2 Ivan Šimonović, "Africa and the death penalty: Time to let go!", <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16751&LangID=E>> accessed 27 March 2021.

3 Eight offenses with the death penalty have been eliminated: Rape; Crime of fraud to appropriate property; Crime of smuggling; Crime of making, storing, transporting, and circulating counterfeit money, checks, bonds; Organizing illegal use of narcotics; Crime of appropriating airplanes, ships; Crime of giving bribes; Crime of sabotaging military weapons and military-technical means. In 2009, the criminal code also contained 22 crimes with the death penalty. There are 13 kinds of crimes in which the defendants are sentenced to death. Murder, possession, transportation, illegal trading, appropriation of narcotics, rape of children are the offenses subject to the death penalty.

4 Including crime of robbery of property; Crime of production and trading in counterfeit goods is food, food, food additives; Illegally possessing narcotics, illegally appropriating narcotics; Crime of destroying works, facilities or means important to national security; Crime of fighting orders and surrendering to enemies.

5 Treason against the country (Article 108); espionage (Article 110), terrorism against the people's administration (Article 113); crime of damaging material and technical facilities of the Socialist Republic of Vietnam (Article 114); murder (Article 123); rape against people under 16 years old (Article 142); crime of manufacturing and counterfeit trading products as curative medicines and preventive medicine (Article 194); crime of illegal transportation of narcotics (Article 250); terrorism (Article 299); embezzlement (Article 353); accepting bribes (Article 354); crime of undermining peace, causing a war of aggression (Article 421); crimes against humanity (Article 422); war crimes (Article 423).

6 Vietnamese Criminal Code art 40.

crimes offenses against human life, drug-related crimes, corruption-related crimes, and some other severe crimes (Article 40). In Vietnam, data related to the death penalty are under the scope of state secret protection. However, the execution is conducted publicly and under the Criminal Procedure Code 2015.

The death penalty in Vietnamese law has also created much debate about whether to keep or abolish criminal law because of its multidimensional impact. There are two views on the death penalty in Vietnam: (1) abolishing the death penalty; (2) sustaining the death penalty in certain crimes.

With the group of views to abolish the death penalty, it is argued that: Human nature is wrong, and Judges can also be unjust (in theory).<sup>1</sup> Human mistakes need to be overcome, but the death penalty cannot help offenders overcome them. The death penalty is inhuman and does not deter offenders, and is ineffective in reducing crime, including serious crimes. However, some believe that the death penalty should be maintained because the most crucial factor is to consider the “danger to society” of crime. This is the most fundamental sign of corruption, which determines the other symptoms of crime. The punishment must be commensurate with the danger to society. The humanitarian death penalty protects the lives and interests of the majority in society when used to punish offenders (the minority).<sup>2</sup> The death penalty is necessary to punish those who commit a severe crime and are judged to be incapable of reform. Proponents of the death penalty upholding have also acknowledged the need to narrow the scope of the death penalty charges and find a way to execute the death penalty without pain for those subjected to it.

In the context of Vietnam’s deeper international integration, it is necessary to amend the Penal Code towards the gradual reduction of the death penalty, which is in line with the general trend of the world’s progressive judiciary gender. However, maintaining or abolishing the death penalty is an important issue, which must be expressed through direct democracy or indirect democracy. The people themselves will express their wishes about whether it is necessary to maintain the death penalty or abolish it. Therefore, it is necessary to have a survey to determine the views of the presidents, researchers, and especially those working in the judicial system of Vietnam to see whether or not the death penalty is required. If so, what severe crime should be committed?

There are the arguments in Vietnam that the death penalty should not be applied to drug crimes and certain other crimes without the purpose of murder because these

---

1 Dinh The Hung, “*The death penalty in the Vietnam Penal Code*” (2018) <<https://tapchitoaan.vn/bai-viet/thoi-su/ve-hinh-phat-tu-hinh-trong-blhs-viet-nam>> accessed 2 February 2021.

2 Nguyen Ngoc Chi, *Some thoughts on the death penalty in Vietnam Criminal Law*, Journal of Science, Hanoi National University, [2012] JL 28.

resulted from the interpretation of the United Nations Human Rights Commission in its General Comment No. 36 2018, Vietnamese law does not satisfy the conditions for severe crimes under Article 6(2) ICCPR. UNHCR determined that crimes that do not directly and intentionally cause death, though severe, cannot be justified by applying the death penalty under Article 6 of the ICCPR. The death penalty reduction for certain crimes and only applies to serious crimes related to intentional murder. However, based on the complexity and diversity of drug crimes in which adequate punishment is required, Vietnam's criminal law still maintains the death penalty as a tool to exercise state power. Although many countries have not recently sentenced the death penalty in practice (de facto), such as Laos, Myanmar, those countries are also considering that when abolishing the death penalty in the legal system, how does it work against criminal trends and society?

The authors support the maintenance of the death penalty because, from international law provisions on the right to life and the death penalty show, there is no statement that a country recognizes the death penalty synonymous with human rights violation. Besides, we cannot take a one-sided assessment that the death penalty is the demeaning of human dignity. When Vietnam joined the ICCPR, Vietnam has strictly complied with the commitments in Article 6(2) of the ICCPR when stipulating that the death penalty applies only to severe crimes.<sup>1</sup> States will determine for themselves which crimes are "grave" to impose adequate penalties and to protect higher interests. This is the internal affairs of a country.

### **3. LIMITATION OF RIGHT AND THE RELATION WITH THE DEATH PENALTY**

The content of the death penalty from the perspective of restricting the right to life refers to the issue of "whether the state agency has an appropriate reason to take a person's life or not"? After that, the judiciary needs to have an appropriate due process to show "good cause." This section analyzes two contents: (1) The death penalty's application is whether the right being deprived is fundamental. If this were a fundamental right, the State would have to bear the burden of stripping it or removing the death penalty itself. (2) If it is not a fundamental right to consider the consequence of a request's restriction, then conditions for limiting the right should be considered.

#### **3.1. Is the right deprived fundamental?**

Fundamental rights are understood as actual values important to people, defined in the national Constitution (declaration of national rights) or expressed in the proceedings.

---

<sup>1</sup> According to Article 40 Vietnam Criminal Code, "Death penalty is a special penalty only applicable to persons committing particularly serious offenses belonging to one of the group of crimes infringing upon national security and human life, drug-related crimes, corruption and a number of other particularly serious crimes prescribed by this Code".

Public institutions protect fundamental rights because the protection of basic rights is essential to our society. Rights are accurate when they are exercised, that is, protected from arbitrary punishment. If the Court is not impartial, its decisions may be arbitrary.

The 2013 Vietnamese Constitution does not specify which rights are fundamental. However, based on Chapter 2 titled, “Human rights, *fundamental rights* and obligations of citizens,” it can be understood that the rights in Chapter 2 are fundamental. Nevertheless, through the judicial activity, the Court will affirm which right is fundamental right based on the provisions of law (the Vietnamese Court has no right to explain the Constitution). The Courts shall recognize which rights are fundamental when making a decision. Factors that help the Court in determining rights are fundamental include:<sup>1</sup> (1) the specificity of which the right is granted; (2) the history and traditions of the right to be affirmed; (3) whether rights are related to dignity; and (4) the distinction between absolute and relative rights.

- *Specificity*

The Court will determine the existence of a right through a regulation that describes explicitly a right or the content implying a right in legal documents. From the contents mentioned in the 2013 Constitution of Vietnam, there are no laws that suggest that an entity has the right to deprive another person’s property or life. For example, the ownership of property that has been taken away for legal reasons? The 2013 Constitution has affirmed in the case of “... the State requisition or requisition with compensation at market prices”.<sup>2</sup> When searching for regulations on the right to be deprived of the right to life, such as the right to euthanasia or abortion in Vietnamese law, it shows that euthanasia has never been recognized in Vietnamese law, yet considered human rights. Vietnamese law only prohibits illegal abortion.<sup>3</sup> It is against the law for one person to conduct an abortion without the health authorities’ permission. Still, there is no prohibition against abortion for family planning (to ensure that each family should only have 1 to 2 children).<sup>4</sup> Vietnam’s lawmakers and judiciaries fear that the right to euthanasia can be exploited when allowed because when the provision of “the right to choose a humanitarian death” becomes a “right commits suicide with the help of others.” Therefore, the Court will find no fundamental right to allow one person to be deprived of another’s rights.

---

1 Kevin M. Barry, “Death Penalty and the Fundamental Right to life [2019] 60 BCL <<https://lawdigitalcommons.bc.edu/bclr/vol60/iss6/3>>, accessed 19 February 2021.

2 Vietnam Constitution 2013 art 32.

3 Vietnam Criminal Code 2015 art 316.

4 Vietnamese Family Planning Law 2018, Article 7 of Vietnam’s Population Ordinance 2003, amended and supplemented in 2008.

*- Historical and traditional elements of the right*

Traditional factors (customs) and practices are flexibly applied in the Court, and it is not a compulsory principle. Vietnamese law stipulates explicitly that the application of customs (tradition) must not contravene the regulations set out in the law (usually applicable to moral rights and property rights in the Civil Code). Besides, the Vietnamese Constitution provides that judges and assessors “obey only the law” when adjudicating.<sup>1</sup> As such, the Court cannot invoke historical and traditional factors to determine whether or not the right to deprivation exists.

*- Dignity*

When making a right a fundamental right, lawmakers value the intrinsic value of a right as a human right and protect that person’s freedom from personal discrimination or humiliation. However, the element of “dignity” is not clearly defined in the content law or the procedural law in Vietnam. The Court will not invoke this element in cases involving individual rights.

Rights related to human dignity and the aspect of being deprived of as a right of euthanasia are not mentioned in Vietnamese law. Vietnamese law recognizes the right to marriage of homosexual people, the right to abort under the ways of “not admitting” or “prohibiting,” for example, “The State does not recognize marriages between people of the same sex.”<sup>2</sup> Alternatively, prohibiting behaviors that prevent “family planning practices.”<sup>3</sup> Historically, Viet Nam has recognized that abortion is the right of women when done on-demand, without limitation, and uses the word “forbidden to marry” between people of the same sex.<sup>4</sup> These provisions are the basis for state agencies to deny the exercise of the right of homosexuals to marry or not to allow euthanasia without explicitly explaining whether or not it is related to the “dignity” of people.

*- Negative and positive rights*

Distinguishing between an absolute or relative right will strongly influence whether an individual’s rights are taken away. When defining a right is fundamentally not directed towards an instrument requiring the State to enjoy the values of rights, but a “shield” for requests from the effects of state power. When determining that the right not to be deprived, but specifically the right to life is the absolute right, then the defendants are not sentenced to death - killed by the State Agency. The Vietnamese Constitution does

---

1 Vietnam Constitution 2013 art 103 (2).

2 Law on Marriage and Family in Vietnam 2014 art 8 (2).

3 Vietnam Population Ordinance năm 2003, amended and supplemented in 2008 art 7 (1).

4 Vietnam Law on Marriage and Family 2000 art 10.

not have a precise regulation on absolute or relative rights; all rights can “be limited,” including the right to life.<sup>1</sup>

### 3.2. The limitation of the right to life - the death penalty

As analyzed above, the right to be deprived is not a fundamental right. This result turns the study of deprivation into a means of rights limitation.

The right to life or, more precisely, the right not to be arbitrarily deprived of one’s life is guaranteed under UDHR and ICCPR<sup>2</sup>. ICCPR provides, “*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*”.<sup>3</sup> It means that ICCPR not only guarantees everyone the right to life but also recognizes the possibility that capital punishment may be lawfully and regulate the circumstances in which the death penalty is not arbitrary. It is generally accepted that international law has not yet prohibited the death penalty. The death penalty is an unusual punishment, the only exception to the restriction of the right to life.

In Vietnam, everyone has the right to life, and no one may be deprived of life in contravention of the law.<sup>4</sup> However, according to Article 14.2 of the Constitutional Vietnam 2013, for the common good and in cases of necessity, all rights should be limited. Therefore, the right to life is not an absolute right, which may be restricted under the law and in necessary cases for national defense, national security, social order and safety, social ethics, community health.<sup>5</sup> This means that the above circumstances under which a person may be legal and non-arbitrarily deprived of their lives. In that case, the restriction of rights to life ensures the State’s legitimate interests and ensures the effective exercise of other rights.<sup>6</sup> However, it must be understood that the application of the death penalty has an element of *arbitrary*, then the death penalty is unlawful in all cases.

The arbitrary imposition of capital punishment that leads to a violation of the right to life is determined to include the following conditions: (i) imposing the death penalty, which does not satisfy the limitation of conditions on the right to life. If such limitation on the right to life cannot be met, the death penalty should not be imposed; (ii) the defendant was not heard by a fair trial or was not guaranteed fair trial rights in the proceedings (such

---

1 Vietnam Constitution 2013 art 14 (2).

2 UDHR Art 3, ICCPR art 6 (1).

3 ICCPR art 6 (1).

4 Vietnam Constitution 2013 art 19.

5 Vietnam Constitution 2013 art 14 (2).

6 Le, Q. M., Dang, M. T, ‘Limitation on human rights in Vietnam: constitutional implications and enforcement perspective,’ *In Asian Constitutional Law Recent Development and Trends* (Vietnam University Publishing Hanoi, Hanoi 2019), Vol 2.

as the right to legal assistance and proper defense, the right to appeal to a higher judicial body, the right to seek pardon or commutation).

Ensures the constitutionality and legality of the application of the death penalty, the judicial should first consider the constitutionality of the provisions limiting the right to life in Article 14(2) of the Vietnam Constitution 2013, and some other essential regulations must be observed in any proceedings that lead to the application of the death penalty, including, the restrictions on the application of the death penalty (Article 6 ICCPR, Article 40 of the Vietnam Penal Code 2015) and the fair trial rights. The specific conditions include the followings:

*- According to the law*

Rights may not be limited unless prescribed by law.<sup>1</sup> Law is a document promulgated by the National Assembly, not sub-law documents or documents containing legal regulations enacted by the Government, which are executive agencies. The death penalty is specified in several crimes in the 2015 Penal Code, issued by the National Assembly. Accordingly, there are 18/314 criminals defined in the Penal Code with the death penalty.

*- In cases of necessity*

The 2013 Constitution stipulates that rights can be limited in necessary cases for national defense, national security, social order and safety, social morality, and community well-being. More specifically, about the necessary cases to limit the right to life, the 2015 Vietnam's Criminal Code defines some particularly extremely serious criminal groups under which a person can be subject to the death penalty (Article 40). These are criminal groups that, when implemented, will have an impact or cause severe consequences on the survival of the regime, national security (for crimes that infringe national security), social order, and safety (for drug-related crimes, corruption-related crimes), the rights and interest of other people (crimes that infringe human life). Among the conditions that limit the death penalty, the "*only apply the death penalty to severe crimes.*"<sup>2</sup> is the most noticeable and creates the death penalty's scope in other countries.

*- In a democratic society*

The ICCPR has set out the conditions on who is not allowed to apply the death penalty and the procedure to apply for parole or change the sentence. Vietnam's Criminal Law also stipulates the conditions to restrict the death penalty's application, including<sup>3</sup> those who are not authorized to apply the death penalty and conditions related to appeals

<sup>1</sup> Vietnamese Constitution 2013 art 14 (2).

<sup>2</sup> Vietnam Criminal Code 2015 art 40.

<sup>3</sup> ICCPR art 6(2); Vietnam Criminal Code 2015 art 40.

and parole procedures. These factors ensure that the limitation of the right to life - the death penalty applies *in a democratic society*.

*The entity did not apply the death penalty.*

The Vietnam Criminal Law has also recognized cases of failure to execute the death penalty, including (i) pregnant women, (ii) women nursing children under 36 months old, (iii) persons aged full 75 years or more, (iv) a person who after being convicted, actively returned at least 3/4 of the embezzled property, took a fix, and cooperated actively working with authorities in detecting, investigating, handling crimes or making outstanding achievements, sentenced to death for property embezzlement or accepting bribes, (v) people sentenced to death receive the President's relief.<sup>1</sup>

*Conditions related to proceedings and the right to appeal to a higher judicial body<sup>2</sup>*

The current Criminal Code has removed the provision for the death sentence's execution immediately after the trial.<sup>3</sup> Before executing a death sentence, there should be special procedures to review and re-check the judgment to avoid irreparable errors. A separate process is provided for in the 2015 Penal Procedure Code for the case where the accused or defendants are investigated, prosecuted, and tried for crimes under the penalty framework with the death penalty to ensure that the death penalty is declared "justifiable." Such defendants and defendants must have defense counsels. If not, the investigating body, procuracy, or Court must appoint their defense counsel.<sup>4</sup> Another rule is that the first instance's trial panel has to be more than in other cases, including two judges and three jurors.<sup>5</sup> Suppose the defense counsel is absent from the court hearing due to force majeure or objective obstacles. In that case, the trial panel must postpone the court hearing.<sup>6</sup>

Suppose the defendant is subject to the death penalty. In that case, the law provides for considering the death penalty before the judgment's execution.<sup>7</sup> After the judgment takes legal effect, the case file must be immediately sent to the Chief Justice of the Supreme People's Court. The judgment must directly be sent to the Chief Procurator of the Supreme People's Procuracy for consideration and decision on the appeal whether or not according to cassation procedures, re-review (time limit for review is two months). The convicted person has 07 days from the effective date of the judgment to send his application to the

---

1 Vietnam Criminal Code 2015 art 40.

2 ICCPR art 6, art 14 (5).

3 Vietnam Criminal Procedure Code 1985 art 27.

4 Vietnam Criminal Procedure Code 2015 art 76.

5 Vietnam Criminal Procedure Code 2015 art 254.

6 Vietnam Criminal Procedure Code 2015 art 291.

7 Vietnam Criminal Procedure Code 2015 art 367.

State President. The death sentence is only enforced when the sentence is not appealed, and the application for parole is denied. The right to appeal or review to a higher court implies an opportunity for a complete re-assessment of all cases and an informed decision on it. Thus, denial of this right will violate the right to life due to the seriousness of the death sentence. When the right to appeal does not change the death penalty application, amnesty (pardon) or commutation is the last hope for a prisoner under the sentence of death. However, in practice, there is very little information as to the extent to which the right to seek amnesty or commutation is exercised because the process belongs to the list of classified national documents.

#### **4. RECOMMENDATION TO VIETNAM ON RESTRICTING RIGHTS WHEN APPLYING THE DEATH PENALTY**

*First, the regulations on the death penalty need to narrow down necessary cases.* The death penalty should only apply to certain types of severe crimes in the three groups of (i) crimes of invading or threatening the regime's survival, of the State, of the State, (ii) offenses killing human life, (iii) breaking world security and peace. This is also the trend of gradually decreasing towards the abolition of the death penalty in other countries. At a seminar in Vietnam in December 2018 on "*The possibility of Vietnam joining the Second Optional Protocol on the abolition of the death penalty under the ICCPR,*" Vietnam expressed its support for maintaining the death penalty, which is considered the most potent and most effective measure against some severe crimes. However, in the future, Vietnamese law will gradually narrow the death penalty scope, and it will be possible to abolish the death penalty.

*Second, Vietnam should protect people's right to life in criminal justice.* Although the death penalty is prescribed in several criminal code crimes, the criminal code is not clear and strict about applying the death penalty list. Therefore, the Court should also consider when declaring the death penalty and evaluating the possibility of replacing it with another penalty to provide opportunities for overcoming (if any) judicial mistakes.

*Third, Vietnam should improve its criminal law to regulate or relate to applying the death penalty.* Vietnam should add a provision that does not apply the death penalty to people with intellectual disabilities or severely limited capacity to act in Article 40 of the 2015 Penal Code because the possibility of this person's recidivism is very high short. This also demonstrates Vietnam's humanitarian policy and is suitable with the Resolution of the Human Rights Commission of 2005, which requires states not to declare or execute the death penalty against people with intellectual disabilities or mental. Vietnam needs to develop a process for determining intellectual competency standards to exclude from using this regulation to avoid judgment execution. The applied objects need to be determined in the direction that they are exceptional ones and in the case of "*necessity.*"

The law requires layers to evaluate and only apply the death penalty as a last resort after assessing the legality and rationality.

## CONCLUSION

In the context of international law on the right to life and the death penalty, global or regional treaties allow the death penalty as a limitation or exception to the right to life. That is a single limitation created by political compromise rather than the respect of rights. However, we should not assume that the abolition of the death penalty is not an international standard. Abolishing the death penalty can be regarded as an international standard since the enactment of the UDHR in 1948, followed by provisions on the application's limitations under the ICCPR in 1966. In the future, the abolition of the death penalty may be a customary practice in all countries. Vietnam's current criminal has narrowed the scope of crimes with the death penalty, more specifically the conditions to limit the death penalty to be applied. Moreover, for the first time, the 2013 Constitution stipulates the principle of limiting rights in Clause 2 Article 14<sup>1</sup> also contributes to ensuring that the application of the death penalty (if any) needs to be strictly followed to ensure the constitutionality (prescribed by law), proportional (in case of necessity: only for severe crimes), and in a democratic society.

## REFERENCES

1. Universal Declaration of Human Rights, 1948.
2. International Covenant on Civil and Political Rights, 1966.
3. European Convention on Human Rights, 1953.
4. American Convention on Human Rights, 1969.
5. African Charter of human rights and the rights of peoples, 1981.
6. Vietnam National Assembly (2013), Constitution.
7. National Assembly of Vietnam (2015), Penal Code.
8. Vietnam National Assembly (2015), Criminal Procedure Code.
9. Nguyen Ngoc Chi, *Some thoughts on the death penalty in Vietnam Criminal Law*, Journal of Science, Hanoi National University, Journal of Law, (2012) 28 JS 42, 48.

---

<sup>1</sup> See more Le Quynh Mai, 'Limitation clause of human rights in the 2013 Vietnamese constitution'. *In Asian Constitutional Law Recent Development and Trends* (Vietnam University Publishing Hanoi, Hanoi 2019), Vol 1.

10. Dinh The Hung, '*The death penalty in the Vietnam Penal Code*,' [2018] <<https://tapchitoaan.vn/bai-viet/thoi-su/ve-hinh-phat-tu-hinh-trong-blhs-viet-nam>> accessed 2 February 2021.
11. Le Quynh Mai, '*Limitation clause of human rights in the 2013 Vietnamese constitution*. In Asian constitutional law recent developments and trends: Vietnam, Hanoi, sixth and 7th December 2019. Volume 1.
12. Le, Q. M., Dang, M. T, 'Limitation on human rights in Vietnam: constitutional implications and enforcement perspective,' *In Asian Constitutional Law Recent Development and Trends* (Vietnam University Publishing Hanoi, Hanoi 2019), Vol 2.
13. Ivan Šimonović, "Africa and the death penalty: Time to let go!," <<https://www.ohchr.org/en/NewsEventsPages/DisplayNews.aspx?NewsID=16751&LangID=E>> accessed 20 March 2021.
14. Kevin M. Barry, '*The Death Penalty and the Fundamental Right to life* [2019] 60 BCL Rev. <<https://lawdigitalcommons.bc.edu/bclr/vol60/iss6/3>> accessed 8 February 2021.
15. Trinh Quoc Toan, '*The death penalty institution in the Vietnam Criminal Law - Some complete recommendations*, Reference book "Right to life and the death penalty," (National Political Publishing House 2015).
16. William Schabas, '*The abolition of the death penalty in International law* (2d ed, Cambridge 1997).
17. Roger Hood, '*The death penalty and human rights*, Reference book "Right to life and the death penalty," (National Political Publishing House 2015).

### Case

18. *Al-Saadoon and Mufdhi v. the United Kingdom* (App no.61498/08) ECHR 02 March 2010.
19. *McCann and Others v. the United Kingdom* (App no 18984/91) 2 September 1995.
20. *Oker v. Georgia* [1977] 433 US. 584.
21. *Atkins v. Virginia* [2002] 536 US. 304.
22. *Roper v. Simmons* [2005] 543 US 551.

# LEGAL DEFENSE IN DEATH PENALTY CASES IN VIETNAM

A/Prof., Dr. Nguyen Ngoc Chi<sup>1</sup>

**Abstract:** The 2015 Criminal Procedure Code (CPC) aims to instill a strict, prudent procedure for death penalty cases to avoid the conviction of innocent people, with particular attention being paid to the right to defense of the accused throughout the criminal proceedings. Suppose the accused does not have a defender. In that case, the competent procedure-conducting agency must assign a defense counsel to ensure that the rights of the excused are exercised. Therefore, in practice, all death penalty cases have the participation of the defense counsel. However, the Vietnamese law, including the 2015 Criminal Procedure Code, the 2015 Lawyer Law and the 2015 Charter of the Vietnam Bar Federation (promulgated following Decision No. 1573/QĐ - BTP of the Ministry of Justice) hardly provide any standards, conditions as well as procedures for lawyers who participate in death penalty cases. As a result, any lawyers can defend in death penalty cases regardless of their qualification and competency, regardless of their level of experience and assertiveness. In many cases, this situation leads to inadequate legal defense even contributes to wrongful convictions where the death penalty is applied, which negatively affects many aspects of social life.

For this reason, this paper will address the following issues: (i) The necessity to have provisions on specific standards, conditions, procedures for lawyers to participate in death penalty cases in Vietnam; (ii) The main content of the provisions on standards, conditions, procedures for lawyers to participate in death penalty cases; (iii) Safeguard conditions that ensure these provisions on standards, conditions, procedures for lawyers to participate in death penalty cases are applicable in practice.

To resolve the issues mentioned above, the author focuses on using the human rights-based method and comparative law method to inform policies in the direction of developing provisions on standards, conditions, procedures for lawyers to participate in death penalty cases in Vietnam.

**Keywords:** defense counsel, death penalty cases, bar association, Statute on legal defense.

## 1. VIETNAMESE LAW ON CRIMINAL PROCEDURE FOR DEATH PENALTY CASES

The 2015 Criminal Code (revised in 2017 and came into effect on 01 January 2018) continues to acknowledge the death penalty as an eligible form of punishment in the

---

<sup>1</sup> School of Law - Vietnam National University, Hanoi, Vietnam.

system of punishments in Vietnam with a smaller scope of the application when compared to the previous criminal codes (1985 Criminal Code, 1999 Criminal Code). Several recent studies in Vietnam find that: *“Maintaining the death penalty in the current period is necessary. However, the scope of application of this punishment should be narrowed down”*.<sup>1</sup> Therefore, it is required for an appropriate legal procedure for death penalty cases to ensure objectivity, transparency, ensure the human rights of the accused, and prevent wrongful convictions in criminal proceedings. Based on this approach, aside from the general procedure for criminal cases, which has many breakthroughs for the first time in the criminal procedure law of Vietnam, such as acknowledging principles of “Assumption of innocence” (Article 13) and “Assurance of adversary in adjudication” (Article 26), the 2015 CPC also provides a specific procedure for death penalty cases. Accordingly, Article 268 of the 2015 CPC stipulates that the jurisdiction adjudicate death penalty cases belongs to the provincial people’s courts and military courts of military zones (for cases under the adjudication jurisdiction of the military court system). Based on the jurisdiction of the courts, the jurisdiction to investigate and prosecute death penalty cases also belongs to investigation agencies and People’s procuracies at the provincial level and of military zones. Procedural-conducting agencies at the district and regional level (for cases under the adjudication jurisdiction of the military court system) do not have the jurisdiction to settle death penalty cases. The 2015 CPC also provides the stricter procedure regarding cases where the accused is prosecuted for a crime with the death penalty as the highest applicable sanction. In particular, in criminal cases where the accused is prosecuted for a crime with the death penalty as the highest applicable sanction, then the participation of the defense counsel is compulsory, if the family of the accused does not request for a defense counsel, then the procedural-conducting agency must assign them a defense counsel (Article 76 of the 2015 CPC). The defense counsel must participate in all procedural stages, and the jury shall postpone the trial if the defense counsel is absent (Article 291 and 297); Defendants subject to the death penalty have the right to appeal for re-trial of the case according to the appellate procedure, and have the right to request the competent procedural agency to protest against the effective judgments or decisions, so that the case would be trial according to the cassation or reopening procedures; Regarding the execution of the death penalty, in addition to the general condition that requires for a legally effective judgment and a decision to execute the judgment issued by the court conducting the first-instance trial, the following conditions are required: a) When a death penalty judgment comes into force, the case file shall be promptly sent to the Chief Justice of the Supreme People’s Court and the judgment shall be immediately delivered to the

---

1 Nguyen Ngoc Chi, “Mot so suy nghi ve hinh phat tu hinh trong Luat Hinh su Viet Nam (Some opinions on the death penalty in the criminal law of Vietnam)” (2012) 28 *VNU Journal of Science - Legal Studies* 39, 43.

Chief Procurator of the Supreme People's Procuracy; b) After having finished reviewing the case file to make decisions on whether to file an appeal through cassation or reopening procedures or not, the Supreme People's Court shall have the case file sent to the Supreme People's Procuracy. In 01 months upon receiving the case file, the Supreme People's Procuracy shall return it to the Supreme People's Court; c) In 02 months upon receiving the case file, the Chief Justice of the Supreme People's Court and the Chief Procurator of the Supreme People's Procuracy must decide whether to appeal through cassation or reopening procedures or not; d) In 07 days upon the coming into effect of the judgment, the convicted can send a request for clemency to the President of Vietnam; đ) A death penalty judgment shall be executed if the Chief Justice of the Supreme People's Court and the Chief Procurator of the Supreme People's Procuracy do not appeal through cassation or reopening procedures. The convicted person does not send a request for clemency to the President of Vietnam. Suppose an appeal is filed against the death penalty judgment through cassation or reopening procedures but is rejected by the Council of Justices of the Supreme People's Court, who decide to keep the death penalty judgment. In that case, the Supreme People's Court shall promptly notify the convicted person so that they can send a request for clemency; e) If the convicted person requests for clemency, the death penalty shall only be executed when the President of Vietnam rejects the request for clemency (paragraph 1, Article 367 of the 201 provisions as mentioned above provisions of the 2015 CPC have internalized international standards on human rights in death penalty cases in particular and in criminal procedure in general in international conventions related to human rights that Vietnam is a member state.<sup>1</sup>

## **2. THE STATUS QUO OF LEGAL DEFENSE IN DEATH PENALTY CASES AND THE NECESSITY TO DEVELOP AND PROMULGATE A STATUTE ON LEGAL DEFENSE IN DEATH PENALTY CASES**

The right to defense is provided as a fundamental principle of the 2015 CPC: "The accused person has the right to defend himself, to seek defense from a lawyer or another person. Competent procedural authorities and persons shall notify, explain and ensure that the accused, victims and litigants fully exercise their right to defense, their legitimate rights and interests according to regulations of this Code." (Article 16). Based on this principle, for the first time, there is a whole chapter of the CPC solely dedicated to prescribing the rights and obligations of defense counsels and the mechanism to ensure the exercise of the right to defense in the proceedings to settle criminal cases, which has "contributed

---

<sup>1</sup> 1948 United Nations Universal Declaration of Human Rights; 1966 United Nations International Covenant on Civil and Political Rights; 1989 United Nations Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty and other relevant international covenants.

to enhancing the status of lawyers in society and legal proceedings as well as protecting their legal rights and interests; broadened the scope of powers and duties of lawyers based on specific, clear, transparent, easily comprehensible orders and procedures, ensuring the feasibility of these regulations, creating favorable conditions for lawyers to fully function and exercise their rights and duties when participating in legal proceedings”<sup>1</sup>. However, the Vietnamese law, including the 2015 Criminal Procedure Code, the 2015 Lawyer Law, and the 2015 Charter of the Vietnam Bar Federation, hardly provided any standards, conditions, and procedures for lawyers who participate in death penalty cases. As a result, any lawyers can defend in death penalty cases regardless of their qualification and competency, regardless of their level of experience and assertiveness. The situation in recent years shows that the majority of the persons who are accused of crimes and facing the death penalty are the poor, persons living in remote areas with complex conditions, persons with low levels of education, some are even illiterate, persons with poor understanding of the law concerning drug-related cases. As a result, many cannot afford to hire a lawyer, and often the person defending their legal rights and interests are defense counsels appointed by procedural-conducting agencies. Therefore the level of responsibility and capacity for legal defense is not exactly high. Even when the defense counsel is chosen, quality legal services supporting the accused who has to face the death penalty in legal proceedings are not guaranteed because there are no standards, criteria, nor conditions legalized by competent agencies or organizations on lawyers who participate in the death penalty cases. This situation leads to inadequate legal defense, in many cases even contributes to the wrongful conviction of innocent persons where the death penalty is applied, which negatively affects many aspects of social life, where justice and equality are not exercised, and the human right to life is violated.

Under this context, the Center for Legal Research and Services (LERES), School of Law – VNU has recently conducted a survey which asks the opinions and points of view of lawyers from the 05 bar associations in Hanoi, Hai Phong, Bac Ninh, Quang Ninh and Nghe An on whether it is necessary to have a specific statute on the representation of persons accused of crimes facing a possible death penalty. The survey received the participation of 181 lawyers from the 05 bar associations above, and the results are as follows: 58 people answered yes, that a specific statute is necessary, accounting for 32.04% of respondents; 51 people answered that it is unnecessary, accounting for 28.17%; 72 people chose not to answer this question which accounts for 39.77%. The same question asked, but the results are vastly different when the respondents are undergraduate and postgraduate students from School of Law - VNU: 114 over a total of 120 respondents

---

1 Nguyen Hoa Binh, *Nhung noi dung moi cua Bo luat To tung hinh su nam 2015 (New changes in the 2015 Criminal Procedure Code)* (National Politics - Truth Publishing House 2016) 181.

from this group answered yes, that a specific statute is necessary, accounting for 95%; 06 people chose not to answer this question, accounting for 5% and no one answered that it is unnecessary. Synthesizing the survey results from both groups – lawyers and law students, we see that the majority think that a specific statute on defending in death penalty cases is necessary, with the following corresponding proportions: 32,04% and 95% respectively, while 28.17% of responses from lawyers saying that it is unnecessary. All of these reflect the need to improve the quality of legal defense in death penalty cases under the context of international integration and judicial reform in Vietnam today.

The above survey results indicate that the introduction of a statute on legal defense in death penalty cases is a necessity arising from the requirement of the 2013 Constitution to recognize, respect, protect, and guarantee human rights<sup>1</sup>, from the practical need to settle death penalty cases, and especially from the requirement to improve the quality of lawyers participating in the criminal legal proceedings to settle death penalty cases. In addition, the establishment of a statute on legal defense in death penalty cases also demonstrates the commitment “to respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984”<sup>2</sup>, which require the Member States that still maintain the death penalty to provide, to create favorable conditions for persons facing the death penalty to have high-quality legal defense and legal aid services, and Vietnam is a member of these international treaties. “Judicial safeguards for those facing the death penalty are an issue of great concern to the international community. Key aspects of this issue include procedural requirements to ensure a fair trial, ensure the right of death row inmates to ask for clemency, the right of death row inmates to have adequate time to appeal and ask for clemency, humane treatment of death row inmates, ensure that the death penalty is not executed when a relevant legal procedure has not been done, ensure notification to judgment executors of the case, and notification to the death row inmate’s family and lawyer”.<sup>3</sup>

### 3. MAIN CONTENTS OF THE STATUTE ON LEGAL DEFENSE IN DEATH PENALTY CASES

Vietnam establishing a statute on legal defense in death penalty cases is indispensable in the development process of the country towards a state that espouses for a rule-of-law, in the process of national judicial reform towards “protecting justice, protecting human

---

1 Constitution of the Socialist Republic of Vietnam 2013, art 14(1).

2 UNGA Res 62/149 (18 December 2007).

3 School of Law - Vietnam National University, Hanoi, *Nhung dieu can biet ve hinh phat tu hinh (What you need to know about the death penalty)* (Labour and Social Publishing House 2010) 106.

rights and citizen's rights" (Article 2 of the 2015 CPC) in the context of international integration today. The issue is: with the conditions of judicial institutions in Vietnam, what should be included in the content of the Statute on legal defense in death penalty cases to guarantee that when issued, the Statute is practical, and is applied, enforced in legal proceedings to settle criminal cases in practice? To resolve this issue, aside from considering the internal needs and requirements of the country, it is also necessary to learn from the experiences of other countries.

Globally, it can be seen that in one way or another, under various forms of regulations on conditions, criteria for lawyers to participate, for the defense procedure in death penalty cases or guidance on legal defense in death penalty cases are often legalized in the form of a legal document of a competent agency or organization depending on the legal institutional characteristics of each country. In the United States, the "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" of the American Bar Association was issued by its House of Delegates in 1989, revised in 2003, and is the official document when lawyers participate in legal defense in death penalty cases. Aside from a part to explain terms used, it includes ten guidelines on Objective and Scope of Guidelines (Guideline 1); Adoption and Implementation of a Plan to Provide High-Quality Legal Representation in Death Penalty Cases (Guideline 2); Designation of a Responsible Agency (Guideline 3); The Defense Team and Supporting Services (Guideline 4); Qualifications of Defense Counsel (Guideline 5); Workload (Guideline 6); Monitoring and Removal (Guideline 7); Training (Guideline 8); Funding and Compensation (Guideline 9); Establishment of Performance Standards (Guideline 10). With these contents, not only does the "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" refer to standards for a lawyer to participate in the legal defense of death penalty cases, but it also focuses on the adoption and implementation of a plan to provide high-quality legal representation in cases where defendants have to face the capital punishment; on the defense process and mechanism for death penalty cases as well as on training and the mechanism to monitor the implementation of the defense process in death penalty cases.

Another notable example is China. Unlike the United States, in China, there are no guidelines on legal defense in death penalty cases applicable nationwide. However, the provincial bar associations can issue their document, which is to be applied within the scope of its county. The "Guidance on legal defense in death penalty cases of the Shanxi Provincial Bar Association of China" is one example. This guidance is intended for lawyers participating in defense of death penalty cases in Shanxi province, and the Shanxi Provincial Bar Association has the responsibility to interpret this guidance. This guidance was adopted after a thorough discussion at the plenary session of the Shanxi Bar

Association's Standing Committee. This guidance is practical from 28 May 2010 (Article 96 of the Guidance).<sup>1</sup> Aside from the general provisions such as principles and strategies, the Guidance focuses on the skills, process, and procedures for collecting, evaluating, and using evidence of lawyers in death penalty cases in different stages of the proceedings, especially at the trial.

Vietnam can take the two models above as reference points to learn from their experience and consider the specific characteristics of the country when developing a statute on legal defense in death penalty cases.

#### 4. CONCLUSION AND RECOMMENDATIONS

From the analysis above, developing a statute on legal defense in death penalty cases of Vietnam is necessary and should include the following principal contents:

*Firstly, on the scope of regulation of the Statute on legal defense in death penalty cases:* Arising from the requirement to ensure consistency for the legal system of Vietnam, based on the principle of legality, the Statute on legal defense in death penalty cases need to have a nationwide scope of application to ensure the highest quality of legal representation for all those facing the death penalty. At the same time, the Statute on legal defense in death penalty cases need to be applied at all stages of the criminal proceedings, started from the initiation of the case when a person is officially charged with a crime and have to face a possible death penalty or from when they are arrested or temporarily detained in the circumstance that they are arrested or detained, to the following stages: investigation, prosecution, adjudication and execution of the criminal judgment.

*Secondly, regarding the conditions and standards for lawyers to participate in the legal defense of death penalty cases:* Currently in Vietnam, other than the general conditions and standards for lawyers specified in the 2015 CPC<sup>2</sup>, the 2015 Lawyer Law<sup>3</sup>, there are no specific regulations on the standards and conditions for lawyers who participate in death penalty cases. Even the 2015 Charter of the Vietnam Bar Federation does not regulate this matter. The lack of regulations on conditions and standards for lawyers who participate in death penalty cases has resulted in the situation that any lawyers can defend in death penalty cases regardless of their qualification and competency, regardless of their level of experience and assertiveness. In many cases, this situation leads to inadequate legal defense even contributes to wrongful convictions where the death penalty is applied,

---

1 School of Law - Vietnam National University, Hanoi, *Bao ve cac nhom de bi ton thuong trong to tung hinh su (Protection of vulnerable groups in criminal justice)* (VNU Publishing House 2011) 199 - 231.

2 Vietnam Criminal Procedure Code 2015, art 72.

3 Vietnam Lawyer Law 2015, arts 10, 11.

which negatively affects many aspects of social life. Meanwhile, international human rights conventions require that defense counsels in death penalty cases be highly qualified, with rich practical experience, highly responsible, and assertive to represent persons facing the death penalty to ensure high-quality legal services are provided in the death penalty cases. In the survey of the Center for Legal Research and Services (LERES)<sup>1</sup>, when answering the question: “*Does legal defense in death penalty cases require for experienced lawyers or not?*”, the vast majority of respondents (166/181) said that having experience was necessary, even crucial, while only a few (13/181) disagreed and there are 02 people who did not express their opinion. This result affirms that setting conditions and standards for lawyers who participate in death penalty cases is highly needed. It is a necessary condition to ensure high-quality defense, to effectively support persons facing the death penalty throughout the criminal proceedings.

However, suppose most lawyers believe that legal defense in death penalty cases requires experienced lawyers (as in the cited survey)<sup>2</sup>. In that case, the results are contrary when they were asked the question, “*Does legal defense in death penalty cases requires a legal specialty certification?*”. Only 41/181 respondents agreed that legal specialty certification is needed. Up to 140/181 respondents said that lawyers do not need to have a legal specialty certification when participating in the legal defense of death penalty cases.<sup>3</sup> This result shows that lawyers in surveyed areas (05 provinces and cities) have not fully aware of the role of lawyers in assisting persons facing the death penalty and the requirement to ensure high-quality legal services in death penalty cases specified in international human rights conventions. Therefore, there is a gap in their understanding of the concept of “experienced lawyers,” which most of them believe were a requirement to participate in the legal defense of death penalty cases.

According to the above survey results, the development and promulgation of specific conditions and standards for lawyers who participate in death penalty cases need to be carried out in order to not only specify the concept of “experienced lawyer” but also to serve as legal standards and legal basis for lawyers to participate in the legal defense of death penalty cases.

Specific conditions and standards for lawyers who participate in death penalty cases that are often mentioned can be regrouped into 03 categories: (i) Conditions and standards required to obtain the lawyer license or a permit to serve as the defense counsel in death penalty cases issued by the authorized agency or organization such as having received

---

1 Survey “*Awareness and experience of lawyers in litigation after coming into effect of the 2015 Criminal Procedure Code*”, cited.

2 *ibid.*

3 *ibid.*

training on knowledge and skills in legal defense in death penalty cases, commitment to provide dedicated legal counseling services and high quality legal representation services in death penalty cases, etc; (ii) Conditions and standards required demonstrate qualifications of lawyers participating in death penalty cases such as having extensive knowledge and understanding of both substantive and procedural law related to the death penalty as a form of punishment, having managerial skills in negotiation of complex dispute issues, having legal research and analysis skills as well as the skill to draft documents related to dispute resolution; (iii) Conditions and standards on litigation skills required in the criminal proceedings of death penalty cases such as the skill to communicate with clients, investigation and collecting evidence skills, skills to prepare defense arguments, litigation skill at the trial, etc.

The above-mentioned specific conditions and standards for lawyers who participate in death penalty cases are determined by training courses (certifications), annual reports of lawyers on legal defense activities, and annual or non-annual lawyer assessment by competent agencies or organizations is based on the feedback from clients and society. These factors are considered when assessing whether a lawyer has experience in legal defense in death penalty cases or not, based on which the competent agency or organization will make a decision to issue a certificate for that lawyer to be able to participate as the defense counsel in death penalty cases. The assessment and determination of “experienced lawyer” are not only done only once for the issuance of a certificate to prove that a lawyer has satisfied the conditions and standards to participate in the legal defense of death penalty cases, but are also done yearly for annual lawyer assessment, if the lawyer does not meet such conditions and standards, they will be removed from the list of “experienced lawyers” and will not be eligible to serve as the defense counsel in death penalty cases.

*Thirdly, guidelines on evidence and procedure for lawyers who participate in the legal defense of death penalty cases:* A critical content of the Statute on legal defense in death penalty cases in Vietnam are guiding provisions on evidence and procedure for lawyers who participate in the legal defense of death penalty cases. These guidelines serve for the direction and strategy of legal defense and as a manual for lawyers to study and use regularly throughout the legal proceedings of death penalty cases. With this approach, the guidelines on evidence and procedure for lawyers who participate in the legal defense of death penalty cases provided in the Statute can be seen as a coach to assist lawyers anytime, anywhere when they participate in the legal defense of the death penalty cases.

In the survey of the Center for Legal Research and Services (LERES),<sup>1</sup> 181 lawyers are asked the question: “*What are the skills that need to be paid attention to when*

---

<sup>1</sup> *ibid.*

*participating in the legal defense of death penalty cases?"* (which respondents could only choose up to 03 options). The results are as follows: 139 respondents chose litigation skills at the trial (28.72%), 126 chose the skill to communicate with the accused who face the possible death penalty (26.03%); 90 chose evidence collecting skill (18.6%); 80 chose the skill to research the file of the case (16.53%); 49 chose the skill to draft defense arguments (10.12%). Thus, the lawyers who participated in this survey emphasized the skill to communicate with clients who have to face the death penalty. A possible explanation is that lawyers often face many difficulties in accessing their clients in death penalty cases due to legal barriers and a complicated procedure to meet and communicate with the accused facing the death penalty.

The development of the Guidelines on Evidence and Procedure for Lawyers Who Participate in the Legal Defense of Death Penalty Cases shall be based on the provisions of the 2015 CPC, the 2015 Criminal Code, the 2015 Lawyer Law, the 2015 Charter of the Vietnam Bar Federation and other relevant legal documents as well as based on the practical experience of lawyers in death penalty cases, and the experience of other countries in the world. Therefore, the Guidelines shall address the following issues: (i) Guidelines on detecting defects of incriminating evidence against the accused facing the death penalty such as unclear source of evidence, contradiction between evidences when compare collected evidences with those presented in the file of the Investigation Agency, counterfeit and forged written documents in the case file or existence of grounds to suspect that these documents have been forged or counterfeited, photographs or video tapes of physical evidence which do not accurately reflect the shape and nature of the original evidence, copy version of the evidence which does not correctly reflect the content of the original document, testimony given by a minor who has physical or mental disability, testimony which is based on subjective opinions and speculations, contradiction between testimonies, testimony which is acquired through illegal measures, written record of testimony which is inconsistent with the required legal formats, inconsistency between the content of the crime scene report and the actual situation at the crime scene, etc.; (ii) Guidelines on the criminal procedure for the accused facing the death penalty in the process to settle the case. The criminal procedure law of Vietnam divides the process to settle the case into rather distinct stages, which are: initiation of the case, investigation, prosecution, adjudication, and execution of the criminal judgment. Each stage corresponds with specific procedures according to the nature, characteristics, and mission of that stage. Thus the development of the guidelines in the Statute on legal defense in death penalty cases of Vietnam should also follow these stages of criminal procedure. In particular: At the initiation stage, guidelines for when noticing that the grounds used to initiate criminal proceedings against accused are not convincing, when there is a violation of the law in the

activities to initiate criminal proceedings; At the investigation stage, guidelines for when detecting a violation in investigation activities, especially in the collection of evidence, interrogation of the accused, in the procedure to apply preventive measures; At the prosecution stage, guidelines for when discovering inappropriate, inconsistent evidences or arguments of the Procuracy, which are not convincing considering the allegation made against the accused whom the lawyer represents; At the trial, guidelines for when there are violations of adversarial principles, open court principle and other provisions on court procedures, when there is a severe violation or deprivation of the rights of the defendant at the trial which are protected by the law, etc.; (iii) Guidelines on the skills of lawyers: skills to communicate with clients, skills to collect evidence, skills in litigation, legal defense skills at the trial, etc.

*Fourthly, regarding the promulgation and implementation of the Statute on legal defense in death penalty cases:*

Experience from other countries shows that most of the work to develop and promulgate statutes is carried out by associations, federations of law-practicing organizations. Therefore, the Vietnam Bar Federation shall be the body in charge of developing and promulgating the Statute on legal defense in a death penalty case. This Statute shall be developed with a board's participation consisting of heads of bar associations in 63 provinces and cities in Vietnam and the lawyer population with their practical experiences in legal defense in death penalty cases.

The Vietnam Bar Federation will be the unified agency to guide and implement the Statute on legal defense in death penalty cases nationwide, and at the same time inspect and monitor the implementation of the Statute of all bar associations and lawyers in order to detect and handle violations. The steering committees of bar associations shall organize for implementation, create necessary conditions for their lawyer to provide the highest quality legal services to persons facing the death penalty. Where there is evidence that a lawyer does not provide high-quality legal representation services, the Vietnam Bar Association and the steering committees of bar associations must take appropriate action to protect the clients' interests while having specific measures to handle that lawyer.

It is necessary to develop a training program for lawyers on litigation knowledge and skills in death penalty cases and specialized training such as on investigation and psychology to support lawyers participating in the legal defense of a death penalty case. Only those who obtain certifications from this training program can participate as the defense counsel in death penalty cases.

Today, legal defense for a person facing the death penalty can be done by one lawyer or a group of lawyers (numerous lawyers participate in the legal defense for a person

accused of a crime who faces the death penalty). However, this defense team is not specific provided as per the law but a group of random lawyers chosen by the client or their representative or by the client's family. They gather to protect the person facing the death penalty. Therefore, the Statute on legal defense in death penalty cases in Vietnam should stipulate that a defense team shall consist of at least 02 lawyers or above, where one member is the team leader, and there should be members from other fields of expertise in the team such as forensic psychology experts and investigation experts.

## REFERENCES

1. Nguyen Hoa Binh (2016), *Nhung no dung moi cua Bo luat to tung hinh sun am 2015 (New changes in the 2015 Criminal Procedure Code)*, National Politics - Truth Publishing House, Hanoi.
2. Nguyen Ngoc Chi (2012), "Mot so suy nghi ve hinh phat tu hinh trong luat hinh su Viet Nam (Some opinions on the death penalty in the criminal law of Vietnam)", *VNU Journal of Science - Legal Studies*, Volume No. 28, p.39-46.
3. School of Law - Vietnam National University, Hanoi (2010), *Nhung dieu can biet ve hinh phat tu hinh (What you need to know about the death penalty)*, Labour and Social Publishing House, Hanoi.
4. School of Law - Vietnam National University, Hanoi (2011), *Bao ve cac nhom de bi ton thuong trong to tung hinh su (Protection of vulnerable groups in criminal justice)*, VNU Publishing House, Hanoi.
5. United Nations (2007), Resolution No.62/149 on the abolition of the death penalty, dated 18/12/2007.  
See <https://undocs.org/en/A/RES/62/149> (last accessed on: 31/01/2021).
6. Center for Legal Research and Services (LERES), School of Law - Vietnam National University, Hanoi and United Nations Development Programme (UNDP) in Vietnam (2020), Survey "Awareness and experience of lawyers in litigation after coming into effect of the 2015 Criminal Procedure Code" conducted in the framework of the Project: "Phase 2 of Supporting Adversarial Principles of Criminal Justice in Vietnam: Improve Criminal Adversarial Knowledge for Law Students Based on Assessment of Litigation After Coming into Effect of the Criminal Procedure Code 2015" on 12/2020.
7. Website: [http://www.americanbar.org/groups/leadership/house\\_delegtranges.html](http://www.americanbar.org/groups/leadership/house_delegtranges.html) (last accessed on: 31/01/2021).

# WRONGFUL DEATH PENALTY AND THE RIGHT TO COLLECT EVIDENCE: REFLECTION FROM VIETNAMESE CONTEXT

Lan Ngoc Nguyen<sup>1</sup>, Diep Thi Le<sup>2</sup>

**Abstract:** The provisions governing the death penalty in Vietnam are currently very diverse and varied and presented in many different aspects. The right to life is recognized in the Constitution of the Socialist Republic of Vietnam, adopted in 2013 and concretized in special laws. At present, the right to life in Vietnamese law has been close to the international human rights law at the basic principles. However, if compared with the specific requirements of these rights in the international human rights law, there are still some gaps that need to be studied for the continued improvement following the international law and following general trends in the world.

In this paper, the author focuses on analyzing the applicable regulations of Vietnam related to the death penalty, based on which the shortcomings in the regulations, as well as the limitations and problems, are pointed out when these regulations are applicable in practice, especially inadequacies in the current execution of the death penalty.

In addition, looking from several wrongful cases in Vietnam in recent years, the author analyzes several causes of the wrongful case. The most significant inadequacy that leads to injustice is the failure to ensure the principle of collecting evidence and the right to collect evidence of the defendant.

Therefore, the author realizes that it is essential to ensure the role and necessity of the right to collect evidence of the defendant to limit the wrongful sentence in general and the injustice in the death penalty in particular.

**Keywords:** death penalty, wrongful sentence, the right to collect evidence, Vietnam.

## 1. OVERVIEW OF THE DEATH PENALTY AND THE RIGHT TO LIFE

The death penalty is the most memorable and severe criminal sanction under which the right to life of the defendant is deprived, and this is only applicable to offenders who are especially dangerous to society. Compared to the others in the penalty system, the death penalty has its particular characteristics: (1) The most memorable and severe criminal sanctions, under which the right to life of the defendant is deprived; (2) A form of

---

1 Ph.D. Candidate, School of Law, Vietnam National University, Hanoi.

2 Ph.D. Candidate, Graduate Academy of Social Sciences, Vietnam.

punishment of radical prevention, without reforming or educating the defendant but with effectiveness and education in crime prevention in general; (3) an endless punishment, which puts an end to the possibility of overcoming mistakes in judicial activities.

In the world, especially in developed countries such as the US, France, it is believed that people are “endowed by their Creator” with natural rights to life. In these countries, the right to life is affirmed in universal legal documents from the 18th century: The United States Declaration of Independence of 1776; The Declaration of the Rights of Man and the Citizen of France of 1789. By the 20th century, the International Human Rights Law inherited and officially affirmed and recognized the right to life as an international legal standard of countries. As per Article 3 of the Universal Declaration of Human Rights (UDHR) of 1948: “*Everyone has the right to life...*”. This was concretized in Clause 1, Article 6 of the International Covenant on Civil and Political Rights (ICCPR): “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. Subsequently, Paragraphs 2, 3, 4, 5, 6, Article 6 of the Convention specify conditions for the application of the death penalty in countries where the penalty is still maintained, namely: a) sentence of death may be imposed only for the most severe crimes in accordance with the law in force at the time of the commission of the crime; b) Sentence of death may not be contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide; c) This penalty can only be carried out pursuant to a final judgement rendered by a competent court; d) Those who are sentenced to death have the right to apply for parole and to be considered for parole or other change of punishment; e) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women; (f) Nothing in Article 6 shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Thus, it can be observed that the International Human Rights Law and the ICCPR both stipulate that the right to life is supreme but not an absolute right. Despite not prohibiting, the International Human Rights Law and the ICCPR encourage eliminating the death penalty and prescribe that it is applicable for the most severe crimes only. Over the past time, as a general trend, the countries around the world have gradually narrowed down the crimes of the death penalty and gradually removed this severe penalty.

Vietnam has joined both the International Covenant on Civil and Political Rights and the Convention on the Child’s Rights. However, the death penalty is still maintained in this country. However, from perspectives on the trends, it can be observed that right from the first Constitution of 1946, Vietnam mentioned the right to life, which was the inviolable right to the body, life, and health of citizens, and the Constitution of 2013, the

right to life was directly stated, associated with legal protection. As per Article 19 of the Constitution of 2013: “Everyone has the right to live. The law protects human life. No one shall be illegally deprived of his or her life”; As per Article 20: “Everyone shall enjoy the inviolability of the individual and the legal protection of his or her life, health, honor, and dignity and is protected against torture, violence, coercion, corporal punishment or any form of treatment harming his or her body and health and offense against honor and dignity.” In addition, currently, a number of laws such as the Penal Code of 2015, the Criminal Procedure Code of 2015, the Civil Code of 2015... all have provisions aiming at protecting the rights to life: The Penal Code of 2015, the Criminal Procedure Code of 2015 crimes of infringing upon human life, health, dignity and honor (Chapter 14); The the Criminal Procedure Code of 2015 prescribes the veneration and protection of human rights and individuals’ legitimate rights and interests: “Competent procedural authorities and persons, when instituting legal proceedings within their duties and authority, must respect and protect human rights...”(Article 8); the law protects protection of individuals’ life, health,...: “Life, health... of every person.

*The laws penalize all unlawful violations of a person’s life, health...”(Article 11)*

Therefore, the right to life is protected by Vietnamese law and is compatible with the International Human Rights Law. With the determination to gradually align with the standard view of the United Nations, the Politburo issued Resolution No.49/ NQ-TW dated June 2, 2005, on the Judicial Reform Strategy to 2020, paying close attention to step by step restricting and minimizing the imposition of the death sentence for crimes in order to gradually eliminate the death sentence in the penalty system. If it is necessary to maintain, the death penalty should only be applied to murder and treason. However, after ten years of implementing Resolution No.49 of the Politburo, the Penal Code of 2015 failed to apply the death penalty only to murder and treason as the goal of Resolution No.49, but eliminated the death penalty for seven specific crimes, including 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 work, facility, equipment essential for national security (Article 303); Crime of fighting against orders (Article 394) and Surrendering to an enemy (Article 399).

Currently, Vietnam has death punishment on its books for 18 crimes, including: 06 crimes of infringing upon the 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); 02 crime of infringing upon human life, health, dignity and honor (Murder - Article 123 and Rape of a person under 16 - Article

142); 01 crime of infringing upon the order of economic management (Manufacturing and trading of counterfeit medicines for treatment or prevention of diseases - Article 194); 03 crime of drugs (Illegal manufacturing of narcotic substances - Article 248; Illegal storage of narcotic substances - Article 249; Illegal deal in narcotic substances - Article 251); 01 crime of infringing upon public safety and public order (Terrorism - Article 299); 02 crimes of position (Embezzlement - Article 353 and Taking bribes - Article 354); 03 crime of disruption of peace, crime against humanity and provocation of war of aggression (Disruption of peace, provocation of war of aggression - Article 421; Crimes against humanity - Article 422; War crimes - Article 423).

Although the death penalty cannot be minimized as the goal of the Politburo in Resolution No.49/2005, it is evident that the legal policies in Vietnam over the past time have clearly shown a gradual reduction of crimes of the death penalty. Compared with the provisions of the previous Penal Code, the Penal Code of 2015, amended in 2017, has narrowed the scope of imposition of the death sentence to reduce the crimes of the death penalty. In fact, of the 18 crimes of the death penalty, over the past time, Vietnam has applied the death penalty only to the following crimes: Murder; Illegal conveyance of narcotic substances; Illegal storage of narcotic substances, and Illegal deal in narcotic substances.

Not only reducing the crimes of the death penalty, but the Penal Code of 2015 also expands the objects upon whom the death penalty are not imposed and enforced: Adding new regulations, the judges shall not impose death sentence shall not be upon people from 75 years of age or older when they commit the crime or during a trial (Para. 2, Para. 3, Article 40 - Death sentence). This is a new humanitarian rule as virtually no people of this age are executed and sentenced to death. In addition, the Penal Code of 2015 also adds new provisions at Point c, Para. 3, Article 40: “3. The life sentence shall not be executed in...c) The person sentenced to death for embezzlement or taking bribes, after being sentenced, has returned at least one-third of the property embezzled or bribes taken, closely cooperates with the authorities in the process of investigation or trial, or has made reparation to atone for the crime”.

Besides, Para. 6, Article 63 of the 2015 Penal Code also stipulates: “6. Concerning a person who is sentenced to death and receives a commutation, or a person sentenced to death in the case specified in Point b or Point c Clause 3 Article 40 hereof, the first commutation may only be given after the convict has served a sentence for 25 years. Nevertheless, he/she must serve a sentence for at least 30 years in reality”. Under this additional provision, a person sentenced to death which is allowed to enjoy concessions will be continuously considered for sentence reduction provided that the time serving a sentence to be considered for the first reduction of sentences is 25 years and despite a series of reduction of sentences, the actual time serving the penalty must be 30 years.

These new regulations aim to gradually reduce and possibly eliminate the death penalty while demonstrating humanity in criminal policy in Vietnam.

In Vietnam, a criminal was previously sentenced to death by firing squads. However, this form of execution has many shortcomings, including the high cost for death penalty execution, a judgment execution council with many participants required for each execution, especially the image of the execution causing pressure, even serious psychological obsession for both the executor as well as the relatives of the judgment creditors when certifying to conduct the customary burial. After many comments, arguments, and learning from many countries around the world, Vietnam has made a breakthrough and has now replaced firing squads with lethal injections according to the provisions of Decree No.47/2013/ND-CP amending and supplementing Decree No.82/2011/ND-CP. This replacement is clearly much more humane for both the executor, the judgment debtor, and the relatives of the judgment debtor. At the same time, it marks a significant improvement in the judiciary in Vietnam, especially a significant change in awareness of the right to preserve the body even when forced to die.

In summary, the worldwide trends in general and the criminal law policy in Vietnam in particular aim to gradually reduce and eliminate the death penalty to absolutely protect the right to life. However, there remains a gap in the protection of the right to life between the concretization and enforcement of the right to life in Vietnamese law and international law and the laws of many countries around the world. The protection of the right to life and human rights in Vietnam still needs to have clear, specific, and institutionalized goals in the legal framework according to a specific roadmap to quickly adapt to International Law. It is an indispensable requirement in the context of global and regional integration.

## **2. WRONGFUL DEATH PENALTY AND THE RIGHT TO COLLECT EVIDENCE OF THE DEFENDANT IN VIETNAM**

As the only penalty depriving the right to life of the defendant, the death penalty is typically unchangeable, terminating the overcoming of mistakes in judicial activities. Therefore, the criminal death penalty is considered a terrible catastrophe of any national judiciary, any era; it unjustly deprives the spiritual right to life of a person and completely breaks humankind's belief in the strongholds of justice. In any justice system, wrongful conviction is always taboo and wrongful conviction to the death penalty should be prohibited absolutely. Suppose under the wrongful case. The death penalty is sentenced and executed by the defendant. In that case, public opinion will not stop at being bad. However, there will be an outrage in public opinion, especially for those who are the relatives of such defendants.

In the past decade, a few rare wrongful cases that are historically seen in the legal proceedings of Vietnam have been announced one after another. Among which, there

must be typical cases of Nguyen Thanh Chan (Bac Giang), who was vindicated after ten years of serving sentence, Huynh Van Nen (Binh Thuan), who spent more than 17 years wrongfully in jail, and Tran Van Them (Bac Ninh) with an injustice lasting nearly half a century. What is mentioning is that the common point in these cases is the highest level of a sentence imposed on these defendants, that is a death penalty, of which some were imprisoned and waited for the execution of the sentence, but they were fortunately vindicated because the real murderers confessed their guilt (the case of Mr. Tran Van Them for example). These wrongful cases are reviewed as follows:

### **2.1. The case of Mr. Nguyen Thanh Chan (Bac Giang)**

*On August 15, 2003, in Me village, Nghia Trung commune, Viet Yen district, Bac Giang province, Vietnam, there was a shocking murder case, Ms. Nguyen Thi Hoan was killed at her home with brutal injuries to her face and head ruptured arteries and acute blood loss resulted in death. Based on evidence at the scene and the investigation results, Bac Giang Province's police arrested Mr. Chan for investigation, prosecution and trial. According to Bac Giang Province's police: On August 15, 2003, a football exchange was held in Me village, Mr. Chan and his wife sold water at the stadium. At 19 o'clock, Mr. Chan's wife told him to go home to take water. On the way home, when passing by the victim's house, Mr. Chan had the intention of rape, so he rushed to molest the victim. Failing to grope and rape, Mr. Chan committed murder. After that, Mr. Chan went home to get water and brought it to his wife to sell. The total time Mr. Chan came back to get water and returned to the water shop was about 30 minutes. (According to Minh Tu - Hung Manh - Ngoc Anh, Looking back on the vindication for Mr. Nguyen Thanh Chan, April 2017: <https://coquandieutravkstc.gov.vn/nhin-lai-vu-minh-oan-cho-ong-nguyen-thanh-chan-ky-1-anh-sang-cuoi-duong-ham>)*

When the experiment was investigated, it took 15 minutes to take water and return to the shop. Thus, in the remaining 15 minutes, Mr. Chan did all the work: arising intentions, calculating, rushing in, and when he failed, he went out to kill the victim. This is unreasonable, especially with that time, but Mr. Chan had no trace left at the scene. Only later, when Mr. Chan was vindicated, looking back at the cause that led to his wrongful penalty, people found that in the criminal proceedings, only one episode, a negligence element in the investigation process also turned the case into a completely different direction. The scene examination and the alibi of the defendant are critical. During the re-investigation process, the Supreme People's Procuracy indicated that in this case, Mr. Chan was arrested in the absence of a crime. However, in the investigation, prosecution, and trial process, there were many mistakes, even the case was wrong, but it was still forced to be correct, put together to finish. Right from the investigation of

the scene, although in the crime scene, there were many footprints on the floor, bloody hand marks on the door, the power switch but these traces were not fully collected, and scientific assessment was not allowed to serve as solid evidence to confirm criminal acts or offenders. Remarkably, both the appellate judgments and the first-instance judgments were based on the results of comparing and determining the footprints of Mr. Chan, his left foot nearly fit the footprints left at the scene, and this was considered as evidence to accusing Mr. Chan of being at the scene. In addition, at the crime scene, there was a sharp blade that was identified as the weapon. However, the police failed to seize the knife handle. Therefore the objectivity was not assured when Mr. Chan accepted the blade. In addition, in the minutes of testimony before prosecuting the accused and the testimony at the first-instance trial, appellate trial, and after the appellate trial, Mr. Chan maintained his innocence said that the investigators forced him and primed him about what to say, drew the scene maps and trained him many times to conduct an experimental investigation. An important episode in the case was that the information about assets such as a gold ring and the victim's money lost when she was killed provided by the relatives of the victim and the witnesses were not clarified. However, the case was still closed, and Mr. Chan was convicted of murder for failing to satisfy his sexual desire.

For this reason, when looking back on the wrongful case of Nguyen Thanh Chan, Mr. Nguyen Hoa Binh - the former head of the Supreme People's Procuracy, currently Chief Justice of the Supreme People's Court, said: "This is an expensive lesson for those who work in legal proceedings," there were no traces of Mr. Chan at the crime scene confirming that Mr. Chan was at the scene, even the footprints left at the scene were not his footprints, but this document was hidden by the investigator and not included in the case file. Mistakes and too many details, too much evidence that was uncoincidental and approximative were used as evidence of the conviction. Under a murder and robbery case, an investigation process without objectivity, failure to comply with the criminal proceedings became a murder because of sexual desires. Only when the natural killer confessed the crime, the blurred spots in the case were clarified. The footprints left on the scene were the footprints of the actual perpetrator in the case. The problem is that the proceeding agencies pursued, collected, and tried to force, tried to combine the evidence of accusation, not paying attention to the evidence of incrimination, the evidence of the alibi of Mr. Chan such as Mr. Chan's footprints did not fit the footprints left at the crime scene, bloody fingerprints left on the wall and the electric socket were not Mr. Chan's fingerprints. The core of this case is that there was no evidence to confirm that Mr. Chan was present at the crime scene, which means that the right to collect evidence of the defendant was neglected and not mentioned.

## **2.2. The case of Mr. Tran Van Them (Bac Ninh)**

*In 1970, during a business trip at night, Mr. Them and his cousin Nguyen Khac Van had a rest at a temporary tent next to Cau Dien (Dong Tinh commune, Tam Duong district, Vinh Phu province) when an incident occurred. While fighting with this group of robbers, Mr. Van was beaten to death. Mr. Them was also injured with a long wound on the top of his head but during the investigation of the case as well as the trial of this case. Mr. Them's head wound was turned into the episode that he staged the robbery and was the one who killed his cousin to rob him. Although at both the first instance and appellate courts, Mr. Them maintained his innocence, his appeal was not considered, was not accepted, and he was sentenced to death on murder and robbery. Five years later, while Mr. Them was in solitary confinement awaiting the execution of the sentence, a perpetrator of the case surrendered, Mr. Them was released from prison, but because he was seriously ill and could not work, so he was released. (According to Ngoc Chi - Kim Anh, What did lawyer Tran Dinh Trien say about Mr. Tran Van Them's case and the wrongful sentence? August 2016 (<https://vov.vn/vu-an/luat-su-tran-dinh-trien-noi-gi-ve-vu-ong-tran-van-them-va-an-oan-sai-539414.vov>))*

After being released from prison, his maintaining innocence was also uncommon, the actual perpetrator of murder and robbery confessed his crime, but it took Mr. Them more than 40 years to be vindicated.

Under this case, Mr. Cu Van Tien, who directly investigated the case and proposed to release Mr. Them, clearly pointed out that the causes of Mr. Them's wrongful penalty included the scene examination, assessment of evidence during an investigation, and subjective and sketchy trials: The killer used a hammer to cut wood with a sharp tongue to kill a person, Mr. Them suffered a long cranial wound with this hammer but when forced pleading guilty, he claimed to use wooden bicycle stakes to commit the crime and injure himself. It is clear that the woodcutter wound with a sharp tongue and the bicycle stick wound is entirely different. However, the right to collect evidence and evaluate evidence for disarming the defendant was not considered. The evidence was only captured, gathered, and combined for accusation to find somebody guilty. If the right to collect evidence is guaranteed and the evidence is assessed for incriminating the defendant, then only an examination of the wound on Mr. Them's head would be examined to conclude that a sharp-edged object had caused this wound. This scientific evidence was enough to prove that Mr. Them could not injure himself with the weapon of a bicycle pole, and perhaps this was the decisive proof of his innocence, and no wrongful sentence would exist.

## **2.3. The case of Mr. Huynh Van Nen (Binh Thuan)**

*On the night of April 23, 1998, Mrs. Le Thi Bong (Binh Thuan) was killed by the murderer who used a rope to strangle her and stole a gold ring. Immediately after that,*

*Binh Thuan province police prosecuted the case and conducted an investigation. While the investigation agency did not find the culprit, Huynh Van Nen, by drinking alcohol, joked with everyone that he was the one who killed Ms. Bong. Unexpectedly, just from a joke of a drunk man, Mr. Nen was prosecuted and arrested. Later, at the Court, Mr. Nen claimed that the investigator beaten and primed him about what to say for several days to force him to confess guilt. Even in order to escape the death penalty, according to the investigator's words, Mr. Nen also claimed that nine people in his wife's family participated in the killing in a case known as "cashew garden" that happened five years before. It was only from his testimony that three generations in a family, including nine people and Mr. Nen himself, continued to be prosecuted and falsely sentenced. Mr. Nen was sentenced to 5 years imprisonment for the case of "cashew garden" and life imprisonment for murder and robbery in the case of Ms. Bong by the People's Court of Binh Thuan province. Mr. Nen was sentenced to life imprisonment at the first-instance court hearing, but he did not know how to appeal, so the first-instance judgment took legal effect. After serving nearly 17 years of his life sentence, and when almost no one remembered his case, the actual murderer of Ms. Bong was arrested and confessed his murder. Mr. Nen was acquitted and subsequently released from prison. (Looking back at Huynh Van Nen case, January 2017 (<https://vtv.vn/trong-nuoc/nhin-lai-vu-an-oan-huynh-van-nen-20170117155457385.htm>))*

For the case of "cashew garden," because there were many defendants who proved their alibi, the weapons were not consistent; Investigators let the defendants hear each other's testimonies before questioning... so the case was finally suspended.

For the murder case of Ms. Bong, after the natural killer pleaded guilty, Mr. Nen was released from prison during the re-investigation process. According to the investigation results, his confession of guilt was inconsistent with the details in the case; the position where Ms. Bong was killed was not consistent, the method of killing her was inappropriate and inconsistent with the wound on her neck. For her lost property, sometimes he confessed to fleeing for nothing, other times claimed to have obtained a gold ring... At the scene, on the side of the leather sofa chair at the main house, there were three footprints without sandals measuring 22x8.5cm and heels 4cm wide; 1.5m southwest far from the central porch of the house was a right foot left imprinted on the sand-sized 23x9cm with the heels 4.5cm wide. The Criminal Technical Department of Binh Thuan Province determined that there were not enough specific characteristics to trace the stripe, so the investigation police agency did not conduct the solicitation of the survey. Therefore, there is not enough basis for concluding the killer's feet. There were many other details about the witness's testimony, and Mr. Nen's self-confession before, during, and after the murder of Ms. Bong was inconsistent. During re-investigation, Mr. Nen claimed to be depressed, so it was impossible to investigate to clarify the above contradictions. Without evidence to

prove, the Police Investigation of Police Department of Binh Thuan province concluded that the investigation process had many difficulties because the scene has changed, some people knowing about the case had left the locality or no longer remembered clearly the content of the case, so many contents required by the Supreme People's Court could not be investigated. However, the police investigation agency made it clear that although Mr. Nen had agreed to kill and rob Ms. Bong's property in the past, there was no evidence to prove that his above testimony was correct during the investigation and prosecution. This testimony also did not match the witness testimony and the results of the scene examination. Therefore, the investigating agency concluded that Mr. Nen did not commit a crime as previously reported. Considering that Mr. Huynh Van Nen's behavior did not constitute murder and robbery, the police investigation of the police agency of Binh Thuan province suspended the investigation of the arrestee Huynh Van Nen.

In the history of proceedings in Vietnam in particular and in the world in general, perhaps Mr. Huynh Van Nen (Binh Thuan) was the only one who was unjustly accused of up to two cases were murder, but finally, he was vindicated. This was called the strange wrongful sentence to Mr. Nen, but it still happened.

### **3. CONCLUSIONS AND RECOMMENDATIONS**

Through the above wrongful cases, looking back at the causes leading to such cases, it can be observed that the standard point and also the fundamental cause of the injustice is that the evidence of the defendant for disarmament are not considered or mentioned, their right to collect evidence for detention to prove they are alibi and not guilty are forgotten both during the investigation and at the trial hearings. Meanwhile, the incriminating evidence is only relative, approximate, and not solid for accusing. However, in all 3 cases that were vindicated above, the vindication only happened after the actual perpetrator in the cases confessed. The problem is that if the perpetrators do not confess, they do not admit the guilt. Indeed, the above cases of injustice will not be vindicated. In the 4 cases with the above three wrongful defendants, one person was sentenced to death, the two others were sentenced to death, one of whom was entitled to extenuating as he was the only son of a martyr (Mr. Chan), and one avoided the death penalty due to deprivation and confessed to another case (Mr. Nen). We assume that the above perpetrators had not confessed to guilt or pleaded guilty after the death penalty was executed against Mr. Tran Van Them. This false death penalty would take Mr. Them's right to life. It raises the issue that the consequences of the criminal death penalty are terrible and what it means to collect and evaluate evidence for the defendant's detention.

Returning to the issue, with the determination to abolish the death penalty in accordance with the spirit of Resolution No.49/2005 of the Politburo and in line with the

general view of the International Law, the right to life is considered an absolutely inviolable right, Vietnam should abolish the death penalty for each crime group, specifically:

For terrorism and most crimes in the group of crimes of infringing upon national security and the group of crimes of disruption of peace according to the provisions of the current Penal Code, in reality, Vietnam has not almost applied the death penalty. Even the International Criminal Court (the Rome Statute of 1998) did not provide for the death penalty for these crimes.

For drug offenders, although these are high-risk crimes to society, the application of the death penalty to this criminal group is still vehemently opposed by the world because many offenders in this criminal group are the poor, the ignorant, seduced, or bribed persons. In contrast, the number of people being executed to death in this crime group is very high compared to other criminal groups. On the other hand, the death penalty is almost impossible to prevent and drug-related crimes. According to statistics, in recent years in Vietnam, although the death penalty is still being applied, drug crimes tend and develop complicatedly, which shows that the death penalty does not impact the action of this crime.

For some remaining criminal groups, it can be seen that in some countries where the death penalty is abolished, crime, especially dangerous crimes like murder, does not increase or even decreases. Meanwhile, in Vietnam and some other countries where the death penalty is imposed, these crimes tend to increase. It requires criminal researchers to have an objective and scientific view of the preventive effects of the death penalty. Of course, like any other penalty, the death penalty is still effective in preventing crime. Even as mentioned at the beginning, this is the most severe punishment that thoroughly prevents recidivism because the defendant has been deprived of the right to life. However, in joint assessment for prevention, will the death penalty have a preventive effect that outweighs the other types of punishment? In the event that the death penalty does not have a remarkable effect, it is indispensable to remove it and replace it with other ones because maintaining the death penalty poses a lot of risks due to its immutability, failing to regain the life of those who are wrongly sentenced that has wholly ended the judiciary's ability to overcome mistakes; In addition, the death penalty caused a terrible emotional crisis for the entire family of the prisoner under death penalty. Especially in the era of global integration, the international community's increasing pressure to face the death penalty.

For economic criminals, according to statistics, after Vietnam abolished the death penalty for fraud and appropriation of property (Article 139 of the 1999 Penal Code) in 2009, this category of crimes increased in the number of offenders and the danger of the offense; cases with an increasingly large amount of property appropriated, even significant,

especially in the banking sector such as Huynh Thi Huyen Nhu fraudulently appropriated assets of many banks and many individuals with the total amount of more than VND 4,900 billion; Chu Minh Ngoc, Director of Cimco Company and his accomplices set up false steel trading documents in order to validate the fraudulent loan documents to appropriate VND 1,124 billions of 7 banks; Phan Ba Tong, Director of Thien Ma Seafood Import and Export Co., Ltd. committed a fraudulent act of appropriating VND 700 billion from banks and customers...Only in Hanoi city, according to the 2017 annual report of the Economic Police Department - Hanoi Police has investigated 90 cases of property ownership infringement, of which 65 cases are an abuse of trust to appropriate property (accounting for 72.22%), leading to property damage of VND 22,555 million (as per *2017 annual report of the Economic Police Department - Hanoi Police*).

Therefore, there are many views that it is because the death penalty for this crime has been deleted, but if a comprehensive study of the factors that lead to the increase of the abuse of trust to appropriate property, it is found that one of the most prominent factors is the strong development of the banking system in the loose legal conditions in this area, which is a fundamental cause of the cases of frauds to appropriate considerable assets in the banking sector that has increased dramatically in recent years. It means that, although the death penalty still exists, the situation of the abuse of trust to appropriate property in this field is undoubtedly increased.

For the remaining crimes, if the death penalty is still maintained, it should apply to cases where the offenses are violent, barbaric, brutal, causing discontent or outrage among the people, or for large-scale gang crimes that cause damage to many people, causing widespread social security disruption, but the subjects of application should be narrowed down to the mastermind, leader, command, stubbornly opposed, thug, thugs, dangerous recidivism, committing professional crimes.

Regarding the objects to whom the death penalty is not applied, people over 70 years old should be considered when committing crimes or when adjudicating as currently prescribed in the criminal law of some countries around the world.

***In addition to the above contents, Vietnam, in particular, needs to do some of the following:***

Firstly, it is necessary to publish statistics on the application of the death penalty as before in order to be consistent with resolutions of the United Nations General Assembly on not applying the death penalty, which urges countries to provide the Secretary-General of the United Nations with information on the application of the death penalty and the implementation of measures to protect those who are facing the death penalty; disclosing information on the application of the death penalty, what information could contribute to

national debates about transparency in the application of the death penalty. Disclosure of information on the death penalty application will enhance the reputation of Vietnam's human rights with the international community and facilitate in-depth research and discussion on the issue of the death penalty in Vietnam.

Secondly, constantly consider strengthening legal provisions and safeguards to promote the rights of people sentenced to death, including prisoners awaiting execution at certain times to be consistent with relevant international standards to ensure the best chance of being able to remedy the mistakes of the judiciary.

Thirdly, refer to the experience of other countries in providing alternative penalties for the death penalty and special humane provisions regarding the application of such penalties, such as provisions on the deferment of execution of the death sentence for two years to consider life imprisonment in China.

Fourth, encourage and promote researches and debates in society on theoretical and practical issues related to the death penalty. To propose and consult with the United Nations, non-governmental organizations, and countries that have abolished the death penalty, supporting experiences to amend and complete legal regulations, legal policies on the death penalty so that it is possible to study the possibility of joining the ICCPR's Second Optional Protocol on the abolition of the death penalty in the near future.

Last but not least, with the policy of thoroughly grasping the judiciary: preventing and combating wrongful sentences and preventing crime omission, the Politburo's Resolution No.49-NQ/TW in 2005 on the Judicial Reform Strategy to the year 2020; Directive No.48-CT/TW dated 2010 of the Politburo on enhancing the Party's leadership over crime prevention and combat in the new situation: The judiciary must really be the support for people in protecting justice, human rights; at the same time is an effective tool to protect the law and socialist legislation; "Continue to promote judicial reform, improve the quality and efficiency of investigation, prosecution, adjudication ... to detect promptly and strictly handle all criminal acts, not to neglect the crime. Commit and do not slander innocent people "is considered one of the critical tasks, mainly in crime-fighting and prevention in the coming time.

Over the past years, although the entire judiciary has made many efforts in fighting against crime and overcoming criminal neglect, it is necessary to focus on meeting the requirements of non-unfairness. However, there are still cases of injustice, in reality, infringing upon citizens' legitimate rights and interests, affecting the people's confidence in the judiciary. Through some of the above false cases, it can be seen that: the cause of the wrongful sentences is that collecting evidence to prove the criminal acts of the defendant fails to respond with the principles in the criminal proceedings. Meanwhile,

the right to collect evidence for the alibi and innocence of the defendant is not almost considered and paid close attention to.

A prominent issue is that the wrongful sentences are only determined and pronounced after the case had happened a long time and mainly in murder cases when the actual perpetrator of the case confessed their criminal acts. Meanwhile, wrongful sentences hardly appear in other crime areas, such as drug crime. Property crime hardly appears, although the number of complaints in these types of cases is numerous. This raises the problem: Why do cases have to go through many procedures and proceedings and must be investigated and sentenced by a series of agencies which have powers to collect, examine, assess evidence, and control each other; The trial of these defendants is conducted publicly, with the presence of defense counsels. But the wrongful sentences are still unavoidable? The objective and subjective causes leading to the wrongful sentences show that: Objectively, the law has not guaranteed the strict enforcement; Subjectively, it is because of the fault of people conducting procedural activities, wrongfully sentenced defendants, and the other participants in the proceedings primarilyly the fault of investigators, prosecutors, and Judges. Specifically, although there are clear procedural time limits for each stage, many cases last long, violating the time limit, but the people involved are not handled. However, there are provisions on the competence to investigate, prosecute and adjudicate. There are still many cases of investigation that are not under the correct authority or are overlapping; There are also cases that the Procuracy requires for investigation, but some investigating agencies do not implement, and they are not sanctioned; under many cases, apart from the defendant's confession, there is no other evidence to prove, but the proceeding agency still uses confession to make charges; etc. All of the above situations are due to the fact that the law requires to do without any sanctions attached. It is not clear the consequences of not doing it. Therefore, it is necessary to have clear regulations and sanctions if there are violations of law, especially violations of proceedings, violations during the investigation, and evidence collection. For example, the rule is clear: testimonies without the participation of an advocate in cases where an advocate is required cannot be used as evidence of accusation; the evidence collection must comply with the order and procedures prescribed by law, evidence collected by illegal methods and procedures shall have no legal validity and must not be used as accusation grounds. Currently, the Vietnamese law does not have precise ear regulation on eliminating evidence that has no legal validity, failing to guarantee the legality to be able to use as criminal proofs, leading to the inconsistent and non-strict use and assessment of the evidence. In the coming time, it is necessary to quickly study and prepare a comprehensive law on evidence.

On the other hand, it is necessary to further strengthen the defense counsel's role right from the early stages and early proceedings Exceptionally, a mechanism should

be in place to ensure a balance in the collection of evidence between the accuser and the debtor. At present, almost all the new regulations only guarantee the collection of evidence by the accusers for accusation. The collection of evidence for vindication (alibi, innocence) has not been focused on and guaranteed. Once the law does not guarantee the right to collect evidence and the collection of evidence for vindication, the weaker party has no guarantees to collect evidence for their innocence. The injustice and unfair situation is inevitable. It is acknowledged that, in the cases of innocence, the role of the defense counsel has not been confirmed or adequately promoted. Under these cases, the advocates were not fully involved at the outset of the proceedings; the justification for vindication has not been given proper attention by the proceeding agencies.

Theoretically, the right of defense counsels is the responsibility of ensuring the implementation of procedural agencies. However, due to the lack of regulations responsible for ensuring the implementation, the above provisions have not been fully implemented in practice. When not fully implemented, it will not be handled due to the lack of specific sanctions. In addition, due to the limited awareness of the law of the people in Vietnam, the defendants, when arrested or summoned to give testimonies or in custody, do not have enough knowledge about his power to have the right to invite defense counsels; the right to remain silent and when they are arrested, they don't know how to invite an advocate. In some cases, it is not clear that procedural bodies must invite the defense counsel. Currently, Vietnam's Criminal Procedure Law stipulates 03 cases under which procedural agencies have to invite defense counsels for defendants, including underage defendants, defendants with mental or physical defects, and the defendant sentenced to death. In many cases, when prosecuting, the investigation cannot immediately determine whether it is required to invite the defense or not?

On the other hand, this provision also does not mean that the defense must participate from the beginning of the investigation process, so many defendants participate when the case is almost done. Thus, in terms of theory or practice, the defense must have rights and obligations. The proceeding agency to have a responsibility to ensure the presence of defense counsel right from the proceedings, especially in "murder" cases. To overcome the wrongful situation in general and the death penalty in particular, Vietnam needs to stipulate and have specific sanctions to ensure the participation of defense counsels right from the first activities of the proceedings. In resolving the case, this must be considered the obligation of the proceeding agency, especially in cases that infringe on human life and health.

Vietnam's criminal procedure law needs to stipulate and ensure that the arrested or detained persons have the right to request a defense counsel or a legal representative for them when taking testimony; Under this provision, proceeding agencies have the responsibility to

invite defense counsels for the defendants and only when this requirement is met can they declare. This is the content of the “right to silence” of arrestees, suspects, and defendants.

Another content related to the spirit of the Party’s Resolution on judicial reform is the restriction of the application of detention during the investigation, prosecution, and trial process. The nature of custody and temporary detention is to prevent suspects and defendants from escaping, causing difficulties in the proceedings, preventing the accused, and continuing to commit crimes. However, the current provisions of the Criminal Procedure Code do not fully express the above spirit, the grounds for applying these measures are still general, creating a space for agencies to conduct proceedings and prosecutors and to apply but are intended primarily to facilitate the investigation, not to prevent a suspect’s possibility of fleeing or continuing to commit a crime. For example, in cases related to banking activities, when the defendants are prosecuted, they have to temporarily suspend their work, the continuing to commit this crime is impossible, but the number of suspects and defendants on bail is still limited.

In short, with the aim of judicial reform in accordance with Politburo’s Resolution No.49/2005, Vietnam is gradually reducing and eventually eliminating the death penalty following the above general trend all over the world. However, to do this, Vietnam needs synchronous and drastic participation of all levels and sectors according to a specific roadmap and particular in time. First of all, Vietnam needs to solidify and practical measures to minimize the wrongful sentences and the neglect of criminals. For crimes of the death penalty, it is necessary to study and adjust the provisions of the law to suit the general trend of the countries, to consider the death penalty a taboo in judicial activities. To this end, Vietnam gradually moves towards a balance, compatibility with the international laws on human rights in general and the right to life in particular./.

## REFERENCES

### Legal documents of the Government and Party

1. Vietnamese Constitutions of 1946, 1959, 1980, 1992, 2013.
2. Vietnam Penal Codes of 1985, 1999, 2015.
3. Vietnam Criminal Procedure Code of 2015.
4. Vietnam Civil Code of 2015.
5. Resolution No.49-NQ/TW dated 2 June 2005 of the Politburo on the Judicial Reform Strategy to 2020.
6. Directive No.48-CT/TW dated 2010 of the Politburo on enhancing the Party’s leadership over crime prevention and combat in the new situation.

7. Decree No.82/2011/ND-CP dated September 16, 2011, of the Government on execution by lethal injection.
8. Decree No.47/2013/ND-CP dated May 13, 2013, of the Government, amending and supplementing a number of articles of Decree No.82/2011/ND-CP dated September 16, 2011, of the Government on execution by lethal injection.
9. Books, Newspapers, Scientific Magazines.
10. Universal Declaration of Human Rights of 1948 - Vietnam Law Library.
11. International Covenant on Civil and Political Rights - Vietnam Law Library.
12. United States Declaration of Independence in 1776.
13. French Declaration of Independence in 1789.
14. Annual Report 2017 of the Economic Police Department - Hanoi Police Department.
15. Dr. Dinh The Hung, On the death penalty in Vietnam Penal Codes, Court Magazine, February 2018 (<https://tapchitoaan.vn/bai-viet/thoi-su/ve-hinh-phat-tu-hinh-in-blhs-viet-name>).
16. Nguyen Thi Hong Loan, Discussing the death penalty specified in the Penal Code of 2015, Investigation Agency of the Supreme People's Procuracy of Viet Nam, March 2019 (<https://coquandieutravkstc.gov.vn/ban-ve-hinh-phat-The-images-to-be-decided-blhs-year-2015-to-do-from-year-2017>).
17. Minh Tu - Hung Manh - Ngoc Anh, Looking back at the vindication of Mr. Nguyen Thanh Chan, April 2017 (<https://coquandieutravkstc.gov.vn/nhin-lai-vu-minh-oan-cho-ong-nguyen-thanh-chan-ky-1-anh-sang-cuoi-duong-ham>).
18. Looking back at the case of the wrongful sentence of Mr. Huynh Van Nen, January 2017 (<https://coquandieutravkstc.gov.vn/nhin-lai-vu-minh-oan-cho-ong-nguyen-thanh-chan-ky-1-anh-sang-cuoi-duong-ham>).
19. Ngoc Chi - Kim Anh, lawyer Tran Dinh Trien: What to say about the case of Mr. Tran Van Them and the wrongful sentence?, August 2016 (<https://vov.vn/vu-an/luat-su-tran-dinh-trien-noi-gi-ve-vu-ong-tran-van-them-va-an-oan-sai-539414.vov>).
20. Master Doan Ngoc Hai, Abuse of trust to appropriate property under the Penal Code, Journal of Electronic Court, March 2019 (<https://tapchitoaan.vn/bai-viet/phap-luat/toi-lua-dao-chiem-doat-tai-san-theo-phap-luat-hinh-su-viet-nam-ly-luan-va-thuc-tien>).

## **NHÀ XUẤT BẢN KHOA HỌC XÃ HỘI**

26 Lý Thường Kiệt - Hoàn Kiếm - Hà Nội

ĐT: 024.39719073 - Fax: 024.39719071

Website: <http://nxbkhh.vass.gov.vn>

Email: [nxbkhh@gmail.com](mailto:nxbkhh@gmail.com)

### **Chi nhánh Nhà xuất bản Khoa học xã hội**

57 Sương Nguyệt Ánh - Phường Bến Thành - Quận I - TP. Hồ Chí Minh

ĐT: 028.38394948 - Fax: 028.38394948

---

## **‘DEATH PENALTY IN ASIA: LAW AND PRACTICE’ INTERNATIONAL CONFERENCE PROCEEDINGS**

*Chịu trách nhiệm xuất bản:*

PGS.TS. PHẠM MINH PHÚC

*Biên tập nội dung:* Trần Lệ Thu  
*Kỹ thuật vi tính:* Đỗ Hồng Sâm  
*Sửa bản in:* Lệ Thu  
*Trình bày bìa:* Nguyễn Ngọc Anh

---

In 100 cuốn, khổ 19 x 27cm, tại Công ty Cổ phần sách và Phát triển Giáo dục Việt Nam

Địa chỉ: Số nhà 73, tổ 34 Hoàng Văn Thụ - Hoàng Mai - Hà Nội

Số xác nhận đăng ký xuất bản: 2400-2021/CXBIPH/4-141/KHXH

Số QĐXB: 137/QĐ-NXB KHXH, ngày 7/7/2021

ISBN: 978-604-308-589-1

In xong và nộp lưu chiểu năm 2021

# Death Penalty in Asia

**Law and Practice**

INTERNATIONAL CONFERENCE PROCEEDINGS



SÁCH KHÔNG BÁN