CAPITAL PUNISHMENT FOR DRUG-OFFENSES IN ASEAN FROM THE PERSPECTIVE OF INTERNATIONAL OBLIGATION IMPLEMENTATION – HOW TO HARMONIZE DIFFERENT POINTS OF VIEW

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Abstract: Death penalty for 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 place¹. Although there has been a trend of decline in capital punishment in light of implementing international legal instruments, there still exists different points of view in this issue in Asia in general, in ASEAN in particular. This is because of not only unclear indicators in relating treaties but also 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 drug offense and suggests some solutions to harmonize the differences in their policies of this issue using international legal instruments and mechanisms.

1. Introduction

Death penalty is a long-standing punishment, applied since ancient times, with many types of crimes in society, with the aim of excluding 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 the death penalty at that time was often accompanied with brutal tortures of the offenders. However, little-known is that the first death penalty regulations were acknowledged in a Code in Asia, which is the Code of King Hammurabi of Babylon from the 18th century B.C, applying to more than 25 different crimes². In ancient Israel, the death penalty was applied to almost every crime, from murdering, desecrating, to cursing others’ parents,…³. In the Middle Ages, with the growth and the widespread influence of the Chinese dynasties, legal doctrines and the five-punishment system emerged, therein three ranks of death penalty was presented: decapitation or hanging, displaying one’s head and mutilation. Under Qing dynasty in China, 850 crimes are punishable by death⁴. In short, in ancient and Middle Ages, death penalty could be applied with a

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² 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%20impalement.


lot of crimes in a way which 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 modern era. With the development of humanity and human rights, the number of punishable crimes as well as the way of death penalty execution has changed in a positive way which is to reduce the number of crimes punishable by 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 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 lowest number over the past decade.

Along with that trend, policies on the application of 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 10 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, as there are only 7 countries has executed the death penalty throughout the year. 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, illegal detention under Chinese law, acts of burning or flooding buildings which have someone inside or flipping trains which cause one’s death in Japanese law); and drug-related crimes. Thus, in the modern era, the death penalty is not applied as commonly as in previous periods, but mainly apply to only serious crimes in Asian countries. Currently, the execution of death row prisoners is also carried out in a more humane methods, mainly lethal injection and shooting that help to 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, but 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

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

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

carried out pursuant to a final judgement rendered by a competent court”. Most Asian countries have signed, ratified, and adhered to the Covenant or, to some extents, accepted its binding.

However, the fact that some Asian countries have signed but not ratified the Covenant such as China, especially some countries 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 death penalty. The statistics also shows 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 abolish the death penalty both in law and in practice)\textsuperscript{9}.

After proving that different views of ASEAN member states towards death penalty abolition is the reason why this area becomes a hotspot of death penalty for 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 offences.

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 offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty… States parties are under an obligation to review their criminal laws so as to ensure that the death penalty is not imposed for crimes which 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.”\textsuperscript{10} 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 the ICCPR, some ASEAN member countries such as Brunei, Malaysia, and Myanmar


\textsuperscript{10} 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
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 which, as recommended by the HRC, 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

<table>
<thead>
<tr>
<th>ASEAN member</th>
<th>Signature</th>
<th>Accession, succession, ratification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Cambodia</td>
<td>17th October 1980</td>
<td>26th May 1992</td>
</tr>
<tr>
<td>Indonesia</td>
<td>23rd February 2006</td>
<td></td>
</tr>
<tr>
<td>Laos</td>
<td>7th December 2000</td>
<td>25 September 2009</td>
</tr>
<tr>
<td>Malaysia</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Myanmar</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>The Philippines</td>
<td>19th December 1966</td>
<td>23rd October 1986</td>
</tr>
<tr>
<td>Singapore</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Thailand</td>
<td></td>
<td>29th October 1996</td>
</tr>
<tr>
<td>Vietnam</td>
<td></td>
<td>24th September 1982</td>
</tr>
</tbody>
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Based on the status of the death penalty execution in ASEAN countries, it can be divided into 3 groups: group of countries which maintain death penalty in their jurisdiction with high death penalty execution rate – hereby called retentionists (including Indonesia, Malaysia, Singapore, and Vietnam), group of countries who has eliminated death penalty in practice but maintain death penalty in their national law – hereby 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 – hereby 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 rates: Indonesia, Malaysia, Singapore and Vietnam. These four countries can be put into one group because the number of drug offenders who are sentenced to death and are on death row in these countries is quite large compared to the second group. In details, all of these 4 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 in the world. The Singaporean government has shown a drasticity in applying the death penalty for drug crimes. Between 1991
and 2003 more than 400 prisoners\textsuperscript{11} 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 indicates that in 2019, Singapore ranked third in terms of confirmed death sentences for drug crimes (13 people)\textsuperscript{12}. In Malaysia, the death penalty is maintained in law for many crimes, but is now mainly applied to murder and drug trafficking. As of February 2019, in Malaysia, 73\% of crimes sentenced to death were drug crimes.

Common pattern of these countries is that the government considered drug crimes as extremely serious crimes and stick to their opinion about the need of 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 Narcostics 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 rupiah\textsuperscript{13}. In Singapore, 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 and 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 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 are able to sustain the death penalty for drug criminals because they get agreement from their citizens. This is also mentioned by Johnson in his 2009 article: “There is strong support for capital punishment everywhere in Asia where the issue has been studied—whatever the execution rate”\textsuperscript{14}.

This conclusion remains true in later periods. Nearly all sociological and criminological survey 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 offences across


\textsuperscript{12} See: Harm reduction International, \textit{The Death penalty for Drug Offences: Global Review 2019}, pg. 9

\textsuperscript{13} Available at http://www.aseansec.org/Law%20of%20the%20Republic%20of%20Indonesia%20Number%2022,%2020Year%201997%20of%20Narcotics.doc (English translation by Indonesian National Narcotic Board)

Malaysia shows that up to about 70% of people surveyed support the application of the mandatory or discretionary death penalty or for drug trafficking\(^\text{15}\). In Singapore, recent researches also illustrate that the majority of Singaporean citizens support the application of the death penalty for intentional murder, illegal drug trafficking and discharging a firearm\(^\text{16}\). 84.6% of Indonesia's population also have the same point of view because they think drugs are destroying young people\(^\text{17}\). 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 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 death penalty in Asia and Europe or Africa is that for Asian countries, death penalty is considered a national issue and instead of international or regional issues\(^\text{18}\). Indeed, this point of view was reaffirmed 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 the notion that death penalty it is not considered a human rights issue, but a criminal justice issue, therefore, whether to abolish death penalty is a question for the sovereign jurisdiction of each country\(^\text{19}\). The right to life, although always protected by the constitutions of these states, is "not the only right" and… “it is the duty of societies and governments to decide how to balance competing rights against each other”\(^\text{20}\).

From another aspect, the decision to abolish or maintain the death penalty, in fact, can be seen as a means of manifesting the government power. Therefore, in these countries, there are frequent changes in the death penalty policy when there is a change in the 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 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 surely21. Therefore, this must be considered a serious crime and get the adequate punishments.

b) De facto abolitionists

Death penalty for drug offenses was maintained lawfully in this group of countries, however this type of punishment was carefully considered when applying in practice. The authors found that the ASEAN countries that 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 9 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 establishment of a moratorium on all executions since 1957 and so has Myanmar since 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 death22. In Brunei, a person can be charged with possession of drugs 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 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 3 decades, only 3 countries have revived the practice and also conducted executions, some expressed determination to abolish the death penalty, others declared they have established a moratorium on

21 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

all executions but that does not mean they are ready for death penalty abolition\textsuperscript{23}. 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."\textsuperscript{24} 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 decision as well as consider the effectiveness of this policy in practice. Some others maintain the death penalty as the symbols 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 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 is 311 people\textsuperscript{25}. Regarding the number of drug offenders sentenced to death, reports by several NGOs almost complain that it is difficult to gather information on this data in these two countries but it is certain that the courts continue to apply death penalty with many crimes, including drug crimes\textsuperscript{26}.

On the contrary, Myanmar and Brunei are in a group of countries that 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 3 death sentences declared for murder, none for drug crimes\textsuperscript{27}.

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? Laos and Thailand are both classified as de facto abolitionists, and both refuse to establish officially moratorium on execution yet these two countries do not share the same political will. On the one hand, although the governments confirmed to "review the list of offenses subject to death penalty under the current Penal Law [...]"

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{25} See: Harm reduction International, The Death penalty for Drug Offences: Global Review 2019, pg.28 and 33
\item \textsuperscript{26} See: Report on Thailand at 25\textsuperscript{th} 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, para.8 and Report on Lao People’s Democratic Republic at 123\textsuperscript{th} 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
\item \textsuperscript{27} See: Report on Thailand at 25\textsuperscript{th} 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\textsuperscript{th} 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
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to be in full compliance with Article 6 of the ICCPR28, no effective amendments to the law has taken place. 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 give recommendation of restrictive application of the death penalty for extremely serious crimes. This shows that Laos is not ready to completely abolish the death penalty. 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 publicize the possibility that in the future the death penalty will be eliminated. In March 2012, replied to the report of the Working Group 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 level in the period of 2013-2018. At the regional level, the Thai Government announced that it would soon pass the law on abolishing the death penalty and is considering endorsing the ICCPR-OP2. Meanwhile, at the global level, Thailand has also promised to consider the possibility of abolishing the death penalty both officially and unofficially30. 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 step31. 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 since 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 death32. In addition, it should also be noticed that these are two countries located in the golden triangle area, which is famous for


29 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 25th 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


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, death penalty act as deterrent methods to drug offenses.

On the other hand, Brunei and Myanmar show a different perspective when their court has 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. King Hassanal Bolkiah of Brunei in a speech officially announced that Brunei officially establish moratorium on execution for drug offences, including ones in the amendment and supplement of the Islamic Law Shariah Penal Code. In Myanmar, although 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 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 are countries that have removed the death penalty from the penalty system.

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 death penalty for all types of crimes since 1989. Cambodia ratified ICCPR - OP2 in 1992 which imposes 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". 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 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, 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 death penalty as an instrument of government authority, therefore, in the following years, the maintenance or elimination of the death penalty depends much on the point of view of the ruling Government. In 1993, the Philippines government under

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34 See: Brunei death penalty moratorium applied to new Shariah laws, AP News, available at: https://apnews.com/article/fe8f64aaee454b2a7278447249b3b67
35 Art.32, Cambodia Constitution
the Ramos administration reinstated capital punishment for 13 crimes through the Republic Act (RA) 7659, 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. The period between 2000 and 2006 witnessed no execution in the Philippines. In 2006, for the second time, the death penalty was declared to be abolished in Philippine law. 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 the form of lethal injections for drug offenders identified in Comprehensive Dangerous Drugs Act of 2002. It was approved by the Philippine House of Representatives on March 7, 2017, with 216 votes in favour, 54 against and 1 abstention. 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 south-east Asia since the Khmer Rouge genocide and Vietnam war in the 1970s. 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.

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

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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" because there is no evidence that the death penalty in fact 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 offences 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 in accordance with 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 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 right cooperation is mostly under the traditional principles which are always highly respected by ASEAN Member States, especially the principal 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 right treaties.

Regarding drug offences, ASEAN member states started to be aware that this is not only national issue but also regional issue since 1976, 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 narcostic drug problem” and they totally were “conscious of the need for combined action at the regional level” 10 years later. This partly shows their acknowledgement that this problem needs to be approached not only from national perspective, but from regional also. In fact, ASEAN has already had some common actions towards this problem which can be seen in their variety of documents in this area. However, there seems to be a contrary here, between their acknowledgement and their attitude when they consider capital punishment for drug offences. ASEAN leaders, as above, mostly agree that this is a national issue while still need international and regional cooperation in other fields when talking

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43 See: 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”

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

about drugs. The difference between their approach and international standards could be a big trouble that causes them stuck inside the problem.

Most of the ASEAN member states, especially The Philippines and Singapore based their argument on “non − tolerance approach” as confirmed in ASEAN Statement in the 62nd session of the Commission on Narcotic Drugs High-Level Segment in 2019. Nevertheless, this argument is also 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 the issue of capital punishment for drug-offences because of difference 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 national issue is opposite to the world’s trend of capital punishment abolishment. By Dec 2018, 86 countries has 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 the establishment of 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. The rest, although to be retentionists, 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 regional perspective.

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

Firstly, this should be a “visible” issue in ASEAN. Currently, death penalty abolition in general and death penalty for drug offences have not been the topic in ASEAN forums yet. Therefore, in the short term, ASEAN needs to include 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 about 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. A common deadlines for these should also be included.

Secondly, to achieve this goal, ASEAN also needs to develop a regional surveillance mechanism that can be 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 make use of its Working Group
for an ASEAN Human Rights Mechanism for making report on death penalty abolition for drug crimes every year, which serve as a basis to improve the abolition in ASEAN member states.

Reference


5. ASEAN Declaration of Principles to Combat the Abuse of Narcotic Drugs 1976


8. Cambodia Constitution


11. Criminal Law of China

12. Criminal Law of Vietnam


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


22. Narcotic Drug and Psychotropic Substance Law 1993 of Myanmar

23. Penal Code of Japan


30. The Misuse of Drugs Act 1971 of Singapore