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SOME ISSUES RELATED TO DEATH PENALTY JUDICIARY IN VIETNAM

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1. The nature and purpose of penalty in general and the death sentence in particular has been hotly debated in judgment and there is not yet a common consensus to it.

How the nature of a penalty is viewed leads to the purpose and its application thereafter.

Nevertheless the nature of a penalty is rooted from the notion of the nature of a crime. As in the definition of criminal explained in the Criminal Code, as well as in many legal sciences in other countries, there are contents and signs of punishment. In other words, dealing with the nature and purpose of punishment depends on the notion of criminals. Therefore, where there are differences in the concept of criminals there are differences in the learning of punishments, an obvious matter.

Together with the humanistic tendency of criminal law, legal researchers and lawyers in the world are making tireless efforts to regulate and apply to some limits the death penalty. Reduced scope of application to elimination or reserving the death penalty to some very rare cases are now commonplace in legislative making and law enforcement. According to Amnesty International by the end of 2007 and early 2008, more than 130 countries and territories have removed death penalty out of the judiciary or non-application in reality. To date, around 100 countries and territories have not applied death penalty to all kind of crimes. However, the roadmap from reducing to fully removing death penalty are not consensually and commonly applied by all countries and territories. This is understandable because of the differences in ideologies, traditions, and even externalities such as social, economic factors, residence, defense and national security, such factors helped shape national policies. And it is not surprised when a country has banned death penalty, others continue to use intensively, or banning in the past and now reusing ...

2. Around the issue of legislation and application of the death penalty, there are legislative concerns and that common trends of death penalty are reflected in the following:

- Some countries have banned or in the process of planning to ban death penalty. A few decades ago, many countries in Africa and Latin America have limited the use of death penalty. In the past decade, in some countries, courts are not making death penalty decisions. These countries are also considering the elimination of death penalty.



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- Secondly, death penalty is not incorporated into the judicial systems, and used in rare cases. In the countries, death penalty is defined in criminal laws, but rarely recognized this kind of punishment in their judicial system. It is seen as a special measure only. For example, The Criminal law of Russia, there is only one article which provides for death penalty (murder case). Such provision starts from the legal standpoint that human life is supreme and that the deprivation of which shall only be subject to death penalty. Death penalty is not applied to women, criminal under 18 years of age or male of over 65 years of age. In case of amnesty, death penalty is replaced by life sentence or a sentence of more than 25 years imprisonment.

In some countries, death penalty is reserved in some criminal laws, but limited to some committed crimes only. In Indonesia's criminal law, the death penalty is applied to crime such as: narcotics trafficking; intentional human shooting; weapons and military supplies robbery, and provocation in military zones; murder and other serious crimes. Iran's criminal law of 1988, death penalty is applied to murder, drug trafficking, political violence, prostitution, gang bang, alcoholism, robbery, anti-religion, conduct violation and disloyal marriages... Thailand's criminal law, death penalty applies to murder, political assassination, and murder of king. In addition, death penalty applies to other crimes such as robbery, hostage taking, use bombs for mass destruction, violent uprisings and espionage ... the fundamental trend here is that death penalty is contained to a groups of serious crimes such as violation of national security, physical health violation, social order and public security violation, and drug related crimes...other categories of ownership violations, economic violations and title-related charges are not subject to application of death penalty. China's current criminal laws provide 66 crimes which are subject to death penalty, mainly national security violations, physical health violation, public order violation, military-related crimes, corruption and drug charges. Death penalty is not applied to juvenile and women with pregnancy. However, there is one exception, people under 16 to 18 years of age found guilty of serious crimes can be subject to death penalty, but execution could be suspended for a period of 2 years. There are other provisions on suspension of up to 2 year performance.

In short, death penalty is being legislated and applied with differences in the world. Although elimination of death penalty is getting more common, this is not a leading trend. However, the progress of development is going along the line toward elimination of death penalty. The extent to which death penalty can be applicable depends on national legislation judgment, and based on particularly internal and external factors, existing space, and critical matters to the maintaining of each's existence and development.



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3. In Vietnam, the recent ancient and feudal legal systems provided for death penalty with frequency and applied to various crimes, in various manners. History shows that consecutive dynasties never ceased to make additions to death punishment and that death penalty continued to be seen as important and commonplace. Increasingly, more methods of execution were added with higher level of cruelty to suppress the perpetrators, people and potential criminals. The feudal governments did apply death penalty to punish the charged and remove from the social life even perpetrator's family members. Death penalty was used both as a tool to take revenge against the violated for their anti-social behaviours, and a means to suppress other people in the society, and more importantly to deprive completely the perpetrator's behaviour competence restoration, and his/her family members. With such a nature and methods, death penalty was very popular with extremely high level of cruelty and brutality.

Punishments such as taking the perpetrator to the boiling oil, leaving to tigers, tearing into pieces to those who violated royal assassination attempts... (Dinh and Prior-Le dynasty), to dumping into water in cage, forcing the perpetrator to climb a tree and then cut the tree off; tearing a sugar cane on perpetrator's head, burning, and using blunt knives to cut into pieces... (under Le Long Đinh dynasty) shows a whole long process of extension of means and methods of punishments, and such process was continually upgraded.

Until Ly and Tran dynasty when the "Royal punishment" law was created (after 1400), together with the regulation of five forms (using rods, sticks, forced labour, isolated detain and killing), the death penalty was also added with new methods of execution. In addition to the commonly used methods, death penalty was also applied to rebels by ways of live burial, or burial but the head which is tied to a strong bamboo then cut off by sharp knife to allow bamboo bounce up with the head.

Under post-Le dynasty, with the "royal national law" – punishments were one step further perfected. Death penalty, continued to be maintained apart from the common methods, was seen as the heaviest method of punishment, was added with executed by hanging, sword and dissection. Methods of execution were also perfected in a way which increased the level of cruelty and warning. For example, dissection execution was carried out slower with drummer. With each drum beat a piece of flesh was taken out, or flesh was taken out of bone with eyes popped up until the perpetrator was dead ...

During the Nguyen dynasty, in 1815 Gia Long king issued "Vietnamese king criminal law" ("Bộ luật Gia Long") – as the last royal law ever issued of the Vietnamese feudal system, death penalty continued to be applied and commonly used, in which the



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system maintained with more added crimes. Death penalty was used as a means of vengeance, punishment, and removal from the root of the upheaval attempt. In particular, violations in the defiance of kings, royal families, and the feudal institutions, not only the direct perpetrators were subject to punishment, others in the perpetrator's families, relatives were also executed. With anti-royal crimes, the execution carried out to three generations of the perpetrator, and in some cases with men of above 16 years of age. Execution was carried out in forms of hanging, by sword and dissection (tear, cut off flesh and pop eyes until death), head cutting, kill and cut the body. Depending on type and extent of crimes, types of execution was selected. For example, behaviours such as wife and lover killed a husband, servants kills master could be executed by dissection.

4. After the August revolution, a democratic people's government was born together with continual improvements are made to the legal system in a more humanistic and democratic manner, which has made gradually changes to the way the death penalty and execution methods is perceived. However, changes in criminal behaviours in Vietnam have taken place with complexities in line with the approval of the criminal code. The main explanation has been due to the constantly changing tasks and duties of the government in tackling domestic issues while protecting the country against foreign forces.

In the beginning, after the take-over the government, in keeping the existing legal system, suppressing potential threats to the existence of the people's new government, the death penalty continued to be applied on a common bass to behaviours such as robbery, destruction of telephone and telegraph systems, public property vandalism, blackmail, military supply robbery, obstruction of military task execution and espionages. In addition, death penalty was also applied to other behaviours such as destruction and violation of dams, dykes, agricultural construction schemes, deserter with possession of weapons; surrender to the enemy and making conspiracy with enemy... due to the initial shortcomings of the newly established government and weak institutional management, the application of death penalty was somewhat over-used.

In the later periods, together with reinforcement of people's authorities, and better government control, the use and extent of death penalty was reduced to a smaller scale to include only the suppression of counter forces. Death penalty was defined as a very heavy punishment against extremely serious crimes, applied in particular cases, and not on a common basis. In the ordinance on punishment of anti-revolutionary violation (1967), death penalty was applied to 11 out of 15 crimes. In the ordinance on socialist property violation (in 1970), death penalty was applied to behaviours such as intentional destruction of properties, robbery, corruption, and illegal property/assets possessions. The



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ordinance on individual property violation also provided for death penalty to the robbery of individual property. In the ordinance on anti-bribery (1981), ordinance on punishment of fake commodity, smuggling, illegal business activities (1982) all provide for death penalty. However it could be seen that the period before the issuance of the 1985 Criminal code, there was not a single legal document which provided a "complete punishment system".

In line with the development progressive humanistic thinking and social equality, the idea of using punishments to rule was replaced by the idea of punishment as a means to education, recorection, and prevention of crimes. In the modern legal system, punishment is considered a tool for recorection, and education which help the charged to return to community and for prevention purposes. Punishment is not meant to be preventive, bring about social justice but to rebuild the violated and distorted social relations under the law. Therefore, death penalty does not provide for the achievement of the first purpose: education, recorection, and social reintegration. Death penalty is merely a means of punishment and warning others.

Vietnam's criminal legal system, based on the scientific and progressive achievements, has continually improved towards creating more scientific, progressive, humanistic and equal achievements. Along the line, the perception and purpose of death penalty was changed drastically. Though death penalty continues to be enforced within the civil legal system, together with progressive outcomes, the use of death penalty continues to be reduced, and more humanistic regulations related to death penalty are created. To the modern Vietnamese government, death penalty is the 'unavoidable', last-resort measure to suppress severe threats to the human life, and critical interests, and directly or indirectly to the very existence of the government. Vietnam does not recognise such punishment as a means of vengeance, and that death penalty defined in the 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 can not be reintegrated in any way back into the human society, and that the State has used every other means it can.

Death penalty is totally a hope lost on a person that he could be brought back to the society, and as a last, irreplaceable resort to prevent the charged from committing the same specially serious crime. Limitation and next to eliminate forever death penalty is unavoidable in the process of legal perfection in Vietnam.

The Criminal Code of the Socialist republic of Vietnam (1985), for the first time has provided for regulations on the punishments and consistent use of such punishment in



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one single legal document, and that it provides death penalty is one of the 7 core punishments.

Article 27 of the 1985 Criminal Code not only provides that death penalty is a special punishment, but also the cases to which such punishment could be applied. Death punishment in the 1985 Criminal code mainly refers to crimes such as violation of national security, drug-related crimes, crime against peace, crime against humanity, war crime, socialist property violation, and violation of human dignity such as health violation, murder and rape. However, until the last amendment to the Criminal code, the 1985 version continues to provide for 44 crimes subject to death penalty, a total of 20% of the overall death penalty crimes.

The 1999, Criminal code (approved at the 6th session of the 10th national assembly), in Article 35, it is stated that: "death penalty is a specially applied charge to specially committed crimes"... compared to the Criminal code of 1985, it is clear that there are major changes to the provisions of general crimes, and crimes which are subject to death punishments in the Criminal code of 1999 including changes in the technical regulations and resolutions. However, there are still 29 provisions out of 263 provisions of crimes and punishments providing for the highest framework of death penalty (reducing 15 provisions compared to the 1985 Criminal Code).

Following the fact that death penalty is a particular measure, improvements are made toward increasing more humanistic aspects of the legal system. The extent to which death penalty can be applied continues to be narrowed down.

If in the 1985 Criminal code, death penalty was not applied to juveniles, women with pregnancy in their course of action or prosecution, the 1999 excludes the application of death penalty to women having children under 36 months of age (including women in the course of raising adopted children). The 1999 Criminal Code extend the scope of excluding death penalty to women having pregnancy or children under 36 months of age; and switch death sentence to life sentence (Resolution No. 229/2000/NQ/UBTVQH10 dated 28 of January 2000 of the NA standing committee). The 1999 Criminal Code also excludes "special circumstances" in which death penalty could be executed right after trial.

The number of article relating to death penalty in the 1999 Criminal Code accounts for just 11 percent in terms of charges. Structurally, death penalty is placed in group of national security violation (7 articles), and in 5 other groups such as: crimes in violation of physical health conditions, drug-related behaviours, obligation and military task



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violations, peace destruction crime, crime against humanity and war crime (three provisions of each group). In addition, two articles which provides for death penalty belonging to groups of violation of public order and security and property violations.

With issuance of the 1999 Criminal Code, death penalty provisions are reduced to certain crimes specifically defined in 15 articles of the Code; death penalty is reserved to crimes such as serious violation of national security, direct or indirect threats to the existence of the people's government, direct interference to the territorial integrity and sovereignty of the country. Crimes which belonged to category of national security but not directly related anti-government are placed in other chapters. As a result there are only 14 crimes relating to national security violations, in which 7 crimes are subject to death penalty. The 1999 Criminal Code reserves death penalty against three particular crimes: murder, rape and rape of children (Article 101; Article 112; Article 112a) .

At the moment, Vietnamese legislators are in the process of researching and considering the reduced application of death penalty within the Criminal Code. The National Assembly of Vietnam gives strong support to this trend. A majority of NA members agreed with the reduction of death penalty and elimination of death penalty in some cases.

I think that the elimination of death penalty in criminal charges is unavoidable. Death or any cruel punishments do not bring the wishful effects if we do not have other guarantees. In some cases death penalty and cruel punishments bring counter effects. The core here is that crimes must be well defined and provided for in accordance with righteous code of conducts, all crimes happened shall be dealt with appropriately, and punishments are applied on an equal, righteous, humanistic and legal manner.

However the suspension and elimination of death penalty to some crimes must be put into consideration taking into account the country's conditions.

Perhaps, instead of keeping a multitude of death penalty provisions just like this, it is important to enforce life sentence in line with increasing financial punishment, in one hand to reduce the use of death penalty, on the other hand, to recover the economic and social damages, at the same time, attacking right to the centre of greed, profit-oriented motives of corrupt, economic and smuggling people.

Nevertheless, to serious crimes which have been defined by the Party, the State and People as "national crimes", it is essential to maintain death punishments. And death penalty should only be applied to serious violation of national security, extremely



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dangerous drug-related crimes (including the trafficking, transport and stockpiling of considerable amount of drug).

To corruption charges, the maintenance of such punishment is fundamental as to Vietnam this remains a serious threat. This is in line with common agreement that corruption is a national crime. Under the context where corruption is a complicated and serious matter, and that the fight against corruption continues to fall short, the decriminalisation of corruption is like supporting the greedy who are digging into the property and interests of people and of the country for the own benefits.

There needs to be the same approaches to drug-related crimes. The elimination of death penalty to the illegal trafficking, transport and stockpiling of drug or deprivation of drugs will likely create legal conditions potentially detrimental to the society as it is like a lifeboat to the drug transporters and storers. The reality also shows that separating the behaviours of trafficking, trading and stockpiling of drugs is not possible and that drug transporters will intensify their operations as this is a legal area they know most difficult and most destructive to them. The elimination of death penalty to drug trafficking will like to create 'a promising' future for drug to be present all over the country, hence the fight against drug trafficking tougher.

The application of death penalty to crimes: peace destruction, waging invasion war (Article 341), crime against humanity (Article 342) and war crime (Article 343), shows clearly the consistent policy of the Government of Vietnam as a peace-loving, war-protesting, and human protection country. As perceived by the Party and the State, these are the most serious crime of the most serious charges. The behaviours of territorial and sovereignty intervention, in some cases, may result in many dead and injured people. In addition, the maintenance of death penalty to some crimes such as murder and other serious violations, the above regulation show the government's consistent policy toward criminal charges.

Besides, violations of military tasks and obligations of military personnels is a behaviour directly reducing the combativeness, disciplines and in some cases, causing serious destructions to the power and potential of military forces, and the physical health of many people. As the army is expected to be highly alertive, the neglected handling of military violations is problematic. Therefore, the application of death penalty to crime such as surrender to enemy (Article 322) is necessary to maintain disciplines, and contribute to the course of national protection and construction of the socialist republic of Vietnam. Similarly, the protection of facilities and infrastructure relating to national security is not only about maintaining safety objectives but to prevent activities which can cause



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tremendous destructions to the national security, economic damages, political instability and social orders. Therefore, death penalty is maintained in this aspect to prevent potential threats and provide severe punishment to the violators.

5. Due to the specialty of the death penalty, judicial procedures in cases which may be subject to death consideration within the Prosecution law of Vietnam are also strictly regulated.

Cases involving death considerations are often complicated requiring a high level of accuracy in all technical procedures. The violator subject to death consideration is also extremely dangerous, requiring special prosecuting procedures and careful handling of case details. As a result, in both aspects: for the interests of the defendants, the plaintiffs, the human destiny and complexity of this type of crime, prosecutors and involving actors are required to have a high level of profession. Specialised judges with high profession and expertise may consider and give right judgements to every details of the case as well as important decision in the course of prosecution.

In the spirit: judging the right people, right violations, and application of right punishment scale is the condition and pre-requisite for the full achievement of Vietnamese law and legal systems, and that Vietnam has created needed regulations to ensure the application of death penalty be most effective and avoidant of even smallest mistakes.

To those charged with the highest punishment, that is death penalty, the legal procedures according to law to ensure legality and the right frame of punishment in one hand produces a trust in the court's judgement, on the other hand, reduces to the minimum possible mistakes in giving final decisions.

In Article 170 of the 2003 Prosecution Law, if the defendant could be prosecuted and subject to death penalty, the case will be handled by a jurisdiction of a provincially-leveled or regional military court.

To ensure the effects of such decisions, and minimise possible shortcomings, when a court is obliged to make a death penalty decision, Vietnamese judicial laws states: to those who could be subject to death penalty, timeframe for the preliminary hearings is three months since the date the case is filed. The law also permits a preliminary court's judge to extend timeframe in a case of complicated procedures (but not more than 30 days). Within 15 days since the case is filed (or the date of file submission if the case is given additional investigation), the judge assigned to handle the case shall have to execute the judicial proceedings.



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In accordance with Article 185 of the Criminal Prosecution Law: to cases which the defendants might be subject to death penalty, the Judicial Council must be composed of two judges and three people's prosecutors. The law also provides that in such as case of death penalty, there must be a lawyer approved by the defendant's legal representative at the preliminary court. As a result, the law assures direct legal aid to the defendants, rejecting nomination of lawyering irrespective to the interests of the defendants. The law also protects the lawyers at court in his job to protect the defendant's legal rights and interests.

Although, there are provisions of two levels of judiciary as stipulated in Article 20 of the Criminal Prosecution Law, Court of Appeal is to reassess the case or the decisions made by the preliminary court and appealed by the defendants. In the case of death penalty, reassessment of such decision is of critical importance. Therefore, reconsidering an appeal is a special procedure. It is the possibility and the last-chance opportunity to recorrect possible shortcomings of the preliminary court's decisions. Once a death penalty, being appealed, shall be reconsidered by the Supreme Court or central military court. Timeframe for these bodies' reconsideration is 90 days since the day of the file submission. This is a time period for the People's supreme court or the central military court to reassess the whole case and prepare for final hearing.

The court of appeal council shall consist of three judges. In some case, there might be three other jurists (Article 244 of the Criminal Prosecution Law).

According to the law, death penalty verdict is not followed in a standard but special procedure. When a verdict is not appealed against shall be effective on the 31st day since the date of preliminary verdict. However, according to the current law of Vietnam, after the appeal period, there is not any appeal filed with the preliminary court by the death penalty-charged, the court shall have to collaborate with custody authorities to check whether the charged has made any appeal or appealed for the relief of death penalty. After the verdict has become effective, the case's file shall be sent (presumably on the day of the verdict validity) to the chief judge of the People's Supreme Court, and then the Chief prosecutor of the People's supreme procuracy (Clause 1, Article 258 of the Criminal Prosecution Law).

Although legislators have tried to foresee any possible shortcomings during prosecution of death penalty cases, there are many provisions which need to be perfected, especially those relating to a death penalty case such as methodologies and procedures.