Research Study

Application of Alternatives to Capital Punishment and the Right to Defence Through Self-Representation in Criminal Proceedings

International Experiences and Recommendations for Viet Nam

EU JULE

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Abstract

The Party and State of the Socialist Republic of Viet Nam have recognised the necessity of reforming the legal and judicial systems to achieve a transparent and effective legal system and an effective and accountable judiciary in line with international standards on human rights, including alternatives to capital punishment (the death penalty), and the right to defence through self-representation, a fundamental aspect of the broader right to a fair trial under the *International Covenant on Civil and Political Rights*.

This study aims to address the extent to which Viet Nam's laws and practice comply with international standards and comparative good practices from international experience relating to each issue. In the past decade Viet Nam has made significant strides in reducing the number of crimes to which the death penalty is applicable. The number of offenders sentenced to death account for less than one percent of the total number of defendants brought to trial, but the number of death sentences has nevertheless increased rapidly.

The right to defence, including the right to represent oneself and the right to be represented by othersis clearly stated in the Constitution of Viet Nam. This right applies not only before the Court but also during the stages of investigation and the period after charges are bought and before the prosecution begins. Despite these legal provisions to protect the right to defence, research findings show that only a very small minority of accused persons are assisted by defence counsel at trial, and most self-represented accused persons do not have the knowledge or skills to effectively exercise their right to defence.

The study concludes by making recommendations on practical measures Viet Nam could take to advance its efforts to limit the application of capital punishment, with a view to eventual abolition. Other recommendations focus on ensuring the right to defence is protected, promoted and fulfilled, including by expanding access to legal aid.

EXECUTIVE SUMMARY

Since early 2000s, the Party and State of the Socialist Republic of Viet Nam have recognised the necessity of reforming the legal and judicial systems to achieve a transparent and effective legal system and an effective and accountable judiciary in line with international standards on human rights and the rule of law, including the *International Covenant on Civil and Political Rights* (*ICCPR)*. To this end, Viet Nam's Supreme People's Court, with support from UNDP Viet Nam, is gathering information on international standards and international experience related to alternatives to capital punishment (the death penalty) and the right to defence through self-representation, a fundamental aspect of the broader right to a fair trial.

The scope of this research study includes international obligations and standards relating to capital punishment and the right to defence, practices of comparative jurisdictions in implementing these international obligations, and Viet Nam's regulation and application of the death penalty and the right to defence. The questions to be addressed in respect of both of these issues are the extent to which Viet Nam's laws and practice comply with international standards and comparative good practices from international experience relating to each issue.

The UN Human Rights Committee has confirmed that the right to life in the *ICCPR* is 1) non-derogable, meaning that it may not be suspended even in a state of emergency, and 2) must be interpreted broadly to protect all persons, even those convicted of the most serious crimes. The *Second Optional Protocol to the International Covenant on Civil and Political Rights* explicitly mandates abolition of the death penalty, however it has not yet been ratified by Viet Nam. Among 193 UN Member States, 170 countries have abolished the death penalty in law or do not apply the punishment in practice, illustrating the ongoing global movement away from the death penalty.

As an alternative to capital punishment, jurisdictions that have abolished the death penalty generally provide for life imprisonment, with or without the possibility of release on parole after a period of time to be determined based on considerations such as the offender's rehabilitation and potential for successful reintegration into society. Research findings from a worldwide perspective show no distinct increase in crime rates following the abolition of the death penalty compared to the use of life imprisonment, including for murder and drug crimes.

The number of crimes and punishments in Viet Nam, including the death penalty, have fluctuated over time along with development of the criminal law. The current *Penal Code*, last revised in 2017, contains eighteen capital offences contained in seven categories. In line with international law, the death penalty automatically does not apply to child offenders, women who are pregnant or have very young children, or the elderly. For each type of crime where the death penalty is prescribed, it is not the only or mandatory penalty, but one of the options available for the court to consider based on the nature and seriousness of the crime and the

requirements of crime prevention and control. The next less severe sentencing option for these crimes is life imprisonment. In 2018, statistics showed that the number of offenders sentenced to death accounted for less than one percent of the total number of defendants brought to trial, in which murder and drug-related crimes together accounted for nearly all capital offenders.

In 2019, Viet Nam participated in the third cycle of the Universal Periodic Review (UPR) process undertaken by the UN Human Rights Council. Recommendations for Viet Nam to adopt measures towards the abolition or restriction of the death penalty were made by several countries. Also in 2019, the Human Rights Committee issued *Concluding Observations* on Viet Nam's compliance with the *ICCPR* which identified as priority recommendations that Viet Nam considers introducing a moratorium on the use of the death penalty and acceding to the Second Optional Protocol of the *ICCPR* aimed at abolition.

The right to defend oneself against an allegation of criminal wrongdoing is a fundamental aspect of the right to a fair trial recognized in the *ICCPR*, which is linked to other fundamental rights such as the right to life and the right to be free from cruel, inhuman or degrading treatment or punishment. The *ICCPR* provides that every person has the right to defend himself, to be informed of this right, and to have free legal assistance provided in any case where the interests of justice so require. This right to defence can be exercised in one of two ways, either through the use of a legal representative such as a lawyer, or through self-representation. Either way, the right to defence encompasses both procedural and substantive rights, including the right to remain silent, the right to disclosure of evidence, and the presumption of innocence. While every accused has the right to choose to self-represent, it is of utmost importance that the choice be voluntary, as there are well-documented disadvantages to self-representation in the criminal context.

'Legal aid' encompasses legal advice, assistance and representation for all persons involved in the criminal justice process at all stages from detention through arrest and incarceration to trial. The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* states that legal aid is required in some form for all accused persons, included self-represented accused. The interests of justice require the provision of legal aid in circumstances where the case is complex or where the potential penalty includes capital punishment. It is the responsibility of police, prosecutors and judges to ensure that this principle is effectively realized by accused persons who are vulnerable or self-represented.

The right to defence, including the right to represent oneself and the right to be represented by others, not only before the Court but also during the stages of investigation and the period after charges are brought but before the prosecution begins, is clearly stated in the Constitution of Viet Nam. The law places no restriction on the accused or their representatives from asking lawyers or others for legal assistance, but places responsibility on the courts to ensure that the right is realized if it is exercised by the accused. If the accused does not seek

the assistance of defence counsel, the court is required to appoint defence counsel for the accused if the sentencing options include life imprisonment or the death penalty. The *Law on Legal Aid* stipulates other circumstances where citizens are to be provided free legal aid, including for children and several categories of persons such as the elderly and persons living with disabilities who are experiencing poverty or difficult socio-economic conditions.

Despite these legal provisions to protect the right to defence, research findings show that only half of detained persons in Viet Nam are aware of their rights upon arrest and detention, and their right to defend themselves or be defended by legal counsel. In addition, only a very small minority of accused persons are assisted by defence counsel at trial, and the experience of judges shows that most self-represented accused persons do not have the knowledge or skills to effectively defend themselves in court.

The authors conclude the report with recommendations on practical measures that Viet Nam can take to advance its efforts to further limit the application of capital punishment and to ensure that the right to defence is protected, promoted and fulfilled. In the past decade Viet Nam has made significant strides in reducing the number of crimes to which the death penalty is applicable. In light of international and regional commentary that capital punishment is a violation of both the right to life and the prohibition against cruel and inhuman punishment, trends around the globe towards abolition, recommendations made under both the UPR and the ICCPR processes, and Viet Nam's commitments made during the UPR process, the authors recommend that Viet Nam progressively continue on the path to total abolition. It should consider immediately replacing the death penalty with life imprisonment, with or without the possibility of parole, for the most serious crimes that do not involve intentional killing, including drug offences. In the interim, it is recommended that Viet Nam introduces a moratorium on execution of death sentences and develops sentencing guidelines for capital offences and for offences attracting life imprisonment.

The main and overarching recommendation with regard to the right to defence in Viet Nam is the expansion of the opportunities for an accused person to have access to legal aid at all stages of criminal proceedings if that person requires so. Provision of legal aid should be expanded through various means, including by ensuring that it is adequately funded.

Finally, data should be collected on all capital crimes, disaggregated by gender, age, nationality, ethnic origin, social origin and other relevant demographics to ensure that socioeconomic factors that contribute to disparities in those who are subject to the death penalty can be eliminated or controlled. Data should also be collected all accused persons who are self-represented in criminal proceedings, and on all persons receiving legal aid, in order to measure whether the right to defence is being effectively realized. All of the data collected in accordance with these recommendations should be made publicly accessible and be updated on no less than an annual basis.

A. INTRODUCTION

Since early 2000s, the Socialist Republic of Viet Nam (hereafter referred to simply as 'Viet Nam') has recognised the necessity of reforming the legal and judicial systems to achieve a transparent and effective legal system and an effective and accountable judiciary in line with international standards on human rights and the Rule of Law. The strategies, plan and targets of this reform were clearly indicated in: Resolution 08-NQ/TW 2002 on Several Key Tasks in the Judicial Sector in the Near Future; Resolution 48-NQ/TW 2005 on the Strategy for Development and Improvement of the Vietnamese Legal System to 2010 and Orientation to 2020; Resolution 49-NQ/TW 2005 on Judicial Reform Strategy to 2020; and Resolution 27-NQ/TW 2022 on continuing to build and perfect the socialist rule of law state in the new period. When summarizing the implementation of these resolutions, the Party and State of Viet Nam both affirmed that Viet Nam needs to continue implementing reforms. The Resolution of the 13th National Party Congress underscores the need to build a socialist rule of law state, including by improving the legal system, mechanisms and policies.

Viet Nam's national strategy (at Resolution 27-NQ/TW on 09/11/2022 of the Central Committee of the Communist Party of Vietnam on continuing to build and perfect a socialist rule of law state in the new period) indicates the requirement to improve its justice system to enable Viet Nam to fulfil its international commitments in the field of criminal justice by respecting and guaranteeing human and citizens' rights under a number of relevant United Nations human rights treaties and mechanisms, including the Universal Periodic Review, the *Convention Against Torture* and the *International Covenant on Civil and Political Rights*.

Having an important role in implementing the recommendations, Viet Nam's Supreme People's Court is gathering information on international standards and international experience related to alternatives to capital punishment (death penalty) and the right to self-representation, which is one of two means by which to assert the right to defence in criminal proceedings, a fundamental aspect of the broader right to a fair trial. This study is a follow up to the *Study on the Possibility of Viet Nam ratifying the Second Optional Protocol of the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* released by the EU Justice and Legal Empowerment Program (JULE) in October 2019.

i. Issues, Scope and Methods of the Study

This study examines two issues in parallel: (1) alternatives to capital punishment; and (2) the right to present a defence to an accusation of criminal conduct, and the component right to represent oneself during criminal proceedings as one of two means by which to present a defence. While the two issues are treated as distinct in the approach to reviewing the relevant law and practice, it should be kept in mind that the right to present a defence against an accusation of criminal wrongdoing is absolutely fundamental, and requires greater protection when the potential penalty for the alleged criminal conduct is death.

The scope of this research study includes international obligations and standards relating to capital punishment and the right to defence, practices of comparative jurisdictions in implementing these international obligations, and Viet Nam's regulation and application of the death penalty and the right to defence. The questions to be addressed in respect of both of these issues are the extent to which Viet Nam's laws and practice comply with international standards and comparative good practices from international experience relating to each issue. This report therefore begins with a review of international law and standards on capital punishment and the right to defence that apply to Viet Nam. It then sets out comparative research and analysis of laws, policies and practice in relevant jurisdictions regionally and globally that may serve as a reference for Viet Nam. The report next turns to a contextual analysis of Viet Nam's current laws, policies and practices, including what crimes are currently subject to the death penalty, and what are the barriers encountered by accused persons in exercising the right to defence, in particular through the means of self-representation. The report concludes with recommendations on practical measures that Viet Nam can take to advance its efforts to further limit the application of capital punishment, including by imposing a moratorium, with a view to its eventual abolition, and to ensure that the right to defence is protected, promoted and fulfilled.

B. INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAWS AND STANDARDS

The 2016 *Law on Treaties* stipulates that "if a legal document, except for the Constitution, and a treaty to which the Socialist Republic of Viet Nam is a contracting party, have different provisions on the same issue, the treaty shall prevail" (Art. 6). The 2015 *Law on Promulgation of Legislative Documents* also states that "[a]pplication of Vietnam's legislative documents must not obstruct the implementation of international agreements to which the Socialist Republic of Viet Nam is a signatory" (Art. 156).

Viet Nam is a member of the Association of Southeast Asian Nations ('ASEAN') since 28 July 1995[1], and the ASEAN Charter provides that its purposes include the protection of human rights and fundamental freedoms and equitable access to justice, in accordance with the principle of upholding the Charter of the United Nations and international law.[2] The ASEAN *Human Rights Declaration* affirms these purposes and principles, and specifically confirms that "every person has an inherent right to life", "no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment" and that "every person charged with a criminal offence shall be presumed innocent until proved guilty according to

[1] Association of Southeast Asian Nations, *About ASEAN,* online: <https://asean.org/about-us> [accessed 14 February 2022].

[2] Association of Southeast Asian Nations, *The ASEAN Charter* (adopted 20 November 2007), online: <https://asean.org/wp-content/uploads/2021/08/November-2020-The-ASEAN-Charter-28th-Reprint.pdf> [accessed 14 February 2022] at Chapter 1, Articles 1 (paras. 7 and 11) and 2 (para. 2(j)).

law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence."[3]

Following are the principles and definitions contained in key international and regional human rights framework documents that have been ratified by Viet Nam, and other treaties and commentary that is binding or persuasive on Viet Nam's practice, and that is therefore relevant to the country's obligations in respect of the right to defence, including through the means of self-representation, and the rights to life and to be free from cruel or inhuman punishment in relation to capital punishment.

I. Capital Punishment in the Global Context

Viet Nam became a member of the United Nations ('UN') on 20 September 1977.[4] While UN General Assembly resolutions are not binding on any member state, they constitute formal and persuasive statements of recognized international law. International treaties or conventions that have been signed and ratified by a member state are binding on the signatory, except to the extent of any allowable reservation that has been formally declared. In this respect, Article 3 of the *Universal Declaration of Human Rights* (*UDHR*)[5] and Article 6 of the *International Covenant on Civil and Political Rights (ICCPR)*[6] each protect against arbitrary deprivation of the inherent right to life. Article 6(2) of the *ICCPR* provides that the sentence of death may be imposed "for the most serious crimes" pursuant to a final judgment rendered by a "competent court". The death penalty may not be imposed on persons under eighteen years of age, or pregnant women.[7]

The *Second Optional Protocol to the International Covenant on Civil and Political Rights*[8] was adopted by the UN General Assembly in 1989 and explicitly mandates abolition of the death penalty, however it has not been ratified by Viet Nam. Since 1980, three additional international human rights treaties have been adopted that commit to the abolition of capital punishment.[9] The goal of progressive restriction of capital offences has

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[3] Association of Southeast Asian Nations, *ASEAN Human Rights Declaration* (adopted 18 November 2012), online: <https://asean.org/wp-content/uploads/2021/01/6_AHRD_Booklet.pdf> [accessed 14 February 2022] at paras. 6, 10, 11, 14 and 20(1).

[4] United Nations, *Member States* (undated), online: <https://www.un.org/en/about-us/member-states#gotoV> [accessed 16 February 2022].

[5] G.A. Res. 217 A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

[6] G.A. Res. 2200A (XXI) of 16 December 1966 (entry into force 23 March 1976) [*ICCPR*]. It is important to note that the only formal declaration made by Viet Nam to the *ICCPR* is in relation to Article 48 under which a number of states are deprived of the opportunity to become parties, which Viet Nam has declared to be discriminatory.

[7] *Ibid*. at Article 6(5).

[8] *Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (15 Dec. 1989).

[9] Protocol No. 6 to the *European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*, 28 Apr. 1983, E.T.S. 114; *Protocol to the American Convention on*

been reiterated in various resolutions by the UN General Assembly and Commission on Human Rights, such as General Assembly Resolution 62/149 in 2007, which calls for all retentionist states to establish a moratorium on executions with a view to abolishing the death penalty. Two further resolutions reaffirming the call for a global moratorium were adopted in 2008 and 2010,[10] and on 15 November 2012 the UN General Assembly's Third Committee voted once again in favour of a moratorium on the death penalty.[11]

In his 2017 yearly supplement to his report on the death penalty, entitled *Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*,[12] the UN Secretary General recommended that states who retain the death penalty should ensure that laws must contain specific provisions to protect persons with disabilities in capital cases and ensure those with mental or intellectual disabilities are not sentenced to death,[13] that states should investigate the socioeconomic factors that contribute to disparities in those who are subject to the death penalty and take measures to eliminate or control these factors,[14] and that states should systematically collect and publish data on capital charges, sentences and executions, disaggregated by gender, age, nationality, ethnic origin, social origin and other relevant demographics.[15] The overall conclusion and recommendation of the report in regard to retentionist states is thus –

> The imposition of the death penalty is increasingly regarded as being 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. States that continue to impose and implement death sentences should establish a moratorium on executions with a view to abolishing the death penalty.[16]

Finally, the UN Human Rights Committee's *General comment No. 36 on article 6: the right to life*[17] adopted by the Committee on 30 October 2018, confirms that the right to life in

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Human Rights to Abolish the Death Penalty, 8 June 1990, O.A.S.T.S. 73, 29 I.L.M. 1447; *Protocol 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances*, 3 May 2002, E.T.S.

[10] UN GA Res. 65/206, *Moratorium on the use of the death penalty*, UN Doc. A/RES/65/206 (28 March 2011), online: <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/206> [accessed 16 February 2022].

[11] UN GA Third Committee, *Moratorium on the use of the death penalty*, UN Doc. A/C.3/67/L.44/Rev.1 (15 November 2012), online: <https://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/67/L.44/Rev.1> [accessed 16 February 2022].

[12] UN HRC, *Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, UN Doc. A/HRC/36/26 (22 August 2017), online: <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session36/Documents/A_HRC_36_26_EN.docx> [accessed 16 February 2022].

[13] *Ibid.* at para. 56.

[14] *Ibid*. at para. 57.

[15] *Ibid*. at para. 55.

[16] *Ibid.* at para. 53.

[17] UN HRC, *General comment No. 36 on article 6: right to life*, UN Doc. CCPR/C/GC/36 (3 September 2019), online: <https://undocs.org/CCPR/C/GC/36> [accessed 16 February 2022].

Article 6 of the *ICCPR* is non-derogable, meaning that it may not be suspended or denied for any reason, even in situations such as terrorist attacks and other emergencies that threaten the life of a nation.[18] The Committee reinforces that the right to life must be interpreted broadly to protect all persons without distinction, even those suspected or convicted of the most serious crimes, from being actively deprived of life,[19] because "the intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat".[20] Given data suggesting that, e.g., members of ethnic minorities and people from poorer communities are disproportionately subject to the death penalty,[21] it is critically important that an individualized analysis of the personal circumstances of the offender and the particular circumstances of the offence be undertaken in every case in which the death penalty may be imposed.[22]

As noted above, it is likewise crucial that fair trial protections, including the fundamental right to defence, are strictly adhered to. Violations of fair trial guarantees such as inability to access legal documents essential for conducting the legal defence, or establishing guilt beyond a reasonable doubt, such as the court judgment or trial transcript, render imposition of the death penalty arbitrary and a violation of the right to life. This is particularly so in light of recent reliable studies showing the prevalence of false confessions and unreliability of eyewitness evidence,[23] and the lack of a deterrent effect of harsh penalties on the commission of crime.[24]

The Committee acknowledges that although the wording of Article 6 of the *ICCPR* suggests that States did not universally regard the death penalty as an unacceptable violation of the right to life or that it constitutes cruel, inhuman or degrading punishment in all circumstances. Subsequent agreements and practice of States however, particularly the number of non-abolitionist States that have nevertheless introduced a *de facto* moratorium on the death penalty, leads to the conclusion that the death penalty is now regarded as a violation of the prohibition against cruel and inhuman punishment in all circumstances.[25] Accordingly, the Committee concludes as follows –

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[18] *Ibid.* at para. 2.
[19] *Ibid*. at para. 3.
[20] *Ibid*. at para. 12.
[21] *Ibid*. at para. 44.
[22] *Ibid*. at para. 37.
[23] *Ibid*. at paras. 41 and 43.
[24] UN OHCHR, *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (New York: 2015), online:<https://www.ohchr.org/EN/newyork/Documents/Moving-Away-from-the-Death-Penalty-2015-web.pdf> [accessed 16 February 2022] at Chapter 2 [*Moving Away from the Death Penalty*]; Death Penalty Information Center, *Study: International Data Shows Declining Murder Rates After Abolition of Death Penalty* (3 January 2019), online: <https://deathpenaltyinfo.org/news/study-international-data-shows-declining-murder-rates-after-abolition-of-death-penalty> [accessed 16 February 2022].
[25] *Supra* note 12 at para. 51.

> Article 6, paragraph 6 reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, *de facto* and *de jure*, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights.[26]

As of the time of writing this study, among 193 UN member states, some 170 countries have abolished the death penalty in law or do not apply the punishment in practice.[27] This illustrates the ongoing global movement away from the death penalty over the last fifty years, towards abolition and a restricted use of the penalty.[28] Of those states that retain the death penalty in law, seven countries apply the death penalty only in extreme cases such as war crimes. The most recent countries to abolish the death penalty in law are Sierra Leone (October 2021), Kazakhstan (December 2021), Papua New Guinea (January 2022), and Zambia (December 2022). and Malaysia is expected to follow in the near future.[29]

It should be noted that some States have made the decision to abolish the death penalty in response to grassroots movements and advocacy, often based on research that shows the lack of a deterrent effect of the death penalty and the positive effects on society of rehabilitation and reintegration of offenders. Abolition has also occurred in response to court decisions finding the death penalty to be a violation of the right to be free from inhuman punishment, found in international human rights instruments and in many modern constitutions around the world. Either way, abolition always requires political will to recognize, respect, protect and fulfil the human rights of all persons without distinction, and to shift penal policy from a focus on retribution to rehabilitation. This is accomplished by reforming all relevant laws and policy from a human rights lens, and becoming State Parties to the *Second Optional Protocol to the ICCPR* without reservation.[30]

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[26] *Ibid*. at para. 50 [citations omitted].

[27] UN OHCHR, *Comment by UN High Commissioner for Human Rights Michelle Bachelet on Papua New Guinea's repeal of the death penalty* (21 January 2022), online: <https://www.ohchr.org/en/2022/01/comment-un-high-commissioner-human-rights-michelle-bachelet-papua-new-guineas-repeal-death> [accessed 17 October 2022].

[28] Penal Reform International, *Alternatives to the death penalty information pack* (Second Edition) (London: 2015), online: <https://cdn.penalreform.org/wp-content/uploads/2015/03/PRI_Alternatives_to_death_penalty_info_pack_WEB.pdf> [accessed 15 February 2022] at 5.

[29] World Population Review, *Countries with Death Penalty 2022*, online: <https://worldpopulationreview.com/country-rankings/countries-with-death-penalty> [accessed 11 September 2022]; UN News, *Zambia: Abolition of the death penalty 'a historic milestone',* online: https://news.un.org/en/story/2023/01/1132212 [accessed 18 January 2023].

[30] International Commission Against the Death Penalty, *How States Abolish the Death Penalty – 29 Case Studies,* online: <https://icomdp.org/wp-content/uploads/2020/10/ICDP-2018-MAYO-PENA-DE-MUERTE-V3.pdf> [accessed 28 October 2022] at 11.

i. Alternatives to Capital Punishment

While Viet Nam is not a signatory to the *Rome Statute of the International Criminal Court*, meaning that Viet Nam is therefore not legally obligated to comply with its statement of international criminal law, the *Rome Statute* can be considered as customary international law, being the general and uniform practice of a significant majority of States that recognize the practice as an international legal obligation.[31] Its provisions therefore represent a standard that Viet Nam should view as persuasive in developing its domestic criminal law. The *Rome Statute* applies to the international crimes of genocide, crimes against humanity and war crimes, but does not provide for the death penalty as a sentencing option. Rather it provides for life imprisonment as the most severe sentence, available only "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".[32] Likewise, the statutes of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia, as well as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, which prosecute the most serious crimes against humanity, expressly exclude the death penalty as a form of punishment to be administered for crimes falling within their jurisdictions.[33]

The United Nations Office on Drugs and Crime (UNODC) Crime Prevention and Criminal Justice Branch in 1994 found that "life imprisonment, like the death penalty, frequently finds favour in public opinion, as it is perceived as demonstrating tough, retributive legal orders. As ultimate penal sanctions, legitimation for both the life sentence and capital punishment tends to follow similar paths."[34] Life imprisonment is used as a mandatory sentence for formerly capital crimes in many countries that have abolished the death penalty, and is also used as the sentence imposed in countries that commute the death penalty as a measure of clemency.[35] The UNODC notes that life imprisonment for the entirety of an offender's life rarely exists however, as practice in most jurisdictions is to temper life imprisonment with the possibility of early release, usually in the form of parole.[36] In this

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[31] Article 38 of the *Statute of the International Court of Justice* includes "international custom, as evidence of a general practice accepted as law" as one of several sources of law at the international level.

[32] 17 July 1998, UN Doc. A/CONF.183/9 (entered into force 1 July 2002) at Article 77.

[33] See *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (September 2009), online: <https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> [accessed 16 February 2022] at Article 24; *Statute of the International Tribunal for Rwanda* (2007), online: <https://legal.un.org/avl/pdf/ha/ictr_EF.pdf> [accessed 16 February 2022] at Article 23; *Statute of the Special Court for Sierra Leone* (2000), online: <http://www.rscsl.org/Documents/scsl-statute.pdf> [accessed 16 February 2022] at Article 19; *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (as amended October 2004), online: <http://www.eccc.gov.kh/en/documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> [accessed 16 February 2022] at Article 38.

[34] UN Office of Drugs and Crime, Crime Prevention and Criminal Justice Branch, *Life Imprisonment* (1994), online: <https://cdn.penalreform.org/wp-content/uploads/2013/06/UNODC-1994-Lifers.pdf> [accessed 16 February 2022] at paras. 13 and 14.

[35] *Ibid*. at para. 7.

[36] *Ibid*. at para. 16.

respect, the *Standard Minimum Rules for the Treatment of Prisoners*[37] clarifies that, since the purpose of incarceration is to protect society against crime, the time spent in custody should be aimed at ensuring that the offender is rehabilitated and able to lead a law-abiding life.[38] Preliminary observation 2 of these *Nelson Mandela Rules* note that they represent "the minimum conditions which are accepted as suitable by the United Nations."

This observation was followed up in 1990 when the UN General Assembly adopted the *United Nations Standard Minimum Rules for Non-custodial Measures* (the *Tokyo Rules*) which provide that states must develop non-custodial measures with the aim of reducing the use of imprisonment, taking into account human rights, social justice and rehabilitation of offenders.[39] A range of non-custodial options should be available at all stages of the criminal justice process, from pre-trial to post-sentencing, "in order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society".[40] In making a decision on sentencing after a conviction, a judicial authority should consider the rehabilitative needs of the offender, the protection of society, and the interests of the victim who should be consulted.[41] To assist re-integration of offenders into society, the *Rules* state that release from incarceration to a non-custodial program such as halfway houses, remission, parole or pardon, *must* be considered "*at the earliest possible stage*."[42] In this respect, courts in various jurisdictions have held that the requirement for a sentence to be reviewed for the possibility of release on parole is what saves a life sentence from being arbitrary, cruel, inhuman or degrading, or a violation of human dignity.[43]

Specifically with respect to female offenders, the United Nations *Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*[44] (*The Bangkok Rules*) that were adopted in 2010 take into consideration the unique circumstances and position that women offenders face in the criminal justice system and calls for special mechanisms to address the same. The UN General Assembly resolution adopting the *Bangkok Rules* recognizes that "a number of female offenders do not pose a risk to society and, as with

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[37] UN ESC Res. 2076 (LXII), (13 May 1977) [*Nelson Mandela Rules*].
[38] *Ibid*. at Rule 4, para. 1.
[39] GA Res. 45/110, UN Doc. A/RES/45/110 (14 December 1990), online: <http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf> [accessed 16 February 2022] at para. 1.5.
[40] *Ibid*. at para. 2.3. See also 3.2.
[41] *Ibid*. at para. 8.1.
[42] *Ibid*. at paras. 9.1-9.4 [emphasis added].
[43] See for e.g., *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE), vol. 86, p.288 (Federal Constitutional Court of Germany, 3 June 1992) as described in *supra* note 28 at 18; *State* v *Tcoeib* (1996) 7 BCLR 996 (Namibia Supreme Court); *State* v *Bull & Another* 2002 (1) SA 535 (South Africa Supreme Court of Appeal); Const. Application No CCZ 48/15, Judgment No CCZ 8/16, 13 July 2016 (Constitutional Court of Zimbabwe); *Vinter v the United Kingdom* [2012] ECHR 61.
[44] UN GA, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* (the *Bangkok Rules*), UN Doc. A/C.3/65/L.5 (6 October 2010), online: <https://www.refworld.org/docid/4dcbb0ae2.html >.

all offenders, their imprisonment may render their social reintegration more difficult" and the *Rules* themselves call upon state and non-state actors to ensure that women offenders are treated fairly and equally during arrest, trial, sentence and imprisonment, with particular attention being paid to the unique problems that women offenders encounter, such as pregnancy and child care. Rule 58 states that "alternative ways of managing women who commit offences, such as … sentencing alternatives, shall be implemented wherever appropriate and possible." Rule 63 addresses post-sentencing dispositions and provides that decisions regarding early conditional release (parole) shall favourably take into account women prisoners' caretaking responsibilities, as well as their specific social reintegration needs.

Therefore, as an alternative to capital punishment, jurisdictions that have abolished the death penalty generally provide for life imprisonment until the offender's death, without the option of release except in the case of a pardon/clemency. This is usually referred to as 'life without parole' (LWOP). In addition or in the alternative, depending on the jurisdiction, life imprisonment is imposed with the possibility of release on parole after a period of time to be determined based on considerations such as the offender's conduct while incarcerated (rehabilitation) during the time of incarceration, and potential for successful reintegration into society.[45]

II. The Right to Defence in the Global Context

The right to defend oneself against an allegation of, and prosecution for, criminal wrongdoing is a fundamental aspect of the right to a fair trial recognized in international human rights law, first in the *UDHR* at Article 11, in all the regional human rights instruments and declarations including the *ASEAN Human Rights Declaration*,[46] and most comprehensively in the *ICCPR* at Article 14. Specifically, paragraph 3(d) of the *ICCPR* Art. 14 provides that every person has the right "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." The right to a fair trial in the ICCPR is linked to other fundamental rights such as the right to life and the right to be free from cruel, inhuman or degrading treatment or punishment.[47]

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[45] Penal Reform International, *supra* note 28 at 10.

[46] See also *European Convention on Human Rights* (Article 6); *American Convention on Human Rights* (Article 8); *African Charter on Human and Peoples' Rights* (Article 7); *Revised Arab Charter on Human Rights* (Article 13); and *ASEAN Human Rights Declaration* (Article 20).

[47] UNOHCHR, United Nations Counter-Terrorism Implementation Task Force, CTITF Working Group on Protecting Human Rights while Countering Terrorism, *Basic Human Rights Reference Guide: Right to a Fair Trial and Due*

As provided for in *ICCPR* Article 14(3)(d), the right to defend oneself from an accusation of criminal wrongdoing – otherwise termed as the 'right to defence' – can be exercised in one of two ways, either through the use of a legal representative such as a lawyer, or through self-representation.[48] Either way, the right to defence encompasses both procedural and substantive rights, as recognized by the UN Human Rights Committee in its *General comment no. 32*, including the right to be informed of criminal charges promptly, the right to have adequate time to prepare a defence, the right to be tried without undue delay, to call and examine witnesses, the right to remain silent and not be compelled to give evidence or confess guilt, the right to disclosure of evidence which is beneficial to the accused's defence, and the right to an interpreter so as to enable the accused to understand the proceedings if required.[49] Further aspects of the right to a fair trial, which are a fundamental prerequisite and enabling criteria to full and effective realisation of the right to defence, include: the presumption of innocence, which imposes the burden of proof on the prosecution and the standard of proof of 'beyond a reasonable doubt';[50] the right to an effective remedy if any of the fair trial rights have been violated, including compensation for persons convicted as a result of a miscarriage of justice;[51] and the right to appeal the conviction and sentence, which necessarily includes access without delay to a well-reasoned, written judgment of the trial court.[52] The right to appeal is particularly important due to the severity and complexity of trials relating to capital offences. The Human Rights Committee has confirmed that a violation of the right to a fair trial in a death penalty case also constitutes a violation of the right to life in *ICCPR* Article 6.[53]

The *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* adopted by the UN General Assembly in 1988[54] expressly sets out all of these rights as follows:

Process in the Context of Countering Terrorism (October 2014), online: <https://www.ohchr.org/en/newyork/documents/fairtrial.pdf> [accessed 14 February 2022] at 7.

[48] Self-representation – acting alone to defend oneself against an accusation of criminal conduct, instead of engaging the assistance of a legal representative such as a lawyer – should not be confused with the legal concept of 'self-defence', which is the use of physical force by a person to protect himself against real or threatened physical aggression by another person. For the purpose of this study, the term 'self-representation' will be used to denote one of two means by which an accused person defends himself from an accusation of criminal wrongdoing. Note that 'himself' is used interchangeably with 'oneself', and includes 'herself'.

[49] UN HRC, *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, UN Doc. UN Doc. CCPR/C/GC/32 (23 August 2007), online: https://www.refworld.org/docid/478b2b2f2.html [accessed 14 February 2022] [*General Comment 32*] at paras. 31, 32, 35, 39, 40 and 41. See also *supra* note 47 at 21 and 33; International Criminal Court, *Defence*, online: <https://www.icc-cpi.int/about/defence> [accessed 14 February 2022].

[50] *Supra* note 47 at 20. See also *General Comment 32, ibid*. at para. 30.

[51] *Ibid*. at 37.

[52] *Ibid*. at 36. See also *General Comment 32, supra* note 49 at paras. 45, 48, 49 and 51.

[53] *General Comment 32, supra* note 49 at para. 59.

[54] UN GA Res. 43/173 (9 December 1988) [*Body of Principles*].

- the right to be informed of the reason for arrest and charges (Principle 10);[55]
- the right to have detention reviewed without delay, and the right to self-represent or be represented by counsel (Principles 11 and 37);
- the right to have these rights explained and accorded, from the time of arrest and detention, including interpretation into a language that the person understands if necessary, and free of charge (Principles 13 and 14);
- the right to legal counsel, including one assigned and paid for by the State if the person cannot afford counsel and the interests of justice require it (Principle 17);[56]
- the right to communicate and consult with legal counsel without delay and in full confidentiality, including adequate time and facilities to do so, within the sight but not within the hearing of a law enforcement official (Principle 18);[57]
- the right to be tried within a reasonable time or to be released on bail pending trial (Principles 38 and 39); and
- the right to be presumed innocent "until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence" (Principle 36).[58]

It should be noted that the UN *Principles for the protection of persons with mental illness and the improvement of mental health care* expressly confirms that the entire *Body of Principles* as set out above apply to criminal offenders with mental illness.[59]

i. Self-Representation versus Representation by Legal Counsel

As noted above, the right to a fair trial includes the fundamental guarantee of an adequate opportunity to prepare and present a defence, including by challenging the evidence and arguments of the prosecution, either through self-representation or representation by legal counsel/a lawyer. While every accused has the right to choose to represent himself, it is of utmost importance that the choice be voluntary, rather than as a result of lack of availability or knowledge of the right to assistance of legal counsel, as there are well-documented disadvantages to self-representation in the criminal context.

[55] See also the *Nelson Mandela Rules, supra* note 37 at Rule 119.
[56] *Ibid*.
[57] *Ibid.* at Rule 61. Note that this Rule also includes the right to "access effective legal aid". See Rule 120 which clarifies that the right includes provision of "writing material for the preparation of documents related to his or her defence, including confidential instructions for his or her legal adviser or legal aid provider." See also *supra* note 47 at 29-31; *General Comment 32, supra* note 49 at paras. 32-34.
[58] See also *Nelson Mandela Rules, supra* note 37 at Rule 111.
[59] UN GA Res. 46/119 (17 December 1991) at para. 5 and Principle 20.

Experiences of judges and lawyers in many jurisdictions, including in Viet Nam as set out in Part III below, show that self-represented accused:

a. most often do not understand the charge against them, including both the nature of the charge and its potential implications if convicted;
b. plead guilty in circumstances where the advice of legal counsel would be to plead not guilty, or alternatively plead not guilty where the advice of legal counsel would be to plead guilty;
c. either fail to challenge evidence through cross-examination or ineffectively cross-examine witnesses to the accused person's detriment; and
d. are liable to more severe punishment because they do not understand how to submit evidence in favour of a lesser punishment.[60]

Research has shown that there is also a broader disadvantage to the legal process and the right to a fair trial, as both judges and prosecutors must have the time, skill and willingness to deal effectively with self-represented accused persons, which necessitates a balancing between providing support to ensure access to justice and maintaining the neutrality of the court process.[61] As stated in one research study report, "lawyers and judges themselves find it hard to keep up with criminal law and procedure, and are under constant pressure to speed up cases. If we are to deliver justice, we essentially have two options - to fund lawyers for all [accused persons] who want or need them, or to change the whole system so that the needs of [self-represented accused persons] are integral."[62]

With respect to the right to be assisted by counsel, the *UN Basic Principles on the Role of Lawyers*[63] recognizes Article 14 of the *ICCPR*, the *Nelson Mandela Rules,* the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, and the *Safeguards guaranteeing protection of the rights of those facing the death penalty*,[64] and affirms that "all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings".[65] The Principles mandate governments to ensure that all persons are immediately informed upon arrest or detention of their right to consult a lawyer "of experience and competence

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[60] Transform Justice, *Justice denied? The experience of unrepresented defendants in the criminal courts* (April 2016), online: <https://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf> [accessed 9 September 2022] at 2.
[61] *Ibid*.
[62] *Ibid*.
[63] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990), online: OHCHR <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx> [accessed 14 February 2022].
[64] UN ECOSOC Res. 1984/50 (25 May 1984), online: UNODC <https://www.unodc.org/pdf/criminal_justice/Safeguards_Guaranteeing_Protection_of_the_Rights_of_those_Facing_the_Death_Penalty.pdf> [accessed 16 February 2022].
[65] *Supra* note 63 at para. 1.

commensurate with the nature of the offence", are provided prompt access to such a lawyer within forty-eight hours of detention or arrest, and have such a lawyer assigned and paid for by the State if the person cannot pay for one.

Further, States must also ensure that "all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality."[66] This is reinforced in Principles 16 and 21 which require governments to ensure that lawyers are able to carry out their professional duties "without intimidation, hindrance, harassment or improper interference" and have "access to appropriate information, files and documents" in the possession of the State "at the earliest appropriate time".

ii. Access to Legal Aid

All of the above principles are reiterated and further reinforced in the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* which states that "legal aid is a foundation for the enjoyment of other rights, including the right to a fair trial."[67] 'Legal aid', for the purposes of the *Principles and Guidelines,* encompasses legal advice, assistance and representation for all persons involved in the criminal justice process at all stages from detention through arrest and incarceration to trial. In addition to persons suspected, accused or charged with an offence, particularly those liable to punishment by the death penalty, legal aid should also be provided to victims and witnesses.[68] For absolute clarity, the definition of 'legal aid' in the *Principles and Guidelines* includes, but is not restricted to representation by legal counsel (i.e., a lawyer).

Legal aid is required in some form – i.e., advice, assistance or representation – for all accused persons, including self-represented accused. Principle 3 clarifies that the "interests of justice require" the provision of legal aid in circumstances where the case is complex or the potential penalty is severe, such as where the potential penalty is or includes capital punishment. It is the responsibility of police, prosecutors and judges to ensure that this principle is effectively realized by accused persons who are vulnerable or self-represented. Guideline 2 mandates that information about the right to legal aid should be provided in police stations, detention centres, courts and prisons, and that means to verify the provision of this information should be in put place. If a person has not been adequately informed of the right, there must be an effective remedy such as release from detention, exclusion of evidence, or compensation. Guideline 4 clarifies that information about the right to legal aid

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[66] *Supra* note 63 at paras. 5-8. See also *supra* note 47 at 28-29; *General Comment 32, supra* note 49 at paras. 31-34 and 38.
[67] UN GA Res. Res.67/187 (20 December 2012) [*Principles and Guidelines*] at para. 1 and Principle 1.
[68] *Ibid*. at para. 9 and Principle 3. See also *General Comment 32, supra* note 49 at para. 10.

should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children and be in a language that the person in need of legal aid understands. The information material should be supported by visual aids prominently located in each detention centre.

Guideline 3 stipulates that States should prohibit the interviewing of any person by the police in the absence of a lawyer unless the person voluntarily waives this right after being informed of the implication of such waiver "in a clear and plain manner", or there are other compelling circumstances. In other words, the decision to defend oneself through self-representation must be made voluntarily, with an understanding of the implications of self-representation on the full and effective exercise of the right to defence. With respect to legal aid during court proceedings, Guideline 5 reiterates many of the *Body of Principles* including adequate time, facilities and technical and financial support to present a defence, representation by a lawyer of choice or one assigned in the interests of justice, assurance that an accused person – and in particular a self-represented accused person – understands these rights and the case against him including the possible consequences of a trial, and availability of a lawyer to consult "at all critical stages of the proceedings (…) at which the advice of a lawyer is necessary to ensure the right of the accused to a fair trial or at which the absence of counsel might impair the preparation or presentation of a defence."[69] In other words, the *Principles and Guidelines* address the fact that most self-represented accused are at a disadvantage compared to those who are represented by legal counsel, and ought therefore to be provided with alternative means of legal aid to assist in preparing and presenting an effective defence.

Guideline 6 confirms that the right to legal aid extends to the post-trial stage, specifically including the right to confidential legal advice and assistance with complaint, review, appeal, early release, pardon and other forms of clemency. Finally, Guideline 9 mandates States to implement the right of women to access legal aid by incorporating a gender perspective into all policies, laws, procedures, programmes and practices. In this respect, the UN Human Rights Committee has stated that equal access to justice before courts and tribunals without discrimination is key to the protection of human rights and the rule of law.[70]

At this juncture it should be reiterated and underscored that all of the fair trial rights are fundamental to effective exercise of the right to defence by every accused person, whether that person is represented by legal counsel or is self-represented. The need for recognition and protection of fair trial rights – particularly including the right to defence – during the criminal process by judges and prosecutors is heightened however in the case of self-represented accused persons and those who are potentially subject to the death penalty.

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[69] See also *supra* note 47 at 26-27; *General Comment 32, supra* note 49 at paras. 31-34 and 37.
[70] *Supra* note 47 at 11. See also *General Comment 32, supra* note 49 at para. 42.

C. INTERNATIONAL EXPERIENCE FROM COMPARATIVE JURISDICTIONS

I. Alternatives to Capital Punishment

There are currently 195 countries in the world, comprising 193 countries that are member states of the United Nations, and two non-member states – Palestine and the Holy See – that have observer status.[71] As noted above, some 170 countries have abolished the death penalty in law or do not apply the punishment in practice. This includes all twenty-seven EU member states, who have abolished the death penalty in law and practice, which is a legal requirement to join the EU.[72] In Southeast Asia, three states (Cambodia, Philippines, and East Timor) have abolished the death penalty, and three states (Brunei Darussalam, Lao PDR, and Malaysia) have suspended application of the death penalty (note that Malaysia announced its intention to abolish in 2022).[73]

At the outset of this section, it should be noted that research findings from a worldwide perspective show no distinct increase in crime rates following the abolition of the death penalty compared to the use of the alternative punishment of life imprisonment, including for murder and drug crimes.[74]

EUROPE

i. Turkey

Turkey applied to join the European Union in 1987. Key among the issues for reform was the suspension of the death penalty. Turkey had already suspended the death penalty in 1984, and by means of Law 4771 of 9 August 2002, the 3rd Package for Harmonization with the European Union, the death penalty was abolished for crimes committed during war time. In its place, offenders are sentenced to life imprisonment.[75] Law No. 5170 of 7 May 2004 abolished the death penalty for all times.[76] Turkey ratified Protocol No. 13 to the European

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[71] World Population Review, *How many countries are there*, online: <https://worldpopulationreview.com/country-rankings/how-many-countries-are-there> [accessed 12 September 2022].

[72] European Parliament, "The death penalty and the EU's fight against it", online: <https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635516/EPRS_ATA(2019)635516_EN.pdf> [accessed 13 June 2022]

[73] See *supra* note 28.

[74] *Moving away from the Death Penalty, supra* note 24 at 84-94.

[75] Republic of Turkey, Ministry of Foreign Affairs, *Political Reforms in Turkey* (2007), online: <https://www.ab.gov.tr/files/pub/prt.pdf> [accessed 23 February 2022] at 3 and 8; Marsilda Xhaferi, *Aggravated Life Imprisonment in Turkey* (2017), online: <https://cisst.org.tr/wp-content/uploads/2020/07/Aggravated_Life_Imprisonment_In_Turkey.pdf> [accessed 23 February 2022] at 41-42.

[76] International Federation for Human Rights, *Death Penalty Cannot be Reinstated in Turkey* (13 October 2020), online: <https://www.fidh.org/en/region/europe-central-asia/turkey/death-penalty-cannot-be-reinstated-in-turkey> [accessed 23 February 2022].

Convention on Human Rights (ECHR) in February 2006[77] which affirmed the full abolition of the death penalty. Punishments now consist of life imprisonment without the possibility of release, life imprisonment with the possibility of release, lower prison sentences, and monetary fines.[78] Life imprisonment without parole, known as 'aggravated life imprisonment' applies to offenders found guilty of crimes against humanity, murder, production of and trafficking in drugs, crimes against security of the state, and crimes against the constitutional order.[79] Otherwise, offenders with no record of discipline, or with only minor disciplinary offences, are eligible for parole after 24 years, or after 30 years if the offender has three or more disciplinary offences.[80]

The *ECHR* does not provide for any right to parole, however on September 24, 2003 the Committee of Ministers of the Council of Europe adopted a recommendation on "Conditional Release (Parole)".[81] One of the key objectives of conditional release is to reduce the harmful effects of prison. This position was further reinforced by the European Court of Human Rights in the case of Öcalan v. Turkey[82] where it held that an offender, irrespective of the sentence he is serving, has two rights: the right to a prospect of release and the right to a review of his sentence. The Court stated that the sentence of life imprisonment without the possibility of parole was in violation of Article 3 of the *ECHR*, which prohibits inhuman or degrading treatment or punishment.[83]

NORTH AMERICA

ii. Canada

Canada abolished the death penalty in 1976, and has retained its abolition despite an effort to reinstate it in 1987.[84] The most severe sentence, life imprisonment, is imposed in section 745 of the *Criminal Code*[85] as follows, defined in terms of a minimum period that the offender must be incarcerated before being eligible for release on parole:

- for 'high treason', first degree (i.e., planned and deliberate/intentional) murder, and second degree murder (i.e., not planned, but deliberate/intentional) that is a second conviction for murder (of either degree) – 25 years;

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[77] Council of Europe, *Chart of signatures and ratifications of Treaty 187*, online: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=187> [accessed 23 February 2022].
[78] Marsilda Xhaferi, *supra* note 75 at 42-43.
[79] *Ibid*. at 44.
[80] *Ibid*. at 43.
[81] Council of Europe, Committee of Ministers, *Recommendation 22 of the Committee of Ministers to member states on conditional release (parole)* (24 September 2003), online: <https://rm.coe.int/16800ccb5d> [accessed 23 February 2022].
[82] ECtHR (No. 2) (18 March 2014).
[83] At paras 197-198 and 206-207.
[84] Kent Roach and M.L. Friedland, *The Right to a Fair Trial in Canada* (undated), online: <hrlibrary.umn.edu/fairtrial/wrft-kr.htm> [accessed 22 February 2022] at s.4 Punishment.
[85] R.S.C., 1985, c. C-46 [*Code*].

- for second degree murder – 10 years, though the *Code* specifically provides for a sentencing judge to increase this number up to as many as 25 years as the sentencing judge determines to be appropriate given the "character of the offender, the nature of the offence and the circumstances surrounding its commission";
- for certain prescribed offences[86] attracting a sentence of life imprisonment that is *not* a mandatory minimum sentence (i.e., life imprisonment is in the range of available sentences) but was prosecuted by way of indictment[87] – one half of the sentence or 10 years, whichever is less

It is important to note with respect to eligibility for parole that these minimum periods of imprisonment *include* any amount of time that the offender was in custody (incarcerated) between the day the offender was arrested and the day he or she was sentenced.[88]

Section 100 of the *Corrections and Conditional Release Act*[89] explains that the purpose of 'conditional release' (i.e., parole, defined as 'authority granted to an offender to be at large during the offender's sentence') "is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens." The paramount consideration in granting parole is the protection of society (s.100.1), and the decision to grant parole is to be made based on all relevant information, including all information from the trial and sentencing process (s.101). A Parole Board is empowered to do so if it is satisfied that the offender will not "present an undue risk to society" by reoffending during their parole period, and that releasing the offender will contribute to protection of society by facilitating the offender's rehabilitation and reintegration as a law-abiding citizen (s.102). Offenders are entitled to receive all of the relevant information, to be given reasons for the decision of the parole board, and to access a review process.

ASIA

[86] Including, *inter alia*, high treason, hijacking, piracy, terrorism offences, use of explosives, using a firearm in the commission of an offence, incest, sexual assault (with or without a weapon, with or without causing bodily harm), sexual exploitation, child pornography, criminal negligence causing death or bodily harm, attempted murder, manslaughter (causing death accidentally), conspiracy to commit murder, criminal harassment, threats, assault, torture, kidnapping, forcible confinement, trafficking of persons, hostage taking, robbery, arson, and trafficking, importing or exporting of controlled or restricted drugs.

[87] Offences in the *Code* are either indictable, summary conviction, or hybrid (meaning that the prosecution decides whether it will proceed by indictment or summary conviction in the circumstances). Indictment and summary conviction attract different penalties, indictment being the more severe and summary conviction being less severe. In this way, life imprisonment falls at the high end of a sentencing range for an offence.

[88] This is referred to as 'credit for time served'. Section 719(3) and (3.1) of the *Code* provide that credit is usually given on a one-to-one basis, however a sentencing judge has discretion to give credit on a 1.5-to-1 basis (i.e., one and a half days of credit for each day of pre-sentence custody) "if the circumstances justify it".

[89] S.C. 1992, c. 20 [*CCRA*].

iii. Japan

The Japanese *Penal Code*[90] prescribes the death penalty for the following crimes: murder, ringleaders of insurrection, instigation of foreign aggression, assisting the enemy, arson of an inhabited dwelling, damage of inhabited building by flood, overturning trains, robbery causing death, pollution of water supply with poisonous material, robbery causing death or injury, rape causing death or at the scene of a robbery, damage to buildings.[91] In 1983 the application of the death penalty was restricted by the Japanese Supreme Court in the *Norio Nagayama* case, in which it ruled that:

> The death penalty is an extreme and dispassionate penalty that takes away forever life itself as the root of human existence. As such, it is the ultimate penalty for use in truly unavoidable cases and for this reason … it must be used only with the utmost caution.
>
> … selection of the death penalty by a court should be an option in extremely heinous cases when there is room for virtually no other penalty ...[92]

The *Nagayama* decision sets out the factors to consider in determining whether capital punishment is an appropriate penalty, including the number of victims, the motives and age of the offender, criminal record and degree of remorse, and the brutality of the crime and its social impact.

The offences for which the punishment is death[93] also qualify for life imprisonment. In addition to those offences the *Penal Code* also includes counterfeiting currency and kidnapping for ransom as punishable with life imprisonment.[94] Article 28 of the *Penal Code* makes parole available for any prisoner who *'evinces signs of substantial reformation'*, provided that the offender has served ten years in the case of life imprisonment. The substantive law on parole in Japan is the *Offenders Rehabilitation Act*.[95] It establishes Regional Parole Boards whose number shall be more than three, to be appointed by the Minister of Justice.[96] The Parole Board when considering a parole application looks at whether the offender has repented for committing the crime and reformed, whether the offender is likely to break the law again and how they behaved since imprisonment. The Parole Board also gives

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[90] Act No 45 of 1907.
[91] Articles 199, 77, 81, 82, 108, 119, 126, 146, 240, 241 and 260.
[92] Judgment on Standards for Selection of the Death Penalty, Case 1981(A) No. 1505, Keishu Reporter vol. 37, no. 6 at 609, Supreme Court of Japan (1983), online: <courts.go.jp/app/hanrei_en/detail?id=74> [accessed 23 February 2022].
[93] Murder, ringleaders of insurrection, instigation of foreign aggression, assisting the enemy, arson of an inhabited dwelling, damage of inhabited building by flood, overturning trains, robbery causing death or injury, pollution of water supply with poisonous material, rape causing death or at the scene of a robbery, damage to buildings.
[94] *Penal Code* Articles 82, 108, 119, 126, 146, 148, 154, 199, 225, 240 and 241.
[95] No. 88 of 15 June 2007.
[96] Article 16 – 28.

the victim of the crime an opportunity to be heard on the offender's release. Once released the offenders are expected to report with the probation office who follows the offender's progress.

iv. People's Republic of China

The *Criminal Law of the People's Republic of China* ('PRC Criminal Law') provides for the 'principal punishments' of control, criminal detention, fixed-term imprisonment, life imprisonment, and the death penalty. The 9th Amendment to the PRC Criminal Law was passed on 29 August 2015, which reduced the number of crimes on the list of capital offences to 46.[97] Article 48 provides that "the death penalty is only to be applied to criminal elements who commit the most heinous crimes. In the case of a criminal element who 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." The death penalty may not be imposed on persons who had not reached the age of eighteen at the time the crime is committed or on women who are pregnant at the time of trial. A sentence of death must be approved by the Supreme People's Court.

The Criminal Law further provides that, if a person who is sentenced to death does not intentionally commit a crime during the two-year period of suspension of execution, the sentence is automatically reduced to life imprisonment. Further, "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" commencing on the date the suspension of execution expires. A person sentenced to death or life imprisonment is also deprived of 'political rights' for life, and if either of these sentences is reduced to a fixed term of imprisonment, the deprivation of political rights is also reduced to between three (minimum) and ten (maximum) years.[98]

Sentences of life imprisonment may be reduced to not less than 10 further years, i.e., commencing on the date of approval by the People's Court, based on good behaviour, repentance, reform or 'meritorious' service during incarceration.[99] Further, an offender who has served at least 10 years of a sentence of life imprisonment, except for those sentenced to life for murder, bombing, robbery, rape, kidnap, or other violent crimes, "may be granted parole if he earnestly observes prison regulations, undergoes reform through education,

[97] The 8th Amendment in 2011 abolished the death penalty for thirteen crimes, and the 9th Amendment abolished the death penalty for a further nine crimes, leaving forty-six capital offences remaining to date. See Library of Congress, *China: Death Penalty Crimes to Be Further Reduced* (22 Sept 2015), online: <https://www.loc.gov/item/global-legal-monitor/2015-09-22/china-death-penalty-crimes-to-be-further-reduced/> [accessed 12 September 2022].

[98] Article 48-51 and 57.

[99] Articles 78-80.

demonstrates true repentance, and will not cause further harm to society after being paroled."[100]

v. Republic of South Korea

While Article 41 of the *Criminal Act* of the Republic of South Korea[101] provides for the death penalty and life imprisonment, the death penalty has not been carried out since 1997 and therefore South Korea is abolitionist in practice.[102] Recently there has been debate about whether to reinstate executions or fully abolish capital punishment in law, with the Ministry of Justice favouring capital punishment and the National Human Rights Commission taking the position that the death penalty is a cruel and inhuman punishment that undermines human dignity.[103] The Human Rights Commission conducted a survey of public opinion in 2018 which found that nearly 80 percent of the one thousand respondents were in favour of the death penalty, but 70 percent of the same respondents also supported alternative punishments.[104]

A majority of the offences for which the death penalty is a sentencing option also provide for life imprisonment in the alternative,[105] and Articles 55 and 42 provide for mitigation of a death sentence resulting in life imprisonment, or for a minimum of 20 years and a maximum of 50 years in aggravated circumstances. Persons sentenced to death or to life imprisonment are also prohibited from public office, voting, owing a business or being the director, auditor or manager of a business (Art. 43). Articles 72 and 73-2 provide for parole of 10 years after an offender sentenced to life imprisonment has served 20 years, if the offender "has behaved himself well and has shown sincere repentance", to be granted by an 'administrative agency'. Offenders on parole are subject to probation (supervision).

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[100] Section 7 Parole.

[101] Expand Act No. 11731, 5 April 2013.

[102] L. Yoon, *Prisoners on death row South Korea 2011-2020* (24 September 2021), online: Statista <https://www.statista.com/statistics/1222368/south-korea-prisoners-under-sentence-of-death/> [accessed 21 February 2022]; Kang Seung-woo, *Horrific crimes reignite debate over death penalty* (2 September 2021), online: The Korea Times <https://www.koreatimes.co.kr/www/nation/2021/09/251_314858.html> [accessed 21 February 2022].

[103] Kang Seung-woo, *ibid*.

[104] Molli Mitchell, *Does South Korea Have the Death Penalty? Why 'The Raincoat Killer' Case Sparked Debate* (22 October 2021), online: Newsweek <https://www.newsweek.com/raincoat-killer-yoo-young-chul-death-penalty-south-korea-dead-alive-netflix-1641573#:~:text=Today%20in%20South%20Korea%2C%20capital,death%2C%20according%20to%20Amnesty%20International.> [accessed 21 February 2022].

[105] For example, insurrection and other treasonous or mutinous acts of the military (Arts. 87, 88, 92, 94, 95, 96 and 98), Organization of Criminal Groups (Art.114), use of explosives (Art. 119), arson (Art. 164), murder (Art. 250), killing of abducted or trafficked person (Arts.291 and 324-4), murder during robbery (Art.338), and piracy resulting in rape or death (Art.340)

ASEAN

vi. Cambodia

Cambodia abolished the death penalty for all crimes in 1989, making it the country with the longest continuous period of abolition in Asia and one of only two ASEAN countries to ban capital punishment.[106] The *Constitution of the Kingdom of Cambodia* (1993) at Article 32 states that "all people have the right to life, freedom and personal security. There shall be no capital punishment." The *Criminal Code* provides maximum and minimum periods for the principal penalty of imprisonment, any of which may be aggravated or reduced in prescribed circumstances.[107] Article 46 states that the maximum sentence of imprisonment for a felony is life, but this may be reduced to between fifteen and thirty years based on mitigating circumstances (Art. 95) and may not be imposed on a minor, who is instead liable to a maximum of twenty years (Art.160).

Life imprisonment is the prescribed penalty for genocide, crimes against humanity, war crimes, premeditated murder, regicide, treason, and murder preceded or followed by torture or rape.[108] It can also be imposed if an offence is aggravated by the fact that it is committed by a person holding public authority.[109] The *Criminal Code* does not provide for parole, however offenders who have served two thirds of their term or 15 years of their life sentence, can request a partial or full pardon.[110]

vii. Lao People's Democratic Republic

The *Penal Code* of the Lao People's Democratic Republic[111] provides for punishments including life imprisonment and the death penalty. Article 51 states that "the death penalty is the special punishment to be imposed on offenders in especially serious cases" and Article 50 provides for life imprisonment "without period of time, applied to a person having committed a very serious offence, but it is not suitable to convict as death penalty." Neither the death penalty nor life imprisonment may be imposed on persons under 18 years of age or on women who are pregnant at the time of the offence, in which case the prescribed sentence is 20 years imprisonment, and the death penalty is further prohibited as a punishment for elderly persons from sixty years of age and for persons with mental disabilities

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[106] UN OHCHR, *Cambodia,* online: <https://cambodia.ohchr.org/en/news/cambodia-forefront-abolishing-death-penalty-asia> [accessed 18 February 2022].

[107] Kingdom of Cambodia, *Criminal Code* <https://www.ajne.org/sites/default/files/resource/laws/7195/criminal-code-cambodia-en-kh.pdf> [accessed 18 February 2022] at Articles 43 and 45.

[108] Articles 184, 189, 195, 200, 433, 440 and 441, and 205.

[109] Article 452.

[110] Keo, C., R. Broadhurst and T. Bouhours, 2011, 'Inside the Cambodian Correctional System' in *British Journal of Community Justice*, Volume 8 (No 3): pp 7-22 at 6.

[111] Lao People's Democratic Republic, *Penal Code* (adopted by National Assembly 17 May 2017), online: <https://bic.moe.go.th/images/stories/pdf/Law_of_Laos_1-11-2562.pdf> [accessed 21 February 2022].

at the time when the offence is committed, who are instead to be sentenced to life (Articles 50 and 51).

All of the offences in the *Penal Code* for which the death penalty is a sentencing option also provide for life imprisonment in the alternative,[112] but the UN Human Rights Committee has expressed concern that the death penalty is still an option for crimes, including drug-related crimes, that are not considered the "most serious crimes".[113] The courts continue to sentence people to the death penalty, including eight people found guilty of drug trafficking in January 2020.[114] The last execution was carried out in 1989 however, and Laos is considered abolitionist in practice, even though there is no official moratorium.[115]

The *Penal Code* provides for the lifting of a punishment through pardon or amnesty, but also provides for "conditional liberation before term … in the case of offender's progressive, repenting, and exemplary working …, having attitude changed and expressing remorse on their past acts" for offenders serving life imprisonment who have served 15 years, but prohibits conditional liberation for capital offenders whose sentence is commuted to life (Article 104).

viii. The Philippines

The Philippines was the first Asian country to abolish the death penalty in 1987. It was reimposed in 1993 and then abolished again in 2006.[116] Seven offenders were executed between 1999 and 2000, and there were an estimated 1200 offenders on death row in 2006.[117] Despite its subsequent abolition, the House of Representatives passed a Bill restoring the death penalty for heinous crimes and drug-related offences in March 2017, though it failed to pass the Senate,[118] and House Bill No. 7814 adopted in March 2021 adds a new

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[112] Treason (Art. 110), Rebellion (Art. 111), Spying (Art. 112), physical harm against the interests of national security (Art. 114), civil commotion (Art. 119), terrorism with financing (Art. 120), aggravated murder (Art.188) and murder committed after a rape (Art.249). Interestingly, genocide does not attract the death penalty (Art.210).

[113] UN HRC, *Concluding observations on the initial report of the Lao People's Democratic Republic* UN Doc. CCPR/C/LAO/CO/1 (23 November 2018), online: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/LAO/CO/1&Lang=En> [accessed 21 February 2022] at para. 17.

[114] Eugene Whong, *Laos Sentences Eight Members of Mr. X Drug Ring to Death* (27 January 2020), online: Radio Free Asia <https://www.rfa.org/english/news/laos/laos-mr-x-drug-ring-8-death-penalty-01272020154027.html> [accessed 21 February 2022].

[115] Harm Reduction International and The World Coalition Against the Death Penalty, *Submission to The Human Rights Committee – 123rd Session (2 – 27 July 2018): LAO PEOPLE'S DEMOCRATIC REPUBLIC* (11 June 2018), online:<https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LAO/INT_CCPR_CSS_LAO_31395_E.pdf> [accessed 21 February 2022].

[116] Parliamentarians for Global Action, *Philippines and the Death Penalty* (2022), online: <https://www.pgaction.org/ilhr/adp/phl.html> [accessed 21 February 2022].

[117] DJ Yap, *Tackling death penalty revival among Senate 2021 priorities* (2 January 2021), online: Philippine Daily Inquirer <https://newsinfo.inquirer.net/1378460/tackling-death-penalty-revival-among-senate-2021-priorities> [accessed 21 February 2022].

[118] *Ibid*.

capital crime to the *Comprehensive Dangerous Drugs Act of 2002*.[119] As of November 2021 this Bill was still under consideration by the Senate.[120] Senate Bill 27, titled "An Act Reinstituting the Death Penalty in the Philippines" was introduced in July 2019 but officially withdrawn in November 2021 by Senator Panfilo Lacson, who noted that the innocent may be executed "because of wrong judgment" and pushed instead for life imprisonment as a "better alternative".[121]

The 1987 Constitution of the Philippines prohibits the imposition of "excessive fines", cruel, degrading or inhuman punishment, and the death penalty "unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it." This provision (section 19) also reduces to "reclusion perpetua" the sentence of any person subject to the death penalty at the time. *Reclusion perpetua* is provided for in the *Revised Penal Code* as a sentence of imprisonment of 20 to 40 years for crimes such as murder, robbery with homicide and rape with homicide (in other words, crimes resulting in death of the victim), and is imposed along with "accessory penalties".[122] An offender sentenced to *reclusion perpetua* is eligible for pardon after 30 years.[123] Alternatively, offenders who are convicted under "special penal laws", such as the *Dangerous Drugs Act* are liable to life imprisonment, which is of an indefinite duration and does not come with any accessory penalties, nor is pardon provided for.[124]

Section 19 of Article VII of the *Constitution of the Republic of the Philippines* provides that "Except in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations and pardons, and remit fines and forfeitures, after conviction by final judgment. He shall also have the power to grant amnesty with the concurrence of a majority of all the Members of the Congress." Executive clemency in the form of absolute pardon, conditional pardon and commutation of sentence may be granted

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[119] Grace Keane O'Connor, *Adoption of Bill Allowing the Imposition of the Death Penalty for a New Crime* (30 April 2021), online: World Coalition Against the Death Penalty <https://worldcoalition.org/2021/04/30/adoption-of-bill-allowing-the-imposition-of-the-death-penalty-for-a-new-crime/> [accessed 21 February 2022].

[120] Jose M. Jose and Maria Corazon A. De Ungria, "Death in the time of Covid-19: Efforts to restore the death penalty in the Philippines" in *Forensic Science International: Mind and Law* (Volume 2, November 2021, 100054) <https://www.sciencedirect.com/science/article/pii/S2666353821000114> [accessed 21 February 2022].

[121] Currie Cator, *Lacson withdraws death penalty bill* (9 November 2021), online: CNN Philippines <https://www.cnnphilippines.com/news/2021/11/9/Ping-Lacson-withdraws-death-penalty-bill-Senate.html> [accessed 21 February 2022].

[122] Perpetual or temporary absolute disqualification, perpetual or temporary special disqualification, suspension from public office, the right to vote and be voted for, the profession or calling, civil interdiction, indemnification, forfeiture or confiscation of instruments and proceeds of the offense, and payment of costs.

[123] Alyosha J. Robillos, *Life imprisonment, reclusion perpetua, and other legal terms you should know* (18 April 2016), online: CNN Philippines <https://www.cnnphilippines.com/news/2015/04/17/life-imprisonment-reclusion-perpetua-legalese-napoles.html> [accessed 21 February 2022].

[124] *Ibid*.

upon recommendation of the Board of Pardons and Parole.[125] Commutation of sentence, which may be granted by the President, is a reduction in the period of a sentence, and an offender may apply after serving one half of the minimum of an indeterminate sentence, after serving at least ten years for offenders serving life imprisonment for most crimes, and after serving at least twenty-five years for capital offenders whose death penalty has been commuted to life imprisonment.[126]

COMPARATIVE ANALYSIS

Country	Abolitionist / retentionist	Crimes to which the death penalty is applied	Alternative sanctions for the most serious crimes
Turkey	Abolitionist since 2004	None	Life imprisonment with or without the possibility of release Fixed-term imprisonment
Canada	Abolitionist since 1976	None	Life imprisonment with the possibility of parole
Japan	Retentionist	Limited to *"extremely heinous cases when there is room for virtually no other penalty"*	Life or fixed-term imprisonment with the possibility of parole
China	Retentionist	Limited to *"criminal elements who commit the most heinous crimes"*	Life with the possibility of a reduced sentence or parole Fixed-term imprisonment with the possibility of a reduced sentence or parole
South Korea	Abolitionist in practice since 1997	None	Life or fixed-term imprisonment with possibilities of reduced sentence and parole
Cambodia	Abolitionist since 1989	None	Life imprisonment with possibility of full or partial pardon
Lao	Abolitionist in practice since 1989	None	Life imprisonment with possibility of pardon, amnesty or parole
Philippines	Abolitionist since 2006	None	Life imprisonment with or without the possibility of parole or pardon *Reclusion perpetua* (20 to 40 years of imprisonment)

Table 1: Summary of international experience from comparative jurisdictions

[125] Government of the Philippines, Parole and Probation Administration, *FAQ on Parole/Executive Clemency* (undated), online: <https://probation.gov.ph/wp-content/uploads/2017/02/FAQ_Parole.pdf> [accessed 23 February 2022].
[126] *Ibid*.

A review of the above practices in various jurisdictions highlights several points that Viet Nam may consider in its path towards reducing, and (ideally) eventually abolishing, the death penalty and replacing it with an alternative sanction. For those countries that retain the death penalty, three practices may be considered: first, in accordance with the recognition of its Supreme Court that the death sentence should be used only in heinous cases, in practice Japan restricts imposition of the death penalty to multiple or egregious murders.[127] Second, where 'immediate execution is not essential' China allows for suspension of execution at the same time the sentence of death is imposed, which allows the offender time to demonstrate rehabilitative behaviour that may be considered in a decision about commutation. Similarly, in South Korea a death sentence may be mitigated to life imprisonment. Finally, in Lao PDR, which is otherwise very similar to Viet Nam in terms of the law and sentencing of capital offences, there is a moratorium on execution of death sentences, such that while the death penalty remains a sentencing option, it is not carried out.

For those countries that have abolished the death penalty, the alternative sanction of life imprisonment is used in various ways as the penalty for the most serious crimes. For example, in Cambodia life imprisonment is the penalty for most of the crimes that currently attract the death penalty in Viet Nam: genocide, crimes against humanity, war crimes, premeditated murder, treason, and murder preceded or followed by torture or rape. Similarly, in the Philippines the penalty for crimes resulting in death is *reclusion perpetua*, which is in effect life imprisonment with the possibility of pardon after 30 years, and the penalty for drug crimes is life imprisonment without the possibility of parole or release. Capital offenders (formerly convicted of capital crimes) are automatically commuted to life imprisonment, and may be released (further commuted) after 25 years. In South Korea, capital offenders whose sentence is mitigated to life imprisonment are eligible for parole after 20 years.

Two jurisdictions that have demonstrated best practices in compliance with international human rights standards and policy direction on treatment of criminal offenders is the EU, which has confirmed that life imprisonment without the possibility of release on parole is cruel and inhuman punishment, and therefore parole must be considered at the earliest possible opportunity for all offenders, in line with the *Tokyo Rules*. Canada's model of an independent Parole Board is an excellent example of a rule of law institution whose statutory function is to implement a shift in penal policy from retribution to rehabilitation, as required by the *Tokyo Rules*, with measures for transparency and accountability – to the public, to victims, and to offenders – built into the process.

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[127] Hanako Montgomery, *Convicted Murderer on Death Row Dies After Choking on Her Dinner* (January 16, 2023), online: Vice World News <https://www.vice.com/en/article/z34dya/japan-death-row-inmate-choking> (accessed 17 January 2023).

II. Right to Defence Through Self-Representation

As explained previously, the right to present a defence to an accusation of criminal wrongdoing may be exercised by choosing to be represented by defence counsel, or through self-representation. Given the fact that self-representation puts an accused at a disadvantage in a criminal proceeding, some jurisdictions make representation by legal counsel mandatory, particularly in cases where the 'interests of justice require' such as for minors, accused who do not understand the proceedings due to mental incapacity, and where the potential penalty is death.

EUROPE

i. European Union (EU)

Article 6(3)(c) of the *European Convention on Human Rights (ECHR)* provides that accused in criminal proceedings have the right to representation by legal counsel, and the right to self-representation unless the interests of justice require otherwise. The 'interests of justice' include protecting the rights of the suspect or accused, or if representation "is required for the effective administration of justice", for example on an appeal.[128] Domestic courts are empowered to make a determination of whether appointment of a lawyer is compulsory in individual cases. Considerations include the need to protect vulnerable witnesses, and prevention of abuses to the dignity of court proceedings such as accused persons who persistently obstruct the proceedings.[129] If an accused person voluntarily and knowingly waives the right to representation by legal counsel, the person is under a duty to show diligence in conducting his own defence.

The *EU Charter of Fundamental Rights* provides for the right of defence in Article 48(2), which states that "respect for the rights of the defence of anyone who has been charged shall be guaranteed", and this has the same meaning and scope as Article 6(3) of the *ECHR*. This provision – and specifically the right to defence either through self-representation or defence counsel – has been incorporated into the domestic laws of Czechia, the Kingdom of Spain (Article 24 of the Constitution), the Republic of Slovenia (Article 29 of the Constitution), and the Slovak Republic (Article 50(3) of the Constitution), among others. Other European Union countries do not provide for self-representation as a requirement of the right to defence, and instead requires a court to appoint counsel for unrepresented accused if the accused does not choose his or her own counsel (see Article 42(2) of the Constitution of the Republic of

[128] European Agency for Fundamental Rights and Council for Europe, *Handbook on European law relating to access to justice* (2016), online: <https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf> [accessed 10 September 2022] at 89.
[129] *Ibid*. at 90.

Poland) or provide that the assistance of a lawyer shall be mandatory in prescribed cases (see Article 32(3) of the Constitution of the Portuguese Republic).

The European Union, in conjunction with UNESCO and several European countries, has published the *Human Rights Guide*: *A European platform for human rights education* which is available online in several languages, and which includes a chapter dedicated to 'Court & Fair trial'.[130] The *Human Rights Guide* clarifies that accused in criminal proceedings have a number of rights that are meant to ensure a fair trial, including adequate opportunity to prepare and present a defence and to challenge the arguments and evidence of the prosecutor.[131] The *Human Rights Guide* states that "As an accused in a criminal trial, you have the right to defence. This means that you must never be tried or convicted without a chance to defend yourself. The right to defence in criminal proceedings includes several important aspects. If these requirements are not met in the criminal proceedings, it might result in a violation of your right to a fair trial."[132] Accused also have duties that they must meet to ensure a fair trial, including the following duties during court proceedings: notifying the court of the accused's contact information; attending all court hearings or notifying the court in a timely manner if not able to attend; complying with time limits; complying with all lawful orders of the court; and not obstructing the investigation or proceedings.[133]

With respect to self-representation, the *Human Rights Guide* confirms that most accused have the right to refuse the assistance of a lawyer and present a defence on one's own, but explicitly warns that "the fact that you have chosen to defend yourself does not mean that you will be given more beneficial treatment in court. It means that you will have the same obligation to comply with all time limits and submit all the documents required by the court as if you were being defended by a qualified lawyer." The right to self-represent is not available to minors, to persons who are suffering from a mental or physical health impairment that prevents a full exercise of procedural rights, or in cases where the issues include compulsory medical treatment or exoneration of a deceased person.[134] The *Human Rights Guide* contains various other pages that explain in greater detail the meaning and substance of the right to a fair trial, including the right to representation by defence counsel, and standards and rules of procedure such as the right to present evidence.

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[130] Available online: <https://www.cilvektiesibugids.lv/en/themes/> [accessed 10 September 2022].

[131] See 'Accused', online: <https://www.cilvektiesibugids.lv/en/themes/court-fair-trial/criminal-proceedings/accused> [accessed 10 September 2022].

[132] See 'Defence', online: <https://www.cilvektiesibugids.lv/en/themes/court-fair-trial/criminal-proceedings/accused/defence> [accessed 10 September 2022].

[133] See 'Duties', online: <https://www.cilvektiesibugids.lv/en/themes/court-fair-trial/criminal-proceedings/accused/your-duties/duties> [accessed 10 September 2022].

[134] See 'Right to Defend Yourself', online: <https://www.cilvektiesibugids.lv/en/themes/court-fair-trial/criminal-proceedings/accused/defence/right-to-defend-yourself> [accessed 10 September 2022].

NORTH AMERICA

ii. Canada

While accused in Canadian criminal proceedings may be self-represented, the Government of Canada commissioned a *Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts*, including a section titled *Impact of self-representation on the accused* which states that, overall, "the data can definitely be used to show that unrepresented accused are very likely to experience serious negative impacts as a result of the court process."[135] Interviewees stated that self-represented accused do not understand the court process generally, the specific proceedings they were involved in, including decisions made such as the details of a sentence, or the full consequences of a conviction. "This lack of understanding of the process and the implications of conviction brought into question the ability of the accused to make appropriate decisions about the conduct of their case." The study found that 91% of self-represented accused plead guilty as compared to 81% who were assisted by legal aid and 74% who were represented by private legal counsel.[136] The report notes that it is a policy choice of individual provinces regarding provision of government-sponsored legal aid.

Measures to provide legal aid vary by Canadian province but include 'duty counsel' stationed in courts who assist unrepresented accused on a one-off basis on the day they appear in court, for example with advice regarding entering a plea, lawyers who are approved by the legal aid system to represent accused at all stages of a criminal proceeding on the basis of an inability to pay, and legal aid clinics that provide legal advice – either on a one-time or specific-case basis (often if determined to be a matter of public interest) – to persons on specific topics or to specifically identified marginalized or vulnerable groups such as indigenous persons or persons living with disabilities.

iii. United States

In its 1975 decision in *Faretta v. California*[137] the US Supreme Court held that accused in criminal proceedings have the right to represent themselves at trial but not in appellate proceedings, if they are competent to understand and participate.[138] A person who chooses to represent himself at trial cannot subsequently appeal on the basis that the quality of defence at trial denied the effective assistance of counsel. The factors that a judge must weigh in making a decision to allow an accused person to represent themselves at a trial are the person's age, level of education, competence in the language of the Court (English), and the

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[135] Justice Canada, *Impact of self-representation on the accused: Chapter 7: Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts*, online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_la3-rr03_aj3/p7_5.html> [accessed 10 September 2022] at 7.5.4.
[136] *Ibid*. at Figure St.J-7.
[137] 422 U.S. 806.
[138] *Godinez v. Moran* (1993) 509 U.S. 389 at 398.

seriousness of the crime with which the accused is charged. The accused is not required to show that s/he has the skill or ability of a trained lawyer, but must voluntarily and knowingly waive the right to defence counsel, and must demonstrate an understanding of the court proceedings.[139] In *McKaskle v. Wiggins*[140] the court clarified that a self-represented accused, even if assisted but not officially represented by counsel (i.e., one who has received some form of legal aid short of legal representation), has the right to control the case that is presented to the court, and the assistance of a lawyer who is simply consulted for advice should not destroy the perception that the accused is presenting his own defence.[141]

ASEAN

iv. Singapore

Article 9(3) of the Constitution of Singapore provides for an arrested person to be informed of the reasons for arrest and allowed to consult and retain legal counsel. The Ministry of Law has a Legal Aid Bureau that provides state-funded legal assistance to persons accused of capital offences, and also has a scheme of pro bono legal assistance, though at a fee if the client is not indigent, offered by the Law Society of Singapore.

The 'Singapore Courts' website of the Judiciary confirms that "you can either hire a lawyer or choose to represent yourself in a court case. … While this is your personal choice, it is an important decision you should make after considering the pros and cons of each option." It advises persons considering self-representation to do so only if confident that the person can handle the legal procedure, will put in the time and effort to prepare his own case, and is prepared to present the case before the court including a judge and prosecutor. A person considering self-representation is cautioned that a self-represented accused is held to the same standard as lawyers, stating that "the court is not expected to relax its procedural rules and standards for you". The site clarifies a judge's role thus: "…to ensure that you have a fair hearing. While the judge may offer some guidance about legal procedures during your court hearings, the judge cannot advise you on what you should do to successfully represent yourself."[142]

The Singapore State Courts have also produced a *Guidebook For Accused in Person: A Guide to Representing Yourself in Court* which, while "not intended to replace legal advice, … hopes to empower the self-represented accused by helping him understand the criminal

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[139] Nolo, *Constitutional Right to Self-Representation*, online: <https://www.nolo.com/legal-encyclopedia/right-represent-yourself-criminal-case.html?pathUI=button> [accessed 10 September 2022].

[140] 465 U.S. 168 (1984).

[141] Justia, *Self-Representation*, online: <https://law.justia.com/constitution/us/amendment-06/16-self-representation.html> [accessed 10 September 2022].

[142] Judiciary of Singapore, *Represent yourself in court: rights and responsibilities*, online: <https://www.judiciary.gov.sg/attending-court/represent-yourself-court-rights-responsibilities> [accessed 10 September 2022] at 2.

proceedings to which he is subjected to."[143] The *Guidebook* contains an overview of the criminal process, essential information for self-represented accused such as 'should I hire a lawyer?' and 'pleading guilty', and chapters on pre-trial, trials, sentencing and appeals.

v. The Philippines

Article III of the *Constitution of the Republic of the Philippines 1987* is the Bill of Rights, which contains many fair trial guarantees, including that: no person shall be deprived of liberty without due process (s.1); "adequate legal assistance" shall not be denied (s.11); accused shall be informed of the right to remain silent and to have "competent and independent counsel" of his own choice, including the right to be provided with counsel if the accused cannot afford one (s.12); solitary or incommunicado detention is prohibited (s.12); the right to be presumed innocent and "to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf" (s.14); accused have the right to "speedy disposition" (s.16) and the right against self-incrimination (s.17).

The *Revised Rules of Criminal Procedure* (2000) reinforce these constitutional rights in Rule 115, section 1(c) which provides in part that "upon motion, the accused may be allowed to defend himself in person when it sufficiently appears to the court that he can properly protect his rights without the assistance of counsel." The *Republic Act* No. 9372 (2007) in section 21 however requires that, immediately upon arrest or detention of a person suspected or accused of terrorism, the person must be informed of his right to choose counsel, and if the person cannot afford counsel, the police must contact the free legal assistance unit of the Public Attorney's Office to provide free legal advice. Further, "these rights cannot be waived except in writing and in the presence of the counsel of choice."

The presumption of innocence, the right to 'effective' counsel, the right to cross-examine witnesses, and the requirement of proof beyond a reasonable doubt have further been confirmed by the Supreme Court of the Philippines in several cases.[144]

In the *Liwanag* case, judgment dated 15 August 2001, the Supreme Court of the Philippines explained the constitutional provision that accused persons have the right "to be heard by himself and counsel" by quoting a decision in *People v. Holgado*:

> One of the great principles of justice guaranteed by our Constitution is that "no person shall be held to answer for a criminal offense without due process of law", and that all accused "shall enjoy the right to be heard by himself and counsel." In criminal cases

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[143] (2018), online: <https://www.judiciary.gov.sg/docs/default-source/criminal-docs/guidebook_for_accused_in_person_english.pdf> [accessed 10 September 2022].

[144] See for e.g. *Valencia* (judgment 26 April 1991), *Lucero* (judgment 1991), *Hernandez* (judgment 1996), *Binamira* (judgment 1997), *Cosep* (judgment 1998), *Liwanag* (judgment 15 August 2001), *Monje* (judgment 2002).

there can be no fair hearing unless the accused be given an opportunity to be heard by counsel. The right to be heard would be of little avail if it does not include the right to be heard by counsel.

Even the most intelligent or educated may have no skill in the science of the law, particularly in the rules of procedure, and, without counsel, he may be convicted not because he is guilty but because he does not know how to establish his innocence. And this can happen more easily to persons who are ignorant or uneducated.

It is for this reason that the right to be assisted by counsel is deemed so important that it has become a constitutional right and it is so implemented that under our rules of procedure it is not enough for the Court to apprise an accused of his right to have an attorney, it is not enough to ask him whether he desires the aid of an attorney, but it is essential that the court should assign one *de oficio* for him if he so desires and he is poor or grant him a reasonable time to procure an attorney of his own.

More recently, the Supreme Court of the Philippines in the *Callangan* case, judgment dated 27 June 2006, reaffirmed the importance of representation by legal counsel thus: "In criminal cases, the right of the accused to be assisted by counsel is immutable. Otherwise, there will be a grave denial of due process. The right to counsel proceeds from the fundamental principle of due process which basically means that a person must be heard before being condemned."

OCEANIA

vi. Australia

The Australian Senate Standing Committee on Legal and Constitutional Affairs has issued a report in 2004 that includes a chapter on 'Self-represented litigants' throughout the justice system, including in family and civil courts in addition to persons accused of committing a crime. The chapter begins by noting statistical and anecdotal evidence of a growing number of self-represented persons across the legal system.[145] The report cites an earlier report by the Australia Law Reform Commission which states that "some litigants choose to represent themselves. Many cannot afford representation, do not qualify for legal aid or do not know they are eligible for legal aid, ... They may believe that they are capable of running the case without a lawyer, may distrust lawyers, or decide to continue unrepresented despite legal advice that they cannot win."[146] The report goes on to note that "however, … more than half (54 percent) of respondents to the ALRC's 1999 survey stated that the main

[145] Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Legal Aid Justice Report* (2004), online: <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2002-04/legalaidjustice/report/ch10> [accessed 12 September 2022] at 10.1 and 10.2.
[146] *Ibid*. at 10.14.

reason they did not have a lawyer was either their inability to pay or the unavailability or cessation of legal aid."[147] Other stated reasons for self-representation included the view that appearing without a lawyer in criminal proceedings is a tactical advantage, in the hopes of getting a finding of a unfair trial.[148] In order to better understand why litigants are self-representing and whether this is causally related to access to legal aid, the Senate Committee recommended that courts and tribunals should collect and publicly report data on the number of self-represented litigants and the types of matters in which they are appearing.[149]

The Senate report notes that it received many submissions arguing that self-represented litigants "adversely affect access to justice by increasing the costs of litigation and impairing the efficient and effective administration of justice … by increasing the time spent by judicial officers, registry staff and opposing counsel on their cases, and the possible increased likelihood of further litigation."[150] The report notes however that the economic costs of self-representation have not been quantified, though one study did confirm that self-represented litigants are more demanding on the court's time.[151] The Senate Committee recommended that research be undertaken to quantify the economic effects that self-represented litigants have on the justice system. With respect to the efficient and effective administration of justice however, the Senate report notes that there are several court judgments and justice system reports that document the difficulty that judges have in maintaining the perception of impartiality when faced with self-represented litigants. One research study concluded that "the perceived tension between judicial impartiality and the need to help litigants in person meant that a number of judges and Registrars thought that their role as presiding officer was compromised by the presence of a litigant in person."[152] Further, the High Court has stated that "an unrepresented accused is always at a disadvantage not merely because they might lack sufficient knowledge or skills but because they cannot assess their own case with the dispassionate objectivity as the crown."[153] Submissions by Advocacy Tasmania also note that self-represented accused represent themselves poorly or plead guilty just to end the matter, whether they believe they are innocent or not, with adverse consequences such as increasing criminalization of the disadvantaged, stigma associated with a criminal record, and loss of self-esteem through failure to understand legal and judicial requirements.[154]

The Senate report also sets out submissions that were made on minimising the adverse effects of self-representation on the justice system, which included: re-prioritising

[147] *Ibid*. at 10.15.
[148] *Ibid*. at 10.21.
[149] *Ibid*. at 10.30.
[150] *Ibid*. at 10.31 and 10.35.
[151] *Ibid*. at 10.34 and 10.38.
[152] *Ibid*. at 10.46 and 10.48.
[153] *Ibid*. at 10.50.
[154] *Ibid*. at 10.57.

and targeting legal aid funding; increasing incentives for lawyers to provide *pro bono* legal assistance; improving community information such as self-help kits and websites; expanding duty lawyer schemes whereby lawyers are appointed to be present in some courts to provide advice to self-represented litigants; unbundling legal services by providing legal assistance at certain stages of proceedings without full legal representation; allowing for lay representation before some courts or in respect of some matters; and measures taken by courts to assist and manage self-represented litigants such as reviewing rules, forms, brochures and guides to ensure they are clearly written and simple to use, and providing further staff training on dealing with self-represented litigants.

The Committee report made several findings as follows: "undue reliance on legal information services is ill-conceived without ongoing evaluation of the extent to which they actually assist self-represented litigants in resolving their matters" and therefore evaluation of government-funded legal information services should be undertaken;[155] an expanded duty lawyer scheme that allows for assistance for self-represented litigants with narrowing issues, preparing evidence and registering a plea to criminal charges would be beneficial, but 'on-the-fly' consultations just minutes before a court hearing does not adequately address the problems posed by self-representation;[156] unbundling of legal services to assist with preparation of simple forms or discrete areas of law may be useful, but unbundling can adversely affect access to justice, as "in our adversarial system of litigation, full service representation is still necessary for litigants to interpret and manage legal data and to properly adduce evidence".[157]

In its conclusion on self-represented litigants, the Senate report states that,

> The Committee considers the lack of empirical evidence on numbers of self-represented litigants, their matter types, their needs and the costs they add to the administration of justice is unacceptable. Effective policy development is impaired without a clear objective understanding of the areas of need. The Committee urges governments to reconsider their commitment to legal aid funding in light of the true economic effects and adverse impact on the administration of justice that self-represented litigants impose.[158]

COMPARATIVE ANALYSIS

While the *ICCPR* includes self-representation as one of two ways by which an accused person may exercise the right to defence, all of the international policy direction on the right to defence is aimed at ensuring that a person accused of committing a crime is afforded a fair

[155] *Ibid*. at 10.70 and 10.71.
[156] *Ibid*. at 10.81 and 10.83.
[157] *Ibid*. at 10.88.
[158] *Ibid*. at 10.96 and 10.97.

trial, regardless of whether the person is represented by counsel or not. Accused who are self-represented must be given every opportunity to freely choose to act in their own defence, and countries must provide legal aid in some form to self-represented accused. This obligation – placed squarely on state criminal justice institutions including the police, prosecutors and the judiciary – is heightened when the accused is liable to the death penalty.

Best practices identified in the above jurisdictions include the provision of information and guidance, in widely accessible forms, to self-represented accused on the implications of a decision to act in one's own defence (advantages and disadvantages), on basic standards and rules of procedure in criminal proceedings, and on the accused's obligations if self-represented, as done by the Singapore Judiciary and the EU. Both the EU and the US require an accused to demonstrate an understanding of the court proceedings if they have voluntarily and knowingly waived the right to defence counsel, and retain the power to order that an accused be represented by counsel even if they do not wish so, particularly where the charges are serious and may result in lengthy incarceration or, in the case of the US, the death penalty. Similarly, the Philippines places a statutory obligation on the Court (judge or other presiding judicial officer) to go beyond advising an accused of the right to counsel and asking if the accused wishes to exercise that right, by requiring that an accused be advised by legal counsel about making a decision to self-represent, and if an accused so chooses, that choice must be in writing before the Court. Otherwise, the Court must appoint counsel for an unrepresented accused.

Finally, two jurisdictions reviewed above – Canada and Australia – have implemented elaborate systems of legal aid with many options to assist accused, from provision of information to provision of defence counsel, in line with international standards and policy direction including the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*. These measures include incentives for lawyers to provide pro bono legal assistance, improving community information such as self-help kits and legal aid clinics, and duty counsel schemes whereby lawyers are present in courts to provide free advice to self-represented litigants on a one-off basis. Perhaps the best practice of these two jurisdictions however is the systematic collection, evaluation and publishing of data to measure outcomes experienced by self-represented accused, and the economic effects of self-representation on the justice system, in order to inform policy development and provision of legal aid measures.

D. VIET NAM'S REGULATION AND IMPLEMENTATION OF CAPITAL PUNISHMENT AND THE RIGHT TO DEFENCE

I. Historical Issues and Provisions of the Constitution on the Right to Defence and the Death Penalty

In the history of contemporary Viet Nam, the law always stipulates the types of penalties for criminal offences, which include the death penalty applicable to some types of crimes, particularly dangerous offences. At the same time, the law clearly stipulates the right to defence of the accused (including the rights to defend oneself and ask others to defend). The types of punishment provided in criminal laws are quite varied. Usually, for each type of crime where the death penalty is prescribed, this is not the only and mandatory penalty, but one of the options available for the court to consider, select and make a final decision based on the nature and seriousness of the crime and the requirements of crime prevention and control. The number of crimes and punishments (including the death penalty) have fluctuated over time along with the change and development of Viet Nam's criminal law.

The right to defence (including the right to represent oneself and the right to be represented by others) is one of the most fundamental and important rights of accused persons. This right has been clearly stated in the Constitution since the first Constitution of Viet Nam in 1946, and thereafter in other legislation, rules and guidelines on criminal proceedings. For those at risk of being sentenced to death, the right to defence is tightly regulated and there is a mechanism to guarantee the right to have defence counsel.

Both the death penalty and the right of the accused to self-representation were first recognized very soon after Viet Nam declared its independence on September 2, 1945. Decree No. 33c dated September 13, 1945 on the establishment of the Military Court stipulated the types of punishments, including the death penalty, the defendant's right to defend himself or ask another person to defend, and the right of defendants sentenced to death to apply for a commutation. These provisions continued to be affirmed and emphasized in many additional Decrees on the organization and operation of the Military Court issued on September 13, 1945; September 29, 1945; December 28, 1945; January 15, 1946 and February 14, 1946.

Following the first documents on the operation of the Military Court, decrees on the prosecution and trial of various crimes including property theft, destruction of public property, kidnapping, extortion, assassination, treason and other crimes against the government all provide for a variety of punishments, including foreclosure, fixed-term

imprisonment, life imprisonment and execution/death, that the Court can choose in each particular case.[159]

Since the early 2000s, the necessity of reforming the criminal justice system has been stated in various resolutions of the Politburo, including Resolution No. 08/NQ- TW (dated 2 January 2002). This direction became the national strategy in Resolutions No. 48/NQ-TW and 49/NQ-TW (dated 2 June 2005) of the Politburo on the Judicial Reform Strategy up to 2020, which confirmed the intent of the Party to "[limit] the imposition of the death penalty in the way that the death penalty shall apply only to a certain number of extremely serious crimes"; complete legal proceedings, ensure uniformity, democracy, publicity, respect and protection of human rights. This Resolution was further reiterated and affirmed in Conclusion No. 92-KL/TW (dated 12 March 2014) and 01-KL/TW (dated 04 April 2016) of the Politburo.[160] More recently, participants at a 2018 consultation workshop on the possibility of abolishing the death penalty, who included representatives of government and the judiciary, agreed that the death penalty is a violation of the right to life that cannot be undone in the event of a wrongful conviction, it deprives capital offenders of the opportunity for rehabilitation, and its application should be progressively restricted with a view to abolition and replacement with alternative measures. [161]

i. Provision for Death Penalty in the Penal Code

Since 1985 all the provisions on crime and punishment have been codified in one document, the *Penal Code*. The *Penal Code* of 1985 contains 280 articles with 195 articles on specific crimes, in which 29 articles provide for the death penalty. The *Penal Code* of 1985 was revised four times in 1989, 1991, 1992 and 1997. As a result of these amendments, by 1997 the *Penal Code* had 301 articles, of which 216 articles were regulated specific crimes, including 44 articles that stipulate the death penalty as the heaviest sentence available. The dramatic increase in the number of articles that provide the death penalty is the result of criminalizing drug-related acts, dividing some complex-crimes into separate crimes, and adding to the number of crimes that carry the death penalty. By 2000 the *Penal Code* of 1985 had expired and was replaced by the *Penal Code* of 1999. The 1999 *Penal Code* had 344 articles, of which there were 29 articles regulating specific crimes that provided for the death penalty, meaning

[159] Decree No. 06 of January 15, 1946 on the prosecution of those accused of stealing, burgling, destroying and cutting telephone lines and telegraph wires; Decree No. 26 of February 25, 1946 on the punishment of crimes of destruction of public property, crimes of theft; Decree No. 27 of February 26, 1946 on the punishment of kidnapping, extortion and assassination; Decree No. 133 of January 20, 1953 on the punishment of all kinds of treacherous and reactionary Vietnamese, all have provision for the death penalty.

[160] Conclusion No. 92-KL/TW dated March 12, 2014 of the Politburo on continued implementation of Resolution No. 49-NQ/TW, dated June 2, 2005 of the IX Politburo on the Reform Strategy justice by 2020; Conclusion 01-KL/TW, dated 04/04/2016 of the Politburo on continuing the implementation of Resolution No. 48-NQ/TW of the IX Politburo on the Strategy for building and perfecting the legal system Vietnam to 2010, orientation to 2020.

[161] EU JULE, *Study on the Possibility of Viet Nam ratifying the Second Optional Protocol of the International Covenant on civil and political rights aiming at the abolition of the death penalty* (Ha Noi, October 2019) at 34.

that the death penalty was abolished for some crimes.[162] Continuing this trend, in the 2009 revision of the 1999 *Penal Code*, the death penalty was abolished for a further seven crimes.

The 2015 *Penal Code*, revised in 2017 (collectively referred to hereafter as the *2015 Penal Code* or the *Penal Code*), further reduced the number of capital offences[163] to 18 crimes remaining out of a total of 314 specific crimes. The *2015 Penal Code* also expands the number of convicted capital offenders who cannot be punished, cannot be executed, and can be reduced to life imprisonment.

ii. The Right to Defence Recognized in the Constitution and Other Legal Documents Regulating Criminal Procedure

In criminal cases every accused person has the right to defend himself, regardless of the nature and seriousness of the crime.[164]

Article 64 of the first constitution of Viet Nam, the 1946 *Constitution*, stipulates: "The defendant has the right to defend himself with or borrow a lawyer". The 1959 and 1980 *Constitutions* also stipulate "The defendant's right to defence is guaranteed" (Articles 102 and 133 respectively). The 1992 *Constitution* provides that "The defendant's right to defence is guaranteed. Defendants can defend themselves or ask others to defend them."

Legal documents on criminal process and procedures not only stipulate the defendant's right to defence during the trial stage, but also more broadly specify the right to defence of the accused in pre-trial proceedings, clearly defining the responsibilities of procedure-conducting agencies (Investigating Agency, Procuracy and Court) in ensuring the right to defence.

Noting the progress in criminal proceedings regarding the accused's right to defend himself or to have someone else defend him, the 2013 (current) *Constitution of Viet Nam* more clearly stipulates the right to defence of the accused in all stages of pre-trial proceedings, not only before the Court but also during the stages of investigation and the period after charges are brought but before the prosecution begins. The 2013 *Constitution* provides that "[a] person who is arrested, held in custody, temporarily detained, charged with a criminal offence, investigated, prosecuted or brought to trial has the right to defend himself or herself in person or choose a defense counsel or another person to defend him or her".[165]

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[162] For example, there was a combination of the crime of "robbing socialist property" with the crime of "robbing citizens' property" into the crime of "robbing property".

[163] Including removing the death penalty for: robbery (Article 168); producing and trading in counterfeit food, foodstuffs and food additives (Article 193); illegal possession of narcotics (Article 249); illegally appropriating narcotics (Article 252); destroying works, facilities and means important for national security (Article 303); disobeying orders (Article 394) and surrendering to the enemy (Article 399).

[164] During development of the law, crimes were classified into different groups: felonies and misdemeanors, less serious crimes, serious crimes, very serious crimes and particularly serious crimes.

[165] Constitution of 2013: Clause 4 Article 31.

The spirit of renewal and expansion on the right to defence and guaranteeing the right to defence of the accused has been specifically implemented in the *Criminal Procedure Code 2015* and related legal documents, including the *Law on Enforcement of Custody and Temporary Detention of 2015* and the *Law on Legal Aid of 2017*. These laws contain regulations on the rights of the accused in custody and cases for which an accused person may obtain legal assistance free of charge.

II. Legal Provisions and Practical Application of the Law on Capital Punishment

i. Regulation of the Death Penalty

The most basic and important provisions on application and enforcement of the death penalty in Viet Nam today are found in the *Penal Code* No. 100/2015/QH13, as amended and supplemented by Law No. 12/2017/QH14 (collectively referred to as the *2015 Penal Code* or *Penal Code* as mentioned above);[166] *Criminal Procedure Code* No. 101/2015/QH13,[167] which is amended and supplemented by Law No. 02/2021/QH15[168] (hereafter collectively referred to as the *2015 Criminal Procedure Code* or the *Criminal Procedure Code*); and *Law on Execution of Criminal Judgments* No. 41/2019/QH14[169] (hereafter referred to as the '*Law on Criminal Judgment Execution of 2019*' or '*Law on Criminal Judgment Execution*').

The *Penal Code* generally provides for the scope of crimes, groups of crimes and conditions for applying the death penalty, including circumstances for non-execution of the death penalty found in Article 40.

Box 1: Capital Punishment in Penal Code of 2015

Article 40. Death penalty

1. Death penalty is a special penalty only imposed on persons who commit a particularly serious crime in one of the groups of crimes infringing upon national security or human life, drug- or corruptionrelated crimes, and a number of other particularly serious crimes prescribed by this Code.

2. The death penalty shall not be imposed on persons aged under 18 years when committing a crime, on pregnant women, women nursing children aged under 36 months, or persons aged full 75 years or older when committing a crime or being adjudicated.

3. The death penalty shall not be executed against a convict who falls into one of the following cases:

[166] This Code came into effect on January 1, 2018.
[167] This Code came into effect on January 1, 2018.
[168] This Law came into effect on December 1, 2021.
[169] This Law came into effect on January 1, 2020.

a/ Being a pregnant woman or a woman nursing her child aged under 36 months;

b/ Being aged full 75 years or older;

c/ Being sentenced to death for embezzling property or taking bribes and, after being sentenced, having voluntarily returned at least three-quarters of the embezzled property or taken bribes and actively cooperated with related agencies in detecting, investigating or handling crimes, or performed a feat.

4. In the cases prescribed in Clause 3 of this Article or in case a person sentenced to death is granted commutation, the death penalty shall be commuted to life imprisonment.

The *Penal Code* consists of 426 articles, structured in three parts: i) Part One is General Provisions, Articles 1-107; ii) Part Two, Crimes, Articles 108-425; and iii) Part Three, Implementation Provisions, Article 426. In particular, Part Two is divided into fourteen chapters corresponding to fourteen specific crime groups, with a total of 314 articles defining 312 specific crimes.[170] Each specific crime is divided into different levels of severity, with different penalty provisions corresponding to the seriousness of the offence or the consequences of the crime. In all 312 articles on specific crimes, there are a total of more than one thousand penalty provisions.

Regarding the death penalty, there are eighteen specific crimes that provide for the death penalty as the most severe punishment available, contained in seven specific crime groups or chapters on: crimes of infringing upon national security (six articles); drug-related crimes (three articles); crimes against peace, against humanity and war crimes (three articles); crimes of infringing upon human life, health, dignity and honour (two articles); crimes of corruption (two articles); crimes of infringing upon economic management order (one article); and crimes of infringing upon public safety and public order (one article).

The eighteen crimes providing for the death penalty contain different penalty frames ranging in severity from 1-5 years in prison to the death penalty. In the eighteen penalty frames for which the death penalty is a sentencing option, the lowest severity of penalty is 10 years' imprisonment, 12 years' imprisonment or 20 years' imprisonment. While two crimes[171] provide for a heaviest penalty of imprisonment from 10 to 20 years, life imprisonment or the death penalty, nine crimes provide for a heaviest penalty of imprisonment from 12 to 20 years, life imprisonment or death, and seven crimes provide for a heaviest penalty of 20 years' imprisonment, life imprisonment or the death penalty. Thus, in the current criminal law of Viet Nam, the death penalty is never mandatory, but is prescribed as the most severe sentencing option, with the next less severe sentencing option

[170] One article provides for additional penalties (Article 122) and one article defines position-related offences (Article 352).

[171] Crime of terrorism (Article 299) and crime of undermining peace, causing war and aggression (Article 421).

being life imprisonment. The eighteen specific crimes with sentencing options containing the death penalty are set out in Table 2 of the Appendix.

Offenders prosecuted for crimes carrying the death penalty as a sentencing option are not all sentenced to death, because the death penalty is specified as an optional punishment. The Court has the discretion to instead impose a term of imprisonment not exceeding 20 years, or life imprisonment. As noted above, the death penalty automatically does not apply to offenders if they were under 18 years of age when the crime was committed, pregnant or raising children under 36 months old when the crime was committed or during trial, or if they were aged full 75 years or older when the crime was committed or at the time of trial. In addition, Article 40(3) precludes execution of the death penalty for persons who were sentenced to death for embezzlement of property or accepting bribes and who, after being convicted, hand over at least three-quarters of the embezzled assets or bribe money and actively cooperate with the authorities in detecting, investigating and handling crimes, or who otherwise make great achievements. In addition to these cases where the death penalty is not imposed or enforced by law, the death penalty is not executed in cases where the President grants commutation.

According to the law, in most cases after a sentence has been passed, the imposed punishment will be executed immediately. For death sentences however, the procedure is more rigorous. Article 367 of the *2015 Criminal Procedure Code* prescribes that, before the death penalty is executed, the Chief Justice of the Supreme People's Court and the Chief Procurator of the Supreme People's Procuracy must review the judgment to ensure that the case has been adjudicated and the death sentence imposed in a grounded and lawful manner, without any error that affected the lawful rights of the convicted person. Then, if within seven days after the judgment takes legal effect the person sentenced to death applies to the State President for commutation of the death sentence, the President considers and decides whether to grant amnesty, in which case the death penalty is reduced to life imprisonment. If the application for commutation is denied, the death sentence is carried out.

Box 2: Criminal Procedure Code

Article 367. Procedures for reviewing death sentences before they are executed

1. The procedures for reviewing a death sentence before it is executed are prescribed as follows:

a/ After a death sentence takes legal effect, the case file shall be immediately sent to the Chief Justice of the Supreme People’s Court and the judgment shall be immediately sent to the Procurator General of the Supreme People’s Procuracy;

b/ After examining the case file to decide whether to protest according to the cassation or reopening procedures, the Supreme People’s Court shall transfer the case file to

the Supreme People's Procuracy. Within 1 month after receiving the case file, the Supreme People's Procuracy shall return the case file to the Supreme People's Court;

c/ Within 2 months after receiving the case file, the Chief Justice of the Supreme People's Court and Procurator General of the Supreme People's Procuracy shall decide whether to protest according to the cassation or reopening procedures;

d/ Within 7 days after the judgment takes legal effect, the convict may send an amnesty petition to the State President;

dd/ The death sentence shall be executed unless it is protested against by the Chief Justice of the Supreme People's Court or the Procurator General of the Supreme People's Procuracy according to the cassation or reopening procedures and the convict sends an amnesty petition to the State President. If the death sentence is protested against according to the cassation or reopening procedures but the cassation trial panel or reopening trial panel of the Supreme People's Court decides to reject such protest and uphold the death sentence, the Supreme People's Court shall immediately notify such to the convict so that he/she can make a petition for death penalty commutation;

e/ If the convict makes a petition for death penalty commutation, the death sentence shall be executed after the State President rejects the petition.

2. If there is a ground prescribed in Clause 3, Article 40 of the Penal Code, the chief justice of the court that has conducted the first-instance trial shall issue no death sentence execution decision and report such to the Chief Justice of the Supreme People's Court for considering the commutation of the death penalty to life imprisonment for the convict. As for those sentenced to death but not executed,[172] the death penalty is commuted to life imprisonment.[173] While serving the punishment, sentences may be reduced from a life sentence to a defined term of imprisonment. Specifically, when a life sentenced offender has served their penalty for at least 25 years, has made great progress and has partially compensated for their civil obligations, the offender may have his or her sentence reduced to a termed imprisonment of 30 years, and must serve the entire 30 years[174] except in the case of a special amnesty.

In some special cases, for internal or external reasons, the State of Viet Nam may earlier release those sentenced to death whose sentences have been commuted to life imprisonment or termed imprisonment, by way of a special amnesty decision as prescribed in the *Law on Special Amnesty*.[175]

[172] Including offenders who fall into the category of offenders prescribed in Article 40 (Clause 3) or who are granted commutation.
[173] *Penal Code*: Clause 4 Article 40.
[174] *Penal Code*: Clause 6 Article 60.
[175] See Article 22.

ii. Practical Application of the Death Penalty

On the basis of the *Penal Code* provisions prescribing crimes and their associated penalty options, in order to determine the punishment for each defendant in a specific case, the Trial Panel must consider the following criteria: the nature and degree of danger to society of the crime, personal records of the offender, and the mitigating and aggravating circumstances that may decrease or increase criminal liability. The application of the death penalty is considered carefully and thoroughly, taking into account socio-political factors such as international relations and public opinion, and the need for crime prevention. Circumstances in which a Court will likely impose the death penalty include: an offender who was a conspirator or ringleader (in organized crimes), who is dangerous recidivist, commited the crime in a barbarous manner (for crimes violating the right to life), or who caused especially great damage or very bad effects on society (in cases relating to drugs or corruption).

The sentencing practice in recent years has been to not impose a death sentence for crimes infringing upon national security, terrorism, crimes against peace or against humanity, and war crimes. According to statistics, the number of defendants sentenced to death accounted for about 0.2% of the total number of defendants brought to trial, in which murder accounted for 32.64% and drug-related crimes accounted for 66.42%.[176] Others are corruption-related crimes and rape of a child under the age of 16, though these offenders make up a very small percentage. In recent years, the number of death sentences has increased rapidly,[177] which can be explained by the fact that the amounts of drugs seized by law enforcement agencies is exceptionally large, many times greater than the minimum amount required to attract a death sentence under the law. Application of the death penalty to corruption-related crimes has also changed since 2013, when the Party and State of Viet Nam stepped up their determination to fight corruption in a drastic and substantive manner, without exceptions. Since then, the number of people convicted of property embezzlement has increased. Among these, defendants were sentenced to death in two cases, including the case of Vu Quoc Hao when he was General Director of the Financial Leasing Company under the Bank for Agriculture and Rural Development of Viet Nam (ALCII).[178] Corruption cases such as this are widely reported by the media and always receive special attention in the court of public opinion.

Recent cases in which the death penalty has been imposed include the case of Duong Chi Dung and Mai Van Phuc, charged with embezzlement of property and intentional violation

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[176] Duong Viet Dung, *The death penalty according to the provisions of the 2015 Penal Code* (Master's Thesis, Hanoi Law University, 2018) at 49.

[177] Le Duy Tuong, 'Powers of the President in the death penalty pardon and amnesty' in *Legislative Studies* (2021), online: <http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid =210798> [accessed 7 March 2022].

[178] See *Twice sentenced to death, Mr. Vu Quoc Hao continues to be offered 75 billion in compensation*, online: <https://tuoitre.vn/hai-lan-lanh-an-tu-ong-vu-quoc-hao-tiep-tuc-bi-de-nghi-boi-thuong-75-ti-20201123133324875.htm> [accessed 6 March 2022].

of State regulations on economic management, causing serious consequences that occurred at Viet Nam National Shipping Lines Corporation (Vinalines), which was heard at first instance in 2013 and on appeal in 2014.[179] Next is the case of Vu Quoc Hao and Pham Minh Tuan, noted above, which occurred at ALCII Finance Leasing Company and Cat Long Hai Joint Stock Company, who were tried at first instance in 2014 and on appeal in 2015,[180] and Dang Van Hai in the case that happened at ALCII Financial Leasing Company who was tried at first instance in 2015 and on appeal in 2016.[181] In the Vinashinlines Group case, Tran Van Liem and Giang Kim Dat were tried at first instance and on appeal in 2017. The most recent is Nguyen Xuan Son in the Oceanbank case in 2018.

In the case of Nguyen Xuan Son, in addition to upholding the death penalty that the first-instance court had imposed against Nguyen Xuan Son, the Appellate Trial Panel commented that the defendant had made honest declarations, (especially during the appellate stage), had many achievements in his working life; the defendant's family had meritorious services to the State, expressed a desire to remedy the damage caused by crime, so that the Appellate Court would recommend the Chief Justice of the Supreme People's Court to consider reducing the death penalty to life impresionment if at least three-quarters of embezzled property is returned to the State.[182] However, after that, the competent authority determined that the amount of property that Nguyen Xuan Son and his family returned was less than three-quarters of the property that Son had to compensate, so that ultimately Son's death sentence was not commuted to life imprisonment as provided for in Clause 3 Article 40 of the *Penal Code*. Instead, the death penalty was commuted to life imprisonment by the President under the process of reviewing Son's sentence before execution.

Since it has been provided for in the *Penal Code*, there has not been any case where the punishment has been reduced from death to life imprisonment due to at least three-quarters of the amount appropriated having been returned.

According to a report summarizing the work of the State President in the period 2016 - 2021, the President commutated the death penalty to life imprisonment for ninety-four offenders, rejected the applications of 295 offenders, and returned twenty-three dossiers to

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[179] See Group of PVs, *Y of death sentence Duong Chi Dung, Mai Van Phuc*, online: <https://www.24h.com.vn/tin-tuc-trong-ngay/y-an-tu-hinh-duong-chidung-mai-van-phuc-c46a628425.html> [accessed 6 March 2022].

[180] In this case, the first instance Court sentenced three defendants to death, then the Court of Appeal reduced the sentence for defendant Hoang Loc from death to life imprisonment. See *The Death Sentence of Former General Director of ALC II Company Vu Quoc Hao*, online: <https://baotainguyenmoitruong.vn/y-an-tu-hinh-nguyen-tong-giam-doc-cty-alc-ii-vu-quoc -hao-263235.html> [accessed 6 March 2022].

[181] See: Twice sentenced to death, Mr. Vu Quoc Hao continued to be offered 75 billion VND in compensation < https://tuoitre.vn/hai-lan-lanh-an-tu-ong-vu-quoc-hao-tiep-tuc-bi-de-nghi-boi-thuong-75-ti-20201123133324875.htm>

[182] See: Nguyen Hung, same sentence to death for Nguyen Xuan Son and life for Ha Van Tham https://cand.com.vn/Ban-tin-113/Y-an-tu-hinh-doi-voi-Nguyen-Xuan-Son-va-chung-than-doi-voi-Ha-Van-Tham-i474401/. [accessed 14 November 2022].

the Supreme People's Court. The reason for returning twenty-three cases was that the offenders did not apply for commutation of the death penalty, but wrote petitions for reconsidering the case or requesting early execution.[183]

As yet, no offenders whose sentences were commuted from death penalty to life imprisonment in accordance with the provisions in the *2015 Penal Code* have been released, because there is still time remaining to be served in their sentences. For those who had been commuted from the death sentence under the *Penal Code* of 1999 or the *Penal Code* of 1985, there are a number of offenders who have been released and are reintegrating into the community after completing their sentences or being granted early release. Among them, there are three mentioned often on social media because the criminal cases related to them were particularly serious, occurring in large companies that had a great impact on the economy, and also particularly because after being released from prison they have made meaningful contributions to the community:

i) Nguyen Van Muoi Hai was arrested in 1990 and sentenced to death for the crime of "Appropriating property through swindling" in the case of Thanh Huong perfume company. His sentence was commuted to life imprisonment, and he was granted special amnesty for early release in 2006;[184]

ii) Le Minh Hai was arrested in 1995 and sentenced to death for the crime of "Embezzling property" in the Tamexco case. His sentence was commuted to life imprisonment, and he was granted special amnesty for early release in 2005;[185]

iii) Lien Khui Thin was arrested in 1997 and sentenced to death for the crime of "Appropriating property through swindling" in the case of Epco-Minh Phung company. His sentence was commuted to life imprisonment in 2003 and he was granted special amnesty for early release in 2009.[186]

iii. Recommendations Regarding the Death Penalty to Viet Nam under International Human Rights Mechanisms

In 2019, Viet Nam participated in the third cycle of the Universal Periodic Review (UPR) process undertaken by the UN Human Rights Council (HRC). The *Report of the Working Group*

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[183] The summary version of the report summarizing the work of the State President for the 2016-2021 term is available online: <https://baochinhphu.vn/toan-van-bao-cao-tong-ket-cong-tac-nhiem-ky-2016-2021-cua-chu-tich-nuoc-102289667.htm> [accessed 2 November 2022]. However, the full report in which these numbers are found is not publicly available.

[184] See *"The number one giant" Nguyen Van Muoi and the story of re-starting a business in Saigon* (3 September 2015), online: Dan Tri <https://dantri.com.vn/kinh-doanh/dai-gia-so-mot-nguyen-van-muoi-hai-va-cau-chuyen-tai-khoi-nghiep-tai-dat-sai-gon-20150903115249505.htm> [accessed 14 November 2022].

[185] Pháp luật, *Tử tù trở thành Tổng giám đốc* (28 January 2009), online: VN Express <https://vnexpress.net/tu-tu-tro-thanh-tong-giam-doc-2119596.html> [accessed 14 November 2022].

[186] Khôi Nguyên, *Chuyện về vụ án "Minh Phụng – Epco" (phần 4): Người tử tù … đặc biệt* (3 August 2020), online: Diễn Đàn Doanh Nghiệp <https://diendandoanhnghiep.vn/chuyen-ve-vu-an-minh-phung-epco-phan-4-nguoi-tu-tu-dac-biet-178561.html> [accessed 14 November 2022].

on the Universal Periodic Review: Viet Nam noted that "Viet Nam attached great importance to the universal periodic review process."[187] Viet Nam received several recommendations on the death penalty from other Member States of the UN. During the interactive dialogue, 120 statements were made, including a number of recommendations on various issues within the purview of the HRC and relating to obligations under the ICCPR, including the death penalty. In this respect, the Report notes that Viet Nam maintained that the death penalty is a necessary measure to prevent the most serious crimes.[188] Recommendations for Viet Nam to adopt measures towards the abolition or restriction of the death penalty were made by several countries. These include recommendation 38.146 by Belgium to "restrict the use of the death penalty to crimes that meet the threshold of "most serious crimes" under international law" and recommendation 38.291 by Sweden to "introduce a national moratorium on the death penalty, aiming at complete abolition. Until then, reduce the number of crimes subject to the death penalty, ensuring that it does not apply to offences other than the "most serious" crimes, in accordance with International Covenant on Civil and Political Rights."[189] In response, Viet Nam stated its "firm commitment that the application of this punishment in reality will strictly be in conformity with the ICCPR, and therefore, Viet Nam only accepts relevant recommendations or elements along that line."[190] As a result, Viet Nam accepted recommendations focused on restricting the use of the death penalty to crimes that meet the threshold of "most serious crimes" under international law, including accepting in full recommendation 38.146 by Belgium.

In addition, echoing recommendations made by the Committee against Torture in 2018, the UN Human Rights Committee issued *Concluding Observations* on Viet Nam's compliance with the ICCPR in 2019 which identified as priority recommendations that Viet Nam consider introducing a moratorium on the use of the death penalty and acceding to the Second Optional Protocol of the *ICCPR* aimed at abolition of the death penalty. The Committee further recommended *inter alia* that, pending the introduction of a moratorium, the number of crimes subject to the death penalty should be reduced and death penalty be retained only for the most serious crimes of extreme gravity involving intentional killing.[191]

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[187] UN HRC, UN Doc. A/HRC/41/7, *Report of the Working Group on the Universal Periodic Review - Viet Nam* (28 March 2019), online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/083/45/PDF/G1908345.pdf?OpenElement> [accessed 12 September 2022] at para. 5.

[188] *Ibid*. at para. 22.

[189] *Ibid*. at para. 38.

[190] UN HRC, UN Doc. A/HRC/41/7/Add.1, *Report of the Working Group on the Universal Periodic Review - Viet Nam: Addendum - Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review* (26 June 2019), online: <https://www.ecoi.net/en/file/local/2012456/A_HRC_41_7_Add.1_VietNam_E.docx> [accessed 12 September 2022] at para. 15.

[191] UN HRC, UN Doc. CCPR/C/VNM/CO/3, *Concluding observations on the third periodic report of Viet Nam* (29 August 2019), online: <https://documents-dds-

III. Legal Provisions and Practical Application of the Law on Exercising the Right to Defence

i. Regulation of the Right to Self-Representation

As mentioned above, the right to defence has been recognized in the Constitution of Viet Nam. Ensuring the accused's right to defence, which includes the right to self-representation, is a fundamental principle of current Vietnamese criminal proceedings, as provided for in Article 16 of the 2015 Criminal Procedure Code.

Box 3: Criminal Procedure Code of 2015

Article 16. Guarantee of right of defense for accused persons and protection of legal rights and benefits of defendants and litigants

An accused person is entitled to defend himself or be defended by a lawyer or another person.

Competent procedural authorities and persons are responsible for informing accused persons, defendants and litigants of all of their rights of defense, legitimate rights and benefits according to this Law. Moreover, competent procedural authorities and persons shall provide explanations and guarantee the implementation of all of such rights and benefits.

In this overarching principle, the right to defence is provided for by stating that the accused person has the right to defend himself or to have someone else defend him, and requiring authorities and persons competent to conduct legal proceedings to notify, explain and ensure that an accused person is able to fully exercise their fair trial rights, including other basic principles of criminal procedure such as determining the truth of the case, presumption of innocence, and a hearing before an independent court.

In a criminal case, depending on the stage of criminal proceedings, the accused person is identified by the terms 'arrested person', 'person held in custody', 'temporary detainee', 'suspect', 'accused' and "defendant". These persons have rights and obligations prescribed in Articles 58-61 of the *2015 Criminal Procedure Code* corresponding to each stage of the proceedings. At all stages they have a number of fair trial rights related to ensuring the presentation of an effective defence, whether through the assistance of a lawyer or by self-representation, such as the right to be informed of the reasons for being arrested and being prosecuted, and the right to receive a copy of judicial decisions. In general, through the stages from being arrested to becoming a person held in case of emergency, arrestee or person held in custody, the accused, and a defendant (generally called the accused) has the rights and obligations contained in articles 58, 59, 60 and 61 of the *Criminal Procedure Code*, as listed below:

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ny.un.org/doc/UNDOC/GEN/G19/257/52/PDF/G1925752.pdf?OpenElement> [accessed 17 October 2022] at para. 24.

BOX 4: Accused Persons' Rights and Obligations

unders the Criminal Procedure Code of 2015 (articles 58 -61)

Rights

1) To be informed of, formed of, or to receive, warrants for holding persons in case of emergency, arrest warrants against persons to be held in case of emergency, decisions approving arrest warrants against persons to be held in case of emergency, or pursuit warrants;

2) To be informed of the reasons why they are held or arrested;

3) To be notified of and explained about their rights and obligations in accordance with Article 58 or Articles 59, 60 and 61;

4) To present their statements and opinions without having to incriminate themselves or being forced to plead guilty;

5) To present evidence, documents, objects and claims;

6) To present their opinions about related evidence, documents and objects and request persons competent to conduct the proceedings to examine and appraise them;

7) To self-represent or ask other persons to defend them;

8) To receive decisions on initiation of criminal proceedings against them; ecisions modifying or supplementing decisions on initiation of criminal roceedings against them, decisions approving decisions on initiation of criminal proceedings against them, decisions approving decisions modifying or supplementing decisions on initiation of criminal proceedings against them; decisions on application, change or cancellation of deterrent measures or coercive measures; written investigation conclusions; decisions to cease or suspend investigation; decisions to cease or suspend criminal cases; indictments; decisions on prosecution; receive decisions to bring criminal cases for trial; the court's judgments and rulings and other procedural decisions in accordance with this [Criminal Procedure] Code;

9) To request expert assessment and property valuation; request replacement of persons competent to conduct the proceedings, expert witnesses, property valuators, interpreters and translators;

10) To read and take notes of copies of documents or digitalized documents relating to the accusation or defense or copies of other documents relating to the defense after the investigation finishes if they so request;

11) To participate in court hearings;

12 To request summon of witnesses, victims, persons with interests or obligations

related to criminal cases, expert witnesses, property valuators, other proceeding participants and persons competent to conduct the proceedings to participate in court hearings;

13) To request judges presiding over court hearings to ask or ask by themselves questions to participants in court hearings if the presiding judges so agree; make arguments and counter-arguments at court hearings;

14) To have final words before the judgment deliberation;

15) To read transcripts of court hearings, and request writing of modifications and supplements in the transcripts;

16) To appeal against the court's judgments and rulings;

17) To file complaints about procedural decisions or acts of bodies and persons competent to conduct the proceedings;

18) To exercise other rights provided by law.

Obligations

19) To be present in response to summonses of persons competent to conduct the proceedings, the court's summonses. In case of absence due to a force majeure event or an external obstacle, they may be police-escorted; if they abscond, they shall be pursued;

20) To obey decisions and requests of bodies and persons competent to conduct the proceedings; to obey decisions and requests of the court

21) Persons held in case of emergency and arrestees are obliged to obey warrants for holding or arrest of persons and requests of bodies and persons competent to hold or arrest persons in accordance with this [Criminal Procedure] Code.

22) Persons held in custody are obliged to comply with the provisions of this Code and the Law on Custody and Temporary Detention.

In addition to the above rights and obligations, an accused who is held in custody or temporary detention also has rights and obligations regulated in the 2015 *Law on Custody and Temporary Detention* as set out below:

BOX 5: Law on Custody and Temporary Detention of 2015 (Article 9)

A person held in custody or temporary detention has the following rights and obligations:

Rights:

1) To have his/her life, body and property safely protected, to have his/her honor and dignity respected; to be informed of his/her rights and obligations and internal rules of the detention facility;

2) To exercise the voting right in accordance with the Law on Election of Deputies to the National Assembly and Deputies to People's Councils and the right to vote in referenda in accordance with the Law on Referendum;

3) To be entitled to the prescribed regime of meal, accommodation, clothing, personal articles, medical care, spiritual activities, sending and receipt of letters, and receipt of gifts, books, newspapers and documents;

4) To meet his/her relatives, defense counsels and to have consular access;

5) To be guided, explained about, and exercise, the right to defend on his/her own or ask for defense or legal aid from others;

6) To meet his/her lawful representative to conduct civil transactions;

7) To file requests for release upon expiration of the period of custody or temporary detention;

8) To complain about and denounce illegal acts;

9) To be compensated for damage in accordance with the Law on State Compensation Liability if being held in detention or custody in contravention of law;

10) To be entitled to other citizens' rights that are not restricted by this Law [on Custody and Temperary Detention] and other relevant laws, unless such rights cannot be exercised due to the custody or temporary detention.

Obligations:

11) To obey decisions, requests and instructions of competent custody and temporary detention management and enforcement agencies and persons;

12) To observe internal rules of the detention facility, this Law [on Custody and Temperary Detention] and relevant laws.

All of the rights of accused persons set out above are aspects of the right to defence, fundamental to the right to a fair trial, which includes the rights of every accused person, whether self-represented or not, to: know information and reasons for being arrested, charged and prosecuted for crimes; receive important procedural decisions, including investigation conclusions, indictments, and judgments; read, take notes on copies of documents or digitized documents related to the accusations or defence; be present at their trial; present opinions on relevant evidence, documents and objects; ask questions of the witnesses (including victims) and any other defendants, if permitted by the presiding judge; and represent oneself at trial.

The 2015 *Criminal Procedure Code* has not however specified a number of rights related to an accused person's right to defence, including the rights to: i) silence; ii) collect evidence and documents; and iii) confront those who have conflicting statements.

As mentioned, the *Constitution* and laws recognize the right to defence of the accused, including rights to self-represent and to ask others to defend (or right to have defence counsel). The right to have defence counsel co-exists with the right to self-represent. Defence counsel provide the accused with legal assistance that enables the accused to better act in defence of an accusation of criminal wrongdoing. Defence counsel may be i) lawyers, ii) representatives of the accused, iii) people's advocates, and iv) legal aid providers in situations in which the accused are entitled to legal aid.[192] Defence counsel may participate in the proceedings from the time of initiation of proceedings against the accused, or from the time when arrestees are present at offices of investigation bodies in the case of arrest or holding of persons in custody.[193] Defence counsel participate in criminal proceedings through one of two ways: i) when invited / asked by the accused or their representatives or relatives; or ii) when appointed by procedure conducting bodies.[194] The law places no restriction on the accused or their representatives from asking lawyers or others for legal assistance, but places responsibility on the state competent body conducting criminal proceedings to ensure that the right is realized if it is exercised by the accused. Article 75 of the *Criminal Procedure Code* prescribes that:

i) after receiving a written request for defence counsel by an arrestee/person held in custody or detainee, the competent body shall transfer the written request to the defence counsel or the accused's representative/relative within 12 hours or 48 hours respectively; or

ii) in case a representative or relative of an arrestee or a person held in custody or a detainee makes a written request for defence counsel, the competent body shall promptly notify such to the arrestee, person held in custody or detainee to have his/her opinion on such request.

If the accused, their representatives or their relatives do not seek the assistance of defence counsel, the body competent to conduct the proceedings is required to appoint defence counsel for the accused if:

i) the accused is charged with an offence punishable by 20 years in prison, life imprisonment or the death penalty as the highest penalty prescribed by the Penal Code; or

ii) the accused has a physical defect which renders him/her unable to defend himself/herself, has a mental defect or is aged under 18.[195]

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[192] 2015 *Criminal Procedure Code*: Clause 2 Article 72.

[193] In case of necessity to keep investigation secrets for offences infringing upon national security, chief procurators of procuracies may decide to let defence counsel participate in the proceedings from the time when the investigation is completed (2015 *Criminal Procedure Code*: Article 74).

[194] 2015 *Criminal Procedure Code*: Clause 1 Article 76.

[195] 2015 *Criminal Procedure Code*: Clause 1 Article 76.

The appointed defence counsel is paid by the body competent to conduct the proceedings as regulated in the law. In other words, the accused receives assistance from appointed defence counsel at the expense of the State.

Besides the *Criminal Procedure Code*, the *Law on Legal Aid* of 2017 stipulates cases where citizens are provided legal assistance free of charge, or legal aid. Article 7 provides that persons are entitled to receive legal aid if they fall into the following categories: i) people with meritorious service to the revolution; ii) members of poor households; iii) children; iv) ethnic minority people residing in areas that have extremely difficult socio-economic conditions; v) accused persons from 16 years old to under 18 years old; vi) accused persons in near-poor households; and vii) people experiencing financial difficulties who are natural parents, spouses or children of fallen heroes or persons nurturing fallen heroes during their childhood, persons exposed to dioxins, elderly, persons living with disabilities, victims in criminal prosecutions aged from 16 years old to under 18 years old, victims in family domestic violence cases, victims of human trafficking, and HIV-positive people.

ii. Assessment of the Actual Situation of Exercising the Right to Defence through Self-Representation

The right to defence in criminal proceedings is a vital part of the right to a fair trial, and an assessment of the actual situation of exercising the right through self-representation or through defence counsel should therefore be considered in this context. Studies and evaluation reports on the exercise of the various rights that are aspects of the right to a fair trial show that the effectiveness of defence counsel before and at trial is not high. The number of cases where an accused is represented by defence counsel is also not very high, and the number of defendants proactively and actively exercising the right to defence is low.

According to a report on national statistics, the proportion of criminal cases with defence counsel in the first-instance trial and at the appellate stage is 7.5% and 8.6% respectively, meaning that the vast majority of accused persons are self-represented, though whether this is by choice or by necessity is unknown. Whereas cases that the district-level People's Courts heard at first instance with the participation of defence counsel accounted for 5% of the total number of criminal cases heard by these Courts, criminal appellate cases heard by the provincial People's Courts with the participation of defence counsel accounted for 5.9% of the total number of appellate cases heard by the provincial People's Courts.[196] The survey results show that: 59.6% of defendants know about the right to self-represent or have defence counsel; 48.9% of defendants know about the rights and obligations of persons who are detained, accused or arrested; and 32% know about the right to have these legal rights guaranteed by the competent authority.[197]

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[196] Ministry of Justice, Institute of Legal Science, 'The reality of ensuring the right to defense of accused persons in Vietnam', in *Legal Science Information* (No. 2/2017, Special Issue) at 13.
[197] *Ibid*. at 15.

Surveys and interviews with Chief Justices and judges who adjudicate criminal cases in thirty-five People's Courts at all levels, demonstrate that the situation of accused persons who exercise their right to self-represent is as follows:

i) Most accused and defendants do not actively participate in their own defence. Usually they only answer the questions of those conducting the proceedings, and very rarely do they submit evidence and arguments in their defence, even though they have plead not guilty. The documents and evidence they submit in their defence are usually few, though most of them make a statement about the case, and answer questions by the Trial Panel, Prosecutor, Defence counsels, defenders of victims and involved parties.

ii) The number of defendants well prepared to represent themselves is low. This is reflected in the fact that few accused had legal assistance or exercised their right to review documents relating to the accusation or defence. Without having a clear understanding of the case and the law, an accused person is generally not able to present an effective defence or response to the prosecution or accuser.

iii) At the court hearings, there was almost no participation of the accused in terms of presenting counter-arguments or evidence in defence. Accused persons usually only answer questions when asked, and make a closing submission asking for a less severe punishment. Those who have plead not guilty usually answer questions of the Trial Panel and the Procurator by simply stating “I have not committed a crime.”

Judges who were surveyed believe that most accused and defendants do not have the skills and knowledge to represent themselves before a court. Even if the laws are explained to them, they do not understand that they have rights and, even if they do understand, they do not know how to exercise them. Self-represented accused persons are also afraid of facing investigators, prosecutors and judges so they don't dare to assert their right to read documents and take notes, and not having a deep understanding of court procedures or laws, they are unable to defend themselves effectively in court. Accused persons who are aware of, and exercise their right to engage defence counsel however, are able to exercise the right to defence more effectively.

The survey results show that among 35 courts surveyed, only four courts have ever received requests from the accused to read and take notes of documents and evidence related to the charges against them. Most of these requests are resolved by the Courts in accordance with the law. On the basis of the petitions of the accused, the Court makes a record of the request, makes a list of documents, then provides copies of the documents in the case file. In one case however, the request was not met because the evidence against the accused was contained in top secret documents.

The results of interviews with, and surveys of judges on their evaluation of the exercise of the right to defence, are consistent with research reports and anecdotal evidence from lawyers on the subject, all of which can be summarized as follows:

i) The level of awareness and experience of the accused in criminal proceedings is generally low. In many cases, accused have not completed secondary education, are fearful and do not dare to make requests of the procurator or the trial panel; and

ii) Accused are threatened or otherwise coerced through the use of force, evidenced by the fact of cases where investigators have been convicted and disciplined for trying to force confessions, assaulting or torturing detainees, and falsifying case files.[198]

E. CONCLUSION AND RECOMMENDATIONS FOR VIET NAM ON ALTERNATIVES TO CAPITAL PUNISHMENT AND THE RIGHT TO DEFENCE

I. Alternatives to Capital Punishment

In the past decade Viet Nam has made significant strides in reducing the number of crimes to which the death penalty is applicable. It is however recommended that Viet Nam progressively continue on the path to total abolition, in light of international and regional commentary that capital punishment is a violation of both the right to life and the prohibition against cruel and inhuman punishment, current trends around the globe towards abolition, and Viet Nam's commitments made during the UPR process. As noted above, in 2021 the governments of Sierra Leone and Kazakhstan abolished the death penalty for all crimes, followed by the governments of Papua New Guinea and Zambia in 2022, and Malaysia soon expected to follow, with the result that more than two thirds of the world's countries have abolished the death penalty in law or in practice.

As discussed above, the *Penal Code* of Viet Nam currently provides for the death penalty as the most severe sentencing option for eighteen crimes. Article 40 states that the death penalty is reserved for "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." Articles 21 and 51 (paragraphs p and q of Clause 1) exclude and reduce penal liability for offenders with severe disability and those with mental illness that deprives or restricts their cognitive ability or the ability to control their own behaviour, with the effect

[198] An Khuong, *Ai giúp dân chứng minh đã bị công an đánh, ép cung?* (23 February 2021), online: Dragon Law Firm <https://luatsubaochua.vn/ai-giup-dan-chung-minh-da-bi-cong-an-danh-ep-cung/> [accessed 14 November 2022]; Le Minh Truong, *Bảo vệ quyền lợi của cá nhân khi bị công an đánh phải làm gì?* (6 November 2022), online: Minh Khuê <https://luatminhkhue.vn/bao-ve-quyen-loi-khi-bi-cong-an-danh-.aspx> [accessed 14 November 2022]; Tran Hong Phong, *The stories about police using torture, coercion and the civil's right to defence* (2020), online: Luật Sư Phạm Tuẩn Anh <https://luatsuphamtuananh.com/bao-chua--bao-ve-quyen-loi-trong-vu-an-hinh-su/chuyen-cong-an-buc-cung--nhuc-hinh---quyen-bao-chua-cua-cong-dan> [accessed 14 November 2022].

that such offenders should not be subject to the death penalty. With respect to sentencing principles, Article 50 dictates that the following factors must be taken into account by a Trial Panel to determine the *individualized* punishment in each case: the nature and degree of danger to society of the crime, personal records of the offender, and the mitigating and aggravating circumstances that may decrease or increase criminal liability. It should also be noted that Article 3 provides that leniency should be granted to offenders who (among other things) confess (i.e., plead guilty), show repentance or compensate for damage caused. Aside from these provisions of the *Penal Code*, Viet Nam does not have any sentencing guidance for judicial officers regarding when to impose the death penalty as opposed to life imprisonment or a determinate sentence.

Article 63 of the *Penal Code* provides for commutation of a life sentence to termed imprisonment of 30 years for first time offenders who have served their penalty for at least 12 years, have made great progress and have partially compensated for their civil obligations. A court may grant commutation upon request of a 'competent criminal sentence execution authority'. There is no further guidance however on the process, including how these criteria are applied in determining when offenders may be eligible for reduction of life imprisonment. This 30-year sentence may be further commuted, but may not be reduced to less than 20 years. A death sentence that has been commuted to life imprisonment may be further commuted after 25 years, but capital offenders must serve at least 30 years.

With respect to the possibility of early release (parole), Article 66 provides for parole to be granted to first time offenders who were sentenced to life imprisonment but have received a commutation to a determinate sentence, including for some, but not all, offences that also attract the death penalty as a sentencing option. Decisions on parole are made by the Court upon request of a 'competent criminal sentence execution authority' and may be granted to life sentenced offenders who have been commuted to determinate imprisonment, after having served at least 15 years. Clause 2 however denies parole to all offenders that have been sentenced to death, even if their sentence has been commuted.

In light of the above, and statistics showing that capital punishment is only applied to 0.2% of defendants brought to trial, of which 66% of defendants were convicted of drug-related offences, the authors recommend that Viet Nam take the following steps to further restrict application of capital punishment to the most serious crimes and circumstances in line with UPR recommendations, with a view to progressively abolishing the death penalty. It is further recommended that, during the period in which the following recommendations are being considered and implemented, Viet Nam introduce a moratorium on execution of death sentences.

i. Crimes of Infringing Upon National Security

Article 108. High treason; Article 109. Activities against the people's government; Article 110. Espionage; Article 112. Rebellion; Article 113. Terrorism; Article 114. Sabotaging Facilities

The current penalty frame for the most serious crimes of infringing upon national security is 12 – 20 years' imprisonment, life imprisonment, or death, however the sentencing practice in recent years has been to not impose a death sentence for these crimes. Given that the UN Human Rights Committee has stated that the death penalty must not be imposed even in situations such as terrorist attacks and other emergencies that threaten the life of a nation, it is recommended that the death penalty be entirely removed as a sentencing option for these crimes, with immediate effect. Further, any offenders who are currently under a death sentence for these crimes should have their sentences immediately commuted to life imprisonment.

Viet Nam could follow the example of Turkey which provides that the penalty for crimes against security of the state and against the constitutional order is 'aggravated life imprisonment', being life imprisonment without the possibility of early release (parole), however given that recent international commentary has found 'life without parole (LWOP)' to be in violation of the prohibition against cruel and inhuman punishment, sentencing guidance should be that LWOP is restricted in respect of crimes infringing upon national security to those most serious offenders who are ringleaders, or in the most serious circumstances where result of the crime is intentional killing of specified groups of people such as public officials acting in their official capacity (including military or police), or members of vulnerable groups such as children or persons living with disability.

ii. Crimes of Infringing Upon Human Life, Health, Dignity and Honour

Article 123. Murder; Article 142. Rape of a person under 16

The current most severe penalty frame for murder is 12 to 20 years' imprisonment, life imprisonment, or death, and the circumstances in which a court is likely to impose the death penalty are set out in the *Penal Code* including multiple murders, murder of children under the age of 16, organized murder, murder of officials on duty, and commission of the crime in a barbarous manner. It should be noted that other crimes resulting in the death of a person, such as Article 124 (killing or abandoning one's newborn), Article 134 (causing human death, of two or more persons) and Article 135 (acting beyond the legitimate self-defence limit, resulting in death) do not provide for the death penalty as a sentencing option. Given that international and regional law and commentary is to abolish the death penalty even for intentional killing, Viet Nam should progressively restrict application of capital punishment

for murder with a view to abolition within the next five to seven years. In the meantime, Viet Nam could continue to follow the lead of countries such as Japan which provide the death penalty as a sentencing option only for 'aggravated murder'. In this respect, in determining the punishment for murder Japan considers the number of victims, the motives, age, criminal record and degree of remorse of the offender, and the brutality of the crime and its social impact. The Philippines imposes a sentence of imprisonment of 20 to 40 years for murder. The authors recommend for Viet Nam therefore that life imprisonment become the most severe penalty for murder in all circumstances except particularly aggravated cases as defined in Article 123 of the Penal Code, such as in the case of multiple or vulnerable victims.

The current most severe penalty frame for rape of a person under 16 years of age is 20 years' imprisonment, life imprisonment, or death, and the death penalty may be imposed only for aggravated offences. International practice, including in countries such as the Philippines, is to impose imprisonment as the most severe punishment for rape, even in aggravated circumstances. The authors therefore recommend that application of the death penalty for this crime in Viet Nam be abolished and replaced with a maximum of life imprisonment for the aggravated circumstances set out in Article 142.

iii. Crimes of Infringing Upon Economic Management Order

Article 194. Manufacturing and trading of counterfeit medicines for treatment or prevention of diseases

The current penalty bracket for this crime in circumstances where the profit earned is VND 2,000,000,000 or over, the offence results in death, permanent disability or bodily harm to two or more people, or property damage is VND 1,500,000,000 or over, is 20 years' imprisonment, life imprisonment or death. Given that current sentencing practice is not to impose capital punishment for this crime, the authors recommend that the death penalty be immediately abolished for all circumstances.

iv. Drug Related Crimes

Article 248. Illegal manufacturing of narcotic substances; Article 250. Illegal transport of narcotic substances; Article 251. Illegal dealing in narcotic substances

The current penalty frame for the most serious drug related crimes is 20 years' imprisonment, life imprisonment, or death for quantities of narcotic substances over 300 grams, quantities of heroin, cocaine, methamphetamine, amphetamine or MDMA over 100 grams, and quantities in excess of 75 kilograms of cannabis or coca leaves etc. or opium poppy fruits. As noted above, drug related crimes constitute the majority (in fact two thirds) of all death sentences imposed in Viet Nam. In March 2021 the Supreme People's Court issued

Resolution No. 01/2001/NQ-HĐTP providing guidance on application of several articles of the Penal Code, including drug-related crimes, in which it directed that in cases where there are no aggravating or extenuating circumstances, or where there are equal aggravating and extenuating circumstances, the death penalty should be imposed for heroin or cocaine having a weight of six hundred grams or more, and anything less than 600g but more than 300g should attract imprisonment for life.

International law clearly states that the death penalty should not apply to drug-related offences, and international and regional practice is to impose life imprisonment as the strictest penalty for drug related crimes, including sale and trafficking. In addition, the UN Human Rights Committee has stated that the death penalty must not be imposed to crimes other than those of extreme gravity involving intentional killing. Further, as noted above, studies have shown that the death penalty is not a deterrent to commission of drug offences, including in Viet Nam[199] It is therefore recommended by the authors that Viet Nam immediately remove the death penalty as a sentencing option for all drug related crimes and

v. Crimes of Infringing Upon Public Safety and Public Order

Article 299. Terrorism

The current penalty frame for the most serious crime of terrorism is 10 to 20 years' imprisonment, life imprisonment, or death. The elements of the crime do not require that there be a fatality, and the current sentencing practice in Viet Nam is not to impose a death sentence for this crime. Further, the UN Human Rights Committee has stated that the death penalty must not be imposed even in situations such as terrorist attacks. It is therefore recommended that Viet Nam immediately abolish the death penalty for this crime, and follow international practice in sentencing terrorist offenders to life imprisonment.

vi. Crimes of Corruption

Article 353. Embezzlement; Article 354. Taking bribes

The current most severe penalty bracket for embezzlement and taking bribes is 20 years' imprisonment, life imprisonment, or death. Since these crimes do not result in physical harm to any person, and the recent sentencing practice is to not impose the death penalty for offences of taking bribes, it is recommended by the authors that the death penalty be immediately abolished for these crimes, and replaced with a maximum punishment of life imprisonment. Given that Article 40(3) of the Penal Code provides that execution should not be carried out against offenders sentenced to death for embezzling property or taking bribes who voluntarily return at least three-quarters of the embezzled property or bribes and

[199] *Moving away from the Death Penalty, supra* note 24 at 93-94.

actively cooperate with related agencies in detecting, investigating or handling crimes, it is proposed that these considerations continue to be taken into account in sentencing for these crimes, with the result that the maximum penalty imposed in these circumstances be 20 years' imprisonment.

vii. Crimes Against Peace, Crimes Against Humanity and War Crimes

Article 421. Disruption of peace, provocation of war of aggression; Article 422. Crimes against humanity; Article 423. War Crimes

The current most severe penalty frame for this group of crimes is 10 or 12 to 20 years' imprisonment, life imprisonment, or death. Given that the recent sentencing practice in Viet Nam has been to not impose a death sentence for these crimes, and the sentencing practice in relation to these crimes at the International Criminal Court is to impose life imprisonment as the most severe penalty, it is recommended by the authors that Viet Nam abolish the death penalty for this group of crimes, with immediate effect.

viii. Proposed Revisions to Article 40 of the Penal Code

1. If the above recommendations are accepted and implemented, it is recommended by the authors that Article 40 of the *Penal Code* be amended as follows:
    a. Restrict the death penalty in Article 40(1) to aggravated murder:

    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~~ *only on persons who commit the extremely serious crime of murder in particularly aggravated circumstances*.

    b. Further, Articles 40(2) and (3) of the *Penal Code* already restrict application of the death penalty from being imposed on persons aged under 18 years when committing a crime, pregnant women, women nursing children aged under 36 months, and persons aged 75 years or older when committing a crime or being adjudicated. Such capital offenders are automatically given life imprisonment with no possibility of release on parole. Since these offenders are considered categories of vulnerable persons in society, and international law and policy is to consider such offenders for release from prison at the earliest opportunity, it is recommended that the default sentence for these categories of people should instead be term imprisonment with the possibility of parole, unless the circumstances of the offence were particularly aggravated (i.e., for offenders convicted of murder in aggravating circumstances, where the death penalty would be imposed if not for the vulnerability of the offender);

c. In addition, it is recommended that a further category of offenders be added to those against whom the death penalty should *not* be executed, in Article 40(3), being citizens of countries that do not prescribe the death penalty and that have signed a bilateral treaty with Viet Nam on mutual legal assistance, or that have applied the principle of reciprocity;

d. Finally, it is also recommended by the authors that a further new subsection be added to Article 40 as follows:

   Execution of the death penalty may be postponed for offenders who were over the age of 18 but under the age of 30 at the time of committing the crime. If, within three years after the judgment takes legal effect, the offender has made great progress towards rehabilitation, the offender's sentence shall be reduced to a term of life imprisonment, with the possibility of release on parole after serving at least 30 years;

2. In the alternative, for all of the above capital offences and in light of international and regional standards and policy direction that even life without the possibility of parole constitutes cruel and inhuman punishment, and recommendations to Viet Nam made during the UPR process to progressively restrict capital punishment with a view to moving towards full abolition, Viet Nam could consider immediately abolishing the death penalty entirely and replacing it with life imprisonment without the possibility of early release (LWOP) for aggravated murder, and retain life imprisonment or a determinate sentence with the possibility of parole (as provided for in Article 66 of the *Penal Code*) for all other formerly capital offences. In this respect, life imprisonment is used as a mandatory sentence for formerly capital crimes in many countries that have abolished the death penalty, and is also used as the sentence imposed in countries that commute the death penalty as a measure of clemency.

   Based on the comparative and best practices reviewed above, in particular the Canadian model, it is recommended by the authors that Viet Nam considers a more nuanced and objective system for early release from imprisonment (parole) that gives sentencing judges discretion to impose a period of ineligibility for parole for every crime based on the particular circumstances of the offender and the offence. Such discretion could use the minimum periods provided for in Article 66 as a starting point, and allow for increasing or decreasing the minimum period to be served based on aggravating or mitigating circumstances. After the minimum period has been served, release should be automatically considered by an independent (from both the court and prison authorities) decision-making body established for this purpose, based on

an application by the offender (instead of the 'criminal sentence execution authority'). Grants of parole should be made in accordance with guidelines on the exercise of discretion that includes considerations of the rehabilitative needs of the offender, the protection of society, and the interests of the victim who should always be consulted.

ix. Development of Sentencing Guidelines for Capital Offences and Offences Attracting Life Imprisonment

As noted above, the *Penal Code* provides limited guidance in Article 50 on principles of sentencing, the Supreme People's Court has issued some guidance on sentencing in drug cases, and the *Criminal Procedure Code* stipulates the order and procedures for dealing with all criminal cases. Otherwise, no specific sentencing guidance exists in relation to determining the circumstances in which the death penalty versus life imprisonment versus a determinate sentence should be imposed, where the penalty bracket provides for all three of these options. It is therefore recommended by the authors that the Supreme People's Court develop and issue comprehensive 'Sentencing Guidelines' that explicitly set out the criteria for imposition of the death penalty, such as has been recommended above with respect to aggravated murder, and life imprisonment for those crimes where the death penalty is abolished as recommended above. In doing so, the Supreme People's Court should engage key stakeholders including parliamentarians, government officials, police, prosecutors, judges, lawyers, prison and probation officials, academics, civil society, victims and their families, and the public on how to introduce an alternative to capital punishment that is fair, proportionate and compatible with international human rights standards. Broadly, for any crime in which the death penalty is retained as a sentencing option, it is recommended that persons who commit a capital crime that does not result in death should be sentenced to the lower penalty bracket, i.e., life imprisonment or defined term imprisonment.

It should be noted that sentencing guidelines in other jurisdictions around the world explicitly require that sentencing should be done on an individual basis and should not take into account broader societal opinions or biases in individual cases, rather these are policy considerations that underlie the development of sentencing options for specific crimes.

x. Data Collection on Capital Offences and the Death Penalty

As a best practice and to aid policy development, the Supreme People's Court should collect, and make publicly available, data on all capital crimes, including charges, convictions, sentences and executions, disaggregated by gender, age, nationality, ethnic origin, social origin and other relevant demographics to ensure that socioeconomic factors that contribute to disparities in those who are subject to the death penalty, or to LWOP, can be eliminated or controlled through the proposed 'Sentencing Guidelines'.

II. Right to Defence

Research findings show that only half of detained persons in Viet Nam are aware of their rights upon arrest and detention, and their right to defend themselves or be defended by legal counsel. In addition, only a very small minority of accused persons are assisted by defence counsel at trial (7.5%), and the experience of judges shows that most self-represented accused persons do not have the knowledge or skills to effectively defend themselves in court. These findings illustrate the dire need for systemic reform to ensure that all accused persons are aware of their right to defence and able to invoke this right, to ensure that the right to defence of accused persons in Viet Nam is fully recognized, promoted and fulfilled.

While Articles 58 to 61 of the *Criminal Procedure Code* contain statutory protection for many fair trial rights in accordance with Viet Nam's international, regional and constitutional obligations, including the rights to present evidence, statements and opinions, and the rights to request the summons of witnesses and to request presiding judges to allow questions to be asked of them, research evidence appears to show a disconnect between the recognition of these rights and their implementation in practice. When these other fair trial rights are not realized, the existence of the Article 16 right to self-represent or to be represented by counsel is rendered meaningless. Further, the right to self-represent is important if it is the free will of the accused person to choose to do so, with full knowledge and understanding of the implications, in which case the accused must be availed of all other fair trial rights in order to make such a choice effective. It is equally important however, to ensure that the procedural right to seek assistance of defence counsel, contained in Articles 75 and 76 of the *Criminal Procedure Code*, is capable of substantive realization, particularly given the fact that the vast majority of accused persons have little or no knowledge or understanding of criminal law and proceedings, as evidenced by the fact that most self-represented accused do not actively participate in their own defence. In other words, this could be an indication that in most cases if an accused person had a realistic opportunity to be defended by trained legal counsel if the person so chooses, the vast majority of accused persons would exercise this right.

Therefore, the main and overarching recommendation to be made in this context is expansion of the opportunities for an accused person to have access to legal aid at all stages of criminal proceedings if that person requires so. In substance, this means that provision of legal aid in Viet Nam should be expanded, including by ensuring that it is adequately funded. Best practice models that could be referenced include the EU, Singapore, Australia and Canada, with further reference to international standards and policy direction including the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, the *UN Basic Principles on the Role of Lawyers*, the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, and the *Safeguards guaranteeing protection of the rights of those facing the death penalty*.

It should be explicitly noted here that Articles 31 to 33 of the *Law on Legal Aid* currently provides for three forms of legal aid, including 'participating in legal proceedings', 'legal consultancy' and 'representation outside the proceedings'. In this respect, 'participating in legal proceedings' is understood as being legal representation for the purposes of all contact with procedure-conducting agencies, including investigating bodies, procuracies and courts, from the time of detention by the police to the conclusion of all judicial proceedings, including appeals, cassation and re-opening procedures.

For absolute clarity, all of the recommendations in this part on 'Right to Defence' apply without exception to those accused of capital crimes, and capital offenders.

i. Access to Legal Aid

Expansion of access to legal aid for the purposes of participating in legal proceedings may be done in several ways which complement each other and still allow for an accused to self-represent if the person so chooses:

1. Expand the eligibility criteria for receipt of legal aid under the *Law on Legal Aid* from a human rights perspective, with the aim to address the needs of particularly vulnerable or marginalized groups. In particular, access to legal aid could be expanded by:
    a. removing the obligation to prove financial difficulties for -
        i. victims in criminal proceedings who are between 16 and 18 years of age;
        ii. victims of domestic violence cases or matters;
        iii. victims of human trafficking;
        iv. persons living with disabilities;
        v. the elderly; and
        vi. persons living with HIV/AIDS and those infected with dioxins;
    b. revise (ii) in the above list as follows: "all victims of sexual and gender-based violence, including rape, forcible sexual intercourse and domestic violence (intentionally inflicting injury on or causing harm to the health of another person in a domestic relationship)"
    c. including the following in the list of legal aid beneficiaries under Article 7(7), being those who have financial difficulties:
        i. single parents or caregivers of at least one dependent child, or dependent adult who is elderly or a person living with disability;
        ii. persons living in rural or remote areas or at a particular distance from the place where the proceedings are conducted;
        iii. foreigners, including migrants and migrant workers, who are visiting or temporarily resident in the jurisdiction (i.e., who are not permanent residents or citizens);

iv. indigenous persons;
v. stateless persons, internally displaced persons, refugees and asylum seekers; and
vi. all other victims of crime not included in other provisions of Article 7;

2. Expand the eligibility criteria for automatic receipt of legal aid under Article 76 of the *Criminal Procedure Code* by lowering the penalty threshold for provision of state-funded legal aid from offences punishable by 20 years in prison, life imprisonment or death penalty to offences punishable by 10 years in prison, life imprisonment or death penalty;

3. Provide duty counsel – trained and licensed lawyers or paralegals – stationed at police stations, remand/detention centres, and in courthouses, who are available 24/7 (or during the hours of operation, as applicable in the circumstances) to provide legal advice or representation on a one-off basis or for the purpose of a discrete action such as being present during an interrogation or entering a plea of guilty to a criminal charge. Such duty counsel can be paid by the State, as part of the public legal aid program, or can provide their services on a *pro bono* basis, in furtherance of obligations such as licensing requirements or in exchange for incentives such as income or other tax relief, with coordination being done by the public legal aid program; and

4. Expand the production, accessibility and dissemination of public legal information, such as “Know Your Rights” publications or messaging, including specific information on eligibility for legal aid, and processes for accessing legal aid. Expansion of accessibility may include such measures as production of plain language and child/youth-friendly informational materials in local languages and Braille, development of websites and mobile apps that contain information on legal rights and how to access assistance of defence counsel, and/or provision of a toll-free telephone or SMS number through which to obtain information on legal rights and how to access assistance of defence counsel. It is important to note that such measures should not be relied upon as the sole method of providing legal aid, as they are not sufficiently nuanced to adequately replace in-person legal representation at critical junctures during criminal proceedings, such as during an interrogation or examination of witnesses, however they may provide an important tool for any person who freely chooses to self-represent to effectively exercise their right to defence.

ii. Transparency and Accountability for Implementation of the Right to Defence

In addition to expanding provision of and access to legal aid, the following recommendations are directed at ensuring that international/regional obligations and the existing statutory provisions setting out fair trial rights are in fact respected, promoted and fulfilled by the procedure-conducing agencies involved in the criminal justice system. These recommendations may be instigated and monitored by the Supreme People's Court, even if implementation is the responsibility of other relevant agencies, in the form of legislation (for example regulations), procedural directions/guidelines or rules of the Court.

5. In respect of the right to be notified of their rights and obligations contained in Article 16, and the right to be informed of the reasons for arrest or detention contained in Articles 59 and 60 of the *Criminal Procedure Code*, and without limiting recommendation 4 above, posters and leaflets should be developed detailing an accused's rights upon arrest and detention. These materials should be prominently displayed and available for free in police stations, remand locations, jails and courts, in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children, and in a language that the person understands, and should include information on the rights to:
    a. remain silent (i.e., not to incriminate oneself);
    b. notify a relative or another person of their choice about their detention or arrest;
    c. the assistance of defence counsel of experience and competence commensurate with the nature of the offence, including prompt access to such a lawyer within forty-eight hours of detention or arrest, in a manner or setting that ensures privacy/confidentiality of lawyer/client communications; and
    d. eligibility for state-sponsored legal aid;

6. Procedure-conducting agencies, including detention authorities should enforce effectively the legal requirements as provided from Article 109 to 125, Article 183 and 184, and other relevant articles of the *Criminal Procedure Code* in ensuring the right of the accused. It is necessary to enhance transparency and supervision over the work of police stations regarding arrest, detention and guaranteeing the right to defense of the accused. In particular, it is required to do voice recording/video with audio recording interrogations provided at the detention facility, or at the investigating agency and other the agencies tasked with conducting investigation (Article 183(6)). In addition, prior to the commencement of every trial the presiding judge should verify that the pretrial detention record is complete and confirm with the accused that the information of arrest and pretrial detention contained in the record is complete and accurate, including: time and place of arrest, name and contact information of the police officer(s) making the arrest, place of detention, date of release, reason for

defendant's detention, and that the defendant has been informed of his or her rights, in particular, the right to an attorney during questioning.

7. Article 60(2)(i) of the *Criminal Procedure Code regarding* the right to read and take notes of copies of documents or digitalized documents relating to the accusation or defence, should be revised as necessary to ensure that the provision of case files to accused or their counsel is considered a priority to avoid undue delays, and should not be dependent on a request but should be a right and automatic, i.e., within a certain time period prior to commencement of a trial. Preliminary hearings should set clear deadlines for the disclosure of evidence by police officers and procurators/prosecutors or other law officers. Judges, clerks and law officers should provide all relevant court documents to accused at the earliest appropriate time and in no case more than twenty-four hours after each document is produced or determined to be relevant to the accused's defence. Judges should:
    a. ask every defendant at the outset of a hearing whether they have received the case file and court documents;
    b. should adjourn the hearing when the accused has not received a case file, or upon request in the circumstance of last-minute disclosure or provision of documents; and
    c. ensure enforcement of the right to receive all evidence relevant to the defence, including taking any of the actions proposed in recommendation xii. below;

8. Prior to the commencement of every trial, the Court should inform and explain to the accused their right to legal representation if they appear unrepresented, warn accused of the potential prejudice to their defence if they self-defend, and confirm on the record their voluntary decision to self-defend. If the accused is represented by legal counsel, the Court should confirm that the accused has had an opportunity to consult with counsel in private, and should adjourn the hearing to allow for such an opportunity if it has not been adequately provided or accessed prior to the hearing. This may require the creation or designation of dedicated rooms in courts where accused may consult legal counsel privately, which rooms should ideally contain copies of legal texts and case reports either in hard copy or through online access for free. If the accused voluntarily elects to proceed without defence counsel, provision should be made for the accused to exercise the right to consult with duty counsel (see recommendation iii. above) at any point during the proceedings, the accused must be informed of this right at the outset of the hearing and again at any point during the hearing that the Court considers appropriate or necessary, and the Court should

adjourn the hearing to allow for such consultation upon request of a self-represented accused;

9. The Court should develop and provide to self-represented accused plain language guidance on the standard of proof (for example, what is meant by "reasonable doubt") and evidentiary burden for criminal prosecutions (including in particular any burden on the defence) to protect the presumption of innocence and help ensure that decisions are based on credible and admissible evidence, including the right of an accused to call and examine witnesses in the same conditions as the evidence presented against them (i.e., that cases may only be decided on the basis of witness testimony that is subject to cross-examination by both sides). Exercise of this right should not require the consent of the presiding judge, so long as the witness or evidence can be shown to be relevant to an issue at trial and, in the case of an expert witness, having the relevant expertise. For clarity, to the extent that the *Criminal Procedure Code* requires the permission of the presiding judge for an accused person or their lawyer to call and examine or cross-examine witnesses, this requirement should be removed entirely or restricted to the authority and responsibility of the presiding judge to determine the admissibility and reliability of any proposed witness/evidence;

10. Without limiting recommendation 9 above, the Court should develop a standard form to guide implementation for all courts, which should set out the following information to be read into the record by the presiding judge:
    a. the fair trial rights to which the defendant is entitled, including in particular the defendant's right to be presumed innocent until a final and non-appealable judgment is rendered;
    b. the fact that the burden of proof is on the prosecutor; and
    c. the fact that the defendant has the right to remain silent without such silence being used against them;

11. The Court should develop clear guidelines, and conduct annual training for judges and prosecutors on international human rights law including fair trial rights, on professional ethics and the duty of lawyers to their clients and the court, and on the disclosure, presentation and evaluation of evidence. In this respect, judges must be trained to sufficiently monitor and evaluate evidence for reliability and authenticity, and to carefully assess whether the evidence presented establishes the accused's guilt beyond any reasonable doubt. If there is an interpretation of the evidence which is consistent with the innocence of the accused, the Court must acquit;

12. If it appears that any fair trial right may have been violated, the Court should have statutory jurisdiction to enforce fair trial rights, including compliance by all public officials with the fundamental legal safeguards, by:
    a. ordering an investigation of the matter by an independent body, including a broader inquiry if there is reason to believe that an individual case is reflective of a systemic problem;
    b. making such orders for exclusion of evidence that has been obtained in violation of fair trial rights, as may be necessary to ensure the integrity of the proceedings and public faith in the administration of justice;
    c. awarding compensation for violation of fair trial rights to persons convicted as a result of a miscarriage of justice; and
    d. ordering the prosecution or other penalization of any failure on part of officials to respect, promote and fulfil an accused person's right to a fair trial.

iii. Data Collection

Statistics on provision of legal aid for the purpose of participation in legal proceedings show that there has been a gradual increase in legal aid cases over the years from 10,937 cases in 2016 to 27,496 cases in 2020, accounting for 29.7% of the total number of legal aid cases during this period, however statistics on the total number of legal proceedings during this time period could not be found, making it difficult to determine the proportion of legal proceedings in which participants are receiving legal aid. Further, data that can be found is not disaggregated into the number of persons represented through legal aid during each stage of legal proceedings (investigation, prosecution and trial, appeals, cassation and reopening procedures).

If the judiciary is not already doing so, data ought to be collected in this respect, following the example of Australia, in order to gauge the effectiveness of any measures taken to increase legal aid representation in legal proceedings, as follows:

1. State management agencies that collect this data (Ministry of Justice, Departments of Justice and units directly providing legal aid) ought to ensure that it is disaggregated by the persons receiving legal aid at each stage of proceedings, at a minimum, so as to support the development of policies and measures specifically targeted to providing and/or increasing legal aid representation at all stages of legal proceedings;

2. Ideally, if not already being done, data should also be further disaggregated by various socioeconomic criteria that denote vulnerability, disadvantage or marginalisation, such as age, gender, disability, level of education, number of dependents, marital status, ethnicity, etc., to support the development of policies and measures specifically targeted to providing and/or increasing legal aid representation to members of vulnerable or disadvantaged groups;

3. Again, if not already being done, data should also be collected on the type of offence and potential penalty for all persons receiving legal aid, and this data should be cross-referenced against the above disaggregated criteria in order to measure whether the right to automatic receipt of legal aid under Article 76 of the Criminal Procedure Code is being effectively realized; and

4. Finally, data should be collected on all accused persons who are self-represented in criminal proceedings, regardless of whether they receive some form of legal aid (other than representation by legal counsel), which data should be disaggregated by type of offence, potential penalty, age, gender, disability, level of education, number of dependents, marital status, ethnicity, nationality and level of income. All of the data collected in accordance with this recommendation should be made publicly accessible, and updated on no less than an annual basis.




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