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Explaining Death Penalty Clemency in the Socialist Republic of Vietnam from 1986 to 2015

Daniel Pascoe*

Abstract: Regarding the operational specifics of death penalty policy, David T Johnson and Franklin E Zimring have argued that it is extreme left or right wing authoritarian states' aversion to a limitation of their own powers that determines high rates of executions in countries such as Vietnam, Singapore, China and North Korea as opposed to other, less-punitive Asian nations which share similar cultural and religious characteristics. For a regime like Vietnam's, the swift carrying out of a death sentence, especially when performed in public, serves to highlight the state's power over life and death and enhance political control over the domestic constituency. At first glance then, little scope for the exercise of the clemency power as a form of lenient reprieve from the death sentence by the executive government appears possible under a repressive regime of this nature.

However, unlike China and Singapore, a notable feature of Vietnam's death penalty practice since the *Doi Moi* reforms of 1986 has been the executive's willingness to reprieve a large minority of prisoners sentenced to death through Presidential clemency, even though executions themselves have continued. What official and unofficial justifications have been given for grants of Presidential clemency in Vietnam, and relatedly, what structural and cultural factors explain the use of clemency in a noticeable proportion of death penalty cases? These are the under-researched questions I provide plausible explanations for in this article, incorporating an empirical study of Vietnam's death penalty clemency grants since the mid-1980s, interpreted through the lens of the relevant academic literature on clemency and pardon grants.

Keywords: Death Penalty, Vietnam, Clemency, Pardon, Authoritarianism

I. Introduction

With regard to the operational specifics of death penalty policy, Johnson and Zimring¹ have argued that it is extreme left or right wing authoritarian states' aversion to a limitation of their own powers that determines high rates of executions in countries such as Vietnam, Singapore, China and North Korea as opposed to other, less-punitive Asian nations which share similar cultural and religious characteristics.² For a regime like Viet-

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1 David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford University Press 2009).

2 *ibid* xiii, 4, 290.

nam's, the swift carrying out of a death sentence, especially when performed in public, serves to highlight the state's power over life and death and enhance political control over the domestic constituency.³ At first glance then, little scope for the exercise of the clemency power as a form of lenient reprieve from the death sentence by the executive government⁴ appears possible under a repressive regime of this nature.

However, unlike China (one of the world's few countries with no formal system of executive clemency)⁵ and Singapore,⁶ a notable feature of Vietnam's death penalty practice since the *Doi Moi* reforms of 1986 has been the executive's willingness to reprieve a large minority of prisoners sentenced to death through Presidential clemency, even though executions themselves have continued. Vietnam's liberal use of clemency, yet continuing harsh use of executions forms a puzzle for death penalty scholars. In order to solve it, in this article I address two under-researched questions: what official and unofficial justifications have been given for grants of presidential clemency in Vietnam, and relatedly, what structural and cultural factors explain Vietnam's use of clemency in a noticeable proportion of death penalty cases?

Throughout the course of the article I demonstrate that, despite the fact that clemency grants have been a prominent feature of Vietnam's post-*Doi Moi* death penalty practice, each and every justifiable clemency grant from 1986 to 2015 appears to have been granted on the state's terms, rather than the prisoner's. Although it has benefited the prisoners who have received it, clemency very much remains an instrumental tool of authoritarian governance in Vietnam, enabling the Vietnamese Communist Party (VCP) to achieve the results it seeks in death penalty cases.

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- 3 Terence D Miethe, Hong Lu and Gini R Deibert, 'Cross-National Variability in Capital Punishment: Exploring the Sociopolitical Sources of its Differential Legal Status' (2005) 15 Int Crim Justice Rev 115, 119; Pip Nicholson and Kieu Truong, 'Drugs Prosecutions in Vietnam: The Modern Propaganda Trial' (2008) 34 Monash UL Rev 430, 434; *ibid* 345-346.
 - 4 Here, I use the term 'clemency' to denote the conversion of a death sentence into a prison sentence of determinate or indeterminate duration. I use the term 'pardon' to refer to a prisoner who is released from prison altogether.
 - 5 Andrew B Whitford and Holona LeAnne Ochs, 'The Political Roots of Executive Clemency' (2006) 34(6) APR 825, 828; Sandra Babcock, John Blume and Delphine Lourtau, 'Death Penalty Database: China' (*Death Penalty Worldwide*, 10 April 2014) <<http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=China>> accessed 23 January 2016.
 - 6 Singapore has only granted clemency to six prisoners sentenced to death since independence in 1965 [Seiu Kin Lee, 'Prosecutorial Discretion and Clemency in the Singapore Criminal Justice System' in Teo Keang Sood (ed), *Singapore Academy of Law Conference 2006: Developments in Singapore Law between 2001 and 2005* (Singapore Academy of Law 2006) 477]. This is a rate of roughly one in a hundred prisoners executed granted clemency [Daniel Pascoe, 'Clemency in Southeast Asian Death Penalty Cases' (2014) 4 Centre for Indonesian Law Islam and Society Policy Papers 5 <<http://law.unimelb.edu.au/centres/cilis/research/publications/cilis-policy-papers>> accessed 23 January 2016]. A dearth of information on the death penalty in North Korea prohibits an accurate characterisation being made about that nation's clemency practice. Executions, both judicial and extra-judicial, have clearly been performed on a widespread and brutal scale during the Kim dynasty [International Federation for Human Rights, 'The Death Penalty in North Korea' (16 May 2013) 22 <<http://www.fidh.org/IMG/pdf/en-report-northkorea-high-resolution.pdf>> accessed 23 January 2016; Johnson and Zimring (n 1) 359-360]. However, it may also be the case that the North Korean regime strategically grants clemency to prisoners as a means of demonstrating state power on special occasions, as suggested to visiting researchers from Amnesty International in 1995 [Amnesty International, 'Democratic People's Republic of Korea (North Korea): Public Executions: Converging Testimonies' (AI-Index ASA 24/01/97, January 1997, 2], and moreover as implied by the fact that every national constitution has at least contained a reference to the power to grant special pardons – North Korea Constitution 2013, Art 103(5); North Korea Constitution 2009, Art 103(5); North Korea Constitution 1998, Art 110(17); North Korea Constitution 1972, Art 107(4); North Korea Constitution 1948, Art 49(5).

II. Methodology

In conducting this study, the methodology I have employed has involved collecting quantitative and qualitative data on clemency grants in Vietnamese death penalty cases in the 30 years from 1986 to 2015,⁷ and interpreting this data in light of what is already known about the Vietnamese political and criminal justice systems, together with the non-Vietnamese academic literature on clemency.⁸ As Kohli et al describe, theoretical frameworks are utilised in social science studies in order to discover 'mechanisms that make the behavior of actors and institutions causally plausible'.⁹

However, the major drawback of Vietnam as a death penalty case-study is the prevailing policy of state secrecy relating to death sentences and executions and its associated influence on clemency analysis. Death sentences and executions were only widely reported in the state media and to foreign governments from 1994/1995,¹⁰ although there were a number of affirmative reports of clemency grants in death penalty cases beforehand.¹¹ Moreover, since 2004, it has been extremely difficult to obtain *any* official

7 The scope of this article extends primarily to executive clemency granted after an application by a prisoner sentenced to death, within the seven day deadline to do so after the rejection of his or her cassation appeal or the failure by the Supreme People's Court and State Procuracy to re-open the case [Criminal Procedure Code 2003 (Vietnam), Art 258(1)]. Excluded from detailed consideration are general amnesties, which are issued by the President on the approval of the National Assembly to many prisoners at once [Nguyen Thi Phuong Hoa, 'Drug-Related Crimes Under Vietnamese Criminal Law: Sentencing and Clemency in Law and Practice' (2014) 8 Centre for Indonesian Law Islam and Society Policy Papers 38 <<http://law.unimelb.edu.au/centres/cilis/research/publications/cilis-policy-papers>> accessed 23 January 2016; Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Hart Publishing 2009) 97], and special amnesties, which are issued on the State President's own authority [see Nicholson and Truong (n 3) 448].

In Vietnam *special* amnesties do not extend to the conversion of death sentences to a punishment less than death ['Vietnam grants amnesty on National Day' *Thai News Service* (14 July 2006); Nguyen Thi Phuong Hoa (n 7) 39; Nicholson and Truong (n 3) 448]. Likewise, although *general* amnesties proclaimed by the National Assembly may theoretically extend to prisoners sentenced to death [Nguyen Thi Phuong Hoa (n 7) 39; Penal Code 1999 (Vietnam), s 57(2)], these tend to be used only for the mass release of prisoners to celebrate important national occasions.

Note that in 1999 and 2009, with the reduction in death-eligible crimes, it is unclear which of these legal mechanisms (if any) were used to *retrospectively* reduce the death sentences already imposed to terms of imprisonment. See Hands Off Cain, 'Vietnam – Retentionist' (Country Profile 2000) <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=1136&idcontinente=23>> accessed 23 January 2016 and Hands Off Cain, 'Vietnam – Retentionist' (Country Profile 2009) <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=12000023&idcontinente=23>> accessed 23 January 2016.

8 Talcott Parsons, 'The Role of Theory in Social Research' (1938) 3(1) ASR 13, 15, 20; Christian Boulanger and Austin Sarat, 'Putting Culture into the Picture: Towards a Comparative Analysis of State Killing' in Christian Boulanger and Austin Sarat (eds), *The Cultural Lives of Capital Punishment* (Stanford University Press 2005) 4.

9 Atul Kohli et al, 'The Role of Theory in Comparative Politics: A Symposium' (1995) 48(1) World Politics 1, 5, 47.

10 Amnesty International, 'Socialist Republic of Vietnam: The Death Penalty' (AI-Index ASA 41/02/96, February 1996); Amnesty International, 'Against the Tide: The Death Penalty in Southeast Asia' (AI-Index ASA 03/01/97, 1 January 2007) 22.

In March 1995, the execution of Nguyen Tung Duong, a policeman convicted of murder, was the first confirmed report of an execution since 1985 [Amnesty International, 'Further information on UA 388/94' (AI-Index 41/04/95, 7 March 1995); 'Vietnam Policeman Executed' *The Washington Post* (8 March 1995)].

11 For example: 'Three men convicted of spying have been executed in Vietnam' *The Times* (London, 11 January 1985); 'Vietnam Commutes Death Penalty for Two Buddhist Monks' *The Associated Times* (21 November 1988); Amnesty International, *Annual Report* (Amnesty International 1984) 252.

set of statistics, as a government decree in that year made death penalty figures a state secret and the reporting of such statistics a criminal offence,¹² a move which exacerbated the already clandestine nature of death penalty trials and the timing of executions during Vietnam's history as a unified state.¹³

The conventional academic route to overcoming these difficulties would be to triangulate what little official information exists with unofficial qualitative and quantitative sources of data and the impressions gleaned from 'elite' interviews with key decision-makers in the Vietnamese criminal justice system.¹⁴ However, even this creative solution becomes fraught in the case of Vietnam, given the difficulty in obtaining a visa to investigate politically sensitive topics and the self-censorship of likely interview subjects.¹⁵ Owing to such obstacles (and my inability to speak the Vietnamese language), I have not been able to conduct fieldwork interviews within Vietnam. The interviews that I do refer to throughout the paper were conducted outside of Vietnam.

The second difficulty in methodology within the present study involves the very definition of the judicial death penalty itself. In the years following the end of the Vietnam War in 1975 and the reunification of the country, mass purges of former South Vietnamese soldiers and officials took place within rural 're-education' camps and following quasi-judicial 'People's Courts' trials in urban areas. As with killings in Communist China under Mao Zedong, it is difficult to tell whether these state-sanctioned executions were judicial or non-judicial in nature.¹⁶ As such, given the aims of this article, it is inappropriate to compare these killings with the executions that at least followed more formal court trials later in Vietnam's history.¹⁷ Although the power to issue pardons and prison amnesties existed as far back as North Vietnam's 1959 constitution (under which re-unification

12 Johnson and Zimring (n 1) 389; Hands Off Cain (Vietnam Country Profile 2009) (n 7). Those NGOs such as Amnesty International and Hands Off Cain that do take a close interest in Vietnam only obtain statistics from official government sources, rather than from their own investigations inside the country [Johnson and Zimring (n 1) 22, 387].

13 Ginetta Sagan, *Violations of Human Rights in the Socialist Republic of Vietnam* (2nd edn, Aurora Foundation 1989); Johnson and Zimring (n 1) 388-389.

14 Sharan B Merriam, 'What Can You Tell from an N of 1?: Issues of Validity and Reliability in Qualitative Research' (1995) 4 *PAACE Journal of Lifelong Learning* 51, 54; Johnson and Zimring (n 1) 234; Philip HJ Davies, 'Spies as Informants: Triangulation and the Interpretation of Elite Interview Data in the Study of the Intelligence and Security Services' (2001) 21(1) *Politics* 73, 75, 78; RL Miller, 'Triangulation' in Robert L Miller and John D Brewer (eds), *The A to Z of Social Science Research Concepts* (Sage Publications UK 2003); Darren G Lilleker, 'Interviewing the Political Elite' (2003) 23 *Politics* 207, 211-212.

15 See generally Zachary Abuza, 'Vietnam Today' (*The History Place: Points of View*, 2004) <<http://www.historyplace.com/pointsofview/vietnam.htm>> accessed 23 January 2016; Foreign and Commonwealth Office, 'Country Profile: Vietnam' (2012) <http://www.fco.gov.uk/content/en/country-profile/asia-oceania/fco_cp_vietnam?profile=politics> accessed 23 January 2016.

16 Johnson and Zimring (n 1) 386.

Amnesty International has defined extra-judicial executions as:

'unlawful and deliberate killing carried out by order of a government or with its acquiescence. Extra-judicial killings are killings which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice. These killings take place outside any judicial framework.'

See Amnesty International, 'Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings' (AI-Index MDE 15/005/2001, 21 February 2001).

17 See Stanislaw Pomorski, 'Communists and Their Criminal Law Revisited' (1989) 14 *Law & Soc Inquiry* 581, 586 for the broader socialist law context.

took place),¹⁸ the limited number of judicial trials following re-unification in 1975 suggests the formal power was seldom used.

Accordingly, my focus in this article extends to the death penalty and clemency policies of contemporary Vietnam, after the beginning of the *Doi Moi* economic reforms in 1986. The post-1986 execution, death sentence and clemency figures relied upon in this article, together with qualitative information about the death penalty and clemency in Vietnam were obtained from media reports, NGO websites, as well as conventional academic sources such as monographs, journal articles, government press releases, UN documents, and academic theses.

However, despite the thorough research conducted via these sources, the figures relied upon throughout the article, together with available individual and collective reports on clemency grants in Vietnamese death penalty cases must be treated with special caution. The information available is subject to a number of obvious sampling biases, quite apart from the state secrecy and selective publicising of death penalty information by the Vietnamese government. The shortcomings in the data relied upon consist of the following:

- Unless expressly promulgated by the executive in the form of a press release or interview, the true reasons for clemency decisions are usually not made public.¹⁹ As such it is left to analysts to deduce the possible reasons for the commutation through the prisoner's demographic data, the jurisdiction's history of clemency in death penalty cases and statements by legal representatives of the accused;
- Attempting to cover the entire post-*Doi Moi* period leads to a sampling bias towards post-2000 cases, as compared with cases from the 1980s and 1990s, before the large-scale digitisation of the media and at an earlier stage of Vietnam's opening to the outside world as part of the *Doi Moi* reforms. At the same time, the advent of the death penalty as an international human rights issue during the early 1990s is reflected in the lopsided exposure of cases from the past two decades in the domestic and international media;
- Western media outlets have lamentably failed to report in any detailed fashion on death penalty cases in Southeast Asia unless a western foreigner has been sentenced to death.²⁰ Moreover, western NGOs and the international media have consistently focused more on China's death penalty practice in recent years, as compared with Vietnam.²¹
- Reports in the local or international media often tend to focus on prisoners sentenced to death and reprieved for political or security-related crimes, rather than the more mundane cases of drug trafficking 'mules' or domestic murders, even though the latter two categories of crime may outnumber more newsworthy political offences.

Bearing in mind these caveats, in the following three sections I describe Vietnam's death penalty and clemency practice over its post-*Doi Moi* history.

18 Sidel (n 7) 52-55; Barbara G James, 'Vietnamese Law in English' (1992) 84 Law Libr J 461, 491.

19 William A Pridemore, 'An empirical examination of commutations and executions in post-Furman capital cases' (2000) 17(1) Justice Quarterly 159, 163.

20 Franklin E Zimring, 'Crime, criminal justice, and criminology for a smaller planet: some notes of the 21st century' (Plenary paper to the Australian and New Zealand Society of Criminology Annual Conference, Perth, 27-30 September 1999) 3-4; Johnson and Zimring (n 1) 318.

21 Johnson and Zimring (n 1) 387.

III. Vietnam's Death Penalty Practice After the *Doi Moi* Reforms

The *Doi Moi* ('renewal') reforms, involving an overhaul and opening of Vietnam's economic system, were approved at the Congress of the Vietnamese Communist Party in 1986.²² State control over the economy was relaxed,²³ and the legal system began to take on some Western characteristics.²⁴ Tentative moves towards greater procedural controls (or at least the *appearance* of greater control) over state action included a more prominent role for judicial trials in crime control.²⁵ Vietnam's first Criminal Procedure Code was only enacted in 1989,²⁶ whilst new Penal (1985) and Civil (1989) Codes supplanted the decree-based governance of previous years.²⁷ Accused political and 'common' criminals were no longer punished through 're-education' or subject to extra-judicial execution²⁸ but were instead more likely to be formally sentenced to death after a court trial.²⁹

However, despite these procedural reforms, the large numbers of executions reported in the 1990s and 2000s are a vestige of the repressive communist government that emerged under Ho Chi Minh in 1954.³⁰ Based on the available figures over the period of study, Vietnam has been one of the most aggressively executing nations in Asia.³¹ Up to 44 crimes carried the death sentence in post *Doi Moi* Vietnam³² (reduced to 29 capital

22 Johnson and Zimring (n 1) 383; LM Holscher, 'Recent Legal and Political Changes in Vietnam and the Role of the Courts in the Vietnamese Criminal Justice System' (1996) 6 Int Crim Just Rev 58, 64-65; Thaveeporn Vasavakul, 'Doi Moi Difficulties' in John Funston (ed), *Government and Politics in South-east Asia* (Zed Books 2001).

23 Sidel (n 7) 83; Johnson and Zimring (n 1) 383.

24 John Gillespie, 'Understanding Legality in Vietnam' in Stephanie Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan 2007) 146; Abuza (n 15).

25 Vasavakul (n 22) 392; Abuza (n 15).

26 Carol V Rose, 'The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study' (1998) 32 Law & Soc'y Rev 93, 101.

27 Abuza (n 15); Tai Van Ta, 'Vietnam's Legal and Economic Reforms: Twenty Years On' (Speech at the Council on Foreign Relations, New York, 21 March 2006) <<http://www.taivanta.com/vietnam/vietnams-legal-and-economic-reforms-twenty-years-on/>> accessed 1 February 2010; Rose (n 26) 101; James (n 18) 489-490; John Quigley, 'Vietnam at the Legal Crossroads Adopt a Penal Code' (1988) 36 Am J Comp L 351, 351.

28 US State Department, *Vietnam 1991 Human Rights Report* (US State Department 1992); US State Department, *Vietnam Human Rights Practices 1995* (US State Department 1996); Jean-Louis Margolin, 'The Impasse of War Communism' in Stéphane Courtois and Mark Kramer (eds), *The Black Book of Communism: Crimes, Terror, Repression* (Harvard University Press 1999) 511; Abuza (n 15).

29 The judicial death penalty was first provided for in the Penal Code 1985 (Vietnam), s 27.

30 Johnson and Zimring (n 1) 394; Margolin (n 28) 569-571.

31 Johnson and Zimring (n 1) 387. Over the eight year period from 2007 to 2014, on the basis of the *minimum* figures available, Amnesty International estimates that Vietnam was the seventh most prolific executioner in the Asian continent, with 69+ executions, behind Pakistan (179+), Yemen (224+), Iraq (615+), Saudi Arabia (671+), Iran (2,635+), and China (thousands) – see Amnesty International, 'What we do: Death Penalty' (2015) <<https://www.amnesty.org/en/what-we-do/death-penalty/>> accessed 1 November 2015; Leila Haddou, 'Death Penalty Statistics 2013: Country by Country' *The Guardian* (London, 27 March 2014) <<http://www.theguardian.com/world/data-blog/2014/mar/27/death-penalty-statistics-2013-by-country>> accessed 1 November 2015.

32 The original total in the 1985 Penal Code was 29 capital crimes, which was increased to 44 crimes through a series of amendments in 1989, 1991, 1992 and 1997 [Giao Vu Cong, 'Capital Punishment in Vietnam: Status and Perspective' in Peter Hodgkinson (ed), *Capital Punishment: New Perspectives* (Ashgate Publishing 2013) 362].

crimes in 1999, and again to 22 from January 2010).³³ Despite the death sentence being a discretionary penalty,³⁴ the average yearly number of executions over the period within which complete statistics are available (1993-2014) ranges from *minimums* of 18+ to 44+,³⁵ depending on which sources are to be believed. This range of figures should be considered as an extremely conservative lower-bound, as most publicly-available statistics are based on official sources.³⁶

The NGO Forum Asia Democracy suggests that the true annual number of executions has sometimes been significantly higher, estimating in 2005 that in excess of 100 executions were carried out each year.³⁷ However, since death penalty information was made a state secret in 2004, it has been extremely difficult to come to precise estimates over the number of executions that have taken place, with executions only periodically reported within official sources. Amnesty International's most recent figures suggest that at least seven executions were carried out in 2013, and at least three in 2014,³⁸ although the true totals are undoubtedly much higher.

For most of Vietnam's history, executions have been carried out by firing squad,³⁹ sometimes conducted in public.⁴⁰ However, with a vote in the National Assembly in 2010, Vietnam's government opted to replace shooting as a method of execution with lethal injection from July 2011. A European Union export embargo soon led to a shortage of lethal injection drugs, postponing executions until a May 2013 decree allowed for 'domestic poisons' to be used.⁴¹ In August 2013, executions resumed by the use of lethal injection, although the government's continued difficulty in sourcing execution drugs has led to proposals to return to shooting in the future.⁴²

33 Hai Thanh Luong, 'The Application of the Death Penalty for Drug-Related Crimes in Vietnam: Law, Policy, and Practice' (2014) 17(1) Thailand Law Journal. See Giao Vu Cong (n 32) 364-369 for a full list of capital crimes in 1985, 1999 and 2009.

34 AI-Index ASA 03/01/97 (n 10) 21.

35 Sources: Amnesty International; Hands off Cain; International Federation for Human Rights; UK Border Agency; Harm Reduction International; deathpenaltyworldwide.org; Associated Press; Agence France Presse; M Ventura, 'Death Penalty Facts: Vietnam' (Reprieve Australia Country Profile) <<http://www.reprieve.org.au/assets/94/files/Vietnam%20Summary.pdf>> accessed 23 January 2016; Johnson and Zimring (n 1) 388; Carlyle Thayer, 'Vietnam: Time to Abolish Capital Punishment?' (*Chennai Centre for China Studies*, 17 January 2015) <<http://www.c3sindia.org/vietnam/4764>> accessed 23 January 2016.

36 Hands Off Cain (Vietnam Country Profile 2009) (n 7); Hands Off Cain, 'Vietnam – Retentionist' (Country Profile 2006) <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=8000462&idcontinente=23>> accessed 23 January 2016.

37 Hands Off Cain (Country Profile 2009) (n 7); see also Hands Off Cain, 'Vietnam – Retentionist' (Country Profile 2002) <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=2638&idcontinente=23>> accessed 23 January 2016.

38 Amnesty International, 'Death Sentences and Executions in 2014' (AI-Index ACT 50/001/2015, 31 March 2015); Amnesty International, 'Death Penalty 2013: Shroud of secrecy around executions in Asia Pacific' (27 March 2014) <<https://www.amnesty.org/en/press-releases/2014/03/death-penalty-shroud-secrecy-around-executions-asia-pacific/>> accessed 23 January 2016.

39 Giao Vu Cong (n 32) 370.

40 Johnson and Zimring (n 1) 386, 390; Amnesty International, 'Socialist Republic of Viet Nam: The Death Penalty – Recent Developments' (AI-Index ASA 41/001/2000, February 2000); G McGregor, 'Cards stacked against Canadians: Vietnam has dramatically increased death sentences for drug trafficking' *The Ottawa Citizen* (7 January 2004).

41 Amnesty International, 'Urgent Action: Lethal Injection Looms for 117 Prisoners' (AI-Index ASA 41/003/2013, 24 June 2013).

42 Sandra Babcock, John Blume and Delphine Lourtau, 'Death Penalty Database: Vietnam' (*Death Penalty Worldwide*, 23 May 2014) <<http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Vietnam>> accessed 23 January 2016.

One notable trend in terms of capital crimes over the past 25 years has been the replacement of political dissent as the most prominent societal evil by drug trafficking, with a corresponding rise in the number of executions of drug traffickers in comparison to political dissidents.⁴³ After Vietnam became one of the main transit routes for Golden Triangle heroin bound for Western markets in the late 1980s, the death penalty for narcotics offences was introduced by the National Assembly in 1992.⁴⁴ Furthermore, economic crimes such as corruption and counterfeiting were made capital offences in 1993,⁴⁵ in response to endemic levels of corruption, which accompanied post-*Doi Moi* economic growth. Official figures from 2001 to 2010 suggest that of 1,421 persons sentenced to death over that period, 56 percent had committed murder, 40 percent were sentenced for drug trafficking, and the remainder were guilty of other offences including child rape and fraud.⁴⁶ By contrast, in 2008 the International Federation for Human Rights reported that drug crimes attract the largest number of death sentences, followed by economic offences and violent offences.⁴⁷ No matter which account is to be believed, what is clear is that despite the large number of capital crimes in force, since the *Doi Moi* reforms at least, Vietnam's courts 'have [largely] focused on executing for murder-related crimes and drug-related crimes'.⁴⁸

IV. Death Penalty Clemency Practice in Contemporary Vietnam

Vietnam's most recent constitution was adopted on 28 November 2013, authorising the State President the power to grant clemency in Article 88(3). Clemency must be sought by the prisoner within seven days of the determination of a final appeal in death penalty cases,⁴⁹ and if the request is successful, the death sentence is converted to life imprisonment.⁵⁰ Similar constitutional and legislative provisions applied during the 1980s

43 S Blagov, 'Vietnam – Drugs: Colonial Era Opium Trade Still Haunts Hanoi Today' *Inter Press Service* (16 July 1996); Nguyen N Phuong, 'Rights – Vietnam: Smuggler's Execution Renews Death Penalty Debate' *Inter Press Service* (30 May 2000); Hands Off Cain (Vietnam Country Profile 2000) (n 7); AI-Index ASA 03/01/97 (n 10) 21; Human Rights Watch, 'Vietnam: The Silencing of Dissent' (May 2000) 6 <<http://www.hrw.org/legacy/reports/2000/vietnam/>> accessed 23 January 2016; Abuza (n 15) noted in 2004 that trials of high-profile dissidents tend to attract adverse international attention, and so indefinite administrative detention is now employed in a majority of these cases in Vietnam.

44 'Vietnamese Sentenced to Death for Trafficking 227 Kilos of Opium' *Agence France Presse* (7 March 1995); Nguyen N Phuong (n 43); A Nette, 'Vietnam – Narcotics: New Transit Point for Global Drug Trade' *Inter Press Service* (29 December 1995).

45 'Vietnam makes Corruption, Smuggling Capital Offences' *Agence France Presse* (4 January 1995).

46 Hai Thanh Luong (n 33). Amnesty International, on the other hand, suggests that in 2014 alone, 80 percent of new death sentences were for drug trafficking (AI-Index ACT 50/001/2015 (n 38) 40). This may indicate an ever-increasing dominance of drug trafficking death sentences.

47 International Federation for Human Rights, 'The Death Penalty in the Socialist Republic of Vietnam' (9 October 2008) <<http://www.fidh.org/The-Death-Penalty-in-the-Socialist-Republic-of>> accessed 23 January 2016.

48 Hai Thanh Luong (n 33).

49 Criminal Procedure Code 2003 (Vietnam), Art 258(1).

50 See Penal Code 1999 (Vietnam), s 35.

and 1990s,⁵¹ although notably the Council of State as Vietnam's 'Collective Presidency' exercised the power to pardon from 1980 to 1992.⁵²

While little is known about the internal decision-making structure within the Vietnamese government as it relates to clemency, at a very minimum the Supreme People's Court Chief Justice must make a recommendation to the State President whether to accept or reject a prisoner's application for clemency.⁵³ Moreover, within a complex organisation such as the Vietnamese Communist Party, presumably different government agencies and ministries make additional recommendations to the State President (or formerly, the Council of State) as to whether a death sentence should be commuted or not. Given the Party's lengthy tradition of collective leadership,⁵⁴ the final decision on such a serious matter would not be made solely by the State President.⁵⁵

As for the frequency of clemency grants, in 2003 Amnesty International broadly concluded that in Vietnam, 'most people sentenced to death are executed once their cases have gone through the final appeals procedure'.⁵⁶ However, while clemency might not be the *expected* outcome in a death penalty case, it has nonetheless been granted with reasonable frequency in the post-*Doi Moi* period, creating the phenomenon I address in this article. Successful clemency appeals were reported in each of the 12 years from 1997 to 2008,⁵⁷ with limited statistics available in other years. Moreover, data collection problems aside,⁵⁸ the average annual number of death sentences imposed over the period 1993-2014 (ranging from minimums of approximately 64+ to 126+) noticeably

51 The 1980 and 1992 Constitutions authorised grants of clemency by the Council of State, and the State President, respectively [Vietnam Constitution 1980, Art 100(19); Vietnam Constitution 1992, Art 103(12)].

The seven-day time limit to apply for clemency also applied in the late 1980s and 1990s [AI-Index ASA 41/02/96 (n 10) 1] Amnesty International, 'UA 388/94: Death Penalty' (AI-Index ASA 41/10/94, 28 October 1994); 'Vietnam to Kill 5 Accused in Plot' *NY Times* (18 December 1984).

52 Sidel (n 7) 71-72; Duiker (n 28) 339-340.

53 Murray Hiebert, 'Merchants of Death: Officials may be executed in war grave fraud case' *Far Eastern Econ Rev* (Hong Kong, 22 April 1993); Mark Sidel, 'Law, the Press and Police Murder in Vietnam: The Vietnamese Press and the Trial of Nguyen Tung Duong' in David G Marr (ed), *Mass Media in Vietnam* (The Australian National University 1998) 115-116. Apparently, this recommendation is made in addition to the decision whether or not to re-open a death penalty case for cassation within two months after receiving the case file from the courts below [Criminal Procedure Code 2003 (Vietnam), Art 258].

54 'Vietnam: Plenty to Smile About' *The Economist* (London, 29 March 2007).

55 Other than the Supreme People's Court Chief Justice, bodies that could advise the State President on clemency might include the Standing Committee of the National Assembly, as well as the Committee on Laws of the National Assembly [see Dang Xuan Hop, 'Vietnam: The past 25 years, the present and the future' in Ann Black and Gary F Bell (eds), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (Cambridge University Press 2011) 197-188; Mark Sidel, 'Vietnam' in Poh-Ling Tan (ed), *Asian Legal Systems* (Butterworths 1997)]. Sidel also mentions an early post *Doi-Moi* case where the Procuracy itself gave advice on a clemency petition [Mark Sidel, *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective: Cambridge Studies in Law And Society* (Cambridge University Press 2008) 116].

56 Amnesty International, 'Socialist Republic of Viet Nam: The Death Penalty – Inhumane and Ineffective' (AI-Index ASA 41/023/2003, 27 August 2003) 1; Amnesty International, 'Socialist Republic of Vietnam: New debate on death penalty?' (AI-Index ASA 41/04/99, August 2003) 2.

57 See (n 64); Nicholson and Truong (n 3) 448; Amnesty International, 'Fear of Imminent Execution' (AI-Index ASA 41/08/97, 2 April 1997); Amnesty International, *Annual Report* (Amnesty International 1999) 261; Hands Off Cain, 'Thailand – Retentionist' (Country Profile 1999) <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=337&idcontinente=23>> accessed 23 January 2016; Hands Off Cain (Vietnam Country Profile 2000) (n 7).

58 See 'Methodology' above.

exceed executions (18+ to 44+).⁵⁹ Given the extremely low success rate of appeals in criminal cases,⁶⁰ and the relatively short stays on death row after all judicial and political (ie clemency) appeals have been rejected,⁶¹ it is reasonable to assume that Presidential clemency grants play a significant role in Vietnamese death penalty policy. As Professor Nguyen Xuan Yem acknowledged in 2006:

'In recent years, the State President [has] granted amnesty to many persons who were sentenced to death for commission of murder, drug-related crimes, organized crime and crimes of corruption by commuting their death sentences to life imprisonment.'⁶²

Although calculating Vietnam's death penalty clemency 'rate' with any degree of precision is fraught with difficulty,⁶³ one further measure indicating clemency's role in the Vietnamese system is the proportion of clemency grants to clemency rejections in (presumably overlapping) media reports during the early 2000s, as follows:

- April 2001: 13 clemency petitions granted, 22 petitions refused;
- May 2001: 7 granted, 12 refused;
- July 2002: 6 granted, 14 refused;
- January 2003 to July 2003: 11 granted, 49 refused;
- January 2003 to July 2003: 12 granted, 49 refused;
- March 2003: 5 granted, 9 refused;
- May 2003: 2 granted, 2 refused;
- May 2003: 2 granted, 8 refused;
- September 2003: 2 granted, 2 refused;
- October 2003: 2 granted, 12 refused;
- November 2003: 2 granted, 18 refused;
- November 2003: 2 granted, 9 refused;
- 2005 (entire year): 1 granted, 17 refused.⁶⁴

Evidently, Vietnam's is a death penalty regime that reprieves not a *majority* of prisoners sentenced to death, but a minority substantial enough to be labelled a 'medium' user

59 See (n 34) (sources for executions), and the following sources for death sentences: Amnesty International; Hands off Cain; International Federation for Human Rights; Harm Reduction International; The Ottawa Citizen; Thanhniien News; South China Morning Post; Agence France Presse; Giao Vu Cong (n 32) 374; Holscher (n 22) 58; Johnson and Zimring (n 1) 388; Ventura (n 35).

60 See Nicholson and Truong (n 3) 442; Hands Off Cain (Vietnam Country Profile 2009) (n 7); Robert Winslow, 'Vietnam' (*Crime and Society: A Comparative Criminology Tour of the World*, 2008) <http://www.rohan.sdsu.edu/faculty/rwinslow/asia_pacific/vietnam.html> accessed 23 January 2016.

61 Hands Off Cain, 'Vietnam – Retentionist' (Country Profile 2015) <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=19000507&idcontinente=23>> accessed 23 January 2016.

62 Nguyen Xuan Yem, 'Reducing Capital Punishment in Vietnam' (*Vietnam Law and Legal Forum*, Hanoi, 5 November 2006).

63 The clemency 'rate' of a particular country is the percentage of finalised death sentences that result in clemency, rather than execution (excluding death row prisoners from the sample who die from natural causes, who escape, or who are removed from death row for other reasons) [Pascoe (n 6) 5]. In an earlier article, I provided a rough estimate of Vietnam's clemency 'rate' on the basis of such data from the limited period of 1997 to 2008 at 6 to 23 percent, however the methodological difficulties in making these kinds of quantitative estimates are significant (see Pascoe *ibid*, 5, 16, and 'Methodology' above).

64 Sources: Hands off Cain; Vietnam News Brief Service; Nguoi Lao Dong; Agence France Presse; Amnesty International.

of clemency with somewhere between 5 and 50 percent of prisoners spared.⁶⁵ Clemency is not the expected outcome in a death penalty case (as it is in Thailand for example⁶⁶), but nor is it particularly unusual either, especially in comparison with Vietnam's fellow authoritarian states China and Singapore.⁶⁷ This forms the puzzle I address in this article.

Next, which prisoners have benefited from Presidential clemency in death penalty cases in post-*Doi Moi* Vietnam? So far I have identified many separate reports of clemency being granted by the Vietnamese State President or Council of State, however during the remainder of the article I focus only on those cases where it is possible to deduce the *reasons* for which clemency was granted, despite the distinct possibility of sampling bias identified earlier. The following three sub-subsections, sorted by the nationality of the prisoner due to its critical bearing on clemency decisions, provide a list of readily explainable clemency grants, as documented within available sources.

A. Western Prisoners

Cases where prisoners from Western nations have been sentenced to death, usually for drug trafficking, are handled with great sensitivity in Vietnam.⁶⁸ Only two Western prisoners have been judicially executed in Vietnam since 1975, both naturalised citizens of Vietnamese descent. In 2000, Nguyen Thi Hiep, a Vietnamese-Canadian woman convicted of trafficking five kilograms of heroin, became the first Westerner executed in post-unification Vietnam.⁶⁹ Then in 2003, Bui Tai Huu, a Vietnamese-born US citizen also convicted of heroin trafficking, became the second Westerner to be executed.⁷⁰ However, in all other cases, Western citizens on death row have had their sentences commuted,⁷¹ despite ongoing Vietnamese government threats not to recognise the dual-citizenship of Vietnamese refugees and migrants to Western nations.⁷² In this context, Johnson and Zimring have argued that:

65 See Pascoe (n 6) 5-6.

66 *ibid* 5.

67 See (n 5) and (n 6).

68 Nicholson and Truong (n 3) 436.

69 'Vietnam: Life, and death, sentences for drugs' (*Asia Death Penalty Blog*, 30 April 2008) <<http://asiadeathpenalty.blogspot.com/2008/04/viet-nam-life-and-death-sentences-for.html>> accessed 23 January 2016; McGregor (n 40).

70 'Vietnam Court Sentences US National to Death for Drug Trafficking' *Albawaba News* (25 November 2000) <<http://www.albawaba.com/news/vietnam-court-sentences-us-national-death-drug-trafficking>> accessed 23 January 2016; 'Ex-Australian resident among five executed' *Sydney Morning Herald* (20 November 2003); John Silvester, 'Chasing the Dragon' *Sydney Morning Herald* (27 July 2009); Hands Off Cain (Vietnam Country Profile 2000) (n 7).

71 Johnson and Zimring (n 1) 391; 'Law Report: The death penalty in South East Asia' (*ABC Radio National*, Transcript, 14 October 2014) <<http://www.abc.net.au/radionational/programs/lawreport/story-segment-template/5808426#transcript>> accessed 23 January 2016.

Depending on who may be classified a 'western' prisoner, another exception could extend to the three Hong Kong prisoners who have been executed in post-unification Vietnam. The first of these prisoners was Wong Chi-Shing, a Hong Kong resident holding a British passport who was executed in June 1995 for drug trafficking, despite appeals for clemency being made by the British government [AI-Index ASA 41/02/96 (n 10) 3; Amnesty International, 'Socialist Republic of Vietnam: Wong Chi Shing' (AI-Index ASA 41/05/95, 22 June 1995)]. In 1998, after the return of Hong Kong to Chinese sovereignty, two more Hong Kong residents were executed for drug trafficking ['Passage' *Asia Week* (Hong Kong, 4 December 1998)], although a conflicting report lists these men as Macanese [Blagov (n 43)].

72 B Mellor, 'Mercenaries' Fate Strains Hanoi Ties' *The Sun Herald* (Sydney, 29 November 1987); 'Three men convicted of spying have been executed in Vietnam' (n 11).

'Vietnam's relatively cautious approach to capital punishment for foreigners [from Western nations] may reflect the regime's need – economically and politically – to avoid censure by abolitionist nations to which its own future is linked.'⁷³

Quiet, behind-the-scenes diplomacy from within the highest levels of foreign governments appears to have been successful in having death sentences commuted in these cases.⁷⁴ It is also possible that death sentences have been commuted in the cases of Australian and other nationals, pursuant to an ongoing relationship of cooperation between Vietnamese and foreign police forces to tackle the problem of drug trafficking, although this remains unsubstantiated.⁷⁵

B. Vietnamese Prisoners

Vietnamese prisoners granted clemency, according to available sources, have included the following individuals and groups (where it is possible to deduce the official justification):⁷⁶

- Persons sentenced to death who have provided information on their accomplices, particularly in drug crimes and economic crimes.⁷⁷
- Persons who, before arrest, possessed a significant 'role in the community'.⁷⁸
- 1988: Thich Tue Si and Thich Tri Sieu, 'two Buddhist monks convicted of subversive activities', who were aided by pleas for commutation from Australia, Sweden and the UK.⁷⁹
- 1997: Le Minh Hai, 'then-director of the Dolphin Vung Tau Company was found guilty [...] of colluding with Pham Huy Phuoc, director of Tamexco, to obtain gov-

73 Johnson and Zimring (n 1) 392. See also Nicholson and Truong (n 3) 451. In one case involving an Australian citizen on death row in 2008, Prime Minister Nguyen Tan Dung spoke of the value of bilateral trade between the two nations (A\$7 billion per year), together with 'good cooperation in such areas as politics, diplomacy, economics, trade investment, tourism, education and training, culture, defence, security and many others' ('Two Australians Spared in Viet Nam' (*Asia Death Penalty Blog*, 25 October 2008) <<http://asiadeathpenalty.blogspot.com/2008/10/two-australians-spared-in-viet-nam.html>> accessed 23 January 2016).

74 Telephone Interview with London-based NGO Staff (1 February 2010); Amnesty International, 'Socialist Republic of Vietnam: Submission to the UN Universal Periodic Review: Fifth Session of the UPR Working Group of the Human Rights Council, May 2009' (AI-Index ASA 41/007/2008, 3 November 2008); J Lockyer, 'Let's Stop the Firing Squads' *The Globe and Mail* (Toronto, 18 September 2000); David Marr, 'Beyond the Vigils' *The Age* (Melbourne, 3 December 2005); Richard L Parry, 'Brain-damaged Briton needs Blair plea to save him from firing squad' *The Times* (London, 23 April 2007); Nicholson and Truong (n 3) 453. In a case involving a British prisoner, arguments were also made that the prisoner was suffering from a mental illness at the time of the crime (Telephone Interview with London-based NGO Staff, *ibid*).

75 Nicholson and Truong (n 3) 453.

76 There are a number of other instances recorded in the international and local media where the reasons for commutation are unclear, and hence these cases are not included for more detailed analysis. Such cases extend to male and female Vietnamese defendants in drug trafficking, rape, murder and economic cases.

77 Nguyen Xuan Yem (n 62); Nicholson and Truong (n 3) 446; AI-Index ASA 41/001/2000 (n 40).

78 Nguyen Thi Phuong Hoa (n 7) 40.

79 'Vietnam Commutes Death Penalty for Two Buddhist Monks' (n 11); 'Penalties Commuted' *Sydney Morning Herald* (22 November 1988); Vietnam Committee on Human Rights, 'Vietnam Committee welcomes the release of prisoners, but condemns Hanoi for "stealing the lives" of religious and political dissidents in Vietnam' (31 August 2005) <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/fidh_vanluong_release_/fidh_vanluong_release_en.pdf> accessed 23 January 2016.

ernment bank loans for personal use'.⁸⁰ The collapse of Tamexco, a major state-owned trading firm 'closely linked to the politburo of the Communist Party'⁸¹ was extensively covered in the Vietnamese media in order to make an example of the company.⁸²

- Le Minh Hai was reportedly granted clemency because 'Hai's father was Vietnam's first Labor Hero (an honor awarded to individuals who have accomplished "outstanding achievements in labor and creation")'. In 2005, Le was released from prison as part of an amnesty.⁸³
- 1999: Nguyen Khanh Loc: 'who had been sentenced to death for drug smuggling, was saved just as he was about to be executed by firing squad in 1997 when he offered to provide the authorities with the names of other people involved in a drug smuggling ring. He was subsequently called as a witness in a trial of six people for drug offenses'.⁸⁴
- 2003: Lien Khui Thin, a former director of the executive board of the state-owned Epco company, who was sentenced to death in August 1999 for 'embezzling VND3 trillion (now US\$ 141 million) by falsifying government loan documents'.⁸⁵ Thin's clemency was granted on the basis of his 'good behaviour' and his efforts to return some of stolen funds. In 2009, Thin was released from prison by amnesty, on the condition that he continued to pay the balance of the stolen money.⁸⁶ Thin's accomplice, Epco Chairman Nguyen Tuan Phuc, was also granted clemency after being sentenced to death,⁸⁷ although less information is known about the justifications for doing so.
- 2006: La Thi Kim Oanh: 'the former head of a state-run company found guilty of massive embezzlement [...] Her company was under the control of the Ministry of Agriculture and Rural Development'.⁸⁸

80 'Ex-cons band together to fight prisoner disenfranchisement' *Thanhnie News* (Ho Chi Minh City, 3 September 2010).

81 Louis Godena, 'Knives out for Vietnamese corruption' (23 February 1997) <http://www.drifline.org/cgi-bin/archive/archive_msg.cgi?file=spoon-archives/marxism-international.archive/marxism-international_1997/97-02-25.170&msgnum=68&start=4935&end=4994> accessed 23 January 2016.

82 Martin Gainsborough, 'Corruption and the Politics of Economic Decentralisation in Vietnam' (2003) 33(1) JCA 69, 79-80.

83 Adrian Edwards, 'Vietnam Publicly Executes 3 For Corruption' *Washington Post* (8 January 1998); An Dien, 'Jury out as Vietnam holds fast to white-collar noose' *Thanhnie News* (Ho Chi Minh City, 26 February 2015).

84 AI-Index ASA 41/001/2000 (n 40).

85 *ibid*; An Dien (n 83).

86 M Cường, 'Từng bị tuyên tử hình, Liên Khui Thìn được đặc xá' *Vnexpress* (2 September 2009) <<http://vnexpress.net/tin-tuc/phap-luat/tung-bi-tuyen-tu-hinh-lien-khui-thin-duoc-dac-xa-2143755.html>> accessed 23 January 2016; 'Ex-cons band together to fight prisoner disenfranchisement' (n 80); An Dien (n 83).

87 Hands Off Cain, 'Vietnam - Retentionist' (Country Profile 2003) <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=3150&idcontinente=23>> accessed 23 January 2016; 'Ấn giảm án tử hình cho Liên Khui Thìn và Nguyễn Tuấn Phúc' *Tuổi trẻ online* (8 September 2003) <<http://tuoitre.vn/tin/phap-luat/20030908/an-giam-an-tu-hinh-cho-lien-khui-thin-va-nguyen-tuan-phuc/789.html>> accessed 23 January 2016; 'Vietnam's president commutes two death sentences in major corruption case' *Associated Press Newswires* (10 September 2003).

88 Hands Off Cain (Vietnam Country Profile 2006) (n 36); 'Death sentence upheld in State embezzlement case' *Viet Nam News* (Hanoi, 6 April 2004).

- 2010: those previously convicted of crimes for which the death penalty was abolished in 2009.⁸⁹ Mass commutations of this kind also occurred on the last reduction of capital crimes, in 1999.⁹⁰

C. Foreign Prisoners from Asian Nations

As for the treatment of foreigners from Asian nations, during the post-*Doi Moi* period, available media reports document the execution of prisoners from Hong Kong (1995 and 1996),⁹¹ Laos, China, Taiwan, Singapore (between 1995 and 2002),⁹² and Cambodia (2004).⁹³ Since the death penalty was decreed a state secret in 2004 it has become much harder to track the cases of foreign nationals in Vietnam, however since 2010, Nigerian, Lao, Thai, Filipino, and Chinese nationals have all been sentenced to death for drug trafficking *without* subsequent reports of their death sentences being overturned by the higher courts, nor of clemency being granted.⁹⁴

Nevertheless, foreign prisoners from Asian nations have also been routinely granted clemency in post-*Doi Moi* Vietnam, albeit not with the same frequency as Western prisoners. Although, as noted above, Asian prisoners on Vietnam's death rows are sometimes executed, Cambodian, Lao and Thai prisoners have also had their sentences commuted at the same time other Vietnamese prisoners have had their clemency petitions rejected.⁹⁵ In these cases, it appears that diplomatic appeals from relevant foreign governments or from western multinational corporations operating in Vietnam,⁹⁶ or the prisoner providing evidence in order to break up a drug-trafficking network and secure the conviction of accomplices⁹⁷ were the relevant factors taken into account by the Vietnamese leadership.

89 Hands Off Cain (Vietnam Country Profile 2009) (n 7).

90 *ibid.*

91 McGregor (n 40); 'Vietnam Executes First Foreigner for Smuggling Drugs' *The Associated Press* (21 June 1995); AI-Index ASA 41/02/96 (n 10); 'Passage' (n 71). Hong Kong resident and British passport holder Wong Chi-Shing was reportedly the first foreign national (from any country) to be executed in Vietnam since reunification in 1975. The prisoners executed in 1996 have also been reported as Macao residents who possessed Portuguese passports at the time of sentencing [Blagov (n 43)].

92 'Lao drug trafficker executed in Vietnam' *Xinhua News Agency* (China, 1 July 1995); 'Two executed in Vietnam, three more sentenced to death' *Agence France Presse* (1 April 2004); AI-Index ASA 41/04/99 (n 56) 3; Hands Off Cain (Vietnam Country Profile 2002) (n 37).

93 'Two executed in Vietnam, three more sentenced to death' (n 92); Hands Off Cain, 'Vietnam – Retentionist' (Country Profile 2004) <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=3403&idcontinente=23>> accessed 23 January 2016.

94 Babcock et al (Vietnam) (n 42); Hands Off Cain (Vietnam Country Profile 2015) (n 61). Although African prisoners have been sentenced to death in Vietnam, there are no confirmed reports of clemency having been granted to an African prisoner.

95 Hands Off Cain (Vietnam Country Profile 2003) (n 87); 'Condemned heroin trafficker gets death row reprieve in Vietnam' *Agence France Presse* (5 August 1997); 'President Reduces Death Sentence for Two Foreign Criminals' *Vietnam News Brief Service* (Hanoi, 19 November 2003).

96 'Death row reprieve applauded' *Bangkok Post* (28 September 1999); AI-Index ASA 41/001/2000 (n 40); Nicholson and Truong (n 3) 453; 'VN lifts death order on Thai businessman' *The Nation* (Bangkok, 25 September 1999).

97 Condemned heroin trafficker gets death row reprieve in Vietnam (n 95); 'Heroin smuggler executed in Vietnam' *Iol News* (5 October 1999) <http://www.iol.co.za/news/world/heroin-smuggler-executed-in-vietnam-1.15205#.VbmBV_mqqko> accessed 23 January 2016.

D. Summarising Vietnam's Clemency Practice

Taken together, the Asian prisoners granted clemency (whether Vietnamese or foreign) exhibit two key features.⁹⁸ First, as with Western prisoners, critical in both the Vietnamese and the foreign cases is the role of diplomatic representations from the (foreign) prisoner's own nation, or representations from Western governments or multinationals. Second, offering to provide information or witness testimony that leads to the conviction of accomplices or 'masterminds' appears to be influential in cases involving drug trafficking or economic crimes. Where either of these criteria are satisfied, a Vietnamese or foreign prisoner stands a strong chance to benefit from Presidential clemency, although as I speculate later in the article, in other cases clemency may also be granted on a more arbitrary basis in order to enhance state power and social control.

Third and finally, looking at the list of Vietnamese prisoners spared from execution, the cases of Le Minh Hai, Lien Khui Thin, Nguyen Tuan Phuc, La Thi Kim Oanh as well as unnamed beneficiaries with significant 'profiles in the community' hint at clemency being granted in favour of individuals with close family or business connections to the Vietnamese Communist Party (even though similarly-placed co-defendants in some of these cases have instead been executed). Importantly, this interpretation accords with Vietnam's past practice in granting leniency through sentencing discretion and prison amnesty to defendants convicted in less serious cases. The prisoners to previously benefit from such leniency have relevantly included those who have served the government in some capacity,⁹⁹ prisoners with previous military service,¹⁰⁰ and those who (or whose relatives) have 'good records in production and fighting'.¹⁰¹ Although we still see a certain amount of arbitrariness in the granting of clemency to Vietnamese prisoners with these attributes, based on the publicly-known cases and the collective inferences we can draw from these, it appears that such criteria are of benefit to prisoners and would at least be discussed during executive decision-making on death penalty cases.

V. Interpreting Vietnam's Clemency Practice in the Light of Academic Literature on Clemency and Pardons

Clemency and pardons, almost by definition, are legally unreviewable executive 'decrees' that are not subject to the dictates of precedent, sentencing guidelines, or administrative law principles that now guide many of the decisions made in the executive and judicial branches of government around the world.¹⁰² Although the way in which the

98 Nicholson observed in 2008 that a draft document specifying how the President should exercise his discretion to grant clemency had been prepared. It remains unknown whether the document has been officially adopted as a part of clemency decision-making, however its adoption would explain why we see clemency being granted in the same kinds of cases repeatedly [see Pip Nicholson, 'Legal Culture "Repacked": Drug Trials in Vietnam' in Pip Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff 2008) 88].

99 Nicholson and Truong (n 3) 445.

100 'Amnesty for Prisoners' *BBC Summary of World Broadcasts* (1 September 1986); Nicholson and Truong (n 3) 445; Huu Phu, '51 foreign prisoners granted amnesty' *Thanhniên News* (Ho Chi Minh City, 31 January 2005); Aurora Foundation (n 12) 64.

101 Amnesty for Prisoners, *ibid*; Nicholson and Truong (n 3) 445; Penal Code 1999 (Vietnam), s 46(r).

102 Austin Sarat, *Mercy On Trial: What It Means to Stop an Execution* (Princeton University Press 2005) 79, 113; Linda R Meyer, 'The Merciful State' in Austin Sarat and Nasser Hussain (eds),

power to grant clemency and pardons is exercised is often perceived as arbitrary and capricious,¹⁰³ a close examination of previous empirical studies on the topic, together with relevant theoretical literature, reveals particular patterns of use. Even though clemency deliberations are performed in secret in the case of Vietnam and other retentionist states, and moreover public reasons and justifications for a clemency grant are not generally revealed, by tallying and analysing cases over a long historical period researchers can observe prisoners receiving the benefit of executive intervention in the same kinds of cases.

Based on a comprehensive reading of the relevant academic literature, clemency in death penalty cases tends to be granted according to four separate justificatory paradigms: 'mercy from the sovereign', 'retributivist clemency', 'clemency as redemption' and 'clemency for political advantage or utilitarian reasons'. Under the first paradigm, clemency is considered a merciful 'gift' from the state to the prisoner, and as such its granting may be more a reflection of the benevolent nature of the ruler¹⁰⁴ and his or her desire for social control and to exercise of the 'power over life and death',¹⁰⁵ rather than any particularly deserving features of the case. Clemency granted by a monarch or dictatorial ruler, often to an entire *class* of condemned persons,¹⁰⁶ generally comports with this kind of classification.

Where 'mercy from the sovereign' is dispensed on a purely discretionary and perhaps even arbitrary basis,¹⁰⁷ clemency in the name of *retributivism* requires the commutation of a death sentence to a term of imprisonment in a number of pre-determined circumstances, where strict conformity with the original sentence imposed would result in undeserved or disproportionate punishment.¹⁰⁸ Pardons or grants of clemency in this context are justified on the basis that they are seen to *enhance* retributive justice, rather than detract from it.¹⁰⁹ Clemency grants for possible wrongful conviction,¹¹⁰ disproport-

Forgiveness, Mercy and Clemency (Stanford University Press 2007); Rachel E Barkow, 'The Ascent of the Administrative State and the Demise of Mercy' (2007-2008) 121 Harv L Rev 1332, 1335; Pridemore (n 19) 162.

103 Sarat (n 102) 69; Meyer (n 102) 64.

104 Daniel T Kobil, 'The Quality of Mercy Strained: Wrestling the Pardoning Power from the King' (1991) 69 Tex L Rev 569, 571.

105 Sarat (n 102) 16; Douglas Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Verso 1975) 48; Randall Coyne and Lyn Entzeroth, *Capital Punishment and the Judicial Process* (2nd edn, Carolina Academic Press 2001) 839; Kobil (n 104) 582.

106 Daniel V Botsman, *Punishment and Power in the Making of Modern Japan* (Princeton University Press 2007) 45; Leslie Sebba, 'Clemency in Perspective' in Simha F Landau and Leslie Sebba (eds), *Criminology in Perspective: Essays in Honour of Israel Drapkin* (Lexington Books 1977) 232.

107 Sarat (n 102) 20-21; Kobil (n 104) 574.

108 Kathleen D Moore, *Pardons: Justice, Mercy and the Public Interest* (Oxford 1989) 129; Frederick C DeCoste, 'Conditions of Clemency: Justice from the Offender' (2003) 66 Sask L Rev 9.

109 Meyer (n 102) 86; James R Acker et al, 'Merciful Justice: Lessons from 50 years of New York Death Penalty Commutations' (2010) 35 Crim Just Rev 183, 185.

110 Sebba (n 105) at 229; Bruce Ledewitz and Scott Staples, 'The Role of Executive Clemency in Modern Death Penalty Cases' (1993) 27 U Rich L Rev 227, 234; Daniel T Kobil, 'Chance and the Constitution in Capital Clemency Cases' (2000) 28 Cap U L Rev 567, 572; Austin Sarat, 'Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State' (2008) 42(1) Law & Soc'y Rev 183, 220. There may also be one or more dissenting judgements contained in the original conviction, casting a degree of doubt over the accused's guilt [Cathleen Burnett, *Justice Denied: Clemency Appeals in Death Penalty Cases* (Northeastern 2002) 158; Geoffrey Robertson, *Crimes Against Humanity: the Struggle for Global Justice* (3rd edn, New Press 2006), 147; Elkan Abramowitz and David Paget, 'Executive Clemency in Capital Cases' (1964) 39 NYU L Rev 136, 170].

tionate punishment as compared with co-offenders or similar cases,¹¹¹ the existence of an arguable defence,¹¹² compassionate family reasons,¹¹³ youth or old age,¹¹⁴ gender or pregnancy,¹¹⁵ further mitigating factors part of the accused's background,¹¹⁶ or a psychiatric or terminal illness¹¹⁷ are amongst the many reasons for clemency to be granted pursuant to this paradigm.

Clemency as *redemption* is granted not as a criticism of the original conviction and sentence or the way that languishing on death row affects the prisoner over time, but in reference to the prisoner's character, behaviour or meritorious activities before arrest and before conviction or in prison after conviction.¹¹⁸ The most common examples are clemency granted after rehabilitation and reform in prison,¹¹⁹ a prisoner embracing religion,¹²⁰ compensation paid to or forgiveness granted by the victim's family in a murder case,¹²¹ or clemency granted on the basis of previous national service.¹²²

Finally, clemency for *political advantage or utilitarian reasons* might be conceived of as the secular form of mercy from the (semi-divine) sovereign, as exercised by the modern leaders of republics and constitutional monarchies.¹²³ Here, clemency is granted in order to gain political benefit for the executive, or for the general public benefit, rather than on the basis of any redeeming qualities of the prisoner or his or her case. Clemency here could be granted as an amnesty granted to combatants on both sides of a civil war,

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- 111 Coyne and Entzeroth (n 105) 843; Elizabeth Rapaport, 'Retribution and Redemption in the Operation of Executive Clemency' (1998-2000) 11 Chi-Kent L Rev 1501, 1521; Sarat (n 102) 155; Burnett (n 110) 158; A Berlow, 'The Texas Clemency Memos' *Atlantic Monthly* (Washington DC, July/August 2003) 91.
 - 112 Meyer (n 102) 67; Abramowitz and Paget (n 110) 165, 168; Burnett (n 110) 158.
 - 113 Elizabeth Rapaport, 'Staying Alive: Executive Clemency, Equal Protection and the Politics of Gender in Women's Capital Cases' (2001) 4 Buff Crim L Rev 967, 987; Michael Heise, 'Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure' (2003) 89 Va L Rev 239, 287-288; Daniel T Kobil, 'Should Mercy Have a Place in Clemency Decisions?' in Austin Sarat and Nasser Hussain (eds), *Forgiveness, Mercy and Clemency* (Stanford University Press 2007); Rapaport (n 111) 1522.
 - 114 Elliot J Blumenthal, 'Executive Power to Grant Reprieves and Pardons: How Can Your Client Receive the Scooter Libby Treatment' (Buchanan Ingersoll & Rooney Litigation Advisory, December 2007) <<http://www.buchananingersoll.com/media/pnc/8/media.1978.pdf>> accessed 23 January 2016; Heise (n 113) 284; Jeffrey Crouch, *The Presidential Pardon Power* (University Press of Kansas 2009) 25; Pridemore (n 19) 164.
 - 115 Rapaport (n 113) 968, 982; Heise (n 113) 275, 277; Moore (n 108) 208-209; Robertson (n 110) at 150; Carolyn Strange, 'Introduction' in Carolyn Strange (ed), *Qualities of Mercy: Justice, Punishment and Discretion* (UBC Press 1996).
 - 116 Sarat (n 110) 205-206; Berlow (n 111) 91; Burnett (n 110) 192.
 - 117 Blumenthal (n 114); UK Ministry of Justice, 'The Governance of Britain: Review of the Executive Royal Prerogative Powers: Final Report' (15 October 2009) 17 <<http://www.justice.gov.uk/publications/docs/royal-prerogative.pdf>> accessed 23 January 2016; Death Penalty Information Center, 'Clemency' (List of American Clemency Grants since 1976, 2013) <<http://www.deathpenaltyinfo.org/clemency>> accessed 23 January 2016.
 - 118 Jonathan Harris and Lothlorien Redmond, 'Executive Clemency: The Lethal Absence of Hope' (2007) 3 Crim L Brief 2, 7; Moore (n 108) 204-205; Rapaport (n 111) 1523.
 - 119 Sebba (n 105) 230-231; Rapaport (n 113) 987, 998; Blumenthal (n 114).
 - 120 Chawkat Moucary, *The Search for Forgiveness: Pardon and Punishment in Islam and Christianity* (Inter-Varsity Press 2004) 271; Abramowitz and Paget (n 110) 168.
 - 121 James R Acker and Charles S Lanier, 'May God – or the Governor – Have Mercy: Executive Clemency and Executions in Modern Death Penalty Systems' (2000) 36(3) Criminal Law Bulletin 201, 209.
 - 122 Moore (n 108) 204; Daniel T Kobil, 'How to Grant Clemency in Unforgiving Times' (2003) 31 Cap U L Rev 219, 222.
 - 123 Austin Sarat and Nasser Hussain, 'On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life' (2004) 56 SLR 1307, 1319.

in order to facilitate societal 'healing';¹²⁴ as part of a transition from autocracy to democracy;¹²⁵ in exchange for a promise to act in the armed forces, to be deported to a penal colony, or to undergo some other form of conduct in the national interest.¹²⁶ Clemency could be granted to the citizen of an abolitionist nation (or in response to a request made by a powerful international ally), in order to maintain good diplomatic and trade relations with that nation;¹²⁷ to a prisoner who acts as an informant or as a witness in a case against his or her accomplices,¹²⁸ to a prisoner sentenced to death for economic offences who repays the money stolen to the state,¹²⁹ to a prisoner who intervenes 'to assist the prison authorities in preventing [another prisoner's] escape, injury or death',¹³⁰ or even to gain direct political, or even financial, support.¹³¹ Finally, clemency on this basis could also be granted in response to changing public, political, judicial or international law views on the 'morality, justice and effectiveness' of the death penalty after the sentence has been imposed.¹³²

Interestingly, most of the reported grants of clemency in Vietnamese death penalty cases over the past 30 years appear to fall within this final 'political advantage / utilitarian' category. The Vietnamese government has made each clemency grant strategically, in order to benefit the state in subtle ways. Examples are the various clemency grants made to Western, Vietnamese and Asian prisoners at the request of foreign governments and multinational corporations; persons sentenced to death who have provided information on their accomplices and recruiters, and those mass grants of clemency retrospectively made when the number of capital crimes has been reduced, due to the Vietnamese state's changing conception of which offences are worthy of lethal punishment.

On the other hand, examples where prisoners may have 'earned' clemency (before arrest) consist of cases where previous service or links to Vietnamese Communist Party institutions were established, although there are of course other known cases of similarly-situated prisoners being executed. Lien Khui Thin's is the only case (of prisoners from any nation) where the reports indicate that 'good behaviour' on death row may have been relevant to the authorities' decision-making on clemency. However, based on the

124 Kobil (n 122) 222; Crouch (n 114) 20; Sarat (n 101) 20.

125 For example, William Schabas, 'Conjoined Twins of Transitional Justice – The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 J Int'l Crim Just 1082, 1086-1087; 'Question About Amnesty' *Jakarta Post* (27 July 1998).

126 Meyer (n 102) 11; Moore (n 108) 90, 199.

127 Johnson and Zimring (n 1) 318, 334; Eric Neumayer, 'Death Penalty: The Political Foundations of the Global Trend Towards Abolition' (2008) 9(2) Hum Rights Rev 241, 242.

128 Sebba (n 105) 227, 229; Blumenthal (n 114); Robertson (n 110) 297; Kobil (n 104) 589.

129 For example: Lawrence M Slinger (ed), *Encyclopaedia of White-Collar & Corporate Crime* (Sage Publications 2005) 48.

130 UK Ministry of Justice (n 117) 17. Clearly this ground, together with acting as an informant or witness, and the repayment of smuggled or embezzled funds to the state, could also fall within the 'redemptive' category. In all three scenarios, the state benefits from the prisoner's actions, and issues clemency as a 'reward'. However, the subtle difference is that 'redemptive' clemency is awarded to prisoners who have demonstrated virtue *for themselves*, whereas 'utilitarian' clemency rewards a specific and practical action that benefits the state or the general public.

131 Sebba (n 105) 231; Rapaport (n 113) 982; Heise (n 113) 289, 298; Crouch (n 114) 4.

132 Sebba (n 105) 230, 232; Rapaport (n 113) 1001; Philip Alston, 'Report of the Special Rapporteur on extrajudicial summary or arbitrary executions' (UN Doc A/HRC/4/20, March 2007) 14; Sarat (n 101) 67. Sentence reductions may be awarded en-masse (by *any* of the three branches of government) if a death penalty statute is found to be unconstitutional or otherwise legally invalid [Burnett (n 110) 192; Acker and Lanier (n 121) 208].

limited information available, it is unclear whether this assessment of 'good behaviour' applied to Thin's previous business career or his time in detention. Moreover, the importance of good behaviour in Thin's case is tempered by the concurrent emphasis put on the Defendant's continued repayment of money embezzled through the crime, even extending beyond his release from prison in 2009.¹³³ Although capital economic crimes are not extensively referred to by the academic literature on clemency, repayment of embezzled funds appears to fall within the 'utilitarian' category as it is an action undertaken for the greater public benefit, encouraged by the Vietnamese authorities.¹³⁴ Vietnamese lawmakers have even recently considered formalising this clemency ground through a proposed amendment to the Penal Code that would allow for a death sentence to be automatically commuted when the perpetrator repays half of the stolen funds to the state.¹³⁵

Conspicuously absent from Vietnam's past clemency practice are clemency grants made because the punishment is 'undeserved', either at the time of imposition, or later before execution (*retributive* clemency). The closest to this are the mass grants awarded in 1999 and 2010 to prisoners sentenced to death under recently repealed capital crimes, although as noted above, these can also be interpreted as clemency grants made in light of changing political views on the appropriateness of capital punishment for such crimes, which fall within the 'political advantage/utilitarian' category. Retributive factors relevant in some cases identified in the literature do tend to be considered within Vietnamese *sentencing* practice,¹³⁶ or in the granting of prison amnesties for lesser crimes.¹³⁷ However, in death penalty cases, the legislative scheme regulating capital punishment already takes into account factors such as a prisoner's youth, a female prisoner's pregnancy, or the prisoner being a young mother. These categories lead to automatic exemptions from execution,¹³⁸ rather than the prisoners concerned needing to rely on the goodwill of the State President on an ad-hoc basis.¹³⁹

After considering the explicit and implicit justifications for each reported grant of clemency in Vietnamese death penalty cases, I can now begin to answer the second question posed at the beginning of this article: what structural and cultural factors ex-

133 See (n 84-86).

134 See (n 129).

135 'Vietnam not to drop death penalty for corruption' *Tuoi Tre News* (Ho Chi Minh City, 4 March 2015) <<http://tuoitrenews.vn/society/27229/vietnam-not-to-drop-death-penalty-for-corruption>> accessed 23 January 2016.

136 The many aggravating and mitigating factors relevant for sentencing are outlined in the Penal Code 1999 (Vietnam), s 45, 46, 48.

137 See (n 6). Criteria for general and special prison amnesties incorporating retributive factors include the severity of the crime committed, youth, excessive delay ['Prisoners see light of day as part of National Day amnesty' *Vietnam Investment Review* (Hanoi, 2 December 1999)]; 'personal characteristics such as old age, being affected with communicable or terminal disease, etc' [Nguyen Ngoc Anh, 'Getting out of jail: the law on special amnesty revisited' *Vietnam Law and Legal Forum* (Hanoi, 24 October 2006) <<http://vietnamlawmagazine.vn/getting-out-of-jail-the-law-on-special-amnesty-revisited-3225.html>> accessed 23 January 2016] and family circumstances [Aurora Foundation (n 12) 64].

138 See (n 203-204). Moreover, from 1 July 2016, the further exclusion of prisoners aged over 75 from execution has been approved by National Assembly delegates ['Vietnam abolishes death penalty for 7 crimes' *Aljazeera America* (27 November 2015) <<http://america.aljazeera.com/articles/2015/11/27/new-law-in-vietnam-abolishes-death-penalty-for-7-crimes.html#>> accessed 22 January 2016].

139 However, see (n 179) on the possibility of retributive justifications being kept secret from the public.

plain the granting of clemency in a significant minority of death penalty cases in Vietnam? Despite some obvious reductionist tendencies, Vietnam's leaders clearly remain strongly in favour of retention and the enforcement of capital punishment as a means of crime control.¹⁴⁰ Why then commute such a large number of death sentences? The identities of known clemency recipients over the past 30 years, discussed above, provide us with some important clues. However, the primary explanations arise from a consideration of Vietnam's political and criminal justice systems in the light of academic theory on clemency *frequency*, which I refer to throughout the following section.

VI. Explaining Presidential Clemency in Vietnam

Within this section, I hypothesise that despite one punitive feature of Vietnam's death penalty landscape that appears to prevent prisoners from forming viable clemency petitions on the basis of the 'redemptive' paradigm (namely the short stays on death row for condemned prisoners), there are three separate but overlapping features of Vietnam's political and criminal justice apparatus that serve to explain the state's regular reliance on clemency as a form of leniency in death penalty cases. These are the authoritarian nature of Vietnam's political regime, the use of capital trials as a form of state propaganda, and the maintenance of Vietnam's international image. In line with my earlier observation that death penalty clemency in Vietnam is *not* normally exercised for the benefit of the prisoner on the basis of individual mitigating factors (other than those already accounted for by legislation), I argue here that grants of clemency, together with the imposition (rather than execution) of the death sentence itself, fulfil important functions for the Vietnamese state.¹⁴¹ In the simplest terms: clemency tends to be granted on the state's terms, rather than the prisoner's.

I begin with the most important factor that inhibits individual prisoners making forceful arguments justifying clemency in their own cases, without which clemency might be granted in *even greater* proportions.

A. Rapid Processing of Cases, Clemency Deadlines – Inhibit Clemency

Although it forms a key component of the academic literature justifying the circumstances in which clemency might be granted, to date the Vietnamese authorities have never publicly supported a grant of clemency solely on the basis of time spent on death row. As noted above, the closest-such case may have been Lien Khui Thin, whose death sentence was commuted in 2003 by President Tran Duc Luong on the basis of good behaviour *in addition to* Thin's efforts to return money obtained through embezzlement.

140 Babcock et al (Vietnam) (n 42); Pip Nicholson, 'The death penalty in SE Asia: is there a trend towards abolition' (*The Conversation*, 3 March 2015) <<http://theconversation.com/the-death-penalty-in-se-asia-is-there-a-trend-towards-abolition-37214>> accessed 23 January 2016; Giao Vu Cong (n 32) 375; UN Human Rights Council, 'Note Verbale dated 13 March 2015' (UN Doc A/HRC/28/G/15, 31 March 2015); UN Human Rights Council, 'Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies presented by the State under Review' (UN Doc A/HRC/12/11/Add.1, 16 September 2009).

141 See David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Oxford University Press 2010) 130.

Historically, the period required for the advent of time-based mitigatory concerns has simply not existed before execution in Vietnam. A 2003 Amnesty International report suggested that the range of time spent incarcerated before execution ranged between five months and four years,¹⁴² the shortest length of time behind Singapore (with an average of two years) amongst retentionist Southeast Asia nations.¹⁴³ Similarly, a 1999 report stated that prisoners spent between 5 and 20 months appealing their death sentence in the courts.¹⁴⁴ Thereafter, a 2006 Amnesty report did note that 'in some instances prisoners have been held on death row for between four to six years',¹⁴⁵ yet even this length of time pales in comparison with other retentionist jurisdictions where clemency has been granted on the basis of remorse and exemplary behaviour, and where constitutional challenges have been successful on the basis of a deterioration of prisoners' physical and mental health on death row over ten or more years.¹⁴⁶

Accordingly, my assumption is that the comparatively short length of time spent in prison before a final outcome of either execution or clemency is a factor that *inhibits* the more widespread granting of clemency in Vietnamese death penalty cases. Although the period covering the investigation and trial of the accused may extend to several years, seeing as a prisoner is only afforded seven days within which to apply for clemency from the State President,¹⁴⁷ followed by an average of one year before execution,¹⁴⁸ the opportunities to argue for clemency on the basis of rehabilitation, remorse, repentance and religious piety, as well as some of the *retributive* and *utilitarian* justifications for clemency cited in previous international cases¹⁴⁹ are simply not available. As such, other than preferential treatment given for meritorious business activities or family connections evident before arrest, one of the four clemency 'paradigms' within the academic literature is largely ruled out. Whereas rehabilitation and good behaviour in prison play a significant role in justifying the selection of a prisoner for release as part of a general or special prison amnesty,¹⁵⁰ this is not the case for death penalty commutation in Vietnam.

While Vietnam's usual practice has been to dispose of appeals and to execute prisoners comparatively quickly after arrest, the government's inability to source foreign-produced lethal injection drugs between July 2011 and January 2013 has significantly lengthened the time that contemporary prisoners have spent on death row. During a 25-month hiatus from executions, Vietnam's death row grew into the world's twelfth

142 AI-Index ASA 41/023/2003 (n 56) 9.

143 Pascoe (n 6) 13-14.

144 AI-Index ASA 41/04/99 (n 56) 7.

145 Amnesty International 'Socialist Republic of Viet Nam – Duong Quang Tri: Sentenced to death for fraud' (AI-Index ASA 41/004/2006, 1 May 2006).

146 Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015) 203-205, 212-215.

147 Criminal Procedure Code 2003 (Vietnam), Art 258(1).

148 Hands Off Cain (Vietnam Country Profile 2015) (n 61). However, Vietnamese law requires that the execution be carried out as soon as possible after the rejection of clemency [Criminal Procedure Code 2003 (Vietnam), Art 258(2); Nguyen Xuan Yem (n 62)].

149 Notably, separate *retributive* justifications such as old age, psychiatric illness, terminal illness and family emergencies are also created by the passing of time on death row. Justifications for political advantage or utilitarianism such as assistance with police investigations in other cases, testifying as a witness against co-accomplices, the bribery of officials, or the dropping of the death penalty from particular crimes are also factors that are assisted by the passing of time [Pascoe (n 6) 15].

150 Nguyen Ngoc Anh (n 137); Nicholson and Truong (n 3) 448; Nguyen Thi Phuong Hoa (n 7) 39.

largest, containing 678 prisoners in November 2013.¹⁵¹ However, since the resumption of executions with locally-produced lethal injection drugs from August 2013, not a single one of these prisoners has been granted commutation on the basis of time served or good behaviour, according to available reports. Instead, citing the 'pressure of holding hundreds of death row inmates in prison', from 2013 the National Assembly has been considering a return to shooting as a method of execution, prompting fears of an avalanche of executions in order to clear the 'backlog' of prisoners.¹⁵² By the end of 2014, Vietnam's death row had expanded to over 700 prisoners, as executions, successful judicial appeals and clemency grants have failed to match the numbers of new death sentences being issued every year.¹⁵³

Next I move to the three overlapping factors that help to explain Vietnam's unusual reliance on Presidential clemency in capital cases, despite the fact that redemptive clemency is so heavily circumscribed.

B. Authoritarian Nature of the Regime – Promotes Clemency

Vietnam remains one of only four countries in Asia (and five in the world) espousing a hard-line communist system of government.¹⁵⁴ Its justice system is shaped by Marxist-Leninist theory, according to which the law serves as an instrument to realise ideology, rather than as a means of securing justice in cases between individuals, or between an individual and the state.¹⁵⁵ As in the People's Republic of China or the former USSR, the power of the Vietnamese public prosecutor, or 'procuracy', is such that it supervises all government ministries and the police, and can veto or take charge of any judicial case.¹⁵⁶ Where the procuracy brings a case to trial in Vietnam, judges, lawyers and political leaders believe 'it is a foregone conclusion that the case constitutes a crime.'¹⁵⁷ Where clemency is sought then, it is unlikely to be granted on the basis of doubts over guilt.¹⁵⁸ Indeed, the Vietnamese Criminal Procedure Code only allows for the conversion of a death sentence to life imprisonment,¹⁵⁹ rather than full exoneration through a single executive decree for pardon, as is possible in many other retentionist states. For the State President to reduce or abrogate punishment on the basis of doubts over guilt would form an implied criticism of the police force, state prosecutors, and judiciary – institutions that

151 Babcock et al (Vietnam) (n 42); An Dien (n 83).

152 Babcock et al (Vietnam) (n 42); 'Vietnam May Return to Firing Squads Amid Shortage of Lethal Chemicals' *Wall Street Journal* (24 July 2013).

153 AI-Index ACT 50/001/2015 (n 38) 40; Hands Off Cain (Vietnam Country Profile 2015) (n 61). There were at least 72 new death sentences issued in 2014.

154 Sue Vander Hook, *Communism* (ABDO Publishing 2011) 67.

155 Gillespie (n 24) 142-143; Thomas E Kellogg, 'Constitutionalism with Chinese characteristics? Constitutional development and civil litigation in China' (2009) 7(2) *Int'l J Const L* 215, 218-219; see also Johnson and Zimring (n 1) 351.

156 Nguyen Hung Quang, 'Lawyers and Prosecutors under Legal Reform in Vietnam: The Problem of Equality' in Stéphane Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan 2007) 169; Nicholson and Truong (n 3) 436; Sidel (n 72) 59-60, 78-79, 105.

157 Nguyen Hung Quang, *ibid* 169; Sidel (n 53) 59-60.

158 International Federation for Human Rights (n 46); 'Half-way from rags to riches' *The Economist* (London, 24 April 2008); Nicholson and Truong (n 3) 436.

159 Penal Code 1999 (Vietnam), s 35.

are indivisible from the Vietnamese Communist Party.¹⁶⁰ As such, prisoners often assume that asking for clemency implies an admission of guilt for the offence.¹⁶¹

However, many other reasons exist for granting clemency other than for doubts over guilt, and authoritarian states such as Vietnam stand to gain greatly from the frequent use of executive clemency, alongside concurrent executions. The academic literature on the subject suggests that in light of the origin of clemency as one of the key sovereign prerogative powers of absolute monarchies,¹⁶² along with the ability to wage war, sign international treaties, and establish diplomatic relations,¹⁶³ authoritarian governments in the contemporary world will continue to demonstrate state power by remitting criminal punishments, as has been done for hundreds of years. This pattern of institutional behaviour can and does arise irrespective of the precise form of government control, whether an absolute monarchy, right-wing 'military strongman' government, or a Communist or Socialist regime: the key feature is the state's authoritarian bent, and the executive's need to legitimise its policies through the *threat of coercion* and the *relief* from that threat,¹⁶⁴ rather than through public scrutiny at the ballot box. This assumption accords with the findings of comparative international studies of the death penalty, holding that authoritarianism is one of the primary drivers of death penalty retention.¹⁶⁵ Moreover, as I elaborate on below, past state practice suggests that authoritarian governments may also grant clemency on an individual or collective basis in order to win support and legitimacy within the international community, when such legitimacy cannot arise as a result of popular election.¹⁶⁶

Conversely, the writings of Austin Sarat and other academic commentators suggest that a modern, democratic state governed strictly by the 'rule of law', in the sense of equality of treatment of all persons by the law, and of non-arbitrary decision-making by the executive,¹⁶⁷ is not the kind of setting where we would expect to find clemency being granted on a frequent basis.¹⁶⁸ The patterns observed in contemporary retentionist democracies now show a trend towards overall declines in the volume of clemency grants, and where clemency and pardons are still granted, they tend to be employed for retribu-

160 International Federation for Human Rights (n 46); Nicholson and Truong (n 3) 436. Notably, up to 99.93 percent of appeals in criminal cases fail in Vietnam [Nicholson and Truong (n 3) 442; Hands Off Cain (Vietnam Country Profile 2009) (n 7)], whereas Winslow (n 60) quotes a figure of 95 percent. In effect the accused is presumed guilty rather than innocent, with most cases being pre-ordained for speedy conviction and sentence at 'pre-trial conferences' [Nguyen Hung Quang (n 156) 169, 171; Nicholson and Truong (n 3) 436, 440; Johnson and Zimring (n 1) 389-390; Abuza (n 15)].

161 Hands Off Cain (Vietnam Country Profile 2004) (n 93).

162 Sarat (n 101) 16; Nasser Hussain and Austin Sarat, 'Toward New Theoretical Perspectives on Forgiveness, Mercy, and Clemency: An Introduction' in Austin Sarat and Nasser Hussain (eds), *Forgiveness, Mercy and Clemency* (Stanford University Press 2007) 6; Adam Sitze, 'Keeping the Peace' in Austin Sarat and Nasser Hussain (eds), *Forgiveness Mercy and Clemency* (Stanford University Press 2007) 200-201.

163 Colin Turpin and Adam Tomkins, *British Government and the Constitution: Texts and Materials* (6th edn, Cambridge University Press 2007) 146, 464-468.

164 Botsman (n 106) 46-49.

165 Johnson and Zimring (n 1) 290; Boulanger and Sarat (n 8) 5, 9; David F Greenberg and Valerie West, 'Siting the Death Penalty Internationally' (2008) 33 Law & Soc Inquiry 295, 298.

166 Interview with Academic Expert on Capital Punishment #2 (Hong Kong, 7 November 2011); Johnson and Zimring (n 1) 392.

167 Turpin and Tomkins (n 163) 77, 88, 95.

168 Sarat (n 101) 2, 69, 113; Meyer (n 102) 64; Strange (n 115) 3; Barkow (n 102) 1339.

tive reasons only.¹⁶⁹ Again, bearing in mind the findings of general comparative studies of the death penalty, although no specific empirical testing has yet been carried out, it is likely that autocratic states carry out more executions,¹⁷⁰ but also show more leniency (in terms of overall volume of clemency grants, as well as a percentage of finalised cases), whereas retentionist democracies execute less but also grant fewer clemencies and pardons.¹⁷¹

For a strictly authoritarian society such as Vietnam,¹⁷² this points to the clear conclusion that the number of clemency grants witnessed is partially a function of the state expressing its legitimacy to rule over the local population by exercising the power to decide between life and death.¹⁷³ Vietnam's government is able to do this not only by sentencing prisoners to death and executing them in order to demonstrate state power, but also by strategically reprieving prisoners in particular cases. For authoritarian states, Vietnam's practice represents the rule, whereas the minimal clemency jurisdictions of China and Singapore instead represent exceptions.

While we cannot be certain of the reasons for which every single clemency petition is granted in Vietnamese death penalty cases, the very fact that reasons are not publicly provided in some cases, together with the *timing* of some such grants around National Day celebrations in September and at the beginning of the Lunar New Year festival¹⁷⁴ also seems to accord with the hypothesis that the Vietnamese government stands to gain power and legitimacy over its constituents by granting clemency, in addition to the utilitarian benefits identified in particular cases. Although it would not be acknowledged by the Vietnamese regime, a certain proportion of reported and unreported clemency grants seem to be made arbitrarily, pursuant to the 'mercy from the sovereign' paradigm identified earlier, in order to boost the regime's threat and legitimacy in the eyes of the public.¹⁷⁵ This is a common feature of authoritarian regimes that retain capital punishment.

169 Kobil (n 110) 37; Rachel E Barkow, 'The Politics of Forgiveness: Reconceptualizing Clemency' (2009) 21(3) Fed Sent Rep 153.

170 Franklin Zimring, 'State Execution: Is Asia Different and Why?' (Keynote Address delivered at International Conference on Capital Punishment in Asia: Progress and Prospects for Law Reform, City University of Hong Kong, 4 November 2011); David Johnson, 'Asia's Declining Death Penalty' (2010) 69(2) The Journal of Asian Studies 337, 338; Johnson and Zimring (n 1) 289-290.

171 Thurschwell describes 'the Foucauldian distinction between the ancient state that exercises the right to kill or let live and the modern state that exercises the right to foster life or allow to die' – Adam Thurschwell, 'Ethical Exception: Capital Punishment in the Figure of Sovereignty' in Austin Sarat and Jennifer L Culbert (eds), *States of Violence: War, Capital Punishment and Letting Die* (Cambridge University Press 2009) 278. See also Austin Sarat and Jennifer L Culbert, 'Introduction: Interpreting the Violent State' in Austin Sarat and Jennifer L Culbert (eds), *States of Violence: War, Capital Punishment and Letting Die* (Cambridge University Press 2009) 5-6.

172 In 2015, Vietnam was ranked 'not free' by the NGO Freedom House, with a score of 5 from 7 on the civil liberties score and 7 from 7 on the political rights score (1 being the highest for both measures): Freedom House, 'Freedom in the World: Vietnam' (2015) <<https://freedomhouse.org/report/freedom-world/2015/vietnam>> accessed 24 January 2016.

173 Hay (n 105) 43-49.

174 'Two death-row inmates in Vietnam have sentences commuted' *Agence France Presse* (16 May 2003).

175 However, see (n 179).

C. The State Trial as Propaganda – Promotes Clemency

A related feature of Vietnam's authoritarian governance, and the second plausible explanation for clemency grants in modern Vietnam, is the use of the capital trial as a form of state propaganda. Here, the foremost use of capital trials (especially for drugs and corruption offences) for propaganda purposes may be perfectly compatible with a later exercise of the Presidential clemency power.¹⁷⁶ So long as the state maintains its 'tough on crime' credentials through highly orchestrated and publicised capital trials, sometimes involving tens of defendants, discretion in certain cases also remains possible,¹⁷⁷ when granted for the reasons identified earlier in the article (primarily: cooperation with the authorities, the maintenance of international relations and the prisoner's existing connections to the Vietnamese Communist Party).¹⁷⁸

Nicholson and Truong have argued that, for the Vietnamese state, the imposition of a death sentence primarily serves a propaganda role in demonstrating state power and the importance of social order to the domestic audience.¹⁷⁹ Significantly, many death sentences in Vietnam are passed by travelling courts visiting provincial districts, and moreover capital judgments are widely circulated in the state-controlled media.¹⁸⁰ These trials have been described as resembling a 'play', where all the major actors know the result before the final act,¹⁸¹ and counsel's only real role is to obtain a lighter sentence for the defendant.¹⁸² As expressed through the travelling courts themselves, as well as the publicization of their judgments in the media, education on designated 'social evils' (mainly drug use and corruption), deterrence from crime by the *threat* of execution, and upholding the state's symbolic hold over the life and death of its citizens are far more important justifications for capital punishment for the Vietnamese state,¹⁸³ as compared with retribution or permanent incapacitation (justifications that necessarily require the execution of the prisoner).

How do these observations interact with the relevant academic theory on death penalty clemency? A number of scholars have observed that the general values and justifications for punishment that underpin judicial and administrative decisions in the criminal justice system may influence executive decision-makers as to clemency: a system that places primary emphasis on retribution, deterrence, and the rights of victims will leave minimal room for executive action,¹⁸⁴ whereas within a system that prioritises the reha-

176 Nicholson and Truong (n 3) 445, 447. By 'propaganda', what I refer to here is the controlled, strategic release of information on individual death penalty cases through public trials and the state-run media in order to influence the behavior and opinions of Vietnamese citizens.

177 *ibid* 445-452.

178 Furthermore, an alternative explanation for the many 'unreported' clemency grants throughout Vietnam's history, other than their arbitrary award by the executive is that many such grants were actually awarded for *retributive* reasons that have been kept secret in order to maintain the propaganda value of capital trials.

179 Nicholson and Truong (n 3) 432, 434. See also Christine Sydnovich, *The Concept of Socialist Law* (Clarendon Press 1990) 47.

180 Nicholson and Truong (n 3) 434-435; Hands Off Cain (Vietnam Country Profile 2015) (n 61); Nicholson (n 98) 80.

181 Nguyen Hung Quang (n 156) 172; Nicholson and Truong (n 3) 434, 436; Abuza (n 15); Nicholson (n 98) 80.

182 Abuza (n 15); *Australia-Vietnam Dialogue: the Currents of Change* (Australian Government Publishing Service 1995) 11-12; AI-Index ASA 41/023/2003 (n 56) 3.

183 Nicholson and Truong (n 3) 434-435; Abuza (n 15).

184 James R Acker et al (n 109) 186; Sarat (n 101) 28, 144; Harris and Redmond (n 118) 7.

bilitation of prisoners and the reconciliation of former enemies, the decision-maker will find him or herself with a legitimate choice of whether or not to commute the death sentence,¹⁸⁵ perhaps on the basis of demonstrated rehabilitation during time spent on 'death row', or else the forgiveness of family members or the wider community in a murder case.

However, Vietnam does not appear to fit into either of these two categories established by the academic literature. Rather than espousing a death penalty regime prioritising both retributive and deterrent or else rehabilitative justifications for punishment, an equally important justification for capital punishment in Vietnam is *denunciation*. As Cavadino and Dignan explain:

'Émile Durkheim [...] argued that one function of the criminal law and punishment was to reinforce the conscience collective of society and thereby ensure that members of society continued to refrain from crime. Punishment, Durkheim thought, has an *educative* effect. It not only teaches people to obey the law out of fear and prudence (which is deterrence); it also sends a *symbolic moral message* that the offender's action is socially abhorred, and therefore wrong.'¹⁸⁶

More specifically, in the case of post-unification, pre-*Doi Moi* Vietnam, Dao Chi Uc has observed that the educative effect of laws exists in 'socialist legal consciousness':

'[T]hrough the enactment and application of laws, the content of the various criminal-law norms is brought to the attention of the population, and thereby demonstration is made of the intolerant attitude of the state and society to particular anti-social conduct and of a readiness to fight such conduct by the most decisive measures.'¹⁸⁷

Observing Vietnam's post-*Doi Moi* practice, the imposition of the death sentence serves important expressive and educational functions for the regime, even though deterrence, incapacitation and retribution are also found in official statements justifying the retention of capital punishment.¹⁸⁸ Denunciation is a particularly important justification for punishment in a system where the objects of government campaigns targeting particular behaviours have changed from time to time. Eliminating political dissent was once the foremost aim of Vietnamese judicial and extra-judicial executions in the post-unification era,¹⁸⁹ whereas an eclectic list of up to 44 capital crimes has followed in the post-*Doi Moi* era.¹⁹⁰ In addition to death sentences for murder and child rape (crimes which presumably do not require much further denunciation), the Vietnamese government has utilised capital punishment to make the public aware of the moral abomination of newer 'social evils' such as drug trafficking and corruption. Of most importance is the public

185 Sarat (n 101) 22, 35; Kobil (n 110) 37.

186 Michael Cavadino and James Dignan, *The Penal System: An Introduction* (4th edn, Sage Publications Ltd 2007) 47.

187 Quigley (n 27) 177, quoting Dao Chi Uc.

188 See Abuza (n 15) (deterrence); Babcock et al (Vietnam) (n 42) (deterrence); Nicholson and Truong (n 3) 452 (deterrence); Nicholson and Truong (n 3) 453 (retribution); Hai Thanh Luong (n 33) (retribution and incapacitation); Vietnam Constitution 2013, Art 11 (retribution).

189 Aurora Foundation (n 12) 36.

190 See (n 32).

imposition of the death sentence and the act of theatre involved, rather than the act of execution itself. Whether a subsequent commutation by executive decree is brought to the public's attention or not, the Vietnamese government's primary penological aims can still be satisfied by sentencing prisoners to death without performing executions in every case.

D. Modern Vietnam's International Image – Promotes Clemency

Finally, despite the steadfast refusal of the Vietnamese Communist Party to move towards democratic and representative government, Vietnam nonetheless remains concerned over its international image as a repressive regime and as one of the leading executioners in Asia,¹⁹¹ based on statistics from the last decade.¹⁹² There is ample evidence to suggest that Vietnam's concern over its international image has intruded into the state's death penalty policies, including a preference to grant clemency to a minority of condemned prisoners for instrumental reasons. As international norms over the death penalty have evolved, Vietnam's leaders have sought to maintain the Socialist Republic's international standing through at least five different reductionist measures.

First, in 2004 the decision was made to make death penalty information a state secret, a move widely thought to be brought about following strident criticism by human rights NGOs and European governments.¹⁹³ Second is the contemporary focus on the 'social evils' of drug trafficking and corruption as targets for denunciation through capital punishment, in place of political dissent. One of the reasons that the Vietnamese state no longer uses the death penalty to silence its domestic critics is due to the international condemnation this policy would inevitably attract.¹⁹⁴ Third, despite its continued use of executions, Vietnam is one of the few actively retentionist Asian nations to have *abstained* in all of the UN General Assembly resolutions calling for a moratorium on executions (in 2007, 2008, 2010, 2012 and 2014),¹⁹⁵ even though most recently it did sign

191 Nicholson and Truong (n 3) 451; Johnson and Zimring (n 1) 328; Abuza (n 15).

192 See (n 31).

193 Johnson and Zimring (n 1) 389; International Federation for Human Rights (n 46); Hands Off Cain (Vietnam Country Profile 2004) (n 93).

194 Human Rights Watch (n 43) 6; Abuza (n 15). See also (n 60).

195 Hands Off Cain, 'Vote on a Moratorium on the Use of the Death Penalty' (Report on UN General Assembly Vote, 2007) <<http://www.handsoffcain.info/chisiamo/index.php?iddocumento=9334249>> accessed 23 January 2016; Hands Off Cain, 'Vote on a Moratorium on the Use of the Death Penalty' (Report on UN General Assembly Vote, 2008) <<http://www.handsoffcain.info/chisiamo/index.php?iddocumento=12300914>> accessed 23 January 2016; Hands Off Cain, 'Vote on a Moratorium on the Use of the Death Penalty' (Report on UN General Assembly Vote, 2010) <<http://www.handsoffcain.info/chisiamo/index.php?iddocumento=13317888>> accessed 23 January 2016; Hands Off Cain, 'Vote on a Resolution on a Moratorium on Executions Approved by the U.N. General Assembly' (Report on UN General Assembly Vote, 2012) <<http://www.handsoffcain.info/chisiamo/index.php?iddocumento=17300965>> accessed 23 January 2016; Hands Off Cain, 'Vote on a Resolution on a Moratorium on Executions Approved by the U.N. General Assembly' (Report on UN General Assembly Vote, 2014) <<http://www.handsoffcain.info/chisiamo/index.php?iddocumento=19302766>> accessed 23 January 2016.

Notably, Vietnam voted *against* similar resolutions in the UN Commission on Human Rights in 2000, 2002 and 2003 [Hands Off Cain (Vietnam Country Profile 2003) (n 87); Hands Off Cain (Vietnam Country Profile 2002) (n 37); UN Economic and Social Council, *Letter dated 26 April 2000 from the Permanent Representative of Indonesia to the United Nations Office at Geneva addressed to the*

the Note Verbale of Dissociation at the 2015 Biennial Panel Discussion on the Death Penalty at the UN Human Rights Council.¹⁹⁶

Fourth, a number of procedural reforms affecting the practise of capital punishment also demonstrate Vietnam's concern over its international image as a punitive regime and its desire to conform with international human rights standards. In 1999 the number of capital offences was reduced from 44 to 29, and thereafter the Vietnamese government made frequent announcements outlining plans for a further reduction, to possibly include economic crimes,¹⁹⁷ in 'keeping with a general, global trend'¹⁹⁸ – statements which finally manifested in a further reduction to 22 capital offences in 2010.¹⁹⁹ 2010 also saw the change in execution method from shooting to lethal injection, partially 'prompted by the regime's perceived need to be seen as a civilized member of the international community'.²⁰⁰ Most recently, in November 2015 the National Assembly committed to abolish the death penalty for a further seven capital crimes, in line with global trends: 'surrendering to the enemy, opposing order, destruction of projects of national security importance, robbery, drug possession, drug appropriation and the production and trade of fake food'.²⁰¹

Fifth and finally, certain categories of offenders have been excluded from the application of the death penalty in the post *Doi Moi* era, presumably to ensure compliance with Vietnam's international treaty commitments. As part of the 1999 Penal Code, death sentences were banned for mothers of children under three years (having already been *postponed* for pregnant women or women with children under 12 months),²⁰² and moreover juvenile Defendants under 18 years of age were again exempted from execution, as per the 1985 Code.²⁰³ These developments appear to accord with Vietnam's obligations under the International Covenant on Civil and Political Rights²⁰⁴ (acceded to in 1982), and the UN Convention on the Rights of the Child²⁰⁵ (ratified in 1990).

So how does Vietnam's patent concern over its international reputation sustain its *clemency* practice? Most obviously, the list of prisoners known to have received clemency in death penalty cases contains many examples of Westerners being granted reprieves on the basis of diplomatic requests and foreign pressure.²⁰⁶ Vietnam has been granting clemency to these prisoners not because of any particular mitigating circumstances evident in their case, but in order to safeguard its international relations and its

Chairman of the Commission on Human Rights (UN Doc E/CN.4/2000/162, 28 April 2000)] indicating a change of official policy in the mid-2000s.

196 See UN Doc A/HRC/28/G/15 (n 140).

197 Johnson and Zimring (n 1) 391; Nguyen N Phuong (n 43); Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (4th edn, Oxford University Press 2008).

198 Aurélie Placais, 'Vietnam Considers Reduction in Scope of Death Penalty' (9 February 2009), <<http://www.worldcoalition.org/modules/smartsection/item.php?itemid=324>> accessed 23 January 2016, quoting an official from the Ministry of Public Security; Giao Vu Cong (n 32) 375.

199 Giao Vu Cong (n 32) 363–369; Hai Thanh Luong (n 33).

200 Johnson and Zimring (n 1) 391.

201 See Hood and Hoyle (n 146) 116; 'Vietnam abolishes death penalty for 7 crimes' (n 138).

202 Penal Code 1999 (Vietnam), s 35; Penal Code 1999 (Vietnam), s 27.

203 Nguyen Xuan Yem (n 62); Penal Code 1999 (Vietnam), s 35; Penal Code 1999 (Vietnam), s 27.

204 See Art 6(2), 6(5) and 6(6).

205 See Art 37(a).

206 Nicholson (n 98) 86. As such, the executions of Asian prisoners since the beginning of the *Doi Moi* period may possibly be explained by an absence of strong representations on the part of the prisoners' home governments in these cases [Nicholson and Truong (n 3) 453], or else an important economic relationship not being at stake.

economic interests. It remains unknown why two Western prisoners were executed during the early 2000s (Canadian Nguyen Thi Hiep and American Bui Tai Huu), however one possibility is that Vietnam's government refused to recognise their foreign nationality, classifying them as 'Viet Kieu', or overseas Vietnamese.²⁰⁷ Nevertheless, thus far ethnic-Vietnamese citizens of Australia, France and the United Kingdom who have been sentenced to death have all been granted clemency in the post-*Doi Moi* period.²⁰⁸

Importantly, the relevant academic literature evinces a difference between the way that *authoritarian* states have tended to treat foreign prisoners sentenced to death, and the way in which *democratic* retentionist states have done so. As noted above, authoritarian states have historically remitted punishment as a demonstration of state power, due to the need to provide the relevant regime with legitimacy, absent popular consent through the ballot box. State practice in retentionist autocracies also suggests that such state power is sometimes manifested through selective clemency grants on an individual or collective basis in order to win support and legitimacy before an international audience, when such legitimacy cannot arise as a result of popular election.²⁰⁹ Conversely, a democratic state governed strictly by the 'rule of law', in the sense of equality of treatment of all persons by the law, and of non-arbitrary decision-making by the executive, is unlikely to grant clemency on a frequent basis,²¹⁰ especially not to foreign nationals in preference to domestic constituents.²¹¹

Granting clemency to a select number of foreign *and* domestic prisoners appears to accord with the Vietnamese government's efforts to portray a more 'human' face to the outside world²¹² (and is also clearly within the spirit of its obligations under the ICCPR). Even after putting aside the position of foreign citizens on death row, a degree of leniency in the application of capital punishment on Vietnam's *own* citizens may have been precipitated by foreign criticism, as the death penalty has evolved from a criminal justice remedy to be evaluated by individual governments to an issue of international human rights, subject to worldwide scrutiny.²¹³ Granting clemency has formed an operative part of Vietnam's strategy in placating international criticism, alongside the procedural reforms, abstention on UN General Assembly resolutions, and more humane treatment of political dissidents referred to earlier in this section. As such, Vietnam's death penalty

207 See variously 'Ex-Australian resident among five executed' (n 70); Mellor (n 72); 'Three men convicted of spying have been executed in Vietnam' (n 11); Nicholson (n 98) 86. An academic source also observed on Nguyen Thi Hiep that 'some suggest she knew too much and had to be executed to save locals from being exposed – others say that it was a mistake. I have heard both accounts. Both might also explain it' [Personal Email Correspondence with Academic Expert on Vietnam (17 September 2015)].

208 Nicholson and Truong (n 3) 448; John Silvester, '630 police swoop in massive drug operation' *Sydney Morning Herald* (23 November 2010); Amnesty International, '2007 world death penalty statistics published' (15 April 2008) <<http://www.amnesty.org.au/news/comments/11957/>> accessed 23 January 2016; 'Two of five men sentenced to death for plotting' *UPI Archives* (3 January 1985) <<http://www.upi.com/Archives/1985/01/03/Two-of-five-men-sentenced-to-death-for-plotting/6223473576400/>> accessed 23 January 2016.

209 Interview with Academic Expert on Capital Punishment #2 (n 166); Johnson and Zimring (n 1) 392.

210 Sarat (n 101) 2, 69, 113; Meyer (n 102) 64; Strange (n 115) 3; Barkow (n 102) 1339.

211 Nicholson and Truong (n 3 at 452) suggest that clemency for foreign nationals is not as widely reported as for local prisoners in Vietnam.

212 Interview with Academic Expert on Capital Punishment (Oxford, January 25 2010); Nguyen Xuan Yem (n 62).

213 Franklin E Zimring, *The Contradictions of American Capital Punishment* (Oxford University Press 2003) 29; Johnson and Zimring (n 1) 4-5.

and clemency practice accords with Johnson and Zimring's observation that 'when authoritarian governments persevere with capital punishment, progress in restraining the volume of executions depends more on external pressure than on domestic initiatives.'²¹⁴

VII. Conclusion

On the basis of the academic literature examined throughout this article, what kinds of societies would we expect to dispense clemency freely? What kinds of societies would we expect to be extremely cautious about granting clemency? Which type of society is contemporary Vietnam?

A simplistic response would be that a truly *compassionate* society does not perform many executions, and instead commutes many of the death sentences imposed on defendants. However, a truly compassionate society would probably not sentence an offender to death in the first place, or even retain the death penalty as a form of criminal punishment through legislation. The institution of clemency, in most jurisdictions that use it with some frequency, plays a far greater role than simply acting as an official outlet for compassionate sympathy for the defendant. The clemency power creates instrumental benefits for the chief executive who exercises it: frequent use might cast the decision-maker (usually the head of state) in a benevolent light, increasing the ruler's hold over the 'life and death' of his citizens. Clemency might help an autocratic government increase its international legitimacy, clemency may conform with the ruler's conception of religious piety,²¹⁵ or it may be utilised as an incentive for informants and witnesses to aid law enforcement efforts (amongst many other uses). It is through this lens that I have considered Vietnam's clemency practice in its post-1986 death penalty cases.

In the Vietnamese case study, I have observed that despite two features of the criminal justice system (the relatively fast processing of cases from arrest through to execution, together with the overarching power of the state procuracy) almost completely negating two of the four possible clemency 'paradigms' (redemptive and retributive clemency, respectively), clemency has still been gifted in reasonably large numbers during the post *Doi Moi* period. This stands in stark contrast to Vietnam's Asian and authoritarian neighbours China and Singapore, who have both been historically enthusiastic users of the death penalty without granting executive mercy. Where explicit or implicit justifications can be surmised, *all* Vietnamese clemency grants during the years 1986-2015 appear to have been issued either on the basis of political or utilitarian considerations, or else as a result of the prisoner's connections to the Vietnamese Communist Party prior to arrest. Moreover, in cases involving Vietnamese prisoners where clemency is granted by the State President and no reason is given for doing so, at least outwardly this conveys the impression that the grant is designed to bolster the government's power over life and death, as is explained by the 'mercy from the sovereign' paradigm within autocracies.²¹⁶

²¹⁴ Johnson and Zimring (n 1) xiii.

²¹⁵ Pascoe (n 6) 10.

²¹⁶ 'Mercy from the sovereign' is the appropriate paradigm to explain this phenomenon, even if some such grants are secretly made for retributive or redemptive reasons, in order to benefit the prisoner.

To put it succinctly, in Vietnam death penalty clemency tends to be granted on the state's terms, rather than the prisoner's. Initially, this might sound like a trite finding, but it is not a situation we see repeated in every single state that retains the death penalty, whether democratic or autocratic.²¹⁷ In every known Vietnamese case, clemency has been granted in order to somehow benefit the state, rather than with the primary purpose of benefiting the individual prisoner. Unlike the United States, where death penalty clemency is now primarily seen as a constitutional safeguard against wrongful conviction or otherwise defective legal processes,²¹⁸ in Vietnam death penalty clemency is exercised solely for instrumental reasons. This finding echoes Johnson and Zimring's observations about the death penalty in Vietnam more generally:

'the VCP maintains a monopoly on power and therefore dictates almost all aspects of death penalty policy in addition to intervening in individual cases, when necessary, to achieve the outcomes it wants.'²¹⁹

For the immediate future then, changes in domestic conditions short of *de-facto* or *de-jure* abolition are unlikely to make much difference to Vietnam's practise of clemency in death penalty cases, although with clemency not subject to the dictates of precedential decision-making, we cannot be absolutely certain. The state will continue to grant clemency en-masse when the numbers of death-eligible crimes are periodically reduced, as has next been confirmed for July 2016.²²⁰ However, in other cases where prisoners sentenced to death cannot assist with ongoing police investigations, repay any money embezzled, or claim any significant attachment to the Vietnamese Communist Party, their clemency chances are likely to depend primarily on the strength of diplomatic representations made by foreign governments, as well as luck, if their case is used by the Vietnamese government to demonstrate humanity and legitimacy before its foreign and domestic audiences.

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217 Hood and Hoyle (n 146) 316, 319, 321.

218 *ibid* 313, 319.

219 Johnson and Zimring (n 1) 389.

220 See 'Vietnam abolishes death penalty for 7 crimes' (n 138).

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