ASEAN and the Death Penalty: Theoretical and Legal Views and a Pathway to Abolition

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Abstract This concluding chapter reviews how retentionist countries often seek to justify their use of capital punishment by relying on punishment theories that draw a distinction between the infliction of just punishment and arbitrary and unjust violence by the State. It also examines how the continuing use of capital punishment in Southeast Asian countries has been explained by some experts to reflect the distinctive Asian perception of human rights, being one that oversees the prevalence of community rights over individual rights, thus reinforcing the desideratum of the State to accentuate stringent punishment for offenders who are viewed as rebelling against the regiments of State control.

There has been an undeniable worldwide decline in retention over the last forty years. This chapter, therefore, asks why, despite this inexorable global trend and the universal recognition of human rights, do most ASEAN States cling to retentionist principles and policies? Moving beyond traditional theories on criminal justice, particularly retribution and utilitarianism, this chapter attempts to conceptually unpack the factors used to justify the retention of the death penalty in the region. It concludes that the death penalty situation in the eight ASEAN countries remains rather static and the record somehow reveals a very mixed reality, reflecting the absence of any shared policy on the death penalty among AMS other than the proviso, 'in accordance with law'. Some observations and recommendations are then made for Member States to consider possible steps towards the abolition of the death penalty.

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1 Introduction

The history of capital punishment can be traced back into antiquity and has been used by societies to punish a wide variety of so-called crimes. Subjecting a person to the punishment of death has, for the most part, been perceived as a customary practice. It was only after World War II when human rights spiralled in importance as a result of the world powers seeking to hinder further atrocities that the practice of capital punishment came under heightened scrutiny. This escalating importance of human rights has led to a more compassionate attitude towards punishment and was accompanied by a move towards the abolition of the death penalty, a movement that gained particular momentum in the late 1980s (Daems, 2011). Increasingly, opponents of capital punishment commonly regard it to be a blatant violation of fundamental human rights, namely, the right to life and the right not to be subject to cruel, inhuman, or degrading treatment or punishment (Hood & Kovalev, 1999).

Capital punishment entails the deliberate deprivation of life authorised by the State and encompasses a legal process by which violators of the law are condemned and subject to sanctions prescribed by specified legal procedures. Criminal punishment requires convincing justification for two main reasons. First, it causes the infliction of harm or detriment to the offender, either through loss of liberty or harsh treatment and second, it involves the expenditure of public resources that may or may not be put to better use for other more imperative needs. Retentionist countries often seek to justify the use of capital punishment by relying on punishment theories that draw a distinction between the infliction of just punishment and arbitrary and unjust violence by the State. Popular penal policy justifications alluded to by retentionist governments cite the effectiveness of capital punishment as a tool for deterring crime, as well as the necessity of capital punishment to inflict retribution, that can best be described by the scriptural expression ‘an eye for an eye, a tooth for a tooth’. Also, according to retentionist countries, capital punishment ensures the incapacitation of the offender by preventing the commission of further crimes (Hodgkinson et al., 2010, pp. 8–10). Debates on capital punishment as a measure of deterrence were unpacked in Chapter 2.

Southeast Asia maintains a stronghold on capital punishment, with eight out of ten of the ASEAN Member States (AMS) adopting a retentionist stance. Conversely, Cambodia and the Philippines, as well as Timor-Leste (whose application to ASEAN has been under review since 2011), have declared themselves abolitionists for all crimes. By contrast, Brunei, Myanmar, and Laos are de facto abolitionist. Retentionist countries employ different concepts to justify capital punishment. Essentially, the four main theories of justification for criminal punishment as proposed by several seminal works on the topic are retribution, utilitarianism, incapacitation, and rehabilitation, all of which will be discussed in later sections.

This chapter intends to review how retentionist countries often seek to justify their use of capital punishment. It also examines how the continuing presence of capital punishment in ASEAN countries has been explained by experts as reflecting a distinctive Asian perception of human rights, being one that oversees the prevalence

of community rights over individual rights, thus reinforcing the desideratum of the State to accentuate stringent punishment for offenders who are viewed as rebelling against the regiments of State control.

Whilst there has been an undeniable worldwide decline in retention over the last forty years, this concluding chapter asks why most ASEAN States cling to retentionist principles and policies despite this inexorable global trend and the universal recognition of human rights. Moving beyond traditional theories of criminal justice, particularly retribution and utilitarianism, this chapter attempts to unpack the factors cited to conceptually justify the retention of the death penalty in the region. Observations and recommendations are made for Member States seeking to take steps towards its abolition.

Following this introduction, the second section attempts to unpack punishment theories while section three analyses the concepts of punishment in ASEAN and the forces shaping them. This segment also examines the reasons why, despite this inexorable global trend and the universal recognition of human rights, most ASEAN States uphold retentionist principles and policies despite the nebulous distinction between just punishment and arbitrary and unjust violence by the State. Finally, section four demonstrates current progressive practices of punishment by AMS which may pave the way for further steps towards the abolition of the death penalty before the paper concludes.

2 Unpacking Punishment Theories

The fear of acts which disrupt social equilibrium has inspired the imposition of punishment by those who have the power to establish and enforce desired standards of conduct (Mayer 1969). Punishment is defined by Meyer (1969) as

> the method which society uses to enforce the desired standards of conduct and methods of dealing with the offender after a crime has been committed. This definition includes the use of torture, imprisonment and treatment (p. 595)

Several elements determine the forces shaping the concept of punishment and the type(s) of punishments being enforced in different countries. One of the cited justification is to address and prevent any acts considered to disrupt the 'social equilibrium'. The punishment is designed and decided by those in power meaning the governments and agencies concerned. It can take many forms ranging from imprisonment (which allows rehabilitation) to torture with its most extreme form arguably being capital punishment. Although the argument that the death penalty constitutes torture is not conclusive, a growing number of regional and domestic opinions and decisions have held that the death penalty constitutes cruel, inhuman, or degrading treatment or even torture, regardless of the methods or circumstances of implementation, or the particular individuals upon whom it is imposed (Mendez, 2012). So, the punishment is mainly determined and justified by the power in place.

Although from a moral perspective criminal punishment may be a universally endorsed concept across the globe, several difficulties arise. Authors espousing the moral perspectives of criminal punishment mostly point to the morality of inflicting pain or suffering on offenders. Therefore, the need to justify punishment as a legitimate form of State practice becomes paramount. Out of this need, four main theories of justification for criminal punishment were proposed: retribution, utilitarianism, incapacitation, and rehabilitation (Boonin, 2008; Hall, 2000).

Incapacitation is a theory that seeks to prevent the lawbreaker from reoffending, whilst rehabilitation seeks to provide therapy to an offender to prevent criminal recidivism. Incapacitation and rehabilitation do not seek to justify capital punishment, because incapacitation can be equally applied to imprisonment, and rehabilitation is not possible in terms of the death sentence. Because capital punishment is mainly justified by retribution and utilitarianism, this review will concentrate on the discourse surrounding those two theories.

Retribution refers to offenders receiving his or her 'just deserts' for a crime, and demonstrates the principle of *lex talionis* (commonly understood as 'giving to each his due') to define retribution or compensation perfectly proportional to the harm caused (Van Drunen, 2008). Contrary to prevalent belief, the intention of retributive justice is not to seek revenge but to impose a penalty on the offender proportionate to the crime committed. According to Hall, retributive justice is based on the rationale that when an offender commits a crime, he or she generates an imbalance in the justice system that can only be reinstated by punishing the offender (Hall, 2000, p. 195).

The philosopher, Immanuel Kant, has been afforded a prominent status among retributivists. Authors such as Hall, Finkelstein, Hill, and Yost all refer to the works of Kant in their discussions on retribution. Kant argued that retribution can be divided into two categories: 'strict retribution' and 'proportional retribution'. The former refers to the punishment being the same kind of harm as the crime committed; in other words, punishment is identical to the actual crime itself. 'Proportional retribution' constitutes punishment not identical to the crime, but rather proportionate to it. Kant's suggestion involves the use of 'strict retribution' only when it is morally and physically possible to do so. For example, the crime of murder can be punished by killing the offender. However, 'strict retribution' is not morally permissible for the crime of rape because it involves another person raping the rapist. Thus, rape must be punished by 'proportional retribution' which in today's world generally equates to imprisonment (Yost, 2010, pp. 5–6). 'Proportional retribution', according to Kant, does not entail the State inflicting on offenders the evil they inflicted on others. Rather, Kant recognised the limits of the concept, 'an eye for an eye', realising the impossibility of subjecting offenders to similarly atrocious acts. Kant's position can be best understood as an affirmation that all guilty offenders should be punished by conforming to the *lex talionis* principle *as closely as possible,* rather than literally taking 'an eye for an eye' (Hill, 1999, p. 433). Kant viewed the destruction of life (being the most valuable of man's possessions) or murder as one of the worst possible crimes because in his view, humans use life as a means of exercising freedom. Since he perceived murder as one of the worst crimes (similar to the modern concept of

'most serious crimes' discussed in Chapter 3), he urged use of the death sentence because its effect most closely resembles the crime of murder in terms of severity (Yost, 2010, pp. 7–8).

The other theory used to justify capital punishment is utilitarianism. Unlike retribution, the application of utilitarianism concerns itself with the benefits of punishment, rather than whether offenders deserve to be punished. The utilitarian theory states that punishment, including capital punishment, is morally permissible so long as it serves the greater good to society. This greater good refers to deterrence of crime in two situations: the first entails specific deterrence when offenders are personally prevented from re-offending; and the second involves general deterrence, whereby members of society are discouraged from offending after witnessing the punishment imposed on the offender—both result in a safer society (Hall, 2000, p. 209; Haist, 2009, p. 794).

As theories justifying punishment, both retribution and utilitarianism have inherent shortcomings. The inadequacies of utilitarianism stem from three contentions. First, the statistical evidence used to prove its deterrent effect is usually inconclusive in that it fails to validate capital punishment as a more effective deterrent than life imprisonment. At the same time, the evidence also fails to negate the view that capital punishment is a stronger deterrent than life imprisonment (Brudner, 1980, pp. 338–441; see also Chapter 2). Second, because utilitarianism justifies punishment based on its presumed deterrent effect, States may condone the punishment of the innocent simply to make an example of someone to further its deterrence measures. Therefore, punishing the innocent is condoned as long as it constitutes a deterrent to others as it would lead to more benefits than costs (Weiner et al., 1997, p. 448). Third, individuals presumed to be offenders are used as examples by States. This 'use' deprives individuals of their autonomy and dignity as human beings; instead, they are perceived as mere tools by the State to further its primary goal of deterrence (Hill, 1999, p. 430). The issue of dignity on death row was discussed in Chapter 4.

Likewise, retribution as a justification also has its drawbacks. Hall argues that determining the proportionality of punishment constitutes a challenge because it is difficult to balance the punishment against the severity of the crime and the degree of guilt of the offender. Oftentimes, similar crimes are given different types of punishment, depicting a lack of consistency in determining proportionality (Hall, 2000, p. 198). Moreover, in determining proportionality, mitigating factors must also be weighed against the severity of the crime. However, when mitigating factors are based on a person's emotions, the process is deprived of rationality. Further, grounding the weight of mitigating factors on emotions may lead to unwarranted leniency or even a desire for forgiveness which would further defy the purpose of retribution, requiring as it does the infliction of punishment in response to a wrongful act (Hall, 2000, p. 204).

Arguments against these theories of punishment were advanced by Boonin in *The Problem of Punishment* in which he asserts the problematic nature of criminal or legal punishment, especially questioning why it is morally permissible for States to treat offenders in ways it would be morally reprehensible to treat non-offenders. Criticising the major theories of utilitarianism and retributivism, Boonin contends there

is no acceptable solution to this problem, further concluding that State-sanctioned punishment is therefore always immoral. As an alternative to legal punishment, he offers victim restitution if five elements are satisfied. First, the punishment must include harm to the offender whereby the 'harm' either inflicts an unpleasant effect on the person or removes something good. Second, the harm must be intentional. Third, it must be retributive, meaning it must be instigated in response to an illegal act. Fourth, an element of condemnation must be present, such as an expression of official disapproval of the offender's act, and finally, the harm must be authorised by the State (Boonin, 2008). Boonin's proposal itself is a problematic one.

From a legal perspective, an ongoing debate continues as to whether the death penalty is compatible with existing international law. As discussed in Chapter 3, within the context of international law, the concept of proportionality (or proportional retribution) is embedded in Article 6 of the International Covenant on Civil and Political Rights (ICCPR) which essentially restricts the use of capital punishment. Since the ICCPR came into existence, many academics have debated which acts constitute the 'most serious crimes', giving rise to allegations that the expression embodies too vague and ambiguous a concept that is subject to different interpretations by different countries due to diverse cultural and political standpoints (Hood, 2006; Schabas, 2002).

This issue is still being debated with no clear resolution either domestically or internationally. So to ASEAN. Here, the main justifications cited for retaining the death penalty are its effectiveness in deterring serious crimes and protecting society. At the same time, pursuant to the *Lotus* principle, what is not expressly prohibited by international law falls within a State's sovereign prerogative to legislate, and ultimately, States are accountable to their own people as the sole bearers of the responsibility to protect. On the other hand, the main arguments for abolishing the death penalty are the risk of wrongful convictions, the questionability of its effectiveness as a deterrent, and the sheer inhumanity of killing. What, however, bridges the two camps is a general reluctance to advocate for the inhumane treatment of prisoners on death row.

Whether viewed from the concepts and theories underpinning punishment or from a legal aspect, its implementation shows how a State exercises authority over the lives of its people through the judiciary's systems and procedures. Although international human rights regimes are calling for the abolition of the death penalty, it is still legally permissible for States to end the lives of those found guilty of certain offences. Neither is it considered 'arbitrary' by international human rights law if due process is followed. However, evidence has also shown that despite careful adherence to the law and the promise of fair and proper proceedings, criminal justice may yet reach the wrong outcome. In addition, greater respect for the right to life is becoming more pertinent resulting in growing movements for the abolition of the death penalty around the world.

3 Concepts of Punishment in Southeast Asia

The previous section outlined two overall theoretical frameworks underlying the use of capital punishment, the first perceiving it as a response to crime and the second identifying it as an instrument of State power. However, over the past two decades, these two frameworks have been criticised as overly simplistic, considering as they do, the use of capital punishment as an automatic response to disconcerting conditions. They also fail to take into account the different responses of different countries to crime or social threats (Greenberg & West, 2008).

However, despite such criticisms, traditional theories of criminal justice, particularly retribution and utilitarianism, are still being lauded as the basis of the stance taken by AMS. In focusing on the utilitarian model of capital punishment, a study opined that AMS predominantly focus on the communal or societal aspect of the justice system instead of seeing it in light of an individualist human rights approach (Miao, 2017). This inclination becomes especially apparent in the so-called 'war on drugs' waged by a number of ASEAN governments against drug offenders. For example, Indonesia's Attorney General stated in an interview that the country wages a war against drugs because such offences threaten the nation's very survival (Hutt, 2018). For him, capital punishment was necessary to save the nation despite its unpleasantness. Malaysia expressed a similar opinion with respect to drug-related crimes, i.e. that the scourge's contribution to the commission of other crimes, such as theft or murder, constitutes a main reason why drug abuse is thus criminalised (Majinbon et al., 2017) Likewise, the Philippine President has gone on record stating that drug-related offenders must be eliminated because they pose a danger to society (Miao, 2017).

Aside from the usual allusions to 'Asian/ASEAN values' which purportedly prioritise community over individual rights, this section attempts to bring in other conceptual justifications for the death penalty by ASEAN retentionist States. For example, Johnson and Zimring (2009b) observe the connection between political democracy and economic development on the one hand, and the abolition of the death penalty on the other pointing out the higher tendency for democratic and developed States to consider abolition. However, analysing which ASEAN States are de facto and *de jure* abolitionists and which continue to execute the penalty with resolve fails to lend credence to this observation.

To address the shortcomings of classical theories of punishment and in an attempt to understand why some countries abolish capital punishment whilst others retain it, Greenberg and West (2008) argue that capital punishment is primarily premised on a country's political system, and is influenced by religious traditions and composition, levels of economic development, and educational attainment. Moreover, current research appears to point to political factors as being the strongest determinant of capital punishment. This is not to decry other factors; only that they act as less significant determinants than political influences. Such factors may be added to analyse the behaviour of retentionist States in ASEAN.

3.1 Religious and Cultural Factors

As demonstrated in Chapter 6, while religion may play an influential role in the use of capital punishment, it is unlikely to be a strong determinant. Having said this, studies have shown that the greater the representation of Roman Catholics in a country, the less chance capital punishment will be used (Greenberg & West, 2008, p.304). Another common belief is that countries holding Islam as their state religion (such as those in the Middle East and parts of Africa) are more likely to condone capital punishment than their non-Islamic counterparts because those States often conflate law and religion. Moreover, Islamic law expressly endorses capital punishment. However, this belief is refuted by Johnson and Zimring in *The Next Frontier: National Development, Political Change and the Death Penalty* in Asia who use statistics to depict how Asian countries with a Muslim majority, such as Indonesia and Malaysia, all demonstrate very low rates of executions. By contrast, countries with low Muslim concentrations, such as Singapore and Vietnam (as well as China and North Korea), boast high rates of executions. This signifies that Islam is not necessarily an obstacle to the abolition of capital punishment (Johnson & Zimring, 2009a). As regards Buddhism and Hinduism, Greenberg and West contend these religions have no significant effect on whether countries condone capital punishment (Greenberg & West, 2008, p. 309).

In the context of Asia, especially Southeast and Northeast Asia, the 'Asian values' argument has been commonly used by retentionist governments as a justification for capital punishment. However, the concept of Asian values cannot be used as a determining factor because rates of executions across retentionist countries in the region are substantially diverse. Only four countries in Asia use capital punishment aggressively, including Singapore and Vietnam, whilst the remaining retentionist countries are either abolitionist in practice or have low rates of executions (Johnson & Zimring, 2009b). In addition, although there is strong popular support for capital punishment across Asian countries, policies concerning capital punishment are not determined by the public, but solely by national governments in what Johnson refers to as 'leadership from the front'. Therefore, capital punishment policies do not reflect public sentiment on any level in the sense that reasoning and open public debates on the issues are missing in the region. Thus, 'leadership from the front' and not Asian values, accounts for the huge decline in execution rates in South Korea and Taiwan, as well as the aggressive use of capital punishment in China, Singapore, North Korea, and Vietnam (Johnson & Zimring, 2009a; Johnson, 2010, p. 340). The Chapter 5 touched upon some of these debates.

3.2 Economic Factors

It is often assumed that economic development inspires a decline in the rate of executions by fostering an environment conducive to political reform or democratisation.

This may have applied in the cases of Korea and Taiwan, where economic development nurtured technological, educational, and even moral advancements that indeed generated pressure for changes in their political structures leading to a decline in the use of capital punishment. Greenberg and West (2008) argue that the economic development of a country secures a role of greater involvement in the world economy, further exposing it to cultural differences ensuing in an increased acceptance of cultural relativism that eventually undermines the support of severe punishments. However, Johnson and Zimring demur, maintaining that economic development is not a weighty determinant of capital punishment, nor of its abolition. To illustrate, some of Asia's poorest countries (for example, Cambodia, Nepal, Bhutan, and Timor Leste) have abolished capital punishment, whereas their rich counterparts (such as the United States, Japan, and Singapore) have steadfastly retained its use (Johnson & Zimring, 2009a, p. 293).

This can be explained from another angle that seems to have occurred in ASEAN/Southeast Asia where economic development has brought about social change. Adopting Giddens' concept of ontological insecurity helps to explain the link between anxiety about social change, fear of crime, and punitive emotions, all of which threaten self-identity and endanger 'aspects of the "reality" of the world' (Giddens 1991, p.65). Giddens argues that ontological insecurity is prevalent in modern societies due to the pace and scope of change entailed by modernity. This experience leads some individuals to attempt to shore up stability by reasserting their 'values as absolutes' (Seal, 2017). As such, they may become intolerant of deviance and create scapegoats for the 'troubles of the wider society'. Consequently, they may favour excessive punishments such as long prison sentences and the death penalty. Fear of crime and associated beliefs in the need for strong punishment 'represent things above and beyond the (actuarially considered) possibility of victimisation' (Jackson, 2004, 2009). Because crime is a metaphor for other social problems, feelings of insecurity induced by the rapidity of social change and anxieties about modernity are channelled through responses to crime (Jackson, 2004).

Garland further argues that the precariousness of late modern societies—in which the welfare state has declined and neoliberal economics flourish — means that such insecurity is now widely experienced (Garland, 2014). Moreover, significant transformations in family life, the consumption of culture, and the growth of mass media accelerate the pace of social change in late modernity (Seal, 2017). In addition, rising rates of recorded crime and media reporting of serious, high-profile crimes, make crime and violence 'channels for the expression of more inchoate fears'. Thus, 'pro-death penalty views frequently emphasised the need to retain capital punishment as a deterrent in order to promote safety. They linked fears of rising crime to harmful social change' (Seal, 2017, p. 6). In other words, such attitudes lie witness to the fact that economic advancement in ASEAN countries has not necessarily contributed to lower crime rates; neither have they reduced the use of capital punishment in the region.

3.3 Political Factors and Authoritarianism

A country's political ideologies regarding crime affect its punishment practices. Such ideologies can be categorised into two; the first being the perception of crime as a consequence of an individual's rational choice or personal defect, and the second being a more liberal perception of crime as a result of social injustice. The first ideology is generally linked to the use of deterrence and incapacitation as methods of punishment, whereas the second usually resorts to rehabilitation as a means to control crime. Literature seems to suggest that undemocratic countries that view crime as a manifestation of personal choice are more likely to use capital punishment (Greenberg & West, 2008, pp. 296–297).

However, the discussions raised in the paragraph above provide little in the way of conclusive support. According to Greenberg and West (2008), countries with fewer political rights are more likely to use capital punishment because they tend to be less receptive to the well-being of their people, and may be more inclined to use force or kill to maintain order and control or to stay in office. For instance, undemocratic regimes may implement policies against the public's needs or interests, and subsequently resort to using force to coerce acquiescence with unpopular policies. Statistics depict a trend that non-democratic governments are more likely than democratic ones to use capital punishment, with the obvious exception of the United States and Japan (p. 298). Many other factors further determine the extent of political rights, such as levels of wealth and education, which are indirect determinants of capital punishment. To illustrate, a country with a higher level of wealth usually also has a higher level of investment in education leading to higher literacy rates which may result in higher public demand for political rights (p. 324). However, this illustration does not hold true for such countries as Malaysia, Singapore, Thailand, and Vietnam where the level of literacy is highest compared to the rest of the region.

Johnson and Zimring are strong advocates of the view that political factors are the most important determinants of capital punishment, especially in Southeast Asia. In proving their contention, they use Singapore and Malaysia as examples, being countries sharing a similar history and culture, to show that political differences account for the large difference in the execution rates of the two countries. In fact, Singapore is amongst the four top executing countries in Asia, the other three being China, North Korea, and Vietnam. Other retentionist countries in Asia do not execute regularly or frequently. Based on this, Johnson and Zimring argue that high execution rates in some countries can be explained by their authoritarian regimes. Notably, authoritarian regimes may be necessary for high rates of executions, but not for capital punishment in itself. This is because the United States, which does not fit the description of an authoritarian government, uses capital punishment, but not to a high extent (Johnson & Zimring, 2009a, p. 296). In addition, the two authors attribute the sharp decline in execution rates in South Korea and Taiwan to the process of democratisation, reaffirming that high execution rates are associated with authoritarian political structures (p. 297). This was also reflected in Wang Yunhai's article, *'The death penalty and society in contemporary China'*. Wang (2008) explains

the extensiveness of death penalty provisions, convictions, and executions in China, by defining it as a 'state-power'-based society rooted in a socialist system. Moreover, Wang asserts that three factors are attributable to the prevalence of executions in China. First, capital punishment is a political issue of State power; second, capital punishment forms an imperative part of criminal policy within a 'state-power'-based society; and third, the question of whether to retain or abolish capital punishment is ultimately a political decision rather than a legal one. This analysis can be applied to explain the cases of Singapore, Vietnam, and a few others, including the Philippines where an elected government essentially turned authoritarian.

The classical definition of authoritarianism was advanced by Linz (1970, p. 225):

> Authoritarianism are political systems with limited, not responsible, political pluralism; without elaborate and guiding ideology (but with distinctive mentalities); without intensive nor extensive political mobilization (except some points in their developments); and in which a leader (or occasionally a small group) exercises power within formally ill-defined limits but actually quite predictable ones.

Looking at Southeast Asia currently, authoritarianism now appears to be a prevalent phenomenon. The conventional perception surrounding political discourse on Southeast Asia classifies most countries therein as authoritarian, with the exception of Indonesia and Timor-Leste (and to a certain extent, Malaysia) which are given the status of democracies. Under the modernisation theory, the concept of democracy is tied to economic development, in that an absence of democracy is associated with a lack of economic development. However, this form of modernisation theory appears problematic upon closer analysis. China stands out as an exception to the trend, because non-democracy has persisted despite the country having undergone substantial economic development since late 1970s. Several countries in ASEAN/Southeast Asia seem to have followed China's path, in that economic development has failed to result in democracy. In particular, Singapore serves as an evident example, by averting democracy in spite of extensive economic growth, thus also challenging the modernisation theory that economic development frees States from authoritarianism.

Under modernisation theories, authoritarian governments continue to be perceived as lacking in legitimacy, which such theorists view as problematic considering the global aspiration for democratic values. To increase legitimacy, governments in ASEAN/Southeast Asia opt for economic development, industrialisation, and modernisation. In SEA, authoritarian regimes are viewed as more 'benign' on the basis that they are market-driven, although they may be, oftentimes, repressive. Any challenge to the system is considered a defiance to the leader, demanding a stringent response (Sim, 2006, p. 147). This includes defiance to the security and order of society. In the context of capital punishment, it is assumed that popular perception and consent give rise to legitimated authoritarianism (which has been the case in the Philippines, Singapore, and Thailand). This is related to Gramsci's (1971) theory of hegemony, which focuses on the desire of elites to secure consensus in order for their rule to seem fair and natural. Accordingly, elites in authoritarian regimes employ social and security projects to persuade other civilians to give consensus to their rule.

The determinant factors advanced by modernisation theories seem to shape the punishment policies and behaviours of many retentionist States and this can be expanded to the Philippines where attempts to re-impose the death penalty have been made by Duterte's government since his presidency in 2016. It is evident that the level of economic development in these countries has not altered their perception; rather, in most if not all cases, it has strengthened it. Cultural and political factors, as well as authoritarianism, also reinforce the already hierarchical and State power-based society that prevails in the region. Despite this, some small steps have been taken in ASEAN.

4 Examination of Some 'Good Practices': An Indication Towards Abolition of the Death Penalty in ASEAN/Southeast Asia?

Research conducted for AICHR's thematic study on the right to life concluded in early 2021[1] revealed some positive trends applied by AMS. In particular, the reports identified some 'good practices'. These so-called 'good practices' include, but are not limited to: the reform of death penalty laws; the application of moratoriums; assessments of the mentally ill in the criminal justice system; and fewer women being condemned to death. The question is can such 'good practices' be translated into indications that the death penalty may be abolished by retentionist States in the region. This section provides an overview of such 'good practices' before concluding if an abolitionist move is, in fact, taking place in ASEAN/SEA.

4.1 Reforming Death Penalty Laws

As analysed in Chapter 3, limitation to the 'most serious crimes' is an established principle of international law in relation to the death penalty. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has further clarified that the death penalty should not be given for economic crimes, drug-related offences, victimless offences, or actions related to moral values.

Whilst some ASEAN retentionist States have retained a long litany of capital crimes, Lao PDR and Vietnam have in recent years reduced the categories liable to the death penalty (although it remains for drug trafficking in all countries). Regular governmental (and inter-governmental) reviews do take place in States concerning the effectiveness, fairness, and suitability of the death penalty regime. This does not mean change is inevitable but where valid reasons exist to consider changing the criteria for certain offences, altering the offences attracting the death penalty, or giving the courts more discretion in sentencing, they may at least be considered and

[1] See AICHR (2021).

properly debated. Sometimes these reviews take the form of public consultations or specially convened commissions. Whichever the shape of such review mechanisms, insofar as the right to life is the most important human right, there must be a perpetual desire to ensure that any death penalty meted out is neither unjust nor results in human rights violations.

Vietnam deserves special mention as since 2005 it has reduced the offences to which the death penalty is applicable from 44 to 18. Vietnam also added a non-imposition of death penalty order for children under 18 years, pregnant women, women with children aged under 36 months, and persons of 75 years or older when committing crimes or during sentencing as well as non-execution of death sentence orders to persons falling into these categories. As stated in the country report for the AICHR's thematic study, these reforms relate to an ambition to advance human rights in the country.

If legislators are making it more difficult to use the death penalty by reducing the number of capital offence crimes to 'particularly serious cases' where it is used as 'the last legal resort', this could be considered a form of good practice. Vietnam, in particular, can be viewed as a reformist and reductionist country in relation to the death penalty.

Making the death penalty non-mandatory, as is the case for certain crimes in Indonesia, Malaysia, Singapore, Thailand and Vietnam, enables life imprisonment to be an alternative sentence to execution. Allowing discretionary use of the death penalty for certain crimes recognises the different circumstances in which offences may be committed and the specific context of offenders and related mitigating factors. However, there is apprehension about replacing the death penalty with a mandatory sentence of 30 years or life imprisonment without the possibility of parole is a concern in Thailand.

Finally, clemency and pardon power is a provision for leniency of capital punishment and as such can be considered a form of good practice. Whilst all the ASEAN retentionist countries have this provision, Thailand has shown a high rate of clemency in the past as has Vietnam where foreigners may receive differential treatment through the clemency process.

4.2 Moratoriums and Progress Towards Abolition

Over the last decade, the UN General Assembly has called for a general suspension of capital punishment throughout the world. Usually every two years around the time of International Human Rights Day, a resolution on the death penalty moratorium is proposed. As already analysed in Chapter 7, there have been some changes in the voting behaviour of AMS. The latest vote at the UN General Assembly was on 16 December 2020 with 123 votes in favour, 38 against, with 24 countries abstaining and 8 being absent (Pascoe & Bae, 2021). Within the ASEAN region, Brunei and Singapore have consistently voted against the resolution while Cambodia has always voted in favour. Indonesia, Lao PDR, Myanmar, Thailand, and Vietnam generally abstain.

Since 2018, Malaysia has voted in favour while the Philippines, which abstained in the 2016–2018 resolutions, voted in favour in 2020 (International Commission Against Death Penalty, 2021).

The suspension of executions (i.e. a moratorium) in a retentionist country is considered to be a key step towards abolition of the death penalty. In particular, a 10-year halt in executions is considered a major milestone for the protection of the right to life and the eventual abolition of the death penalty. Indeed, its use is becoming increasingly restrained in some retentionist countries within ASEAN. For example, the last execution in Brunei was reported in 1957 whilst the last known executions in Lao PDR were in 1988. Other countries could be in a good position to move towards a moratorium (e.g. Indonesia) while the government elected in Malaysia in 2018 planned to abolish the death penalty for all crimes and halt 1,200 pending executions (but backtracked after another change in government).

Clearly, Cambodia and the Philippines have been at the forefront of abolishing capital punishment. Unfortunately, one ASEAN country has recently resumed its use after having previously suspended the practice for long periods of time. Thailand was in its ninth year of a de facto moratorium and nearing the goal of abolition until June 2018 when it executed 26-year-old Teerasak Longji. Furthermore, in March 2017, the Philippine Lower Chamber passed House Bill 4727 which seeks to re-impose the death penalty; President Rodrigo Duterte stated he wants the death penalty re-imposed for drug crimes. Myanmar, after decades of a moratorium, announced in June 2022 the planned execution of two political dissidents by the military junta (Diamond & Nasser, 2022).

4.3 Assessing the Mentally Ill in the Criminal Justice System

Malaysia has a commendable legal process for determining whether an accused is too mentally ill to be given a death sentence. It entails a two-prong approach of assessing whether a person was insane at the time of the offence or whether the individual's insanity renders him or her unfit to stand trial. Additionally, a series of legal tests of mental insanity requires not only medical evidence but also expects courts to decide whether an accused is too mentally ill to convict or execute. These processes support global standards of not sentencing mentally insane persons to death as it recognises that the mentally ill may not have control over their actions, lack competency to stand trial, and ultimately may not understand the exact nature of the punishment they will receive (AICHR, 2019a). Finally, Myanmar has reported a stay of execution for prisoners displaying 'extraordinary' symptoms prior to execution (AICHR, 2020).

4.4 Women Condemned to Death

The Malaysia country report for the AICHR thematic study considers the treatment and facilities of female death row inmates to be generally good. The Women's Prison is housed in a separate block, away from their male counterparts and has its own healthcare facility, specifically for women prisoners. Further, the cells housing female death row inmates are in accordance with ICRC recommended standards with adequate floor space, natural light, and ventilation. Thus, according to the Malaysia report, the State does appear to be appropriately applying international standards concerning the treatment of female death row inmates.

Interestingly, the Thailand report raises the suggestion that an important first step towards the process of abolition could be the exclusion of women all together from the death penalty. In Thailand, 426 prisoners (368 men and **58 women**) were on death row in 2016. By 3 March 2021, this number had progressively decreased to 257 (228 men and **29 women**) (FIDH & UCL 2021). Drug-related offences continue to represent a disproportionate share of the crimes for which the death sentence is imposed. According to Thailand's Department of Corrections, 58% of men and 100% of women under death sentences as of 3 March 2021 had been found guilty of drug-related offences (FIDH & UCL 2021). This despite the advice of the UN Human Rights Council that drug crimes should not be subject to capital punishment. In light of the caring responsibility of their gender and of their diminished responsibility arising from male inducement to crime, the Thailand report suggests that in a country still strongly supportive of the death penalty, abolition for women may yet find acceptance.

5 Conclusion: ASEAN/SEA and the Prospect for Abolition

At a conference in 2016, Professor William Schabas showed a slide depicting the world's progress in regards to abolition and the decline in retention of the death penalty over the last forty years (Fig. 8.1).

This image deserves to be a masthead for all discussions on the abolition movement. It is dominated to the left of centre by the crossover of the lines for full abolition and for retention, which took place in about 1990. The rise of abolition and the fall of retention, are seen to be steady and continuous, with the inevitability of such natural phenomena as the rise in global temperature or the decline of glacial masses. His interpretation of the curves is that abolition is inevitable although it may slow or accelerate in different periods; despite this, one day in the increasingly predictable future, the death penalty will inevitably end.

The curves give courage and help to prevent discouragement among those who work for its abolition. They are the result of a complex interaction of many forces and tendencies, and correct the apparent decline of progress in some areas and cultures by advances in others. They include the astonishing progress of abolition in the area

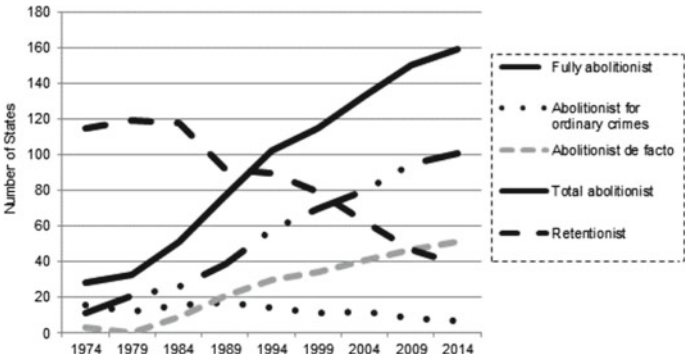

Fig. 8.1 Trend in status of capital punishment, 1974–2014 (UN Economic & Social Council, 2015)

of the 48 countries of the Council of Europe which have seen the area of abolition stretch from the Atlantic to the Pacific coastlines on the world's largest land mass. They teach us to be patient with the slow pace of change in Asia, the Middle East, and the US. They also show us the tide of history which cannot be opposed.

If one is to accept the trend presented by Professor Schabas, the course towards abolition of capital punishment in the ASEAN region is set, even if it may be slower than right to life advocates would prefer. The pace of the decrease he sees as inexorable is, after all, still impacted by factors and variables that are not so easy to define, predict, or counter. Indeed, in certain (recent) instances, backsliding of what has already been admirable progress has occurred. As previously mentioned, Thailand, for instance, which for nearly a decade prior had been an 'abolitionist de facto', saw an execution take place in June 2018 (OHCHR, 2018). Likewise, the Philippines saw a resurgence of the movement to re-impose capital punishment in 2017. It, in fact, came close, with the Lower House of the Philippine Congress voting 'yes' (217 votes to 54 'nays') for restoration.[2] This was not happenstance and the attempt was aborted due to other political factors like a lack of assured support in the Senate. But what does seem to be certain is that there will be greater efforts to re-impose it in the near future, especially if politicians close to President Rodrigo Duterte, who has made no secret of favouring re-imposition (Associated Press, 2016), wish to be seen to align with him politically. Myanmar military leaders have already reversed their practice recently.

As already presented in the introductory Chapter, the death penalty situation in the eight ASEAN countries seems to remain rather static. The record somehow reveals a very mixed reality, reflecting the absence of any shared policy on the death penalty among AMS other than the proviso, 'in accordance with law'.

The validity of exposure is provided by AMS inclusion into the UN and the obligations to which they became obliged by their accession to the human rights treaties. The extent of ASEAN commitments to these treaties is shown in their ratification

[2] The text of the bill is available at http://www.congress.gov.ph/legisdocs/?v=bills#HistoryModal.

of international human rights treaties, whereby the majority of AMS show significant attachment to the values represented therein. Furthermore, ASEAN documents proclaim and encourage the adherence of their Member States to the human rights values of these key instruments. In its opening words, the ASEAN Human Rights Declaration asserts:

> a [C]ommitment to the Universal Declaration of Human Rights, the Charter of the United Nations, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties.

The acceptance of the 'United Nations Charter and international law, including international humanitarian law' is repeated in the ASEAN Charter. Such acceptance should include the ongoing interpretations of international law regarding abolition of the death penalty which were also the subject of UNHCHR statements. Such adherence and acceptance by AMS, hopefully, will involve them in the worldwide progress of abolition posited above.

This book serves as a stepping stone towards more in-depth studies on the right to life in ASEAN. As stated in previous chapters, the right to life was recognised by various international and regional human rights instruments. Most, if not all, countries in ASEAN enshrine the right to life in their respective constitutions. Yet, laws allowing capital punishment are still applied throughout although reform and abolition as well as de facto non-execution are the current trends in ASEAN. The concepts behind maintaining the death penalty are both utilitarianism and retentionism, as well as modernisation. Although the positive global trend is foreseeable, some AMS seem to be expanding the crimes to which the death penalty shall be applied, especially drug offences which are often considered 'most serious crimes'.

As already mentioned, currently the law and policy of ASEAN countries on the issue of the death penalty are divided. Some countries have completely abolished it. Some have suspended its execution for a period of time. Meanwhile, others have retained the death penalty with restrictions. Thus, the reinforcement of the sharing of experience and promoting ASEAN's role in the process of regional policy formulation on this issue is fundamentally important, especially in the context of Member States looking to establish an ASEAN community.

From the studies and analysis of different chapters included in this book, some observations and questions can be raised:

- It does appear, from one perspective, that the experiences of abolition in Cambodia and the Philippines were very different. Earlier chapters in this book on the right to life also show many distinctions and differences across other ASEAN States. It is important therefore to tackle the issues here more closely and critically.
- What variables are at play in executive clemency matters? What influences mandatory sentencing? What factors have led to the moratorium? These are some of the questions that can be more intensively researched regionally and domestically. It may also be useful to look into alternative criminal law theories to counter entrenched retributive and utilitarian views. A look into how rehabilitative and restorative justice can be underscored as being in step with ASEAN's communal

views and cultural norms as well as the global trend towards abolition may be warranted.

- To fill the gap between giving importance to the right to life over the imposition of capital punishment, there may be a need to undertake a more extensive assessment of the effectiveness of the death penalty in deterring crime and a pragmatic comparison of the cost-effectiveness of rehabilitations vis-à-vis the imposition of capital punishment.
- A strong stand for true criminal law reforms and a steadfast implementation of the rule of law should accompany discussions of the right to life in the region.
- There are notable common aspects of approaches to the death penalty in ASEAN. These include the exclusion of some groups of offenders from the death penalty such as pregnant women, children, and minors below 16–18, the mentally ill, as well as mothers with infants. A de facto moratorium on executions exists in a number of AMS. Despite the increasing number of death sentences, some countries do not execute prisoners on death row. It also seems there are possibilities for appeal and pardon but procedures may vary from one country to another.

As noted in Chapter 3 the issue of the death penalty has always been contentious—those against it argue, for example, that the possibility of a wrongful conviction, the lack of empirical data to show its deterrent effect, and the permanence of the punishment, are grounds for abolishing the death penalty. Conversely, retentionists maintain that its retributive effect is necessary to give closure to the victim's family and for crime control, particularly heinous crimes.

While professing commitment to the Universal Declaration of Human Rights, the ASEAN Human Rights Declaration repeats, in some ways, the provision in the ICCPR in its presentation of the right to life: 'Every person has an inherent right to life which shall be protected by law. No person shall be deprived of life save in accordance with law.' A Muslim Thai lawyer once said that although Islam allowed the death penalty, this presupposed a just legal system. Since a number of countries in ASEAN do not have a just legal system, he favoured abolition (AICHR, 2019b). Of course, the necessarily direct simplicity of the Universal Declaration of Human Rights had to be expanded in other legal treaties and was open to interpretation by UN experts. But the principle of the right to life, not the right to law, holds.

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