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THE CLEMENCY PROCESS IN EAST AND SOUTHEAST ASIA

A REPORT UPDATE ON THE PROCESSES IN THE REGION



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CLEMENCY PROCEDURES IN EAST AND SOUTHEAST ASIA

Clemency Procedures in East and Southeast Asia

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C-5-22 Centum @ Oasis Corporate Park
No: 2, Jalan PJU 1a/2, Oasis Damansara
47301 Petaling Jaya, Selangor, Malaysia

Tel: +0378318870

Email: adpan@adpan.org

Website: www.adpan.org

Facebook: facebook.com/ADPANetwork

Twitter: twitter.com/ADPANetwork

Instagram: ADPANetwork

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Clemency Procedures in East and Southeast Asia

Benjamin Chia, Imogen Fox, Divna Starcevic and Matthew Song of the Eleos Anti-Death Penalty Clinic, Monash University, Australia.

1. Introduction

There is a growing movement towards the abolition of capital punishment with the number of abolitionist countries rising from 16 countries in 1977 to the current number of 108 with an additional 28 being abolitionist in practice.¹ Whilst there is a global movement for the abolition of the death penalty, it remains entrenched in the legal systems of a number of countries, particularly those in the Southeast and East Asian regions. After having exhausted all judicial appeals, the final reprieve for those on death row is clemency. Clemency is the abrogation of a prisoner's sentence. A grant of clemency may lead to the commutation of the sentence or, in some cases, outright release. The grant of clemency originates from a variety of sources that depend on the country. For example, Malaysia² and Thailand³ are constitutional monarchies and the power to grant clemency is vested in their respective royal families. In contrast, clemency in the democratic republic nations of Singapore⁴ and Indonesia⁵ stems from their respective Presidents.

Each country has a unique system and set of considerations in granting clemency with discretion ultimately vesting in the decision-maker. Each country has a unique system and set of considerations in granting clemency for death row and non-death row prisoners, with discretion ultimately vesting in the decision-maker. With that said, there are three common factors that determine the success rate of clemency appeals for death row prisoners.⁶ Firstly, the amount of lenient discretion exercisable at earlier stages of the legal process has an inverse correlation with the rate of clemency. In Malaysia, the rule of double presumptions of possession and knowledge of illicit substances, and subsequent mandatory death sentence, restricts judicial discretion and is procedure to place more importance on the role of clemency as a reprieve.⁷ Secondly, political influences can factor into a decision to grant clemency. For example, a country may be influenced by international pressure, and for this reason, there is a higher rate of clemency granted for foreign nationals on death row than their own citizens.⁸ Thirdly, the length of time between incarceration and execution has been seen to correlate with

1 Amnesty International, *Death Sentences and Executions 2020* (Amnesty International Report, 2021) 57 ('Amnesty International Report 2021').

2 Constitution of the Kingdom of Thailand s 179 ('Thai Constitution').

3 Federal Constitution (Malaysia) art 42(1) ('Malaysian Constitution').

4 Constitution of the Republic of Singapore art 22P ('Singaporean Constitution').

5 1945 State Constitution of the Republic of Indonesia art 14 ('Indonesian Constitution').

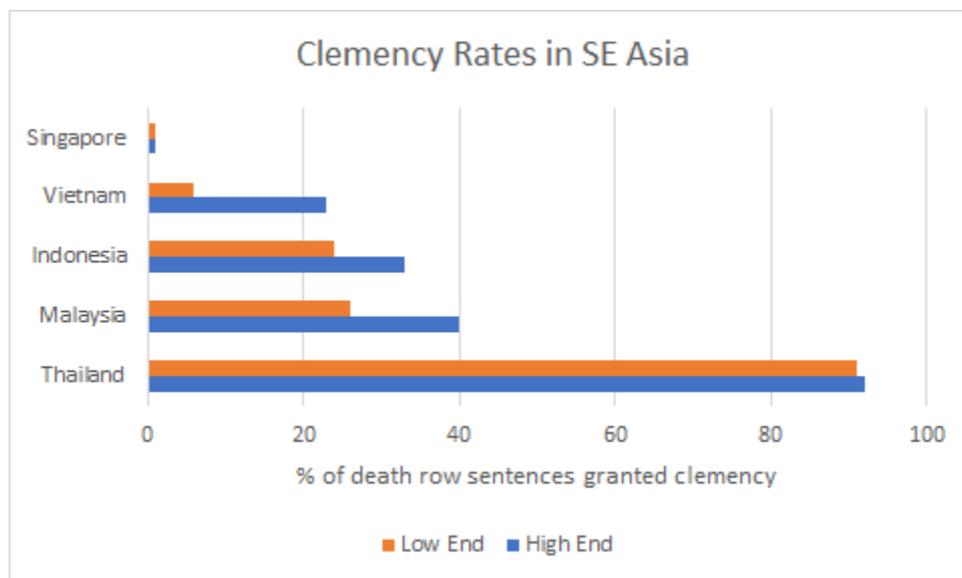
6 Daniel Pascoe, 'Clemency in Southeast Asian Death Penalty Cases' (2014) 4 *Centre for Indonesian Law, Islam and Society* 6, 6 ('Clemency in Southeast Asian Death Penalty Cases').

7 Daniel Pascoe, *Last Chance for Life* (Oxford University Press, 2019) 141 ('Last Chance for Life').

8 *Ibid* 49.

the rate of clemency. Countries, such as Vietnam, which are quicker to reach decisions on clemency applications and to execute their death row inmates, may see a lower rate of successful grants of clemency.⁹ This is because rehabilitative and retributive factors are less available as considerations due to the short time in incarceration. Rehabilitative factors refer to the extended time in prison leading to the decision-maker finding that the prisoner has been reformed during that time. This is usually coupled with the finding of good behaviour. Retributive refers to the fact that the prisoner has been deemed to have been adequately punished due to the length of their prison sentence.

In this report, we summarise the current international position on clemency and the death penalty and compare it to snapshots of the clemency processes in the following Southeast and East Asian countries: Thailand, Malaysia, Singapore, Indonesia, Vietnam, Japan, Taiwan, and China. All references to clemency in this paper are in the context of reprieve from the death penalty.



⁹ Daniel Pascoe, 'Explaining Death Penalty Clemency in the Socialist Republic of Vietnam from 1986 to 2015' (2016) 10(2) Vienna Journal on International Constitutional Law 165, 184-5 ('Socialist Republic of Vietnam').

2. International Legal Framework

International law protects and upholds the right of a condemned person to seek clemency, with article 6(4) of the *International Covenant on Civil and Political Rights (ICCPR)* stating that ‘anyone sentenced to death shall have the right to seek pardon or commutation of the sentence’ and that clemency may be granted in all cases.¹⁰ The *ICCPR* has been signed and ratified by Thailand, Indonesia, Vietnam and Japan.¹¹ China has signed but not ratified the *ICCPR*, whilst Singapore and Malaysia have done neither.¹² Taiwan has incorporated it into their law, but is not considered a signatory given that it is not recognised as a state by the UN.¹³

Safeguards adopted by the UN also protect death row inmates from being executed whilst their clemency application is pending,¹⁴ with this protection being mirrored in Article 4(6) of the *American Convention on Human Rights*.¹⁵ Furthermore, in *Desmond McKenzie et al v Jamaica* and *Neville Lewis v A-G of Jamaica*, the Inter-American Commission on Human Rights and Judicial Committee of the Privy Council respectively require the need for clemency processes to be “fair and proper”,¹⁶ and follow “minimum procedural guarantees”,¹⁷ such as the guarantee that the application will be heard within a reasonable period of time, and the right for prisoners to make submissions to the decision-maker, to ensure prisoners are able to fully enjoy their rights under the *American Convention on Human Rights*.¹⁸ Given the similarity between the two conventions, it is likely that such an interpretation would also be applied to the *ICCPR*.

Therefore, as required by Schabas, a country will generally fall out of step with international obligations if they don’t allow prisoners to seek clemency, if they execute prisoners before the application is heard, and if the process is insufficiently fair and transparent.¹⁹

10 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6(4) (‘ICCPR’).

11 ‘International Covenant on Civil and Political Rights’, United Nations Treaty Collection (Web Page, 2021) <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND>.

12 Ibid.

13 Yu-Jie Chen, ‘Isolated but not Oblivious: Taiwan’s Acceptance of the Two Major Human Rights Covenants’ in Jerome Cohen, William Alford, Chang-Fa Lo (eds), *Taiwan and International Human Rights: A Story of Transformation* (Springer, 2019) 207, 207.

14 Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, approved by Economic and Social Council resolution 1984/50, 25 May 1984, safeguard 8.

15 Organization of American States (OAS), *American Convention on Human Rights* (entered into force 18 July 1978) art 4(6).

16 *Neville Lewis v A-G of Jamaica* [2000] UKPC 35, [62] (Lord Slynn of Hadley).

17 *Desmond McKenzie et al v Jamaica* (Judgment) (Inter-American Commission on Human Rights, Cases 12.023, 12.044, 12.107, 12.126, and 12.146, 13 April 2000) [228].

18 Ibid.

19 William A Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge University Press, 3rd ed, 2002) 168-9.

3. Methodology and Countries

In our investigation into clemency procedures across East and Southeast Asia, we first had to determine which countries to analyse. We decided to focus on China, Indonesia, Japan, Malaysia, Singapore, Taiwan, Thailand, and Vietnam, as these are the key retentionist countries in the region in terms of population size and geopolitical influence. We felt that investigating these states would also illustrate a holistic view of regional clemency practices by highlighting the nuances of each country's process.

In conducting our research, we consulted key legislation such as the Constitutions, Criminal Codes, and Statutes of each country, in addition to scholarly articles and books. A special mention must be given to Daniel Pascoe who is the preeminent scholar in the field of clemency. Without his tremendous research, this report would not be possible.

3.1. China

In our research, we discovered that China, despite having a legal framework which allows for clemency to be granted, has never exercised this power since the CCP took power in 1949.²⁰ Instead, they appear to rely on the "suspended death sentence" to achieve a similar result.²¹ If a court grants the suspended death sentence, it will suspend a prisoner's death sentence for two years where the prisoner's behaviour is monitored. Upon the completion of the two-year sentence, their death sentence will be automatically commuted to life imprisonment if their behaviour in prison was satisfactory. Further information on the deliberations behind this sentence, or clemency in general, is hard to find given the CCP's lack of transparency.

3.2. Indonesia

Indonesia appears to grant clemency at 'medium' rates for death penalty cases. From 1975 to 2013, Indonesia granted clemency to 24-33% of death row prisoners.²² However, it should be noted that Indonesia's President (Joko Widodo) has promised to refuse to grant clemency to any prisoners convicted of drug offences, as part of the nation's war on drugs.²³ Clemency is believed to have been granted in the past for reasons such as public pressure and strong public opinion in support of a clemency application, rewarding prisoners for good behaviour, and to encourage clemency grants for Indonesian nationals on death row in foreign countries.²⁴ Although the power to grant clemency ultimately rests with the

20 Daniel Pascoe and Andrew Novak, 'Deadly Justice Without Mercy in East Asia?' (2020) *International Journal Comparative and Applied Criminal Justice* 1, 1 ('Deadly Justice')

21 Ziyu Li, Xiaotong Jiao and Qin Qin, 'Public Opinion on the Death Penalty in Mainland China and Taiwan' (2021) 57(3) *China Report* 330.

22 Pascoe, *Last Chance for Life* (n 8) 159.

23 Daniel Pascoe, 'Clemency Sign of Presidential Power', *The Jakarta Post* (New Article, 30 January 2015)

<<https://www.thejakartapost.com/news/2015/01/30/clemency-sign-presidential-power.html>> ('Clemency Sign of Presidential Power').

24 Daniel Pascoe, 'Legal Dilemmas in Releasing Indonesia's Political Prisoners' (2017) 3 *Indonesia Law Review* 313, 321-2 ('Indonesia's Political Prisoners').

President, the President will routinely seek advice from foreign affairs ministers, minister of law and human rights and the cabinet when considering applications.²⁵

3.3. Japan

In theory, the power to grant clemency vests in the Cabinet upon recommendation from the National Offenders Rehabilitation Commission.²⁶ With that said, clemency has only been granted 24 times in Japan since WWII with the most recent instance being in 1975.²⁷ It is suggested that the lack of clemency grants for death row cases may be due to the Japanese Court system and how it allows for re-trials and appeals, with it being believed that this is sufficient to provide justice for prisoners. For a prisoner on death row, applying for a re-trial appears to be a more useful way of obtaining a commutation than clemency.²⁸

3.4. Malaysia

Malaysia has a moderate clemency rate, with approximately 25-40% of applications being approved.²⁹ A substantial proportion of their death row prisoners have been convicted of drug trafficking offences.³⁰ However, in contrast to its neighbour Indonesia, drug offenders are actually more likely to be granted clemency than the average death row prisoner.³¹ Part of the reason for this modest clemency rate may be because Malaysia has a myriad of mandatory sentencing regimes and double presumption laws, which afford little discretion to the courts upon sentencing.³² Given these laws, the State may rely more heavily on clemency to spare prisoners from the death penalty. Due to the complexity of the Malaysian royal family and the lack of a streamlined approach to consider applications, the clemency process is also extremely lengthy, spanning more than a decade on average.³³

3.5. Singapore

Singapore is extremely strict in its approach to clemency and successful applications for clemency are incredibly rare.³⁴ Unlike neighbouring countries like Indonesia and Malaysia who grant clemency at a moderate rate, Singapore has exercised the power only six times since 1965.³⁵ Singapore also shows no leniency to foreign nationals. It is apparent that Singapore views the use of executive

25 Tim Lindsey and Dave McRae, *Strangers Next Door? Indonesia and Australia in the Asian Century* (Hart Publishing, 2018) 243.

26 Pardon Act 1947 (Japan) art 12 ('Japanese Pardon Act').

27 Pascoe and Novak (n 26) 9.

28 Ibid.

29 Pascoe, 'Clemency in Southeast Asian Death Penalty Cases' (n 6) 5.

30 Sidney Harring, 'Death, Drugs and Development: Malaysia's Mandatory Death Penalty for Traffickers and the International War on Drugs' (1991) 29(365) *Columbia Journal of Transnational Law* 405.

31 Pascoe, 'Clemency in Southeast Asian Death Penalty Cases' (n 6) 19.

32 Dangerous Drugs Act 1952 (Malaysia) s 37A ('Malaysian Dangerous Drugs Act').

33 Pascoe, *Last Chance for Life* (n 8) 154.

34 Ibid 95.

35 Ibid.

clemency as undermining the rule of law and potentially undermining their harsh stance on crime in general.

3.6. Taiwan

Like its neighbours Japan and China, Taiwan has not granted clemency in the past several decades despite having a legal framework for it.³⁶ Taiwan has also executed prisoners before their clemency application has been officially rejected.³⁷ The application process is relatively opaque, and decisions are not available for judicial review.³⁸

3.7. Thailand

Unlike the other countries studied in this report, Thailand grants clemency to the vast majority of death row prisoners.³⁹ Whilst this is often done through individual pardons, death row prisoners frequently have their sentences commuted through a collective royal pardon.⁴⁰ Collective pardons are a display of mercy and grace by the King and often align with important holidays in the national calendar.⁴¹ On the rare occasion that prisoners are denied clemency, it is often for committing “shocking” crimes, particularly serious drug trafficking offences.⁴²

3.8. Vietnam

Like China, Vietnam maintains a high level of secrecy around clemency and executions, with there even being criminal penalties for disclosing such information.⁴³ However, despite the lack of resources, Vietnam appears to grant clemency in a moderate number of cases.⁴⁴ Given the speed at which Vietnam executes death row prisoners, the clemency process is marked by its rapidness, meaning that clemency is practically never granted for reasons of good prison behaviour, rehabilitation, or remorse.⁴⁵ Instead, Vietnam largely grants clemency for foreign nationals whose country of origin is abolitionist and with whom Vietnam has a good relationship, for those who have VCP connections, and for those who have helped in police investigations.⁴⁶

36 Taiwan (Republic of China)’s Constitution of 1947 art 40 (‘Taiwanese Constitution’)

37 The Death Penalty Project, *The Death Penalty in Taiwan* (Report, 2014) 22 (‘The Death Penalty in Taiwan’).

38 *Ibid* 23.

39 Pascoe, *Last Chance for Life* (n 8) 74.

40 *Ibid* 72-3.

41 *Ibid*.

42 *Ibid* 74; Yingyos Leechaianan and Dennis R Longmire, ‘The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis’ 2013 (2) *Laws* 115, 138.

43 Pascoe, ‘Socialist Republic of Vietnam from 1986 to 2015’ (n 10) 171.

44 *Ibid* 175.

45 *Ibid* 185.

46 *Ibid* 175-8.

4. Conclusion

Countries in East and Southeast Asia follow widely different practices when it comes to clemency. Whilst countries such as Singapore, Taiwan, China, and Japan rarely, if ever, grant clemency, Thailand commutes death sentences to life imprisonment in every case. Furthermore, Malaysia, Indonesia, and Vietnam grant commutations for a significant portion of death row prisoners, particularly when they are women, foreign nationals, or when they have shown significant rehabilitation or remorse. All countries studied are particularly unlikely to grant clemency to drug offenders.

The time taken for a clemency application to be considered ranges from less than a year in Vietnam, to upwards of 15 to 20 years in Malaysia or Thailand. Some countries, for example Malaysia,⁴⁷ may also execute prisoners even when their application is pending, in discordance with international law. Additionally, whilst Singapore and Thailand are relatively transparent with their clemency procedures and statistics, China, and Vietnam have rendered these procedures a state secret, resulting in little reliable data being available. In most jurisdictions (Taiwan, Indonesia, Malaysia, Japan) there appear to be minimal legal protections for prisoners throughout the clemency process. There also appears to be few avenues for judicial review of decisions, further suggesting that these countries may be failing to comply with international legal obligations.

To sum up, it appears all countries in the study would benefit from fairer and more accessible clemency processes. Accessibility would be facilitated by countries making their clemency decisions more transparent, ensuring prisoners know what evidence they need to submit, not limiting the number of times an individual can apply, making the process timelier, and publishing reasons for grants and refusals. It is our hope that this snapshot of clemency and the death penalty in these eight East and Southeast Asian countries can help advocates gain a better understanding of clemency procedures in this region and possible areas of reform.

For better or for worse, the lack of distinction between application online and offline for laws that criminalizes freedom of expression means that all of the existing laws that penalize freedom of expression or restrict freedom of expression can cross apply into the online sphere. As noted in some of the cases above, a comment made online could potentially be double the trouble as an individual can be charged for a traditionally offline crime under laws such as the Sedition Act 1948 and at the same time, charged for an offence under the Communications and Multimedia Act 1998.

With the rise of social media applications and the growing popularity of instant messaging applications on a global level with almost nationwide adoption, state authorities would naturally feel more inclined to extend their existing powers to cover these platforms. On one hand, the government would reiterate the need for 'holistic' solution and prevention with regards to issues of security, online fraud and 'fake news', and would utilize this as a leverage for further control and punitive measures; on the

⁴⁷ A Ruban , 'Brothers executed despite pending clemency appeal' (*Malay Mail*, 15 March 2017) <<https://www.malaymail.com/news/malaysia/2017/03/15/brothers-executed-despite-pending-clemency-appeal/1335169>> accessed 16 December 2021.

other hand, the imposition of additional regulations with expanded regulatory powers afforded to politically aligned entity, legitimate interest with regards to freedom of expression would likely be compromised to achieve the former.

With the rising prevalence of hate crimes and death threats against activists and other actors in the civil and political rights discourse, there is a growing need for some laws that can restrict and criminalize such behaviours online and offline. Realistically at this juncture, suggestions or implementation of any further regulations would likely be met with scepticism with regards to the sincerity of the laws and their implementation. This unfortunate dilemma brings the question, 'how do we address the need for legitimate protection when the institution implementing it is not necessarily trustworthy?'.

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<https://fr.vietnamplus.vn/completer-les-procedures-pour-examen-de-la-commutation-de-la-peine-de-mort/164098.vnp>

Clemency Framework by Country

1. CHINA

EXISTING LEGAL FRAMEWORK	
Government Structure	China is governed by the authoritarian Chinese Communist Party (CCP). The CCP oversees all branches of government including the Legislative, via the National People's Congress, the Executive, via the State Council, and the Judiciary, via the Supreme People's Court. The General Secretary of the CCP also acts as the President of the country.
Crimes punishable by Death penalty	China has 42 different crimes that warrant the death penalty. They can be grouped into the following offences: ⁴⁸ <ul style="list-style-type: none">● Endangerment of National Security● Endangerment of Public Security● Economic Crimes● Crimes Against People● Crimes Against Property● Crimes Against Public Order● Crimes Against National Defence● Corruption● Breach of Soldier Duty
Decision Maker	The State President has the power to grant clemency on instruction from the Standing Committee of the National People's Congress.

⁴⁸ Guodong Du, "How Many Crimes Are Punishable by Death in China?", China Justice Observer (Web Page, 23 November 2020) <<https://www.chinajusticeobserver.com/a/how-many-crimes-are-punishable-by-death-in-china>>.

Clemency Procedure	There has not been a recorded grant of clemency since the CCP came into power in 1949 for death row inmates. Coupled with the lack of transparency surrounding their government processes, there is no clear indication as to the clemency process. It is accepted that death row prisoners have no avenue for political review of their death sentences after exhausting their judicial reviews.
Possible Outcomes	In theory, commutation of sentence or outright release is possible. However, there is no record of this being exercised for prisoners on death row.
KEY INSIGHTS	
Clemency Application Processing Time	Nil
Frequency of Successful Grants	Nil
Reasons for Successful Grants	Nil
OTHER INFORMATION	
Other Notes and Considerations	<p><u>Suspended death sentence</u></p> <p>China has seen the increased popularity of the “suspended death sentence” which has replaced the automatic death sentence in some cases. Prisoners are given a two-year probation period during which they cannot be executed.⁴⁹ After two years, if their behaviour is satisfactory, their sentence is automatically commuted to life imprisonment or 25 years. This process achieves a similar outcome to clemency. The court accounts for any possible mitigating factors in</p>

⁴⁹ Li, Jiao and Qin (n 27) 330.

deciding to grant a “suspended death sentence” and the final decision to commute the sentence of the prisoner is informed by rehabilitative and retributive factors.

China has also reduced the number of “most-serious crimes” for which the immediate death penalty is awarded.⁵⁰ Furthermore, in 2007, the Supreme People’s Court has set out specific kinds of death penalty applications that would not be accepted, namely cases that were unclear and lacked sufficient evidence would be returned to the lower courts for resentencing.⁵¹ Hence, while there is a lack of development of clemency, China is mitigating the issues of mistrial and the misappropriation of justice through other measures earlier in the judicial process.

⁵⁰ Susan Trevaskes, ‘The Death Penalty: Kill Fewer, Kill Cautiously’ (2008) 48(3) Asian Survey 393, 406.

⁵¹ Ibid 407.

2. INDONESIA

EXISTING LEGAL FRAMEWORK	
Government Structure	Indonesia operates as a democratic republic with an elected president who serves as head of state and government. ⁵²
Crimes punishable by Death penalty	<p>The government of Indonesia views drug trafficking and drug-related offences as a threat to the lives and cultural values of its people.⁵³ The government considers drug-related offending a problem of crime and morality, taking a harsh law enforcement approach.⁵⁴ Drug-related offences carry significant criminal penalties including life in prison and the death penalty.⁵⁵ Between 2015 and 2016 under President Joko Widodo's leadership, 18 prisoners were executed for drug-related offences.⁵⁶ Currently, prisoners convicted of trafficking drugs account for around 60% of death row prisoners.⁵⁷</p> <p>Other crimes carrying the death penalty include.</p> <ul style="list-style-type: none">● Murder● Robbery● Terrorism

⁵² Tim Lindsey and Helen Pausacker, *Crime and Punishment in Indonesia* (Taylor & Francis Group, 2020) 1.

⁵³ Tim Lindsey and Pip Nicholson, *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam* (Hart Publishing, 2016) 42.

⁵⁴ *Ibid* 47.

⁵⁵ *Ibid* 47.

⁵⁶ Amnesty International, *Indonesia: Time to Establish a Moratorium on Executions and Review on Executions and Review all Death Penalty Cases as First Steps Towards Abolition* (Amnesty International Report, 10 October 2016).

⁵⁷ Heru Andriyanto, 'More Indonesians Oppose Death Penalty: Research', *Jakarta Globe* (News Article, 30 June 2021) <<https://jakartaglobe.id/news/more-indonesians-oppose-death-penalty-research/>>.

<p>Decision Maker</p>	<p>The law governing clemency in Indonesia is found in both the Indonesian Constitution and in statute.⁵⁸ Specifically, Article 14(1) of the Constitution is considered the ‘clemency power’.⁵⁹ The clemency power states that the ‘president gives clemency and rehabilitation by having regard to the determination of the Supreme Court.’⁶⁰</p> <p>The statutory rules that govern the clemency process are found in Law No 22 of 2002 on Clemency (‘clemency law’).⁶¹ Clemency Law provides that the President is entitled to grant or reject a clemency application after obtaining a determination from the Supreme Court.⁶²</p> <p>In 2010, the Clemency Law was amended by Law No 5, which provides a negative example of when the president should be hesitant to grant clemency.⁶³ The amended Clemency Law states that ‘in issuing a decision in relation to a clemency application, the president needs to wisely and judiciously consider...cases where the crime has been commissioned repeatedly, is a crime against morality and crimes that are sadistic or premeditated in nature’.⁶⁴</p>
<p>Clemency Procedure</p>	<p>Once a final and binding decision is reached an application for clemency can be made within one year of the decision.⁶⁵ Clemency applications can be submitted by a prisoner, their legal representative or family members.⁶⁶ The Minister for Law and Human Rights can help facilitate the clemency application and submit requests to the President.⁶⁷ Clemency applications must be forwarded to the court that heard the case in the first instance. The court will then forward the</p>

⁵⁸ Bradley Holland, ‘Clemency and Constitutional Duties in Indonesia: A Promise Made is a Promise Kept?’ (2018) 19(1) Australian Journal of Asian Law 23, 25.

⁵⁹ Ibid.

⁶⁰ Indonesian Constitution (n 5) art 14(1).

⁶¹ Law No 22 of 2002 on Clemency (Indonesia); Law No 5 of 2010 amending Law No 22 of 2002 on Clemency (Indonesia).

⁶² Law No 22 of 2002 on Clemency (Indonesia); Holland (n 63) 25.

⁶³ Pascoe, ‘Indonesia’s Political Prisoners’ (n 30) 323.

⁶⁴ Ibid 232; Indonesian Law 5/2010.

⁶⁵ Lindsey and Nicholson (n 58) 104-105.

⁶⁶ Ibid.

⁶⁷ Ibid.

	<p>application documents to the Supreme Court for consideration.⁶⁸ The Supreme Court must then provide a written opinion to the President within 30 days of receiving the application.⁶⁹</p> <p>The Indonesian Constitution and Clemency Law (Law No 22 of 2002 and Law 5 of 2010) define clemency as a 'form of official forgiveness for punishment imposed by a court of law'.⁷⁰ This means that the laws governing clemency implicitly require a prisoner to acknowledge his or her guilt for the convicted offence.⁷¹ A prisoner who pleads not guilty and continues to maintain their innocence may be hesitant to apply for clemency prior to exhausting all appeal options in fear of their application being taken as an admission of guilt.</p> <p>Clemency Law requires that a decision regarding clemency be made after thoroughly considering the clemency application.⁷² In theory, the President needs to 'wisely and judiciously' consider the matters that are connected to the crime that the prisoner committed.⁷³ Any decision made by the president be made 'appropriately'.⁷⁴ Depending on the case under consideration, the president can seek advice from the Vice President, ministers for law and human rights, attorney general, secretary of state, chief of state, cabinet and the head of the national police force.⁷⁵ Whether seeking advice from other parties or not, the decision must nonetheless be in conformity with the opinion of the Supreme Court.⁷⁶</p>
Possible Outcomes	The President has the power to grant clemency by reducing the sentence or nullifying the sentence. ⁷⁷

68 Ibid.

69 Ibid.

70 Pascoe, 'Indonesia's Political Prisoners' (n 30) 325.

71 Ibid.

72 Ibid.

73 Ibid.

74 Holland (n 63) 25.

75 Lindsey and McRae (n 31) 243.

76 Andrew Novak, *Comparative Executive Clemency: The Constitutional Pardon Power and the Perogative of Mercy in Global Perspective* (Taylor & Francis Group, 2015) 7.

77 Law No 22 of 2002 on Clemency (Indonesia) art 4(2).

KEY INSIGHTS

Clemency Application Processing Time

The President has 30 days to decide a clemency application under Clemency Law.⁷⁸ Despite the short time frame, applications routinely take much longer.⁷⁹

Frequency of Successful Grants

Between 2015-2016, President Widodo rejected 23 applications for clemency in death penalty cases.⁸⁰ In 2015, clemency was granted to three prisoners convicted of murder.⁸¹ In this same year, to foster peace in Papua and West Papua Provinces of Indonesia, the president also granted clemency to five political prisoners convicted of military related offences (with the remainder of their sentences waived).⁸² This was believed to be a gesture of goodwill in order to restore tensions between the provinces.⁸³

Reasons for Successful Grants

Factors that are believed to contribute to successful clemency applications include:⁸⁴

- To maintain relationships with foreign nations
- To encourage clemency grants for Indonesians on death row in foreign countries
- To account for mitigating factors such as disability, old age, youth, or illness
- To acknowledge good behaviour in prison and express remorse
- The prisoner's motives for committing the crime
- Public opinion and strong support for the prisoner
- The prisoner's prior good behaviour and standing in society
- Provocation in murder cases

⁷⁸ Holland (n 63) 25.

⁷⁹ Ibid.

⁸⁰ Pascoe, 'Indonesia's Political Prisoners' (n 30) 325.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid 321-322.

- Underlying doubts surrounding the prisoner's guilt

Successful applications can be a result of one of the above factors, a combination of the above factors or none of the above factors. The reasons motivating a president to grant clemency are not always obvious. Whilst the president can release an official reasoning for granting clemency, they do not have to do so.⁸⁵ Often, only speculation can be made behind the reason for granting clemency. Advocates and commentators tend to look to the circumstances surrounding previous grants of clemency to determine what factors may apply in a specific case.⁸⁶

OTHER INFORMATION

Other Notes and Considerations

Right to life protected by the Constitution

Article 28A of the Constitution states that 'every person shall have the right to live and to defend his/her life and living'.⁸⁷ Additionally, the Constitution states that this 'right', cannot be derogated under any circumstances.⁸⁸ Despite the right to life being protected by the Constitution, numerous crimes continue to carry the death penalty and prisoners continue to be executed in Indonesia.

Indonesia's position on drug offences and clemency

President Joko Widodo stated a blanket denial on all clemency applications for drug offences – the underlying reason being the belief that the death penalty has a deterrent effect on crime, and if clemency is granted then it reduces this effect.⁸⁹ Despite this strong position, there is no evidence that a 'blanket denial' of clemency petitions will reduce the rate of drug offences in Indonesia.⁹⁰ This blanket ban resulted in the failed clemency applications of two Australian men,

⁸⁵ Holland (n 63) 26.

⁸⁶ Pascoe, 'Indonesia's Political Prisoners' (n 30) 321.

⁸⁷ Indonesian Constitution (n 5) art 28A.

⁸⁸ Ibid.

⁸⁹ Pascoe, 'Clemency Sign of Presidential Power' (n 29); Daniel Pascoe, 'Jokowi's Dilemma: Amnesty or Clemency for Political Prisoners?', Indonesia at Melbourne (Article, 20 July 2015) <<https://indonesiaatmelbourne.unimelb.edu.au/jokowis-dilemma-amnesty-or-clemency-for-political-prisoners/>>.

⁹⁰ Pascoe, 'Clemency Sign of Presidential Power' (n 29).

Chan and Sukumaran who provided strong evidence and testimony 'deserving of a presidential grant'.⁹¹ Both Chan and Sukumaran provided evidence to the court regarding their involvement in prison programs, rehabilitation and help provided to other prisoners as well as testimony from the Prison Commander attesting to their reform.⁹²

Public opinion on the death penalty

A 2021 study by the Death Penalty Project indicates that public approval of the death penalty is declining. Support for the death penalty declined when interviewees were informed about how the death penalty is carried out in Indonesia – being unfairly and disproportionately.⁹³ Support for the death penalty fell to 25% when interviewees were given an alternative of life imprisonment over the death penalty.⁹⁴

⁹¹ Holland (n 63) 24.

⁹² Ibid.

⁹³ Carolyn Hoyle and Parvais Jabbar, 'Indonesians' Support for The Death Penalty Declines with More Rigorous Survey Methods', The Conversation (Article, 8 October 2021) <<https://theconversation.com/indonesians-support-for-the-death-penalty-declines-with-more-rigorous-survey-methods-167123>>.

⁹⁴ The Death Penalty Project, Investigating Attitudes to the Death Penalty in Indonesia, Part Two Public Opinion: No Barrier to Abolition (Report, 2021).

3. JAPAN

EXISTING LEGAL FRAMEWORK	
Government Structure	<p>Japan is a unitary state comprising of 47 divisions with the Emperor acting as Head of State.</p> <p>The Emperor's role is ceremonial in nature and he acts on the advice of the Cabinet. The Cabinet is composed of the Prime Minister as head of government, and other Ministers of State.</p>
Crimes punishable by Death penalty	<p>Offences which carry the death penalty in Japan include:</p> <ul style="list-style-type: none">● Instigation of Foreign Aggression (81)● Assistance to the enemy (82)● Arson of inhabited buildings (108)● Overturning of trains causing death (126)● Pollution of water causing death (146)● Homicide (199)● Robbery causing death (240)● Rape causing death <p>The death penalty is mandatory for the crime of Instigation of Foreign Aggression.⁹⁵ Other crimes which carried the death penalty in the Penal Code had the alternative of life imprisonment.</p>

⁹⁵ The Death Penalty Project, The Death Penalty in Japan (Report, 2013) 7-8 ('Death Penalty in Japan'); Penal Code 1907 (Japan) art 83 ('Japanese Penal Code').

<p>Decision Maker</p>	<p>The Cabinet shall ‘<i>decide on general amnesty, commutation of punishment, reprieve and restoration of rights.</i>’⁹⁶</p> <p>‘<i>Special pardons, commutations with respect to a specific person shall be granted to persons subject to a recommendation from the National Offenders Rehabilitation Commission.</i>’⁹⁷</p> <p>The National Offenders Rehabilitation Commission has the power to recommend executive leniency, and have made numerous recommendations in cases involving lesser punishments including the elimination of fines and the remission of remaining sentences for existing paroles.⁹⁸</p>
<p>Clemency Procedure</p>	<p>Prisoners retain the right to make an application for clemency after all avenues of appeal have been exhausted.⁹⁹</p> <p>Prisoners may make an informal written application for clemency to the prison management. Prison wardens, probation officers and prosecutors may make formal applications to the National Offenders Rehabilitation Commission. Approved applications and recommendations are forwarded to the Minister of Justice for Cabinet Consideration.¹⁰⁰</p>
<p>Possible Outcomes</p>	<ul style="list-style-type: none"> ● General pardons (groups of individuals) ● Special Pardons (named individual) ● Commutations ● Reprieves

⁹⁶ The Constitution of Japan 1947 art 73.

⁹⁷ Japanese Pardon Act (n 32) art 12.

⁹⁸ Pascoe and Novak (n 26) 16.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

	<ul style="list-style-type: none"> ● Restoration of Rights¹⁰¹
KEY INSIGHTS	
Clemency Application Processing Time	There is no clear indication of the time it takes for a clemency application to be determined. Kenjiro Ishii, the last person sentenced to death to be granted clemency, spent 28 years on death row before having his sentence commuted to life imprisonment. ¹⁰²
Frequency of Successful Grants	<p>Clemency has been granted 24 times in death penalty cases since World War II.</p> <p>There have been no grants of amnesty, pardon, or commutations in a death penalty case since June 1975.¹⁰³ This suggests that <i>'executive mercy is dead in Japanese capital punishment.'</i>¹⁰⁴</p>
Reasons for Successful Grants	<p>The <i>Offenders Rehabilitation Act</i> provides the following:¹⁰⁵</p> <p><i>'if the commission makes a recommendation under the preceding Article, it must carry out necessary research in advance in respect of the character or behaviour of the person subject of the recommendation, the likelihood of the person committing illegal acts (in the future), social perception of the person and other matters.'</i></p> <p>Other possible considerations include:¹⁰⁶</p> <ul style="list-style-type: none"> ● Illness ● Old Age

¹⁰¹ Ibid 8.

¹⁰² Masami Ito, 'Back From the Brink After Living 28 Years on Death Row', Japan Times (News Article, 25 April 2004) <<https://www.japantimes.co.jp/life/2004/04/25/to-be-sorted/back-from-the-brink-after-living-28-years-on-death-row/>>.

¹⁰³ Pascoe and Novak (n 26) 9.

¹⁰⁴ The Death Penalty Project, Death Penalty in Japan (n 62) 10.

¹⁰⁵ Offenders Rehabilitation Act 2007 (Japan) art 90(1).

¹⁰⁶ Pascoe and Novak (n 26) 9-10.

- Repentance
- Forgiveness
- Ascension or death of the Emperor

OTHER INFORMATION

Other Notes and Considerations

- General Pardons are still being granted for petty crimes in Japan. Upon Emperor Naruhito's ascension to the throne in May 2019, approximately 550,000 pardons were granted for crimes including theft and traffic offences.¹⁰⁷
- Between 2005 and 2007, the average time spent on death row before execution was 8.5 years. Between 2008 and 2010, the average time had decreased to four years.¹⁰⁸
- The best post-appellate option for death row prisoners is to apply for retrial. In 1975, the Supreme Court held that retrials may be granted where there is newly discovered evidence that suggests reasonable doubt. Applications for retrial may be made an unlimited number of times.¹⁰⁹ More than half of death row prisoners file requests for retrial.¹¹⁰ Requests for retrial may assist in delaying execution, but pending applications do not prevent actual execution.¹¹¹
- There is no mandatory appeal process for death sentences in Japan. Persons who withdraw their appeals tend to be executed faster than those who do not.¹¹²

¹⁰⁷ Julia Hollingsworth, 'Japan to Pardon 550,000 Criminals to Mark New Emperor's Enthronement', CNN (Web Page, 18 October 2019) <<https://edition.cnn.com/2019/10/18/asia/japan-enthronement-pardon-intl-hnk/index.html>>.

¹⁰⁸ Roger Hood and Surya Deva, *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford Scholarship Online, 2014) 178.

¹⁰⁹ Pascoe and Novak (n 26) 9.

¹¹⁰ Ibid.

¹¹¹ Pascoe and Novak (n 26) 9.

¹¹² The Death Penalty Project, *Death Penalty in Japan* (n 109) 26.

4. MALAYSIA

EXISTING LEGAL FRAMEWORK	
Government Structure	Malaysia's government is a constitutional monarchy with the 'Yang di-Pertuan Agong' (king) as the head of state and the Prime Minister as head of government. The former is elected on a rotational basis between the nine states which have a hereditary ruler, with the title passing the earlier of every five years or upon the death of the current king. The latter is elected through democratic elections held every five years.
Crimes punishable by Death penalty	Malaysia imposes mandatory death sentences for several of its most serious crimes, including murder and drug trafficking. The death penalty can also be imposed for other offences, including kidnapping, arms trafficking and water contamination resulting in death. ¹¹³
Decision Maker	<p>As Malaysia has 13 states, all nine hereditary rulers and four state governors have the power to grant clemency to the population within their own state. Furthermore, if the offence was committed in one of Malaysia's Federal Territories or concerned national security, it would fall within the king's jurisdiction.¹¹⁴</p> <p>The decision-maker in each case acts on the advice of the Pardons Board, which consists of five members: the Attorney-General, State Chief Minister and not more than three other members appointed by the decision-maker.¹¹⁵</p>
Clemency Procedure	A clemency application is lodged automatically for death row inmates. Ordinarily, the relevant materials for an application for clemency in a general case are the proposed reason(s) the pardon should be given, any relevant police, psychologist or Prisons Departments files, and the Federal Attorney-General's written opinion/submission. ¹¹⁶

¹¹³ Pascoe, Last Chance for Life (n 8) 130.

¹¹⁴ Malaysian Constitution (n 3) art 42(1).

¹¹⁵ Ibid art 42(5).

¹¹⁶ Daniel Pascoe, 'What The Rejection of Anwar Ibrahim's Petition For Pardon Tells Us About Malaysia's Royal Pardon System' (2016) 18(1) Asian-Pacific Law & Policy Journal 71 ('Anwar Ibrahim's Petition').

	In addition, in the case of clemency applications for those on death row, the Pardons Board will look at evidence from the trial and the trial judge’s recommendation for possible mitigating factors as well as the report from the Federal Court on any appeal. ¹¹⁷
Possible Outcomes	Both commutation and outright release have been recorded.
KEY INSIGHTS	
Clemency Application Processing Time	Malaysia has a notoriously long processing period of its clemency applications, taking an average of 13.5 years to consider applications. Applications have been recorded to take up to 38 years. ¹¹⁸
Frequency of Successful Grants	The clemency success rate has been cited between 26-40% for capital punishment cases since 1975. ¹¹⁹ Interestingly, this probability increases for capital drug cases, rising to 50-60%. ¹²⁰
Reasons for Successful Grants	<p>The factors considered in successful grants of clemency are usually non-legal, often political, in nature. The common factors include:</p> <ul style="list-style-type: none"> ● Age ● Foreign nationality ● Foreign influence ● Connections to the royal family or government ● Procedural irregularities ● A Positive impression on the decision-maker

¹¹⁷ Ibid 38.

¹¹⁸ Pascoe, Last Chance for Life (n 8) 154.

¹¹⁹ Pascoe, ‘Clemency in Southeast Asian Death Penalty Cases’ (n 6) 5.

¹²⁰ Ibid 19.

- Financial contribution to victim's family¹²¹

OTHER INFORMATION

Other Notes and Considerations

Composition of Death Row

More than two-thirds of the death row prisoners were convicted of drug trafficking offences. Whilst Malaysia appears to have relaxed its 'Draconian' approach to drug use as seen in the 1990s,¹²² this indicates that the country is still taking a tough stance with regards to this issue. Furthermore, this has factored into a disproportionate proportion of foreign nationals on Malaysia's death row (44%) as many are convicted of international trafficking.¹²³

Despite Malaysia's reputation as being culturally diverse,¹²⁴ there is also a disproportionality amongst Malaysian death row inmates in terms of ethnicity. Ethnic Indians, who form only 6.8% of Malaysia's population, make up 22% of death row inmates.¹²⁵

Rule of Double Presumptions

The rule of double presumptions of possession and knowledge of illegal substances has eroded judicial discretion in drug trafficking cases.

S.37A of the *Dangerous Drug Act*¹²⁶ allows s.37(d) and s.37(da) to be read together. The former places a presumption of knowledge upon the possession of illicit substances while the latter sets out the assumption of drug trafficking upon the possession of a certain amount of illicit substances. However, the Malaysian Federal Court recently criticised the

¹²¹ Pascoe, 'Anwar Ibrahim's Petition' (n 121) 76.

¹²² Harring (n 36) 405.

¹²³ Amnesty International, *Fatally Flawed: Why Malaysia Must Abolish the Death Penalty* (Amnesty International Report, 2019) 5.

¹²⁴ Abdul Rahman Embong, 'Malaysia as a Multicultural Society' (2002) 12(10) *Macalester International: Volume 12* 38.

¹²⁵ ADPAN, *Reform in Limbo* (Report, 2021) 7.

¹²⁶ Malaysian Dangerous Drugs Act 1952 (Malaysia) s 37A.

joint application of these presumptions, deeming the combined use of the two presumptions as 'harsh, oppressive and impermissible'.¹²⁷

As such, the current position with regards to s.37A is a test of proportionality between the competing interests of the accused and the State.¹²⁸ The Federal Court now considers whether s.37A should infringe the presumption of innocence on the merits of the case. This increased judicial discretion during the trial may reduce the number of death sentences which may, in turn, lead to a lower rate of clemency.

¹²⁷ Benjamin Kho, 'Double Trouble No More: The Striking Down of Double Presumptions for Drug Trafficking by The Federal Court', University of Malaya Law Review (Web Page, 14 July 2019) <<https://www.umlawreview.com/lex-in-breve/double-trouble-no-more-the-striking-down-of-double-presumptions-for-drug-trafficking-by-the-federal-court>>.

¹²⁸ Ibid.

5. SINGAPORE

EXISTING LEGAL FRAMEWORK	
Government Structure	The executive branch of Singapore is comprised of the President and the Cabinet. The President's role is largely ceremonial and decisions are largely made by the Prime Minister and Ministers in Cabinet.
Crimes punishable by Death penalty	<p>There are 25 offences punishable by the death penalty, including:¹²⁹</p> <ul style="list-style-type: none">● Drug offences● Arms offences● Murder and homicide● Acts with nuclear facilities● Terrorism● Mutiny● Waging war <p>The death penalty is mandatory for:</p> <ul style="list-style-type: none">● Murder¹³⁰● Drug Trafficking¹³¹● Terrorism

¹²⁹ Wing Cheon Chan, 'The Death Penalty in Singapore: in Decline but Still Too Soon for Optimism' (2016) Asian Journal of Criminology 179, 198-9.

¹³⁰ Penal Code (Singapore, cap 224, 2020 rev ed) s 300(a).

¹³¹ Misuse of Drugs Act (Singapore, cap 185, 2021 rev ed) s 5(1).

	<ul style="list-style-type: none"> ● Use or attempted use of unauthorised firearms¹³²
Decision Maker	President of Singapore on the advice of the Cabinet.
Clemency Procedure	<p>The Cabinet is mandated to consider the possibility of commuting every death sentence confirmed by the Court of Appeal.¹³³</p> <p>Although not a legal right, it has become a custom for prisoners to submit a written plea through the Singapore Prison Service within three months of the Court of Appeal judgment.¹³⁴</p> <p>The Attorney-General is bound to consider reports written by the trial judge and leading appellate judge, and the evidence notes from the first trial when writing a recommendation as to whether a sentence should be commuted.¹³⁵ The above documents, including the report by the Attorney-General, are considered by Cabinet alongside the clemency petition by the prisoner. The Attorney General’s written report is highly influential or determinative.¹³⁶</p> <p>The President is bound to follow the decision of the Cabinet.¹³⁷</p>
Possible Outcomes	<p>Possible outcomes include:</p> <ul style="list-style-type: none"> ● Commutations to life sentence. ● Conditional and unconditional pardons ● Reprieves or postponement of the offender’s sentence

¹³² Arms Offences Act (Singapore, cap 14, 2020 rev ed) s 4(1).

¹³³ Singaporean Constitution (n 4) s 22P(2).

¹³⁴ Pascoe, Last Chance for life (n 8) 102.

¹³⁵ Singaporean Constitution (n 4) s 22P(2).

¹³⁶ Ibid.

¹³⁷ Pascoe, Last Chance for life (n 8) 101.

	<ul style="list-style-type: none"> ● Respites or suspensions of the offender’s sentence. <p>Prior to 1997, it was customary for Presidential Clemency to reduce a death sentence to a twenty-year term of imprisonment with the possibility of parole after serving 2/3 of the term.¹³⁸ In 1997, the Supreme Court reinterpreted the Penal Code, ruling that death sentences could only be commuted to life imprisonment.¹³⁹ Prisoners who are serving a life sentence will be entitled to annual reviews to examine their suitability for a remission order once they have served 20 years.¹⁴⁰</p>
KEY INSIGHTS	
Clemency Application Processing Time	<p>When clemency has been granted, the processing time was relatively short. Most cases were granted in a period of less than five years.</p>
Frequency of Successful Grants	<p>The death penalty has been commuted a total of six times since 1965.</p>
Reasons for Successful Grants	<p>Life sentences have been commuted for various potential reasons, including:¹⁴¹</p> <ul style="list-style-type: none"> ● Terminal illness ● First offences or young age ● Offences occurred in provoked circumstances ● Accomplices

¹³⁸ Ibid 102

¹³⁹ Hansah v Public Prosecutor [1997] 2 SLR(R) 842, 49-70.

¹⁴⁰ Prisons Act (Singapore cap 247, 2021 rev ed) s 50P(1)-(2).

¹⁴¹ Pascoe, Last Chance for life (n 8) 106.

The circumstances of each of the six successful death penalty clemency cases are outlined as follows:¹⁴²

- 1978 Mohamad Kunjo Ramalan: convicted of murder and was granted clemency on the recommendation of the Privy Council to Singaporean authorities.
- 1980 Bobby Chung Hua Watt: convicted of murder which involved an apparent 'spontaneous' murder or 'crime of passion'.
- 1983 Siti Aminah Jaafar: 18-year-old Jaafar was convicted of assisting her 32-year-old partner in drug trafficking. She was the mother of a young child and may have been seen to be "used" by the partner.
- 1992 Sim Ah Cheoh: convicted for drug trafficking. The reasons for her commutation are unknown. However, her expressions of remorse, her clean criminal record, being a mother of two, her poor upbringing and her manipulation by two men into committing the crime may have been influential. Sim was released on a second grant of clemency after being diagnosed with terminal cancer to allow her to spend her remaining time with her family.
- 1992 Koh Swee Beng: convicted of murder at the age of 22, and was potentially granted clemency due to his diagnosis of AIDS. Furthermore, the provocation defence was raised at trial and his petition stated that he had come from a poor family and possessed a clean national service record.
- 1998 Mathavakannan Kalimuthu: killed a man in a brawl. It is speculated that he played a lesser role in the attack compared to his two co-accused. Furthermore, he was deeply remorseful, and his petition was supported by five letters.

¹⁴² Ibid 103-105.

OTHER INFORMATION

Other Notes and Considerations

- In addition to having the power to grant a pardon to any offender convicted of any offence, the *Constitution of the Republic of Singapore* provides a specific section that allows pardons to be granted to accomplices who provide information that leads to the conviction of the principal offender.¹⁴³
- Singapore's low clemency rate may be explained by its firm stance surrounding the death penalty and the Rule of Law. The use of any discretionary lenience after a conviction and sentence may be seen as undermining these principles.¹⁴⁴
- While clemency seems to be rarely granted in Singapore, the criminal justice system is not entirely without discretion. It is argued that much of the discretion occurs at the prosecutorial stage, rather than the post-appellate stage.¹⁴⁵ Potential death penalty cases are filtered away before there is a chance for executive intervention. Mitigating circumstances such as age, criminal record, mental impairment, testifying against co-accused, or the offender's nationality are considered by the prosecutor in their approach to the case. The Attorney-General or prosecutor may lay different charges to avoid the death penalty.¹⁴⁶

¹⁴³ Singaporean Constitution (n 4) s 22P(1)(a).

¹⁴⁴ Pascoe, Last Chance for life (n 8) 107-110.

¹⁴⁵ Ibid 107.

¹⁴⁶ Ibid 115-119.

6. TAIWAN

EXISTING LEGAL FRAMEWORK	
Government Structure	<p>Taiwan operates as a democracy and semi-constitutional republic. The President is the head of state and has ultimate decision-making power.¹⁴⁷</p> <p>Between 2006-2009, when the Democratic Progressive Party was in power in Taiwan, a temporary pause was placed on the execution of death row prisoners.¹⁴⁸</p> <p>After a newly elected government came into power in 2010, Taiwan resumed executions of death row prisoners.¹⁴⁹ The Minister of Justice, Wang Ching-feng resigned from her position in 2010 stating that she would rather ‘step down than sign any death warrant’.¹⁵⁰ The Minister of Justice’s beliefs did not align with those of the newly elected President Ma Ying Jeou, who was strongly in support of the death penalty.¹⁵¹ From 2010 to 2020, approximately 35 executions have been carried out.¹⁵²</p>
Crimes punishable by Death penalty	<p>Until the 1990s, many offences imposed a mandatory death penalty sentence. In total, 89 offences imposed a mandatory death penalty sentence, with a further 108 offences carrying a discretionary death penalty sentence. In 2006 mandatory death sentences were abolished.¹⁵³</p> <p>Offences that carry the death penalty are now divided into three categories of crimes.</p>

147 Jerome Cohen, William Alford and Chang-fa Lo, *Taiwan and International Human Rights: A Story of Transformation* (Springer, 2019) 3.

148 Sangmin Bae, ‘International Norms, Domestic Politics, and the Death Penalty: Comparing Japan, South Korea, and Taiwan’ (2011) 44(1) *Comparative Politics* 41, 47.

149 Susyan Jou and Bill Heberton, ‘Support for the Death Penalty in Taiwan: A Study of Value Conflict and Ambivalence’ (2019) 15(2) *Asian Journal of Criminology* 162, 167.

150 ‘Taiwan Justice Minister Resigns Over Death Penalty’, BBC News (News Article, 12 March 2010) <<http://news.bbc.co.uk/2/hi/asia-pacific/8563838.stm>>.

151 Ibid.

152 Jou and Heberton (n 155) 162, 166.

153 David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford University Press, 2009) 200-6.

	<ol style="list-style-type: none"> 1. The first category imposes <u>either</u> a mandatory death sentence or life imprisonment. It consists of serious aggravated crimes that result in loss of life, treason, sexual offences, and some military offences. 2. The second category consists of other serious offences such as murder which imposes <u>either</u> a death sentence, life imprisonment or imprisonment of no less than 10 years. 3. The third category includes offences such as kidnapping, threats to public safety, robbery, piracy, and other serious offences against the person which carry <u>either</u> a death sentence or a minimum of 7 years imprisonment.¹⁵⁴
<p>Decision Maker</p>	<p>In Taiwan, the President has the power to grant clemency. Article 40 of the Constitution provides that <i>'the President shall – in accordance with the law – exercise the power of granting amnesties, pardons, remission of sentences, and restitution of civil rights.'</i>¹⁵⁵ The President can order the Cabinet to set up a meeting with the ministers to consider granting clemency. Amnesty Law of 1980 states that the President may delegate a pardon, remission or restoration case to the Ministry of Justice.¹⁵⁶</p> <p>The <i>Criminal Commutation Act 2007</i> states that the President has absolute discretion to make individual clemency orders without any participation from outside parties, including the Ministry of Justice and defence lawyers.¹⁵⁷ The attitudes of the government towards the death penalty could affect the likelihood of clemency applications being granted.</p>
<p>Clemency Procedure</p>	<p>In 2009, Taiwan ratified and domestically incorporated the <i>ICCPR</i>. This created a legal requirement that Taiwan must provide death row prisoners with the <i>'right to seek'</i> commutation or a pardon for their sentence.¹⁵⁸ As a result, all death row prisoners should <i>'have an opportunity to submit petitions for clemency.'</i>¹⁵⁹</p>

154 Ibid.

155 Ibid 210.

156 Ibid.

157 Criminal Commutation Act (Taiwan) 2007; Johnson and Zimring (n 158) 210.

158 Nigel Li, Wei-Jen Chen and Jeffrey Li, 'Taiwan: Cutting the Gordian Knot – Applying Article 16 of the ICCPR to End Capital Punishment' in Peter Hodgkinson (ed), *Capital Punishment: New Perspectives* (Ashgate, 2013) 210-28.

159 Ibid; Cohen, Alford and Lo (n 152) 3-4.

	<p>The procedure for applying for clemency in Taiwan is informal, ill-defined, and confusing. An application is initiated by a prisoner’s lawyer who needs to submit a petition to the Office of the President.¹⁶⁰</p> <p>An ‘Amnesty Law’ governs the process of clemency applications and the granting of clemency; however, the procedures are not clearly set out.¹⁶¹ There does not appear to be any specific rules indicating what needs to be considered when granting clemency and the decision appears to be entirely discretionary.¹⁶² The President is also not required to respond to applications nor give reasons for denying applications.¹⁶³</p> <p>In 2014, the Ministry of Justice enquired with the Office of the President regarding the status of pardons and was told that ‘the President had not considered granting pardon to any persons on death row’.¹⁶⁴</p>
<p>Possible Outcomes</p>	<p>If clemency is granted, the sentence will normally be commuted to life imprisonment.¹⁶⁵</p> <p>In 1988, 26 death row prisoners had their sentences reduced to life imprisonment.¹⁶⁶</p> <p>In 1991, 38 death row prisoners had their sentences reduced to life imprisonment.¹⁶⁷</p>

160 Pascoe and Novak (n 26) 13.

161 Ibid.

162 Ibid

163 Ibid.

164 The Death Penalty Project, The Death Penalty in Taiwan (n 43) 23.

165 Pascoe and Novak (n 26) 5.

166 Ibid 7.

167 Ibid.

KEY INSIGHTS

Clemency Application Processing Time

There are no time limits for clemency applications, prisoners can spend 20 years on death row awaiting a decision.¹⁶⁸

Frequency of Successful Grants

Successful clemency applications are extremely rare in Taiwan.¹⁶⁹

In 2010, 44 prisoners on death row filed applications for clemency.¹⁷⁰ From 2010-2012, a total of 15 death row prisoners were executed, including those who had submitted clemency applications. The executed prisoners had not received replies or notifications that their applications for clemency were determined or even reviewed.¹⁷¹

In 2013, the remaining prisoners on death row filed administrative appeals to the President for determination of their earlier petitions.¹⁷² This same year, a further six prisoners were executed without receiving any notification as to the progress of their pending applications for clemency.¹⁷³ The administrative appeal was dismissed later in 2013 with the reason being that 'presidential pardons are an executive privilege and as such not reviewable under Administrative Appeal Act'.¹⁷⁴

¹⁶⁸ Pascoe, 'Clemency in Southeast Asian Death Penalty Cases' (n 6) 22.

¹⁶⁹ Ibid.

¹⁷⁰ The Death Penalty Project, The Death Penalty in Taiwan (n 43) 22.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid 22.

¹⁷⁴ Ibid 23.

Reasons for Successful Grants

In 1957, the President commuted the sentence of Huang Xiao Xian, who was a convicted murderer.¹⁷⁵ The sentence was reduced from death to life imprisonment. It was believed that commutation was granted because of the offender's family military ties.¹⁷⁶

OTHER INFORMATION

Other Notes and Considerations

Continued public support of the death penalty

Public support for the death penalty plays a significant part in the retention of the death penalty and the lack of approval of clemency grants in Taiwan. It has been reported that close to 80% of people in Taiwan support the death penalty.¹⁷⁷ Support for the death penalty and calls for executions of death row prisoners is often heightened after media coverage of high profile and publicly condemned offences. In 2012, protests took place calling for the execution of a man who murdered a young boy.¹⁷⁸ Following the protests, six death row prisoners were executed that year.¹⁷⁹

175 Pascoe and Novak (n 26) 6.

176 Ibid.

177 Jou and Heberton (n 155) 168.

178 Taipei Times, 'Protesters urge implementation of death penalty'(7 December 2012) <http://www.taipeitimes.com/News/taiwan/archives/2012/12/07/2003549569> Support for the death penalty article

179 Jou and Heberton (n 155) 167.

7. THAILAND

EXISTING LEGAL FRAMEWORK	
Government Structure	Thailand is a Constitutional Monarchy that retains a King as its head of state.
Crimes punishable by Death penalty	<p>55 crimes carry the death penalty, with the most serious crimes carrying it as a mandatory sentence. Those crimes include;</p> <ul style="list-style-type: none"> ● Murder ● Rape causing death ● Murder of a Government official ● Regicide ● Trafficking of 'type 1' drugs.¹⁸⁰ <p>The Thai court retains the discretion to refuse to grant the death penalty in all circumstances, even where the statute makes it mandatory.¹⁸¹</p>
Decision Maker	The Constitution grants the King the exclusive power to grant individual or collective pardons. ¹⁸²
Clemency Procedure	A person must exhaust all appeal avenues before seeking clemency, including appealing to the Court of Appeal and then the Supreme Court. ¹⁸³ There is a significant attrition rate, with many prisoners' sentences being reduced to life imprisonment on appeal. ¹⁸⁴

¹⁸⁰ Pascoe, Last Chance for Life (n 8) 67-8.

¹⁸¹ Ibid 68.

¹⁸² Thai Constitution (n 2) s 179; Criminal Procedure Code 1934 (Thailand) ss 259, 261bis ('Thai Criminal Procedure Code').

¹⁸³ Pascoe, Last Chance for Life (n 8) 69.

¹⁸⁴ Ibid 69-70.

If the prisoner is unsuccessful on appeal, within sixty days after the final appeal judgment has been handed down, they may submit a petition for an individual royal pardon through prison authorities.¹⁸⁵ They may submit the petition themselves or submit it via relatives or an organisation.¹⁸⁶ There may be some leniency regarding the 60-day time limit.¹⁸⁷

The petition must contain:

- A letter to the King including biographical factors (such as mitigating factors, details regarding the prisoner's education and reputation, why they committed the crime, what they would do if the sentence were commuted) and detailing how the pardon would reflect on the Monarch.
- Extrinsic documents including birth and marriage certificates.
- Supporting letters from family, friends, and NGOs.¹⁸⁸

The Department of Corrections will then supplement the petition with court documents from the prisoner's trial, their criminal record, and prison behaviour record.¹⁸⁹

The petition is considered by numerous bureaucratic bodies including the Department of Corrections, Ministry of Justice, Prime Minister, and the King's Privy Council, who will make a recommendation to the Monarch.¹⁹⁰ The King has full discretion and does not need to follow the recommendation.¹⁹¹

185 Thai Criminal Procedure Code (n 187) s 262.

186 Pascoe, Last Chance for Life (n 8) 70.

187 Ibid 70-1.

188 Ibid 71.

189 Ibid.

190 Ibid 71-2.

191 Ibid 72.

	<p>Collective royal pardons may be granted at any time, but the individual prisoner cannot seek them directly.¹⁹² Rather than the prisoner submitting a petition, the Ministry of Justice and the Government will draft a Royal Decree to honour an important royal occasion, which is then passed to bodies including the Cabinet, the King’s secretary, and Privy Council for refining and approval, before being sent to the King to sign.¹⁹³ The King retains discretion and need not sign, although they are unlikely to reject a decree.¹⁹⁴ If the collective pardon is not intended to benefit all prisoners on death row, they will decide who to exclude from the pardon based on the severity of their crime and their prison behaviour.¹⁹⁵</p>
<p>Possible Outcomes</p>	<p>If a clemency application is successful, the death sentence may be commuted to life imprisonment, or rarely, the prisoner may be released altogether.¹⁹⁶</p> <p>If commuted to life imprisonment, the prison can submit another petition to reduce the life sentence to a shorter term, typically of around 40-50 years.¹⁹⁷</p> <p>If the individual application is rejected, further applications can be submitted, but the applicant cannot file a new petition for at least 2 years following a rejection.¹⁹⁸</p>
<p>KEY INSIGHTS</p>	
<p>Clemency Application Processing Time</p>	<p>The process can be extremely protracted. After exhausting both appeals avenues (which can itself take up to 10 years), the individual petition application must pass through various levels of Government before being accepted or rejected,</p>

¹⁹² Ibid 72-3.

¹⁹³ Ibid; Thai Criminal Procedure Code (n 187) s 261.

¹⁹⁴ Pascoe, Last Chance for Life (n 8) 81.

¹⁹⁵ Ibid 73.

¹⁹⁶ Ibid 72.

¹⁹⁷ Ibid.

¹⁹⁸ Thai Criminal Procedure Code (n 187) s 264.

	<p>often taking 5 to 10 years.¹⁹⁹ Although not barred by law,²⁰⁰ in practice, prisoners will not be executed during this waiting period.²⁰¹ This means the King can practically stay an execution by merely not responding to the petition for an extended period.²⁰²</p>
<p>Frequency of Successful Grants</p>	<p>According to Pascoe, clemency has been granted for over 95% of prisoners on death row between 1991 and 2016.²⁰³ There have been approximately 45 pardons per year, as opposed to only 1.9 executions, being 50 executions as opposed to over 1300 commutations in total over the period.²⁰⁴</p> <p>The death penalty is reduced to life imprisonment in almost all cases.²⁰⁵</p>
<p>Reasons for Successful Grants</p>	<p>Pascoe identifies that a prisoner is practically guaranteed clemency if they:</p> <ul style="list-style-type: none"> ● Are foreign ● Have demonstrated rehabilitation or remorse ● Were wrongfully convicted ● Are a woman (particularly with young children) ● Are either very young or very old ● Are employed in the civil service or military ● Have a serious illness ● Have helped police in investigations.²⁰⁶

¹⁹⁹ Pascoe, Last Chance for Life (n 8) 83-4.

²⁰⁰ Thai Criminal Procedure Code (n 187) s 247(1).

²⁰¹ Pascoe, Last Chance for Life (n 8) 84.

²⁰² Johnson and Zimring (n 158) 405.

²⁰³ Pascoe, Last Chance for Life (n 8) 74.

²⁰⁴ Ibid 74, 253.

²⁰⁵ Ibid 72.

²⁰⁶ Ibid 77.

Prison conduct is also important, with prisoners given a rating from 1 (excellent) to 6 (very bad), with those in the last category risking exclusion from pardons.²⁰⁷

According to Pascoe, “only in cases deemed especially shocking, or where the government has sought to ‘make an example’ of the offender” has an execution actually taken place,²⁰⁸ particularly for shocking offences such as crimes against the state, rape resulting in death, and, particularly since the mid-2000s war on drugs, drug trafficking.²⁰⁹ Heard and Jacobson also emphasise that those convicted of serious drug trafficking crimes or “recidivists” are likely to be excluded from collective pardons.²¹⁰ Recent collective pardons, however, have cleared death row of all prisoners, including those convicted of such crimes.²¹¹ This could be explained by a recent trend towards mercy from the current Monarch.²¹²

OTHER INFORMATION

Other Notes and Considerations

The extremely high clemency rate can be explained by various factors:

- The King wishes to preserve his reputation as benevolent and merciful, particularly in line with Buddhist principles.²¹³ However, it should be noted that the country’s turbulent political history and retention of the death penalty, in general, is at odds with Buddhist teachings, meaning Buddhist principles may have less political influence in Thailand than is commonly assumed.²¹⁴

207 Catherine Heard and Jessica Jacobson, Sentencing Burglary, Drug Importation and Murder: Evidence from Ten Countries (Institute for Crime & Justice Policy Research Report, January 2021) Appendix, 5.

208 Pascoe, Last Chance for Life (n 8) 74.

209 Ibid 74-5; Leechaianan and Longmire (n 48) 138.

210 Heard and Jacobson (n 212) Appendix, 5, 11.

211 Pascoe, Last Chance for Life (n 8) 76-8.

212 Eugénie Mériéau, ‘Thailand in 2018: Military Dictatorship under Royal Command’ in Daljit Singh and Malcolm Cook (eds), Southeast Asian Affairs 2019 (ISEAS - Yusof Ishak Institute, 2019) 327.

213 Pascoe, Last Chance for Life (n 8) 86.

214 Leanne Fital Alarid and Hsiao-Ming Wang, ‘Mercy and Punishment: Buddhism and the Death Penalty’ (2001) 28(1) Social Justice 231, 242.

- The Thai Government already engages in substantial extra-judicial killings, eliminating “unwanted” elements from society.²¹⁵ Sai-ngam argues that the Monarchy and the Government/ military exercise power over society through the death penalty in converse ways; the Monarch shows grace through pardons, whilst the military shows their power through extrajudicial killings against suspected drug offenders.²¹⁶
- Clemency is likely often granted to foreign nationals, as the Government is encouraged to avoid executing foreigners in order to preserve its positive international image and encourage stable relations with other states.²¹⁷
- Lastly, as wait times to be granted clemency are so substantial, with prisoners often spending 15-20 years on death row, they give prisoners ample time to evidence substantial rehabilitation and good behaviour, making it more likely that the Monarch will deem them deserving of clemency.²¹⁸

215 Pascoe, Last Chance for Life (n 8) 85-6.

216 Pilanthana Sai-ngam, 'Attitudes to the Death Penalty: Measuring Thai Perspective Through Mixed-Methods' (MA Thesis, George Washington University, 2020) 10.

217 Pascoe, Last Chance for Life (n 8) 88-9.

218 Ibid 83-85.

8. VIETNAM

EXISTING LEGAL FRAMEWORK	
Government Structure	Vietnam is a one-party led Socialist republic. The head of the republic is the State President.
Crimes punishable by Death penalty	<p>Currently, 18 crimes carry the death penalty, including:</p> <ul style="list-style-type: none"> • Murder • Child rape • Corruption • Drug trafficking <p>The death penalty is always discretionary.²¹⁹</p>
Decision Maker	The State President is the only person able to grant clemency. ²²⁰
Clemency Procedure	<p>Within 7 days of a death penalty sentence being handed down by the Supreme Court or an appeal being rejected, the prisoner can seek clemency.²²¹ There may be some flexibility with the time limit.²²²</p> <p>Whilst Article 88(3) of the <i>Constitution</i> gives the State President the power to award clemency, the process is relatively opaque.²²³ Since 2004, anything to do with clemency or the death penalty has been considered a state secret, and</p>

²¹⁹ Kien Tran and Cong Giao Vu, 'The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry' (2019) 9(56) *Societies* 1, 23.

²²⁰ Vietnamese Constitution s 88(3) ('Vietnamese Constitution').

²²¹ Criminal Procedure Code 2015 (Vietnam) art 367(d) ('Vietnamese Criminal Procedure Code').

²²² Lindsey and Nicholson (n 58) 286.

²²³ Vietnamese Constitution (n 225) s 88(3).

	<p>there are even criminal penalties for disclosure.²²⁴ However, what is known is that the prisoner must make a petition for clemency, following which “the Supreme People’s Court Chief Justice must make a recommendation to the State President” regarding whether or not to accept it.²²⁵ Based on the Vietnamese Government’s structure and collective approach to governance, we can also assume that several other bodies within the Communist Party of Vietnam (CPV) would be consulted to make recommendations.²²⁶</p> <p>What is needed to substantiate a petition for clemency is largely unknown, however, the government is currently working towards improving transparency around the required evidence.²²⁷</p>
Possible Outcomes	Commutation to life imprisonment is the only possible outcome of a successful clemency application. ²²⁸
KEY INSIGHTS	
Clemency Application Processing Time	<p>It is unknown how long it takes for clemency to be granted, but we assume it is relatively quick. Vietnam is known for its speed in executing prisoners, with most being executed within a year from sentencing,²²⁹ and prisoners will not be executed until their application is rejected.²³⁰ Therefore, it is likely that the clemency process takes less than one year. After a prisoner’s application is rejected, they must be executed as swiftly as possible.²³¹ Prior to execution, they will be read the State President’s reasons for rejecting their clemency application.²³²</p>

²²⁴ Pascoe, ‘Socialist Republic of Vietnam’ (n 10) 171.

²²⁵ Ibid 173.

²²⁶ Ibid.

²²⁷ Vietnam News Agency, ‘Compléter les procédures pour examen de la commutation de la peine de mort’ Vietnam+ (online, 14 September 2021) <<https://fr.vietnamplus.vn/completer-les-procedures-pour-examen-de-la-commutation-de-la-peine-de-mort/164098.vnp>>.

²²⁸ Penal Code 1999 (Vietnam) s 35.

²²⁹ Pascoe, ‘Socialist Republic of Vietnam’ (n 10) 185.

²³⁰ Tran and Vu (n 224) 17; Vietnamese Criminal Procedure Code (n 226) art 367.

²³¹ Vietnamese Criminal Procedure Code (n 226) art 367(e).

²³² Tran and Vu (n 224) 19.

Frequency of Successful Grants	<p>Although numbers are extremely unreliable given the CPV’s secrecy, Pascoe’s triangulations suggest somewhere between 5 and 50% of death row prisoners have received commutation to life imprisonment.²³³ He had previously suggested it could be between 6 and 23%.²³⁴</p>
Reasons for Successful Grants	<p>The following groups appear to commonly receive clemency:</p> <ul style="list-style-type: none"> ● Foreigners. Those from Western nations are practically never executed,²³⁵ whilst those from other Asian countries are more likely to be executed than Westerners, but less likely than Vietnamese citizens.²³⁶ Lindsey and Nicholson observe that death row prisoners from countries with whom Vietnam has good relations, or with whom they collaborate on police investigations, and who have abolished the death penalty domestically, are extremely likely to be granted clemency;²³⁷ ● Pregnant women or those caring for children under 36 months of age are legally exempt from the death penalty, so those who become pregnant in prison will have their sentences commuted automatically;²³⁸ ● Older people are also likely to be spared the death penalty;²³⁹ ● Prisoners are likely to be granted clemency where there has been international pressure or campaigning; ● Prisoners who have associations with the CPV; and ● Prisoners who have helped with police investigations.²⁴⁰

²³³ Pascoe, ‘Socialist Republic of Vietnam’ (n 10) 175.

²³⁴ Lindsey and Nicholson (n 58) 285.

²³⁵ Pascoe, ‘Socialist Republic of Vietnam’ (n 10) 175-6.

²³⁶ Ibid 178.

²³⁷ Lindsey and Nicholson (n 58) 289.

²³⁸ Hai Thanh Luong, ‘Why Vietnam Continues to Impose the Death Penalty for Drug Offences: A Narrative Commentary’ (2021) 88 International Journal of Drug Policy 1, 6.

²³⁹ Ibid.

²⁴⁰ Pascoe, ‘Socialist Republic of Vietnam’ (n 10) 182-3.

Clemency is rarely granted for mitigating factors, innocence, or due to rehabilitation, good prison behaviour, or remorse.²⁴¹ This could be in part due to the fact that, given execution is so swift in Vietnam, prisoners do not spend sufficient time on death row to prove remorse or good conduct.²⁴²

OTHER INFORMATION

Other Notes and Considerations

Pascoe has noted that Vietnam's status as an authoritarian socialist nation motivates it to both execute and grant clemency as a display of the state's power over its citizens.²⁴³

Pascoe suggests that a reason for Vietnam's relatively high clemency rates is that trials are often for show and done to appear "tough on crime".²⁴⁴ Courts may apply death sentences to appear strict and unrelenting even though the State doesn't wish to put the person to death. Therefore, to spare those people from execution, clemency must be relied on as a means of exercising discretion.²⁴⁵

²⁴¹ Ibid 184.

²⁴² Ibid 183-5.

²⁴³ Ibid 186-7.

²⁴⁴ Ibid 189; Pip Nicholson and Kieu Truong, 'Drugs Prosecutions in Vietnam: The Modern Propaganda Trial' (2008) 34 Monash University Law Review 430, 433-5.

²⁴⁵ Pascoe, 'Socialist Republic of Vietnam' (n 10) 189-91.