



## Guest Editorial

# Death Penalty Politics: The Fragility of Abolition in Asia and the Pacific

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Despite a steady increase worldwide in the number of states that have abolished the death penalty, capital punishment remains a troubling presence in the international order. In Europe and Latin America, abolition dominates. However, the world's leading powers in terms of economics and population include the retentionist states of China, India, Japan and the United States of America (USA). It seems there is no linear path to abolition, and its achievement is indeterminate. Yet, in international human rights law, death penalty abolition is a powerful norm embraced by half the countries across the world.

This special collection of articles on the death penalty and the politics of abolition in Asia and the Pacific is published to coincide with the centenary of one of the world's earliest statutory abolitions, in the Australian state of Queensland, in August 1922. Scholars of the death penalty, its practice and its abolition were invited to participate in a symposium in May 2021 hosted in Melbourne by Eleos Justice at Monash University and the Griffith Centre for Social and Cultural Research at Griffith University. They were joined by lawyers and abolition advocates, including some who had worked on death row cases.

While the majority of death penalty research has emanated from and focuses on the USA, well over 90 per cent of global executions occur in Asia, which lags behind the global trend towards abolishing the death penalty. Our symposium and this collection seek to bring perspectives from a variety of disciplines and methods—historical, legal, sociological, comparative—to bear on the questions of retention and abolition in a variety of jurisdictions and time periods. In asking how abolition has been and might be achieved, we consider historical conditions for abolition, political impediments to its advance, the phenomenon of reinstatement of the death penalty, the discursive context of death penalty attrition and the relations between civil society activism and governmental legislative programs. If there is one conclusion to these collective studies, it is the fragility of abolition. Abolition may now be widely embraced as a norm of international human rights law, but its establishment as a comprehensive and irrevocable fact remains elusive. The task of a research collection such as this is to understand why that may be as a guide to what might be pursued in the future regarding abolition.

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The death penalty is a judicial sentence available as an outcome in a criminal trial. It remains in law or is practised in just under half the countries in the world. However, its significance cannot be limited to the domestic jurisdictions where it is exercised. International cooperation in law enforcement, expressed in extradition treaties, in addition to policing and criminal intelligence collaborations, turns the death penalty into an international issue or, at the very least, a matter of bilateral interest and potential conflict. Retentionist states insist on their sovereign right to social defence against crime and other harms. Abolitionist states assert their own sovereignty in decisions to resist demands for extradition of persons wanted for prosecution in death penalty jurisdictions. These facts of contemporary international relations highlight the interests at stake for all in the politics of abolition. Even once accomplished, abolition in a single jurisdiction is never complete in a world where the death penalty is retained.

For this reason alone, and even in attrition, the death penalty continues to demand attention. The focus of this collection is a range of problems in research, policy and activism that bear on the past and future of abolition politics. How is abolition achieved? What is the role of civil society in its pursuit? Why do jurisdictions of similar character abolish or retain the death penalty? What conditions allow for its reintroduction? What is at stake in discourses of the death penalty? How is an international norm transformed into a general practice? These and other questions arise variously in the articles published here. Below, we develop a perspective on these questions regarding the politics of abolition.

The pathway to abolition is historically contingent on the highly varied political conditions associated with the character of domestic criminal law. In many of the states of the Asian and Pacific region, the criminal law was shaped by the experience of empire, particularly the British empire. The death penalty was a judicial sentence in the introduced criminal law, and its longevity has been associated with the survival of that framework. However, the imperial histories of the region were dynamic—and the postwar independence achieved over many decades sometimes followed the abolition of the death penalty, in part or whole, by the imperial government. Even so, in states as different as India and the small states of the South Pacific, imperial legacies continued to be expressed in the language and remedies of the law, changing only slowly over time. The result has been a patchwork of abolition and retention in the states of the former British empire. As discussed in this collection, the death penalty is retained in India, Malaysia and Singapore, while it has long since been abolished in the Pacific states of Solomon Islands, Tuvalu and Kiribati, which inherited an already abolitionist criminal law at their independence in the 1970s. In other parts of the British empire, such as the settler colonial states of Australia and New Zealand, abolition was never a straightforward process of linear development. The Queensland abolition of 1922 might have been followed, but was not, in the adjacent and politically similar jurisdiction of New South Wales shortly after, while New Zealand abolished just several years later, only to reintroduce. Moreover, an Australian colonial history in Papua New Guinea, continued under international mandate responsibilities between 1920 and 1975, was the vehicle for death penalty retention that has persisted to a belated abolition in 2022.

In some states, abolition has been associated with the achievement of independence from former colonial rule. In others, it follows a long period of attrition of use of the death penalty. However, tracking that attrition and determining how far it reflects a shift in policy as well as practice is challenging, particularly in examining states with opaque administrative and political histories. States may deploy the discourse of the judicial death penalty as a tool of social policy or social defence—even while the use of capital punishment declines. But, does a disappearing discourse of the death penalty signal a policy shift that might result in abolition, or is it just another phase of domestic politics? These have been particularly pertinent questions for scholars tracking contemporary Chinese death penalty policy in one of the world's top executing states.

Complete abolition (in law *and* in practice) commonly follows a long period of disuse of the death penalty or a slow decline in its frequency. Yet, as several articles in this collection explore, the attrition of the death penalty is no guarantee of its removal from the criminal justice armoury. Historical and contemporary examples confirm the position—abolition is a fragile thing, and complete abolition has been and continues to be challenged by changing political alignments, including populist invocations of law-and-order remedies to address social disorder and crime, real and imagined. As we write, the state of Malaysia has signalled its intention to remove the mandatory death penalty, a decision that reverses an earlier retraction of an announcement of abolition in 2018. Commonly, the progress of abolition is marked by an incremental removal of capital offences from the penal regime—yet, as examples as contrasting as India and Papua New Guinea demonstrate, the eruption of social anxieties in the wake of extreme events of crime or terrorism can play havoc with the expectations of a more measured statutory approach to death penalty reform.

In this context, it is evident that a great burden is placed on the abolitionist commitment of civil society activism, including professionals closely linked to death penalty case advocacy and governments engaged in an international politics of abolition. At this point, as is also addressed in this collection, the interdependency of civil society activists and governmental decision-makers is crucial. Especially in death penalty states that have historical, political and economic ties with now-abolitionist states,

clemency campaigns for particular individuals have played a major role in elevating to continuing public attention the reality of death penalty practice in the contemporary world.

In this context, we call attention to the need for governments committed to abolition through their endorsement of the Second Optional Protocol (1989) to the International Covenant on Civil and Political Rights to match their commitment with active advocacy. In Australia, the historic and politically bipartisan commitment to an international advocacy of abolition has been welcomed widely. However, the challenge of such a stance is to meet the expectation that this is more than a ritualistic expression of progressive politics. As we have emphasised at the outset of these remarks, the retention of the death penalty in some states of a globalised and interdependent world presents repeated occasion for abolitionist states to match their domestic achievement with actions that keep faith with their embrace of abolition.

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