

Socio-Political Determinants of the Death Penalty and Australia's Foreign Policy

A Submission to The Joint Standing Committee on Foreign Affairs, Defence and Trade's Inquiry
into Australia's Advocacy for the Abolition of the Death Penalty

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Introduction

The death penalty is a cruel, ineffective and irreversible punishment, and a stain on the nations who retain and use it. Hopefully a number of valuable submissions will be made within the present Parliamentary Inquiry as to how the Australian government can advocate for the worldwide abolition of the death penalty. Many of these submissions will propose multilateral and bilateral measures specifically targeting the death penalty as a criminal justice institution. However, in this submission I propose a slightly different approach. With a grounding in the previous transnational academic studies on the death penalty and with a particular focus on the Asia-Pacific region,¹ in this submission I argue that the Australian government ought to devote more of its soft-power resources to promoting pro-democracy reforms, regional human rights institutions, treaty compliance, minimising corruption and maximising the economic development of Australia's neighbours, all in order to indirectly promote moves away from capital punishment. Moreover, Australia ought not to act alone but to share the lead on these issues with those abolitionist jurisdictions neighbouring retentionist ones in the Asia-Pacific, due to the death penalty's noticeable regional 'contagion' effects.

While this novel approach is not incompatible with making the death penalty the specific object of domestic policy initiatives, diplomatic representations and international agreements, a more nuanced and potentially more effective strategy is to promote abolition of the death penalty *indirectly*, by focusing on those socio-political factors that contribute towards the legal retention and use of capital punishment. Otherwise, the risk in making the abolition of the death penalty Australia's (only) direct policy object is a backlash from retentionist nations and a hardening of their existing positions, on the basis of national sovereignty arguments.² In short, if the Australian government can help to eliminate the conditions which allow the death penalty to flourish, then the punishment itself will also disappear.

¹ The Asia-Pacific is one of three existing regional holdouts on capital punishment, the others being the Caribbean and the MENA (Middle East and North Africa) region. Over 90% of the world's executions during the 2000s took place in Asia, as broadly defined including the Middle East (Johnson and Zimring (2006), 89-95). Accordingly, in this submission I will focus on the Asia-Pacific region, yet the principles I outline have broad application within any regional setting.

² Johnson and Zimring (2009), 337. Hobson (at 14) raises the further possibility that *even if* abolition of the death penalty is achieved solely through external pressure directed to this end, the danger arises that the former retentionist nation becomes merely an 'illiberal abolitionist': a state 'that remove[s] the death penalty without altering the system of punishment that it embodied.'

Previous Comparative Studies of the Death Penalty

I begin by describing the results of previous comparative social sciences studies of the death penalty. These transnational studies (primarily authored since the global 'wave' of abolition began during the late 1980s³) tell us which socio-political factors are correlated with death penalty *retention* and higher annual rates of execution, and moreover which kinds of *processes* lead retentionist nations to abandon the death penalty altogether. My argument is that Australia's response to the death penalty abroad should be informed by the results of these research studies.

The major qualitative and quantitative academic studies on the death penalty with a global, or at least an Asia-Pacific focus, include those by Hood and Hoyle (published in 2015, 2009 and 2008), Futamura (2014), Hobson (2014), Garland (2014), McGann and Sandholtz (2012), Zimring (2011c), Johnson (2010), Johnson and Zimring (2009), Neumayer (2008a and 2008b), Bae (2007), Miethe et al (2005); Boulanger and Sarat (2005), Anckar (2004), Ruddell and Urbina (2004), Greenberg and West (2003), and Hood (2002 and 1989), following on from the original study of the graduated processes of abolition by French scholar Marc Ancel in 1962.

Assessing the academic contribution of the various studies, the authors' collective achievement is to generalise what are, in reality, complex political decisions and developments.⁴ In general, these studies and others have answered the question of the attributes of retentionist versus abolitionist nations by first isolating the *political structures* associated with abolition:

- unitary systems of government, as opposed to federations, lend themselves to making unpopular political decisions, such as to abolish the death penalty for all crimes;⁵
- democratic government increases the odds of abolition,⁶ and hence authoritarian governments tend to be retentionist;⁷ and,

³ See Hood and Hoyle (2009), 4-8; Anckar, 177.

⁴ Bae (2007), 124. However, Anckar casts doubt on the ability of academic studies to predict retention and abolition *in the future*, given the increasing influence of globalisation and regional effects (at 102): 'Perhaps it is not too venturesome to suggest that generalizations of the determinants of the death penalty will be less and less deterministic as time goes on.'

⁵ Bae (2007), 120. However, contrast Miethe et al, 120.

⁶ Anckar, 96-97, 100, 167-170; Neumayer (2008a), 250, 263; Ruddell and Urbina, 920, 922; Zimring and Johnson (2008), 109. Contrast Miethe et al, 126 and Hobson, 3-4. There are obvious exceptions to this principle, such as the United States, Japan, India, Indonesia, Taiwan, South Korea and some Caribbean nations.

⁷ Johnson and Zimring (2009), 290; Boulanger and Sarat, 5, 9; Greenberg and West, 298; McGann and Sandholtz, 278; Hobson, 4.

- more specifically, left-leaning executives are more likely to abolish than their right-wing counterparts.⁸

Second, the subject nation's economic development appears to be relevant: with the glaring exceptions of the United States, Singapore and Japan, retentionist nations tend to be at a lower stage of economic development.⁹

Third, specific colonial inheritances appear to correlate with death penalty retention: countries with a colonial heritage are more likely to be retentionist per-se¹⁰ (and further, Neumayer finds a related link between retention and the inheritance of a *common-law* legal system).¹¹ Moreover, countries with a history of slavery are more likely to be retentionist.¹²

Fourth and finally, in terms of religion and ethnic makeup, Christian majority countries are more restrictive in their use of the death penalty than Muslim or Buddhist majority countries,¹³ whereas nations that are more ethnically homogenous are also more likely to have abolished.¹⁴ More specifically, within the Asia-Pacific context, further *regional* attributes of actively retentionist states include a high national population, a history of conflict, a high level of corruption,¹⁵ and a lack of engagement with regional or global human rights institutions.¹⁶

Common findings on the second question, the *processes* that contribute towards abolition, first consist of explanations based on domestic and international politics:

⁸ Neumayer (2008a), 263; Johnson and Zimring (2006), 92; Greenberg and West, 299; Johnson and Zimring (2009), 92-94.

⁹ Miethe et al, 122-123, 127; Johnson and Zimring (2009), 289-290, 295.

¹⁰ Ankar, 96-97, 100-101.

¹¹ Neumayer (2008a), 265.

¹² Ankar, 96-97, 100-102.

¹³ Ankar, 91, 100; Boulanger and Sarat, 5; Miethe et al, 122. McGann and Sandholtz (at 285) found that after 1960, Catholicism as a dominant religion was strongly correlated with the odds of abolition, whereas Islam and Protestantism did not have statistically significant effects on abolition.

¹⁴ Ruddell and Urbina, 919.

¹⁵ Ankar, 127, 130.

¹⁶ Zimring (2011a), 2; Zimring (2011b); Bae (2008b), 230; Johnson and Zimring (2009), 82, 315-316.

- abolition in many countries was only achieved after capital punishment developed from a domestic criminal justice issue to a central concern of the *international* human rights movement;¹⁷
- strong political leadership (perhaps pressured by international developments), rather than a change in domestic public opinion, is generally required for abolition;¹⁸ and similarly,
- abolition of the death penalty exhibits regional contagion effects, the classic example being Eastern European nations abolishing during the 1990s in order to further their ambitions of European Union/Council of Europe membership;¹⁹

Second, abolition of the death penalty is, in many cases, a graduated process rather than an abrupt one. States failing to carry out executions for a number of years become 'abolitionist de-facto' before finally abolishing the death penalty in law;²⁰ perhaps accompanied by restrictions in death-eligible crimes and the mandatory death penalty,²¹ together with legal challenges that gradually whittle away the scope and legitimacy of death penalty practices, pending abolition.²² Those states that do transform from enthusiastic executioners to outright abolitionists within a short space of time tend to be states emerging from conflict and undergoing radical political change, where a newly-installed government treats abolition as a symbolic and necessary 'break from the past'.²³

In contrast, quantitative or qualitative comparative research that addresses procedurally or operationally specific questions in retentionist countries, such as why specific crimes possess a capital or non-capital status, the structural and cultural determinants of high or low death sentence totals, the number of prisoners on death row, the length of time they spend there,

¹⁷ Bae (2007), 116; Anckar, 168; Neumayer (2008a), 252; Zimring (2003), 29-30; Hood (2002), 337; Hood and Hoyle (2015), 22-24.

¹⁸ Bae (2007), 119; Bae (2008b), 232; Hood (2002), 338-339; Johnson and Zimring (2009), 112.

¹⁹ Anckar, 102, 174; Neumayer (2008a), 253, 263; Hood and Hoyle (2009), 22-31.

²⁰ Johnson and Zimring (2009), 112; Hood and Hoyle (2009), 4; Fitzpatrick and Miller, 301.

²¹ Hood and Hoyle (2008), 278-279; Hood and Hoyle (2009), 4.

²² Hood and Hoyle (2009), 24-28, 34-37.

²³ Futamura, 15-16; Bae (2007), 121; Neumayer (2008a), 250; Hood (2002), 339; Hobson, 6. Futamura further notes that the involvement of international actors such as the United Nations correlates with death penalty abolition in transitional societies (at 20).

There are two examples of this practice in the Southeast Asian region: Cambodia and East Timor.

together with yearly execution totals, has been far harder to come by.²⁴ Five of the transnational studies mentioned above: those authored by Zimring (2011c), Johnson (2010), Johnson and Zimring (2009), Neumayer (2008b) and Ankar (2004) were the only ones to engage in substantial analysis of the differences between high-executing and low-executing retentionist states, rather than the differences between abolitionist and retentionist nations per-se. Their general findings, echoing the results of the abolition/retention studies described above, were as follows:

- retentionist *authoritarian* governments execute far more than retentionist *democratic* governments, whether they are situated at the extreme left or the extreme right of the political spectrum;²⁵
- economic development reduces execution rates,²⁶ with the notable exceptions of Japan and Singapore in the Asia-Pacific context;²⁷
- countries with a history of slavery, together with majority-Islamic countries are more likely to consistently execute than other retentionist countries;²⁸ and,
- retentionist countries with a common-law heritage execute at higher rates than do retentionist countries with a civil-law heritage.²⁹

Importantly for present purposes, one of Johnson and Zimring's findings in their seminal 2009 comparative study of capital punishment in the Asia-Pacific region was that a supposed pan-Asian *culture* favouring harsh punishments and the advancement of the family and state over the individual (or, to use the more commonly-advanced epithet, 'Asian Values') did not exist other

²⁴ See Johnson and Zimring (2006), 92. In some cases, the requisite data has proven hard to find or does not exist at all for each jurisdiction in such a comparative study; the statistical data that is available is of questionable reliability; or alternatively, the authors of prior comparative studies of the death penalty have seen the most important global issue as not the drivers of greater numbers of death sentences or executions, but instead the determinants of outright abolition, especially in cases where, as abolitionists, they hope for policy impact arising from their research.

²⁵ Zimring (2011c) (Asia-wide reference); Johnson (2010), 338 (Asia-wide reference); Johnson and Zimring (2009), 289-290 (worldwide reference). Hood (1989) extends this to authoritarian nations who perceived a threat to the stability of the regime (at 50).

²⁶ Johnson and Zimring (2009), 290; Johnson (2010), 342.

²⁷ Johnson (2010), 342.

²⁸ Ankar, 40, 165. However, Zimring and Johnson (2008) (at 105) observe that Islamic-majority countries in the Asia-Pacific region tended to execute at low-rates.

²⁹ Neumayer (2008b), 11. A further, but as yet untested factor on a global basis, is that over the past few years 'retentionist states are limiting the scope of the death penalty in direct response to concerns about reciprocal action by other retentionist states [against their citizens]' (Babcock).

than as a political construct to justify repression. It is authoritarian government, rather than 'Asian Values' that better explains the high execution rates in particular Asian countries.³⁰

Discussion: Implications for Australia's Response

As noted earlier, the major problem with tackling the death penalty directly as a policy initiative is that this risks a sovereign backlash from nations who believe criminal justice policies are a matter of domestic policy only, rather than one of international human rights. In Australia's region, China, Singapore and Japan have sometimes responded to external criticism in this fashion.³¹ While Australia, together with other abolitionist states, the United Nations and NGO groups should nonetheless continue to act and advocate for the abolition of the death penalty in a principled manner,³² the Australian government should also consider harnessing the results of the aforementioned social science studies in order to achieve policy change in a more surreptitious manner. The Australian government has available many different soft-power tools to achieve this end, as I describe below.

Of course, not all of the findings described above are directly relevant to Australia's promotion of abolition on a global or regional scale. There is little that the Australian government can say or do about retentionist states exhibiting federal systems of government (given Australia itself possesses such a system); whether or not a retentionist state experienced colonial subjugation, military conflict or slavery at some point in its history; whether a retentionist nation has a civil law or a common law legal system; the religion of the majority of its populace; whether it is ethnically more or less varied, and whether it has a high or a low population. These attributes are beyond the scope of Australian foreign policy influence, or at least beyond the scope of attributes that the Australian government would *want* to influence.

On the other hand, those determinants of death penalty abolition that the Australian government has the ability to directly foster in retentionist states around the globe, and especially within the Asia-Pacific region, include the following:

- democracy or democratisation;
- a lack of corruption; and
- engagement with regional and global human rights institutions.

Moreover, Australia's strategies ought also to be informed by the processes that are known to lead to death penalty abolition in former retentionist nations:

- strong political leadership, rather than a change in domestic public opinion;

³⁰ Johnson and Zimring (2009), 83, 290, 297-299.

³¹ Johnson and Zimring (2009), 337.

³² See Hood and Hoyle (2015), 24-35 on more direct approaches to promoting abolition.

- the influence of regional contagion effects; and
- a gradual restriction of death penalty laws and practices preceding abolition, except in those newly democratised societies seeking a clean break from an authoritarian past.

With these findings in mind, what kinds of steps can the Australian government take? First, amongst the strongest correlates with retention is an authoritarian political structure, with the explanatory reason for the significant overlap between autocracies and retentionist states clear to see: these are governments who are averse to any laws limiting their own powers, governments who rule by fear when they have little or no electoral legitimacy,³³ and moreover, governments who may use the death penalty to permanently eliminate political dissidents and other threats to their power.³⁴ Australia already sponsors a number of initiatives to foster democracy in the Asia-Pacific region and further afield.³⁵ While there are obviously significant exceptions already such as the United States, Japan and Indonesia (indicating that democracy is not a sufficient condition for abolition),³⁶ funding and supporting pro-democracy initiatives such as civil society organisations, independent media, judicial reform, election monitoring and applying pressure to authoritarian and semi-authoritarian governments to reform their political and electoral systems³⁷ comprises the most effective strategy to achieve execution declines in Australia's regional neighbours such as China, Malaysia, North Korea, Singapore, Thailand, and Vietnam, to name but a few non-fully democratic regimes in East and Southeast Asia that continue to execute prisoners.

On the other hand, For those holdout nations that are *already* democratic, one of Australia's possible responses is a historical rebuke to the notion that an elected leader must wait until it is the wish of the majority to abolish the death penalty. Hardly any liberal democracies, including Australia and the United Kingdom, have abolished with a majority supporting the decision to do so. As Hobson notes:

Politicians pursuing abolition against the will of the majority does not create a 'contradiction' or 'irony'; it simply reflects the way modern democracy functions... Abolition being advanced in the face of majority opinion may [even] be a sign of *progress* in the democratization process.³⁸

³³ Botsman, 46-49; Garland (2010), 77; Sarat, 18-19.

³⁴ Johnson and Zimring (2009), 290, 310-311, 345.

³⁵ See ABS, 155; DFAT, 'Commonwealth development programs'; DFAT, 'Promoting effective governance in Papua New Guinea'.

³⁶ Johnson and Zimring (2009), 290; Futamura, 15.

³⁷ For relevant strategy, see USAID (2015); USAID (2013); Rakner et al.

³⁸ Hobson, 10, emphasis in original.

Closely related to authoritarianism are retentionist nations' lack of engagement with global and regional human rights institutions. In the Asia-Pacific context, regional human rights institutions of any kind are conspicuously rare.³⁹ The ASEAN Intergovernmental Commission on Human Rights (AICHR) is a reasonable beginning but requires a more significant enforcement mechanism.⁴⁰ Moreover, global human rights treaty adherence amongst Asia-Pacific states remains patchy,⁴¹ and unlike the Americas, Africa and Europe, there is no regional human rights treaty nor court nor common individual complaints mechanism in the Asia-Pacific region. Although achieving such outcomes requires significant time, funding and patient negotiation, if the Australian government champions the establishment and membership of global and regional human rights institutions, restriction of the death penalty amongst signatories will inevitably follow,⁴² as eventually will abolition.⁴³

Also strongly correlated with abolition is economic development: it remains the case that Japan and the United States are the only two rich democracies who continue to perform executions.⁴⁴ The causal mechanism linking death penalty retention with average income is less clear than it is with authoritarian government, however two possible explanations are that rising economic development tends eventually to lead to (usually abolitionist) 'liberal multiparty democracy',⁴⁵ or a more effective and reliable prison system in lieu of capital punishment.⁴⁶ Here, the implication for Australia's foreign policy is that minimising trade, investment and aid to retentionist nations does not encourage the economic conditions that lead to abolition in the long term. Compromising the economic development of Australia's neighbours may instead prove counterproductive, as these retentionist nations a) solidify in their policy standpoints when they are threatened or criticised, and b) turn their backs on economic ties with socially liberal nations such as Australia to instead court authoritarian regimes (China being an obvious example).

As for corruption, the causative link between this factor and death penalty retention in the Asia-Pacific region is provided by Ankar, who argues that in highly corrupt jurisdictions lower levels

³⁹ Johnson and Zimring (2009), 315-316; Zimring (2013), 17.

⁴⁰ 'Asean's Toothless Council'.

⁴¹ Relevant global human rights treaties include the ICCPR, ICESCR, CEDAW, CAT, CROC and their various protocols.

⁴² See for example, ICCPR Article 6(1), 6(2), 6(4), 6(5), 7, 14; CROC, Article 37(a). Amnesty International summarises the various international human rights standards in relation to the death penalty in its 2006 report 'International Standards on the Death Penalty'.

⁴³ See for example, ICCPR Article 6(6).

⁴⁴ Stearman, 7.

⁴⁵ Johnson and Zimring (2009), 295.

⁴⁶ Ruddell and Urbina, 925.

of societal stability, and less trust in the ruling authorities result in more serious punishments for criminal offences as a governmental means of maintaining order.⁴⁷ The policy implication is that the Australian government, through its overseas aid programme and through AFP law enforcement assistance, should further prioritise the reduction of corruption, with particular emphasis on nations such as Indonesia, where members of parliament and the public often advocate for the death penalty's use against corrupt officials,⁴⁸ as well as China and Vietnam, where corruption constitutes a frequently enforced capital offence.⁴⁹ However, as compared with the other explanatory factors described in this submission, corruption's reliability as a predictor of death penalty retention is circumscribed by its statistical relevance only within the Asia-Pacific region,⁵⁰ rather than having worldwide explanatory significance.

Next, the gradualist abolition thesis contends that other than in cases of democratic regime change, a retentionist state's annual execution numbers, mandatory death sentences and death-eligible crimes tend to gradually fall until *de-facto* and then full abolition is achieved. Accordingly, the Asia-Pacific nations that now form the most promising candidates for full abolition consist of Brunei, Laos, Maldives, Myanmar, Nauru, Papua New Guinea, Sri Lanka, South Korea, and Tonga, due to their abolitionist *de facto* status, not having conducted a judicial execution for more than 10 years.⁵¹ Through the approaches described above, these nations in Australia's regional backyard are the prime candidates for *de-jure* abolition in the near future. Thereafter, their abolitionist status will place further pressure on neighbouring retentionists. However, for those nations who still continue to execute today, the pace of change may be slower. In these cases, the Australian government can pragmatically push for a gradual reduction in the numbers of executions and capital crimes, unless there is a sudden collapse of an authoritarian regime, in which case *de jure* abolition becomes an immediately feasible option.

Finally, the obligation to help bring about change should not fall on Australia alone. The social science literature suggests that the impact of regional contagion is strong on abolitionism in every world region. Australia's abolitionist partners in the Asia-Pacific region could consist of Cambodia (abolished the death penalty for all crimes in 1989); New Zealand (1989); Hong Kong and Macau (1993 and 1976 respectively); Samoa (2004); the Philippines (2006); Mongolia (2012); and Fiji (2015).⁵² Australia should enlist the help of these nations in promoting the kinds of measures mentioned earlier in this submission (pro-democracy support; economic development; anti-

⁴⁷ Anckar, 52.

⁴⁸ For example: McRae; 'Bali Nine: Indonesia condemned over death penalty'.

⁴⁹ See Babcock et al, 'Vietnam'; Babcock et al, 'China'.

⁵⁰ Anckar, 127, 130.

⁵¹ Hood and Hoyle (2015), 16, 21; Thailand is another clear candidate for abolition, with the last two executions there occurring in 2009, no other executions having taken place since 2004.

⁵² Other abolitionist nations with less regional influence consist of Nepal (1997), Timor-Leste (2002), Bhutan (2004) as well as various Pacific Island states.

corruption measures, and engagement with human rights institutions). Close neighbours, sharing similar cultural and religious characteristics, are best placed to exert their foreign policy influence in one way or another (for example, Samoa and New Zealand towards Tonga; Hong Kong and Macau towards Taiwan and Singapore; Cambodia towards Laos; Philippines towards South Korea; Fiji towards Papua New Guinea, and so forth). Depending on their leadership and resources, these nations' influence on their neighbours' abolition of the death penalty may well prove the most significant factor of all.

Conclusion

In this submission I have demonstrated that there is much that the Australian government can do, and is already doing, to *indirectly* reduce the scope of the death penalty regionally. Certain policy initiatives will always require the death penalty at their very centre: for example, a global campaign to encourage ratification of the ICCPR's Second Protocol, stricter protocols on Australian law enforcement assistance on death-eligible crimes committed abroad, mobilising murder victims' campaign groups against capital punishment, and the training and briefing of local lawyers to defend individual clients accused of death penalty offences and to launch constitutional challenges. These types of measures must still be carried out.

However, it would be a mistake to concurrently forget the socio-political context in which the retention of the death penalty arises. Some of the factors suggested by the social science literature as determining retention of the death penalty, Australia can do little about, such as colonial and legal history, and state religion. Yet for other factors that it *can* influence, the Australian government must not lose sight of the bigger picture and consider the death penalty only in isolation from the system that sustains it. Polemic issues such as capital punishment require not only creative solutions, but also faith in the results of socio-scientific studies.

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