

Confronting Capital Punishment in Asia

*Human Rights, Politics,
and Public Opinion*

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Introduction

Roger Hood and Surya Deva

Asia remains central to the quest to abolish capital punishment worldwide. There are several reasons for this. China and India, both of which retain this cruel, degrading, and inhumane punishment, although use it on a very different scale, between them account for 37 per cent of the world's population. Indeed, the 13 countries that remain actively retentionist in the region account for half of the world's population.¹ But can one really talk about 'Asia' as a uniform entity? Is Asia different from the rest of the world when it comes to the factors that determine retention or abolition of the death penalty? Will Asian countries continue to resist the international movement towards its abolition?² What are the prospects of Asian retentionist countries abolishing capital punishment in the near future? How could/should these countries move in this direction? This book tries to grapple with these questions by shedding light on the evolving human rights discourse, politics, public opinion, and judicial practices *vis-à-vis* the death penalty in Asia through in-depth analyses of the situation in China, India, Japan, and Singapore. Progress towards abolition of the death penalty in these four countries—which represent diverse political and judicial systems, levels of economic development, social structures, and civil society movements—is likely to make the biggest impact on developments in the region as a whole.

The chapters are substantially revised versions of papers presented at a conference on 'Capital Punishment in Asia' held at City University of Hong Kong in November 2011. In the time that has passed since the conference, the essays have been developed further and brought as much up-to-date as was possible before the manuscript went to press at the end of April 2013.

In their insightful and comprehensive scholarly survey of the death penalty in Asia, published in 2009, David Johnson and Franklin Zimring referred to the region as *The Next Frontier* in the international campaign to abolish capital punishment.³ In contrast to Africa south of the Sahara on the one hand (where many countries since the end of the 1980s had abolished the death penalty or instituted a moratorium on judicial executions) or the Islam dominated nations of the

¹ These countries, which have all carried out executions within the past 10 years, are: Afghanistan, Bangladesh, China, India, Indonesia, Japan, North Korea, Malaysia, Pakistan, Singapore, Taiwan, Thailand, and Vietnam. For further information about them, see Roger Hood, *Enhancing EU Action on the Death Penalty in Asia*, Briefing Paper for the European Parliament, Directorate General for External Policies, EXPO/B/DROI/2011/22 (2012).

² As at 31 December 2012, 140 nations were abolitionist in law (105) or in practice (35), whereas 58 retained the death penalty for ordinary crimes. Amnesty International, *Death Sentences and Executions in 2012* (London, Amnesty International 2013) Annex II, 50, AI Index: ACT 50/001/2013.

³ David T Johnson and Franklin E Zimring, *The Next Frontier. National Development, Political Change, and the Death Penalty in Asia* (New York, Oxford University Press 2009).

middle-east on the other hand (where most had resolutely opposed abolition), several Asian countries within the past decade have, as Professor Zimring relates in his contribution to this book, shown a greater awareness of the issue and become possibly more susceptible to the case for moderating and eventually eliminating recourse to this cruel, degrading, de-humanizing, and irreversible punishment.

Professor Zimring begins by reminding us that it is not particularly helpful to talk about Asia as if it is a unified region in respect of death penalty policies. Indeed, he points to the variety of such policies and practices within the region. Excluding Australasia and the small islands of the Pacific (which he includes in his analysis), only two Asian states had successfully abolished capital punishment prior to the end of the 1990s and maintained abolition since then—Cambodia in 1989 after the fall of Pol Pot's murderous regime and as part of the United Nations settlement and Nepal in 1997. They were joined by Bhutan in 2004 after 40 years without an execution and by the Philippines which, having abolished it in 1987 following the overthrow of President Marcos, re-introduced it in 1994, but only carried out seven executions before abolishing it again in 2006. In 2013, these four abolitionist nations will almost certainly be joined by Mongolia which, after ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), with effect from 13 June 2012, is now preparing to eliminate it from its domestic law.

Six other Asian countries have retained the death penalty in law but not enforced it through executions for at least 10 years: the last executions took place in the Maldives in 1953, in Brunei Darussalam in 1957, in Sri Lanka in 1976, in both Burma and Laos in 1989, and in South Korea in 1997. These are regarded by the United Nations as 'abolitionist de facto' and by Amnesty International as 'abolitionist in practice', although it has to be recognized that all of them have continued to impose death sentences, even if only occasionally. Among the other Asian countries, executions have become more sporadic even if not rare events. Notably, Pakistan, which had executed 34 people in 2008 has since then adopted a policy not to carry out executions (although one did occur under military jurisdiction in November 2012). There have been no executions in Thailand since 2009, none in Malaysia between 2010 and 2013, and none in Indonesia from 2008 until 2013. In fact, only three Asian countries carried out an execution in 2012 and every one of the previous 10 years (China, Bangladesh, and North Korea) and as Zimring points out, only one of them (China) has what he calls an 'operational' death penalty policy aimed at crime repression. Even though Liu Renwen in his chapter tells us that the estimated 'number of executions has been reduced by at least a half, even two-thirds, since the withdrawal of the approval power from the Provincial High Courts and its return to the Supreme People's Court' in 2007, this means that the number may still be as high as 3,000 to 4,000. The continuing insistence of the authorities to keep the number shrouded by its secrecy law remains a large blot on the Chinese government's claims that it is proceeding gradually towards abolition and building a society based on the rule of law.

There have been a few set-backs to this general trend to ameliorate the full potential impact of capital punishment. In Taiwan, an 'unofficial', but Ministry

of Justice-backed, moratorium on executions which began in 2006 was ended in 2010 when executions resumed. In Japan, the victory of the democratic Liberal Party (LPJ) in 2010 brought with it the appointment of a prominent abolitionist as Minister of Justice but after a short pause executions resumed. India, where the authorities had shown a great reluctance to move from death sentences to executions since the late 1990s, with the consequence that it has a substantial 'death row' of over 400 persons, suddenly broke an eight-year period of abstention since 2004 when in November 2012 it executed the lone remaining perpetrator of the 2008 'Mumbai massacre', Mohammad Ajmal Kasab. Three months later, another politically motivated offender, Afzal Guru, who had been implicated in the attack on the Indian Parliament in 2001, was executed and since then the President of India has rejected clemency pleas for murderers convicted of non-political murders. More recently, in April 2013, the Indian Supreme Court held that the delay in disposal of a mercy petition by the President cannot be a ground to commute the death penalty into life imprisonment.⁴

As will be seen from the table of contents, the book begins by exploring the ways in which and the reasons why Asia is different from other parts of the world, in particular Europe, as regards the speed at which the international movement to abolish capital punishment in all countries, first promulgated by the UN General Assembly in 1971, has been embraced. Zimring rightly, in our view, dismisses the hypothesis that the difference lies in the so-called 'Asian values', culture or in public opinion, which appears not to be so different than that canvassed in Europe prior to abolition. Instead, he stresses the importance of political and economic development and authoritarian rather than democratic 'political and governmental structures'.

This theme is taken up in other parts of the book, in particular in relation to China. In her chapter, Susan Trevaskes writes:

Party-state policy, the product of politics on the nation's politico-legal landscape, continues to heavily inform judicial interpretation of criminal law for capital case sentencing in China's march towards modernization. This makes death penalty decision-making vulnerable to political vicissitudes at both the central and provincial level... We can therefore be sure that policy and politics will continue to firmly shape legal practice as the place of capital punishment in China's national reform continues to evolve.

Børge Bakken, in his revealing comparative analysis of the lower level of support for capital punishment among the 'masses' than among the 'elite' in China, is equally insistent that this 'is a political, not a cultural issue'.

David Johnson's authoritative essay also points to the highly variable resort to executions that have followed Ministerial changes in Japan. This is echoed in Michael Hor's conclusion that the dramatic change in the execution rate in Singapore ('from a rate of seven executions per million pre-2004... to 1.2 per million post-2004') was not brought about by the courts but by the government after the election of 2011. As Hor puts it, the changes 'are not apparently

⁴ *Devender Pal Singh Bhullar v State of NCT of Delhi*, WP (CrI) D No 16039/2011 (judgment dated 12 April 2013).

fully explicable on grounds other than an unannounced change of official policy towards the necessity of executions... Large and profound shifts are taking place in the political culture of Singapore—so much so that the newly elected president Tony Tan blessed this phenomenon with the phrase “the New Normal”. It should be noted too that the great decline in the number of executions has not been accompanied by a rise in the murder rate which has remained stable. Indeed, the number of murders recorded in 2012 was the lowest for 20 years.⁵

Another important theme covered in this volume is the influence of, and reaction to, the development of international norms both in relation to the pressures to abolish capital punishment altogether and to protect the rights of those facing the death penalty where it is still enforced. The European Union has been at the forefront in engaging with Asian countries, especially China, to impress upon them that the death penalty inevitably, howsoever administered, contravenes the rights embodied in the Universal Declaration of Human Rights and the ICCPR, namely, the right not to be arbitrarily deprived of life and the right not to be ‘subjected to torture or to cruel, inhuman or degrading treatment or punishment’. It is significant that Professor Liu Renwen, one of the leading and most influential advocates for abolition in China, in his analysis of the factors that have spurred China within the past 10 years to change its death penalty policy—so as to lower the number of executions, reduce the number of capital crimes, and to improve procedures to protect the rights of the accused to a fair trial—places first the fact that the Chinese government has been made aware that ‘abolition of the death penalty has become an international trend’ and that ‘in those countries without executions or even few executions, there is no evidence to show that the situation of public safety deteriorated’. Such information, he believes, ‘has had a marked impact on thinking in China’.

Similarly, Michelle Miao, in her revealing chapter on China’s response to the global campaign against the death penalty, notes that

collecting statistics about the worldwide administration of capital punishment has been a crucial device because it induced changes in states still actively practising capital punishment by informing them about the position of other countries on capital punishment policies and by forcing them to accept their status as ‘rogue states’ in the international community... [This] has forced China to re-consider whether it should insist on its excessive capital punishment policies and whether such policies comport with China’s self-perceived identity as a ‘civilised nation’ and a ‘responsible member of the global community’.

Her chapter provides two striking examples—the execution of the British citizen Akmal Shaikh in 2009 for drug trafficking, and the hurdles faced by the central government in trying to extinguish completely ‘shaming parades’ prior to

⁵ ‘The number of murder cases registered a 20 year low, dropping from 16 cases in 2011 to 11 cases in 2012’, Singapore Police Force, ‘Annual Crime Brief 2012’, <http://www.spf.gov.sg/stats/stats2012_details.htm> (accessed 20 April 2013). For a fascinating comparison of the murder rates of Singapore and Hong Kong (which has no capital punishment), see Franklin E Zimring, Jeffrey Fagan, and David T Johnson, ‘Executions, Deterrence and Homicide: A Tale of Two Cities’ (2010) 7 *Journal of Empirical Legal Studies* 1–29.

execution—of the tensions that still exist between its ‘reputational interest’ in seeking to conform to international human rights standards and China’s ‘political interest’ in putting security of the party and the state as its top priority. Nevertheless, as she shows, there is growing acceptance among the judicial and political elite that China needs to adhere to international human rights norms. As Professor Zhao Bingzhi, of Beijing Normal University, the leading figure in the death penalty reform movement, stated in 2009: ‘The international standard of the death penalty is new. In the past, whether the death penalty was applied in a country fell into the scope of domestic affairs, but now it has become an international obligation...abolition is an inevitable international tide and trend as well as a signal showing the broad-mindedness of civilized countries... [abolition] is now an international obligation...’.⁶

Professor Murthy looks at the influence of human rights values emanating from various countries as regards their impact on the death penalty debate, most notably the extent to which National Human Rights Institutions (NHRIs) have played a part (or rather little part as in the case of India) in extending the human rights case against capital punishment. To buttress this point, Murthy quotes the current Chair of the Indian National Human Rights Commission (NHRC), Justice KG Balakrishnan, who has said: ‘It is not proper for the NHRC to give an opinion on the death sentence. But if you ask me, I personally feel that the death penalty should continue. It has got a very great deterrent effect on society’. As Murthy notes, the NHRIs in the Asia Pacific region could play a more active role in abolishing capital punishment through conducting research, submitting shadow reports to the UN Treaty bodies, intervening in test cases’, bringing forward legislative reform proposals, and supporting advocacy campaigns.

Another aspect that must be considered is discussed in Sam Garkawe’s chapter. By referring to the relevant extradition laws and policies and the ‘Bali Nine’ case, he analyses the role that the Australian government can play in influencing the policies of retentionist Asian states and the dilemmas that the Australian government faces in relation to extradition and pleas for assistance in criminal matters where a death sentence could be a possible outcome. This has arisen both when responding to the threat of execution of its citizens for capital offences committed abroad and to threats to execute those who have killed Australians abroad, most notably in the Bali bombing. Ironically it is the Indonesian government that is now complaining about threats to execute its own citizens convicted of capital offences while working in the Middle East, Malaysia, and China: hence the significance of pressures that can be mounted on retentionist states to refrain from the use of capital punishment, what Professor William Schabas has called a form of ‘indirect abolition’.⁷

⁶ Zhao Bingzhi and Wang Shuiming, ‘Development Trend in Death Penalty in Contemporary Era and its Inspiration for China’, Guangzhou China, June 2009, 37.

⁷ William Schabas, ‘Indirect Abolition: Capital Punishment’s Role in Extradition Law and Practice’ (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 581.

Saul Lehrfreund brings to bear his profound experience of litigation in the international sphere by considering the extent to which the countries in Asia live up to their obligations entered into by acceding to the ICCPR and the Safeguards Guaranteeing the Protection of Rights of those Facing the Death Penalty (Safeguards), first adopted by the UN, without dissent in 1984. China signed the ICCPR in 1998 but has not yet ratified it, whereas Singapore (and Malaysia) has yet to sign or ratify the ICCPR. Nevertheless, the norms established by the ICCPR and the Safeguards have had a clear influence on recent developments directed at limiting the scope and number of crimes subject to the death penalty to the 'most serious crimes' under Article 6(2) of the ICCPR, which has been interpreted by paragraph 1 of the Safeguards to mean only 'intentional crimes with lethal or other extremely grave consequences'.

Several contributors to this book reveal that the retentionist countries under consideration have a long way to go to reach these international minimum standards. Liu Renwen remarks that although it 'is obvious that China has made great progress in the reform of its death penalty system when seen in the Chinese context', the fact 'that 55 offences are still punishable by capital punishment is certainly unacceptable and it is difficult for China to provide a convincing explanation' for this position because more than half these 55 offences are non-violent crimes. Among the vital reforms he highlights is the need for China to have an effective system for considering and granting clemency independent of the Supreme People's Court. David Johnson brings his expert knowledge of Japan's criminal justice system to bear critically on the relatively new 'lay judge' system, which appears to have weakened safeguards for those facing the death penalty, and shows that in Japan death is not, as it is in the United States, regarded as 'different'. He contrasts the United States and Japan with respect to 12 safeguards available under the US 'super due process' system (though without claiming that these have proved a satisfactory means of making the death penalty acceptable in the United States). On this basis he demonstrates how weak the protections are for those facing the death penalty in Japan, a country which has ratified and therefore should conform to the standards set out in the ICCPR. In particular he draws attention to the vagueness of the Japanese guideline limiting the circumstances when the death penalty can be imposed, namely, to when 'it is unavoidable' and 'cannot be helped'.

Another theme running through several chapters in this book is the role of public opinion. In China and Japan and no doubt in India one of the most prevalent arguments is that public opinion demands the death penalty. In China and Japan this appears to be taken for granted and even when evidence is brought forward to challenge this assumption, it is largely ignored, not only by the media but also by academics and administrators. As Michelle Miao notes: 'It is commonly asserted that the general public has a blind faith in capital punishment in China. The Chinese authorities insist that resorting to the death penalty is necessary to appease growing public anger in highly publicised cases involving murder and other grave crimes'. Susan Trevaskes in her contribution gives two telling examples in which an outcry over suspended death sentences regarded as too lenient by 'netizens' influenced the Courts to change the sentence to immediate execution,

despite findings being available from a scientifically sound public opinion survey which demonstrated the generally low level of concern among members of the public about the use of the death penalty.

Børge Bakken, in contrast, argues cogently, on the basis of the evidence of the first major and sophisticated public opinion survey carried out in China in 2007 and 2008,⁸ that it is the intellectual, legal and administrative elites that are holding back the pace of reform in China, not the masses. This survey found that when asked whether they favoured or opposed the death penalty, 58 per cent of almost 4,500 respondents were *definitely* in favour—by no means a very high proportion when compared with the experience of European countries when they abolished capital punishment. While only 14 per cent said they opposed capital punishment, as many as 28 per cent were recorded as being ‘unsure’. When asked whether China should speed up the process to abolish the death penalty, only 53 per cent were opposed to doing so and a further 33 per cent were ‘unsure’. This can hardly be said to indicate a fervent desire for capital punishment of a kind that would make abolition politically impossible to achieve. Yet he cites a debate between three leading death penalty scholars in 2010 in the publication *Faxue (Legal Studies)* in which all appear to have ignored the evidence from this survey when claiming that the strength of Chinese public opinion in favour of capital punishment is a barrier to abolition. ‘Thus’, he concludes, ‘even liberally minded reductionist intellectuals tend to blame “penal populism” for the slow pace of capital punishment reform’.

Mai Sato’s original quantitative and qualitative research and her imaginative deconstruction of the Japanese government’s claims about the strength of public opinion in favour of the death penalty, on which they base their own support for the death penalty, turns the question round from ‘Do the public approve of or support the death penalty?’ (the Japanese government states that 86 per cent do) to ‘Is support so strong for the death penalty among the public that to abolish it would undermine their trust in government?’ In other words, would abolition erode the legitimacy of political and judicial institutions and lead to ‘non-compliance with the law, lack of co-operation with the criminal justice system, and in the worst scenario, vigilantism where victims’ families take justice into their own hands?’ After examining closely the government survey, she found that if those who said they supported the death penalty at present but could contemplate abolition in the future were excluded from the total percentage of people favouring the death penalty, the percentage that would *resolutely* be in support of capital punishment—‘pure retentionists’—would be not 86 but 56 per cent. More importantly, her own surveys of over 20,000 Japanese citizens showed that the majority did not hold strong opinions on the issue, and that only 44 per cent endorsed the view that the death penalty ‘should definitely be kept’. She calls on the Japanese government to take the lead in better informing the public about the realities of capital

⁸ Dietrich Oberwittler and Shenghui Qi, *Public Opinion on the Death Penalty: Results from a General Population Survey Conducted in Three Provinces in 2007/08* (Freiburg, Max Planck Institute 2009) 1–30, <http://www.mpicc.de/shared/data/pdf/forschung_aktuell_41.pdf> (accessed 20 April 2013).

punishment and to provide public education on the subject rather than to 'wait passively until a change occurs in public opinion'.

In democratic India the death penalty is to be imposed in only the 'rarest of rare' cases, as per the principle laid down by the Supreme Court in *Bachan Singh v State of Punjab* in 1980, and further developed in *Macchi Singh v State of Punjab* in 1983. Because of the 'special reasons' requirement stipulated by section 354(3) of the Code of Criminal Procedure 1973 and its judicial interpretation, life imprisonment is to be the 'normal' penalty for murder. Although the Indian Penal Code and other criminal statutes provide the death penalty for offences other than murder (such as kidnapping under threat of death and mandatorily for drug-trafficking on a second conviction for specified offences), it is doubtful whether executions would now ever be carried out other than for aggravated forms of murder or for a murder coupled with other crimes. However, the 'rarest of the rare' principle (which in reality means 'the worst of the worse') gives discretion to the Supreme Court to define what classes of killings should fall within this category. For example, the court ruled in 2009 that 'dowry deaths' and 'bride burning' should be subject to the death penalty, while in 2011 it added 'honour killings' to the list.

The enlightening analysis of death penalty cases dealt with on final appeal by the Indian Supreme Court between January 2000 and October 2011 carried out by Surya Deva shows the extent to which a device aimed at restricting the use of capital punishment has produced another objectionable outcome, namely, arbitrariness in the administration of capital punishment. This arbitrariness, Deva argues, violates the right to equality under Article 14 of the Constitution. Furthermore, as Amit Bindal and Raj Kumar demonstrate conclusively in their chapter, this arbitrary administration of the death penalty by the Supreme Court is certainly not 'fair, just and reasonable' as required by Indian law. Since it is unlikely that this judicial arbitrariness could be remedied, Deva argues that the Indian parliament should abolish the death penalty for all 'ordinary' crimes which do not threaten the national unity and integrity. Bindal and Kumar advance an additional argument for abolishing the death penalty. Applying Joseph Raz's theory that human rights require that individuals must be allowed to attain their ultimate potential as part of their personal autonomy, they argue that sentencing persons to death is a violation of this individual right, as there is no way of determining that an individual is beyond hope of redemption.

As long as the death penalty remains in force in India, a major concern will be the length of time that prisoners have been held on death row, subsequent to exhausting their right to file appeals, waiting for a response to their clemency petitions to the Governor of the State in which they have been convicted and finally to the President of India. Bikramjeet Batra has provided a comprehensive analysis, in the light of decisions of international human rights bodies, of the Supreme Court's jurisprudence on the question of delay and the 'death row syndrome' and the varying extent to which, in the past, Indian courts took into account the suffering and mental deterioration of prisoners who had been left for long periods

of time under terrible conditions on death row. However, Batra informs us that the recent 'Indian jurisprudence on this issue has been limited to delay alone' and the Supreme Court 'only starts the clock after it has disposed of the appeal and a mercy petition has been sent to the executive'. Batra also shows how the April 2013 judgment of the Indian Supreme Court in *Bhullar* has turned the clock back on an evolving progressive jurisprudence which had castigated inordinate delay on the part of the executive in disposing of mercy petitions. The politics relating to disposal of mercy petitions—keeping petitions pending indefinitely or disposing them at a given point of time to serve political purposes—is also a matter of great concern.

To conclude our brief introduction, the essays in this volume highlight the challenges that the countries discussed, as well as other retentionist states in Asia, face if the goal of universal total abolition of the death penalty is to be reached within the foreseeable future.

First, even if it is impossible for various political reasons to remove the death penalty from the statute book overnight for all crimes, concrete steps must be taken immediately to reduce substantially the imposition of the death penalty and the recourse to executions. The nature of these steps may vary in different countries—from limiting the death penalty only to crimes that affect the national unity and integrity of the state (as European nations did originally); to making greater use of rigorous judicial and clemency review aimed at reducing the number of executions to the minimum; to imposing a moratorium on executions. It is critical, however, that even during this transitional phase, retentionist states in Asia remain wedded to achieving the ultimate goal of total abolition as soon as possible.

Secondly, retentionist countries in Asia should make greater use of clemency procedures. The award of 'suspended' death sentence by the courts in China and grant of clemency by the executive in India are cases in point. It should be possible to develop guidelines to make use of such measures swiftly, consistently, and in a greater number of cases.

Thirdly, retentionist states must display higher transparency and procedural fairness in conformity with international human rights standards at all stages of administering capital punishment. Any secrecy in state-based institutionalized killing not only infringes international human rights law but also runs counter to globally accepted good governance aspirations. Countries should make available to the public, in conformity with Resolution 1989/64 of the UN Economic and Social Council, regular statistical information, if possible on an annual basis, providing the number of death sentences imposed and the number of executions carried out for each category of offence, the number of persons under sentence of death, the number reversed or commuted on appeal, and the number of instances in which clemency has been granted.

Fourthly, a significant organizational and political difference between Europe and Asia that Franklin Zimring has highlighted should be noted and acted upon. There is a lack of robust regional organizations, whether governmental or civil

society, in Asia that can put pressure on states to develop a regional policy towards abolition of capital punishment. This, for instance, made a profound difference in Europe, as first the Council of Europe and then the European Union made complete abolition a key element of its human rights agenda. Professor Zimring's case for an institutional structure that would support abolition across the Asian countries is one that the conference from which this book has evolved hoped to provide a platform.

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