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# Policy Brief

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## Overview

Countries under transition from war to peace or from an authoritarian to a democratic regime face fundamental political and social transformations and difficulties in emerging from a problematic past. The transition presents challenges but also opportunities for countries to reconsider their death penalty policies. It is in such a context that some countries abolish, retain or even actively resort to the death penalty to tackle transitional needs. Those who are working for abolition of the death penalty need to go beyond the human rights approach and take a more holistic approach to understand the fragile and complex local situation and needs in which the death penalty becomes a highly political issue.

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**UNU-ISP**

Institute for Sustainability and Peace

## *Death Penalty Policy in Countries in Transition*

**S**OME COUNTRIES ABOLISH THE DEATH PENALTY during their transition from war to peace or from an authoritarian to a democratic regime. In other cases, countries regard the death penalty as a necessary policy to promote their transition. In whatever way, it seems that the transition process has some impact on death penalty policy. How and to what extent is this so, and what exactly are the elements that influence countries in transition in deciding on their death penalty policy?

### **The abolitionist trend**

Since the end of the Second World War, a number of countries have abolished the death penalty. The abolitionist trend gained momentum in the 1980s, reached a peak in the 1990s, and continued into the twenty-first century. As of December 2012, the number of states that had abolished the death penalty for all crimes totalled 97, and the number that had abolished the death penalty for ordinary crimes only was 8; there were 35 states regarded as abolitionist in practice.<sup>1</sup> Several factors may explain this trend. One often-mentioned factor is the development of international human rights norms. Indeed, the issue of the death penalty has been extensively addressed in relation to and in the discourse of human rights: the death penalty is seen as a violation of basic rights and human dignity and it is demanded that it be abolished. Thus the worldwide abolitionist movement has been closely tied to the development of human rights norms, and both trends accelerated further in the 1990s.<sup>2</sup>

At the same time, the abolitionist trend has progressed hand in hand with the waves of democratization in countries in Latin America in the 1980s and in the former Soviet bloc in the 1990s, as well as with the increase in the number of countries going through post-conflict peacebuilding since the late 1980s. A total of 12 countries, including Slovenia, Romania, Hungary, and the Czech Republic and Slovakia, abolished the death penalty in 1989 and 1990. Several countries abolished the death penalty during a process of post-conflict peacebuilding, for example Angola, Bosnia, Burundi, Mozambique and Timor-Leste. However, there are also cases such as Rwanda, which, right after the 1994 genocide, claimed that the death penalty was necessary for the country's transition and resorted to it to punish "genocidaires", and Iraq, which executed Saddam Hussein after his

conviction by the Supreme Iraqi Criminal Tribunal. Such attitudes and policies did create tension between these countries and the United Nations and the international community supporting their transitions.

### **Death penalty policy and political transition**

Whether in democratizing or post-conflict contexts, countries in transition face fundamental political and social transformations and challenges in emerging from a difficult, problematic past. These are times when societies struggle to regain social order, reform governance structures and legal systems, come to terms with the past,

policies, if any, in turn bring not only legal but also political, social and economic impacts on the transition process?

The relationship between death penalty policy and transition can be highlighted through the major imperatives of transition: democratization, the rule of law, security, and transitional justice, which are closely connected to the way a new government conceives of criminal punishment.

### **Democratization**

Democratization is one of the major imperatives for countries in transition. This is also the case for post-conflict

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and rebuild a relationship between the government and the people. Transition processes present challenges and opportunities that are not faced by non-transitional countries. It is in such a context that death penalty policies, whether they are abolitionist or retentionist, become highly political, because they become embedded in fragile and complex transition processes and intricately connected to various transitional imperatives noted above, which make states engage in a balancing and reconciliation exercise. In other words, some countries abolish, retain or even actively resort to the death penalty to tackle transitional needs. How do these needs influence the way a new government envisages the death penalty? And how do death penalty

peacebuilding processes, in which a democratic form of governance is often regarded, especially by the United Nations and international donors, as necessary for durable peace. A newly emerging government first faces pressure to mark a clear departure from a previous autocratic/totalitarian regime. In this context, the abolition of the death penalty is seen by a new government as a symbolic departure from the former regime, under which severe punishments, including the death penalty, were regularly used for political repression or persecution without due process. This was particularly clear in South Africa, where judicial abolition of the death penalty in 1995 was part of the transition to democracy. Countries such as the Philippines and



Cambodia, and countries in Eastern Europe also abolished the death penalty with a clear desire to break with the past.

One of the important issues for a new government is to gain public support and legitimacy in the eyes of both the domestic population and the international community, which is critical for emerging governments to consolidate their fragile regime. In this context, a commitment to human rights, and the abolition of the death penalty specifically, is expected to be taken as a new government's declaration of its commitment to democracy. In the case of post-communist countries in Eastern Europe, they faced pressure to choose an abolitionist policy in order to join the Council of Europe, which regards the death penalty as incompatible with democracy. The Council has set abolition as a condition for membership. In these cases, countries abolished the death penalty not just because of their commitment to human rights but also because of their political and economic goals under democratization. The need for international recognition and legitimacy means that countries under democratization are more susceptible to international pressure, which is another important factor for understanding death penalty policy under transition.

Although some researchers point out that democracy and democratization are major political factors driving the abolition of the death penalty,<sup>3</sup> the relationship between the death penalty and democracy is not necessarily clear-cut, as it can be seen from the cases of the United States and Japan. What is more, it is interesting that some governments abolish or attempt to abolish the death penalty despite public support for the punishment.

This was the case in South Africa, and the South Korean government is seeking abolition while its people strongly support the death penalty. Views are divided on whether the government's abolitionist policy against the will of its people is a "paradox" of democracy or a healthy state of democracy.

### **The rule of law and justice sector reform**

The rule of law is "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards".<sup>4</sup> It is an important principle for peacebuilding in terms of not only protecting people from the abuse of power by governments but also ensuring human dignity and regaining public trust in governmental institutions. Indeed, during conflict, those in power often put themselves above the law and undertake violence with impunity. In addition, rules and laws adopted at the time of conflict or under an authoritarian regime rarely meet human rights standards and are not effectively and impartially applied. What is more, the police, the courts and the prisons, the major institutions for upholding the rule of law, are often decapitated during conflicts and/or become tools of corruption and oppression under abusive leaders, which results in a lack of public trust in the judicial system. A newly emerged government under transition therefore faces challenges in building and rebuilding its judicial system. This is why the United Nations, as well as other international agencies, regards the restoration and strengthening of

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the rule of law as vital for peacebuilding activities and places it at the very heart of peacebuilding missions.

The promotion of the rule of law in post-conflict countries involves the important task of reforming the police, the courts and the prison system. It includes activities such as reforming law-making processes, (re)drafting constitutions and other legal codes, and training judicial experts to enhance their capacity. It is through these activities that international agencies and donors may influence a country's death penalty policy. In the case of peacebuilding activities in Timor-Leste, the UN-authorized transitional administration was given the authority to administer justice, maintain law and

changes in the criminal law throughout the territory of Bosnia and Herzegovina. This was even more serious because the country was going through a number of national trials of war crimes carried out during the Yugoslav war. This case reminds us of the importance of a comprehensive approach to death penalty policy, that is, not only focusing on the abolition per se but also taking into consideration a long-term judicial sector reform, as well as a complex transitional context.

### **Security**

Some research points to the potential relationship between a public perception of insecurity and recognition of a

“Hastening abolition of the death penalty may harm the rule of law and leave a negative legacy in countries in transition”

order, and determine the applicable law, in which it made the abolition of the death penalty one of its goals.

However, hastening abolition of the death penalty may harm the rule of law and leave a negative legacy in countries in transition. The case of Bosnia demonstrates that the challenge faced by that country was not necessarily the abolition itself, which was endorsed by the European Union, but the preparation and codification of appropriate and consistent alternative punishments to the death penalty, as well as the improvement of prison conditions to meet the potential increase in inmates. The country faced challenges and even some injustice because it failed to achieve systematic

rising crime rate and popular support for the death penalty. Indeed, there are several cases of abolitionist countries where a public debate to reinstate the death penalty emerged when they faced heinous crimes. This is a relevant point for countries in transition, especially post-conflict countries, which confront a high probability of the recurrence of violence and social disorder and a rising crime rate while they are not yet ready and able to cope with such insecurity. Given that deterrence is one of the most popular arguments in favour of retaining the death penalty, it is expected that public demand for the death penalty may rise in the context of fragile transition processes. For example, in the Democratic Republic

of Congo, even some human rights activists support the death penalty because they see it as “a legitimate deterrence” in the face of the country’s ongoing violence.<sup>5</sup> However, it should be noted that the deterrent impact of the death penalty has been questioned by several academic studies.<sup>6</sup>

Perhaps a more relevant argument in the context of transition is that governments that are suffering from a lack of legitimacy and public support see the death penalty as an essential and powerful instrument of security, social control and exploitation, because the death penalty in a sense is “the ultimate demonstration of the state’s claim to the power over the life of its citizens”.<sup>7</sup> The case of Iraq is indicative. Although the death penalty was suspended in 2003 by the Coalition Provisional Authority, it was re-instated in 2004 by the Iraqi Interim Government for murder, drug trafficking, kidnapping and threats to national security. According to one of its ministers, the government “had decided to apply the death penalty in Iraq as a temporary measure to have a dissuasive impact and to improve the security situation”, while saying that it was intended to abolish the practice altogether “once the security situation had improved”.<sup>8</sup> The statement indicates that the death penalty is seen as a necessary measure to maintain a fragile peace during transition. Here, especially during an unstable transition process, the death penalty comes to be expected to have both practical and symbolic effect to remedy a weak government – this may be an incentive for policy makers to retain the punishment.

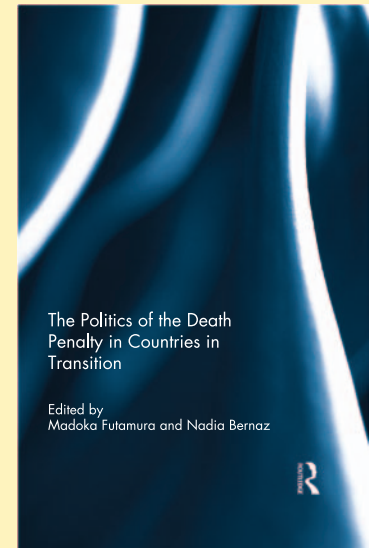
### Transitional justice

How to address huge violence and gross violations of human rights under-

taken in the past and how to deal with the individuals, including top political and military leaders, responsible for such violence are issues of “transitional justice”. When a society in transition is profoundly traumatized by past gross violence, public sentiment and opinion, especially the voice of victims and survivors wanting appropriate justice, are compelling. They cannot and should not simply be dismissed, because the mishandling of justice may trigger frustration, anger and the recurrence of violence caused by private revenge. The way a new government deals with transitional justice questions will also be seen by people as indicating whether and to what extent the new government is different from past abusive regimes and is ready to commit to its claimed causes. As Samuel Huntington argued, transitional justice is one of the major problems of transition, being related to “fundamental questions of national identity and political legitimacy”.<sup>9</sup>

The United Nations and the international community became committed to the pursuit of accountability and justice in post-conflict situations. At the same time, they came to acknowledge that a successful transitional justice strategy needs to be based on local perceptions and needs, especially of victims and survivors. This raises an interesting issue in terms of the death penalty. Based on its commitment to “international norms and standards”, the United Nations has stated that it would not establish or provide assistance to any tribunal that allows for the death penalty.<sup>10</sup> How, then, should it respond if victims request the death penalty as a means to punish former political and military leaders responsible for crimes against humanity and genocide? After the 1994 genocide,

### About this brief



This policy brief draws upon the results of a research project, “The Politics of the Death Penalty in Countries in Transition”, which focused on the relationship between death penalty policy in countries going through the democratization process or a transition from war to peace and examined what makes these countries decide to abolish, retain or resort to the death penalty during their fragile transition process. The project was funded by the United Nations University Institute for Sustainability and Peace (UNU-ISP). The project resulted in *The Politics of the Death Penalty in Countries in Transition* (Routledge, 2014), edited by Madoka Futamura and Nadia Bernaz. The detailed analysis of some country cases referred to in this brief can be found in the volume.



Rwanda asked the United Nations to create the International Criminal Tribunal for Rwanda (ICTR) to prosecute and punish those responsible for genocide; however, Rwanda eventually opposed the Tribunal, partly because it does not allow death sentences. In the case of Iraq, the United Nations and international experts did not participate in and support the Supreme Iraqi Criminal Tribunal because the Tribunal retained the death penalty owing to forceful demands from the Iraqi side. The lack of international scrutiny and support resulted in dubious justice being implemented at the Tribunal, and led to the execution of Saddam Hussein. In both cases, the death penalty was regarded by local governments as a necessary and appropriate measure to tackle the fragile transition process.

### **International justice or local justice?**

A difficult question for international actors is whether and to what extent local people's support or even desire for the death penalty need to be taken into consideration in fragile transition processes. The United Nations and international non-governmental organizations push for the abolition of the death penalty from the human rights perspective, which involves protecting the right to life. However, the death penalty policies discussed here are being elaborated not in a normal criminal situation but in a context of war crimes, genocide and crimes against humanity. This is not simply an ethical question but also has a potential impact on the overall international strategy for peacebuilding. In 1998, when a group of people who had been convicted of genocide in Rwanda's national courts were executed in the

country, the relationship between the Rwandan government and the United Nations worsened and damaged cooperation between the United Nations and Rwanda in the country's peacebuilding process. This resulted in the United Nations Human Rights Field Operation in Rwanda leaving the country.<sup>11</sup> This is a dilemma for the United Nations, facing not only a gap between international and local understanding of justice but also a tension between its agenda on peacebuilding and the death penalty.

Nevertheless, there are also cases where internationally supported transitional justice mechanisms enhanced the abolitionist movement. The final report of Sierra Leone's Truth and Reconciliation Commission raised "the enshrining of the right to human dignity and the abolition of the death penalty" as one of the Commission's core recommendations. Although, at the time of writing, the government had not yet responded to the recommendation, the report definitely encouraged the national abolitionist movement. What is even more interesting is the case of Rwanda, which gradually paved the way towards abolition after the row with the United Nations. The case shows that the work of the ICTR, as well as progress in the country's peacebuilding process, influenced Rwanda's understanding of the death penalty and led it to decide to abolish it.

### **A holistic approach to death penalty policy**

Death penalty policy is complex, being linked to many other political, social and ethical questions that entail going beyond human rights considerations. This is especially so in countries in transition experiencing fundamental



social and political transformation, during which death penalty policy is intricately connected to issues related

policy, international actors need to approach the abolition of the death penalty from a broader and more

## “International actors need to approach the abolition of the death penalty from a broader and more holistic viewpoint”

to governance, security, the rule of law and justice.

Given that the transition process provides both challenges and opportunities to reconsider death penalty

holistic viewpoint, taking into consideration how death penalty policy is embedded in fragile and complex local situations.

### Notes

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