

Abolition of the Death Penalty: Challenges and Prospects

Panel 1: Institutional efforts aimed at preventing and stopping
the death penalty

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Intervention

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“Abolition and the Rule of Law”



“Natural justice is a pledge of reciprocal benefit, to prevent one man from harming or being harmed by another.”

– Epicurus, some three hundred years before Christ

In moral and political philosophy, “the social contract” theory – or fiction – is ancient. In the “state of nature”, the human condition absent of any political order may be described as a war of all against all. To avoid this, rational individuals would voluntarily consent to give up their natural freedom to obtain the benefits of political order. Justice and law is rooted in mutual agreement and advantage. The individuals delegate to the State their right to violence save that needed for self-defence. The State is granted a monopoly of violence to administer and enforce the law.

The right to life is the supreme human right. The effective protection of the right to life is the prerequisite for the enjoyment of all other human rights that are to give quality to the life upheld.

A key characteristic of the human condition is its frailty. The human being is vulnerable in every respect. Even the strongest and the brightest individual is likely to be defeated if outnumbered by people of ill intent. The human being was placed in the company of others like itself, so that what was wanting in its nature, and beyond its attainment, if left to its own resources, it might obtain by association with others.

Social harmony means to balance the rights of the individual – every individual – against the rights of the community. Two sides that are mirrored in the human nature. Every person are both “self” and “the other”.

Aristotle argued that the human being, as a social and political animal, *must* live in organized society. The people would fall apart if the rights of each person were not accompanied by their corresponding duties.

Roman law states that the explanatory reason for the law is the human persons for whose sake it is made. The most significant element of the law is its coercive force – in consequence, a violation of the law is punishable.

The Universal Principle of Right, as formulated by Kant, is a principle of mutual autonomy. Freedom can only legitimately be constrained by freedom. “Right is, therefore, the sum of conditions under which the choice of one can be united with the freedom of the other in accordance with universal law.” Without being entitled to avert a wrongful hindrance of personal freedom, the person has no freedom.

The discipline of human rights has primarily concerned itself with constraining the powers of the State. Violence perpetrated by a State is not on a par with that perpetrated by individuals or groups. But, most people experience their freedom limited primarily by fellow human beings and not by State agents. People need the State’s protection – the rule of law – to have security.

The International Commission against the Death Penalty, abbreviated ICDP, is an independent body of politically influential people with international standing – supported by a diverse group of 23 governments from all world regions – working to free the world from the death penalty. It opposes the death penalty in all situations, and urges the immediate establishment of a universal moratorium on executions globally with a view to total abolition.

The ICDP Commissioners come from across the globe. They do not represent their respective countries and act with total independence. Abolition is a world-wide concern.

The ICDP engages in dialogues with State actors to attain abolition and to arrange for moratoriums and assists in preparing the public for such changes. The ICDP uses its good office to intervene with States when executions are imminent.

Abolishing the death penalty – as upholding the rule of law – is an act of State. Good governance can only be assisted by non-State actors.

The ICDP with its commissioners – experienced from government institutions and international justice – is mindful of the death penalty as an integral part of the larger issue of the rule of law. Abolition is an aspect of good governance – a sign that a State functions well.

The rule of law – as the essence of freedom – is to be viewed in dynamic rather than in static terms. The rule of law cannot

be taken for granted once achieved, it is never finally accomplished but an ongoing process.

The ICDP is welcoming the continuing international trend towards the abolition of the death penalty and that many States are applying a moratorium on the use of the death penalty. Welcomed are, as well, measures taken by States towards limiting the application of the death penalty.

This conference is to provide a broad picture of the work concerning abolition, remaining challenges and prospects included. New challenges that could potentially cause setbacks must be brought to mind as well.

According to the Human Rights Committee, States parties to the International Covenant on Civil and Political Rights that have abolished the death penalty are barred from reintroducing it. The reinstatement by a State party to the Second Optional Protocol to the International Covenant on Civil and Political Rights is a violation of international law. This may not suffice to prevent the reintroduction of the death penalty.

The same Article 6 – on the right to life – in the International Covenant on Civil and Political Rights is invoked to champion the rule of law and the abolition of the death penalty. If the rule of law is lacking to an extent endangering life, the value at stake is human life – the same value that is disregarded when the death penalty is applied. The general sentiment in such situations is to give priority to protecting people from crime rather than from punishment. The prime reason for the

State punishing is that people should not do it themselves. Street justice is often harsh, not seldom lethal.

Many States are *de facto* deteriorating as to their ability to function adequately. Distrust in basic State institutions, conspiracy theories, false news, enormously strong transnational economic powers, polarization, the promotion of individual interests and the weakening of communitarian values, a kind of deconstruction of history and differences – this may cause the foundations of social life to corrode. Feeling insecure and less protected people may think that they stand almost alone fending for their rights. Less benign politicians spread despair and discouragement to gain control. New totalitarian States may emerge.

It is never too late, to make a better world. Now is the time! The challenges are not new, however! Cesare Beccaria, a great jurist of the Enlightenment, said “If I can go on to prove that such a death [the death penalty] is neither necessary nor useful, I shall have won the cause of humanity.”

He ascertained that the death of a citizen might be held to be necessary only: (i) when it is evident that even if deprived of his freedom, he retains such connections and such power as to endanger the security of the nation; and/or (ii) his death is the true and only brake to prevent others from committing crimes.

Immunities and amnesties provided to perpetrators of violent crime are, generally, incompatible with the duty to ensure the right to life, and to provide victims with an effective remedy.

A criminal investigation is normally required and should lead, if enough incriminating evidence is gathered, to a criminal prosecution. Administrative or disciplinary measures alone do not suffice. States must disband irregular armed groups that are responsible for killings, and reduce the proliferation of lethal weapons to unauthorized individuals. But, the States are not to engage in extrajudicial executions – homicides deliberately committed by State agents – often said to be clashes with criminals or the unintended consequences of the reasonable, necessary and proportionate use of force in applying the law.

To ensure abolition of the death penalty, new moratoriums and no setbacks, there is a need to enhance human dignity and assist States to provide the rule of law. Peoples must be ensured that the death penalty is no longer necessary – that it will be possible otherwise to defend society. There is no evidence that the death penalty has a deterrent effect that reduces the crime rate. It may be argued that brutalization is a more likely effect: executions desensitize the public to the immorality of killing; the State legitimizes the notion that vengeance for past misdeeds is acceptable; and executions may have an imitation effect.

It is the length of a punishment that makes the greatest impression on the human being and have the person adjust accordingly. Furthermore, ‘the impressions made in a free and peaceful State should be frequent rather than strong’. Consequently – as stated by Beccaria – a paradox appears,

“if it is important that men often see the power of the law, executions ought not to be too infrequent: they therefore require there to be frequent crimes;”

Add to this the possibility of judicial error; the fact that the death penalty is irreparable, applied in a disproportional manner against marginal individuals, and that dictatorial regimes utilise it as a means of suppression and persecution. People have reason to *fear* the existence of the death penalty.

How States abolished the death penalty, vary considerably. It has taken place in very different political and historical contexts. Numerous lessons are to be learned from across the globe. Despite the contrasts, the measures adopted by the States to advance towards abolition, and the resistances met, have been very similar in most cases. The political choice to abolish the death penalty is not determined by specific circumstances. It is a matter of willingness.

The establishment of an official moratorium on death sentences and executions has been the first step taken in several countries. Other countries did not carry out executions for years whereby they established a *de facto* moratorium. *De jure* moratoriums have usually been accompanied by commutations of death sentences to terms of imprisonment.

Some States abolished the death penalty for ordinary crimes before becoming fully abolitionist. In other countries the number of crimes carrying the death penalty was progressively reduced.

Mongolia and Benin started their abolitionist journeys by becoming a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

Madagascar signed the Protocol before final abolition, but ratified it after finalizing the abolitionist process domestically. Guinea and Congo started by voting in favour of UNGA resolutions calling for a global moratorium. Some countries abolished the death penalty by amending their Constitutions, before removing it from their laws. Mexico did it the other way round.

Several countries abolished the death penalty to mark a new beginning after a conflict that involved genocide and crimes against humanity, or to move away from an authoritarian past.

The rule of law provides a climate conducive to abolition. In Norway, the criminal code of 1902 abolished the death penalty in peace. The last previous execution had been in 1876. The *population* perceived of the death penalty as not needed, cruel and outmoded, and their will was accepted.

In most countries, political leaders or courts have spearheaded abolition. Numerous actors such as religious leaders, professional organizations, national human rights institutions, and individuals from civil society have played important roles in overcoming public support for the death penalty.

International pressure has also played an important role for the abolition movements. It is for the State actors to prove capital punishment unnecessary by ensuring the rule of law.

What people desire is to see human dignity enhanced, to have respect for human life affirmed and to see the rule of law upheld. Death as punishment is perpetuating a culture of violence. In times of enormous challenges, it may be very prudent to reduce the utilization of the death penalty. We must plant the seed of the tree we want to grow – that is enhance human dignity and everyone's confidence in and respect for the life of the human being safeguarded by the rule of law.

