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[일반논문]

ON DEATH PENALTY

: At a tipping point? Gradual abolitionist trend worldwide,
reduced executions but facing profound challenges

Rajiv Narayan* · Asunta Vivó Cavaller**

Abstract

The article focuses on the present situation of the death penalty globally. It notes that there is an increasing trend, albeit gradually, of countries that have abolished the death penalty, but this trend faces important challenges. The article initially reflects and gives shape to the current global situation of death penalty in numbers and with a map. It then describes the abolitionist perspective starting with a history of abolition of the death penalty. There is a brief description of the evolution of the international legal framework which reduces the scope of the death penalty with a view to eventual abolition. There is focus on regional abolitionist legal protocols in Europe and the Americas and the attempt to adopt one in Africa. The article tries to understand the retentionists' perspective on why countries retain the death penalty. It is argued that the increased hardening of positions by countries retaining capital punishment could be a reflection of a number of factors including penal populism, the rise of populist, 'strong man' leaders, increased focus on victims; that the death penalty is a sovereign issue where the death penalty is perceived as a criminal law issue and thereby in the deterrent effect of capital

* Dr. Rajiv Narayan is Director of Policy at the International Commission against the Death Penalty.

** Asunta Vivo Cavaller is Executive Director at the International Commission against the Death Penalty.

punishment. The article identifies some routes adopted by countries in abolishing capital punishment. More than half the number of countries has abolished the death penalty and over two-thirds do not use capital punishment in law and practice. Moreover, the number of executions has declined, and death penalty-applicable crimes are declining among retentionist countries. But the most populous countries still retain the death penalty and for achieving a tipping point, there is a need for new and more creative narratives, for establishing engagements with emerging stakeholders.

Keywords: Death penalty, capital punishment, abolitionist, retentionist, international legal framework, sovereignty, routes to abolition

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I . Introduction

The situation of the death penalty globally is delicately balanced. As of November 2021, 109 countries are considered to be abolitionist for all crimes, the latest being Sierra Leone¹⁾ whose

¹⁾ On 23 July 2021, Sierra Leone's Parliament voted unanimously to abolish the death penalty. This vote followed its delegation stating on 12 May 2021 during its National Report that was submitted to its recent

President Julius Maada Bio signed, on 8 October 2021, the death penalty abolition bill passed by its Parliament in July. Meanwhile at least 89 countries retain the death penalty with around 18 countries (including Taiwan, which is not a UN Member-State) carrying out executions in the last few years. Interestingly, among the retentionist countries, 27 States have not carried out executions for over a decade or more and eight countries have abolished the death penalty for crimes during peacetime, while retaining the death penalty during times of war.²⁾ So, more than two-thirds of the countries around the world do not use the death penalty in law and practice.

Since the Second World War, we have witnessed the emergence of a legislative framework that has sought to increase the respect, protection and fulfilment of the right to life beginning with the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol, regional legislations in Europe, in the Americas. From a judicial perspective, courts, including Constitutional courts,

Universal Periodic Review that, “GoSL (Government of Sierra Leone) has already made firm commitments... On 17 December 2020, the President stated the clear intentions of his government to abolish the death penalty.” See National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Sierra Leone, UN Index: A/HRC/WG.6/38/SLE/1, paragraph 42, p.10, 16 February 2021 at https://www.upr-info.org/sites/default/files/document/sierra_leone/session_38_-_may_2021/a_hrc_wg.6_38_sle_1_e.pdf accessed on June 1, 2021.

²⁾ Figures cited from Amnesty International Global Report, “Death Sentences and Executions 2020,” Amnesty International ACT 50/3760/2021, April 2021, p.57 at <https://www.amnesty.org/download/Documents/ACT5037602021ENGLISH.PDF> accessed on April 29, 2021.

international courts like the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Panels for Serious Crimes in the District Court of Dili, East Timor and the Extraordinary Chambers for Cambodia have all excluded the death penalty for all crimes.

At a political level, countries have seen leaders, parliaments taking the lead in abolishing, or moving away from, the death penalty in Europe, in Asia, in the Americas (the USA), Africa.

There are religious influences, for instance the Catholic Church, which encourages several countries to move towards abolition and where the abolitionism has gained further ground under Pope Francis, as reflected in a change in the Catechism in August 2018,³⁾ which was confirmed by his encyclical letter in October 2020.⁴⁾

An important role has been played by regional initiatives or movements, which have influenced countries to move towards abolition for instance in Europe, which wanted to avoid repeating the grave, widespread, systemic human rights violations caused by the two World Wars and during the inter-war period. The other regions include the Americas, with the notable exception of the USA, and the Pacific Islands, where all countries are abolitionist

³⁾ See Pope Francis' Letter to the Bishops regarding the new revision of number 2267 of the Catechism of the Catholic Church on the death penalty, from the Congregation for the Doctrine of the Faith, 02.08.2018 at <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802b.html> accessed on April 20, 2021.

⁴⁾ See Encyclical Letter *Fratelli Tutti* of the Holy Father Francis on Fraternity and Social Friendship, paragraphs 263-270 at http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciale-fratelli-tutti.html accessed on April 20, 2021.

except for Papua New Guinea and Tonga, and they have not carried out executions for decades.

Among the 27 countries, which have a long-term moratorium⁵⁾ on the death penalty, there appears to be a reluctance in moving from moratoria, be it *de facto or de jure*, to abolition. Often, there is a lack of political will to move towards abolition.

The calls to end, or move away from the death penalty, are portrayed often by the countries, who retain and use the death penalty, as attacks, onslaughts on their sovereignty. Partly, this perception of sovereignty emanates from the view that the death penalty is being part of the penal codes – in many cases, a legacy from their former colonisers; that it is a criminal justice issue and thereby a matter of domestic jurisprudence. Capital punishment is retained under the assertion that it deters crime. “The most common argument used by those in favor of continuing the application of the death penalty is the deterrence effect.”⁶⁾ Another reason used to

⁵⁾ Moratorium: A moratorium on the death penalty refers to a delay in death penalty sentencing and pursuance of death penalty executions of those on death row. During a moratorium, those persons under sentence of death are placed on a stay of execution. Thus, as long as the moratorium persists, executions will not occur. The word moratorium derives from the Latin word *morari* meaning to delay.

A moratorium does not fully abolish the death penalty, as making this penalty illegal must occur through legislation. Thus, in countries where moratoria are employed, the death penalty is still, technically, legal.

Countries that are *de facto* abolitionist or abolitionist in practice include those States that retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice when they have not carried out an execution during the last 10 years and are believed to have a policy or established practice of not carrying out executions.

⁶⁾ Michèle Duvivier Pierre-Louis, “Death Penalty in the Greater

justify retaining death penalty is fulfilling the expectations of victims' families of retribution, the 'eye for an eye' principle, which it is argued will help bring closure to those who have been affected by the serious crime. These countries argue, and they have a level of backing here, that they are not violating international law as the International Covenant on Civil and Political Rights (ICCPR) does allow for countries to carry out executions for the most serious crimes.

The challenges, at various levels, to the global spread of abolition of capital punishment include a perceived increase in opposition of globalisation with liberal values, including human rights within the context of the

- increasing influence of penal populism addressing large sections of population who feel aggrieved, victimized, threatened by

Caribbean,” in Ioanna Kuçuradi (ed.), “The Death Penalty: Justice or Revenge?,” Lit Verlag GmbH&Co. KG Wien: Zurich, October 2020, p.152-53. As Hood and Hoyle point out, “Those retentionist countries that rely on the deterrent justification should face the fact that if capital punishment were to be used to try to obtain its maximum possible deterrent effect, it would have to be enforced mandatorily, or at least with a high degree of probability, and therefore on a substantial scale across most categories of homicide. Even if capital punishment could produce a marginal deterrent effect it could only be achieved by high rates of execution mandatorily and speedily enforced. This would increase the probability of innocent or wrongfully convicted person being executed and also lead to the execution of people who, because of the mitigating circumstances in which their crimes were committed, do not deserve to die. This is not an option for democratic states bound by the rule of law, concern for humanity, and respect for human rights.” Roger Hood and Caroline Hoyle, *The Death Penalty: A Worldwide Perspective*, Oxford: Oxford University Press, 2015, p.425.

- global uncertainties at social, economic, technological levels,
- influence of media (and at times, religious) narratives that support victims' rights and resolution by 'eye for an eye' retribution,
 - rise of nationalistic, populist 'strong men' leaders,
 - narratives that call for illiberal measures including tough anti-crime policies that promises stability, certainty with a deep suspicion of civil, political, individual rights.

The 2020 UN General Assembly (UNGA) resolution on a moratorium on the use of the death penalty reflected the delicate situation of the death penalty. According to the United Nations' press release on 16 December, "Simmering differences over human rights questions bubbled over into votes on a moratorium on the use of the death penalty..."⁷⁾ The voting record was in line with the increasing global trend away from the death penalty with the adoption, at the UNGA plenary session on 16 December 2020, of the resolution, by a record-high 123 Member-States voting in favour, 38 against and 24 abstentions. However, one has also to note the context of the resolution as its text was weakened by the introduction of a sovereignty amendment, which was voted in by 95 Member-States with 69 opposing it and 17 abstentions at the Third Committee on 17 November.⁸⁾ More recently, on 8 October

⁷⁾ "General Assembly Adopts 48 Third Committee Resolutions, Proclaims International Day for People of African Descent, Covering Broad Themes of Human Rights" United Nations, Meeting Coverage, GENERAL ASSEMBLY PLENARY SEVENTY-FIFTH SESSION 46TH MEETING (AM), GA/12304, 16 DECEMBER 2020, <https://www.un.org/press/en/2020/ga12304.doc.htm> accessed on April 18, 2021.

⁸⁾ For an analysis of the 2020 UNGA resolution, see the article by Navi

2021, the 47-member UN Human Rights Council adopted the resolution on the question of the death penalty by a seemingly comfortable vote of 29 countries in favour, 12 against and 5 abstentions.⁹⁾ However, the tensions were revealed by the vote for the sovereignty amendment which was not adopted by a single vote with 19 countries voting against while 18 countries voted for and 8 countries abstained.¹⁰⁾

The current situation of death penalty in figures and a map

From a figurative perspective, as of October 2021, 109 countries have abolished the death penalty for all crimes; eight countries have abolished the death penalty for ordinary crimes but retain the death penalty during times of war and 27 countries have not carried out an execution for the last ten years, even though they retain the death penalty for crimes such as murder. From this narrative, one could state that nearly two-thirds of the countries in the world have not used the death penalty in practice and/or in law and the move away from the death penalty is positive, especially when we note

Pillay and Ruth Dreifuss, “Many Countries Cheer Gains to Ending the Death Penalty Globally, but Foes Harden Their Stance,” PassBlue, 17 December 2020 at <https://www.passblue.com/2020/12/17/many-countries-cheer-gains-to-ending-the-death-penalty-globally-but-foes-harden-their-stance/> accessed on December 18, 2020. A disclaimer: one of the authors contributed to this article.

⁹⁾ See A/HRC/48/L.17/Rev.1 - Question of the death penalty at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/269/99/PDF/G2126999.pdf?OpenElement>, accessed on November 12, 2021.

¹⁰⁾ See A/HRC/48/L.66 - Amendment to A/HRC/48/L.17/Rev at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/273/53/PDF/G2127353.pdf?OpenElement>, accessed on November 12, 2021.

that at the beginning of the 20th century, three countries had abolished the death penalty for all crimes - Costa Rica, San Marino and Venezuela. In 1948, when the Universal Declaration for Human Rights (UDHR) was adopted, the number stood at eight.

If one were to look at it from the retentionists' perspective, in 2020, 18 countries carried out executions, some 54 countries are considered to retain the death penalty,¹¹⁾ but when one includes those countries that have not abolished the death penalty including those that retain the death penalty during times of war, then some 89 countries still have the death penalty in their law statutes. Here it is important to note that the majority of the global population live in States that carry the death penalty¹²⁾ in their legal statutes. Besides, there are calls to reinstate the death penalty in countries which already abolished the death penalty like the Philippines,¹³⁾ Turkey¹⁴⁾ and Mongolia.¹⁵⁾

11) For figures cited in this paragraph, see Amnesty International 2021, *ibid.* (footnote 3), pp.57-58.

12) To give a very superficial picture, seven of the ten most populous nations retain the death penalty, with Russia observing a long-term moratorium. The population living in countries under the death penalty increases further if we note that 13 of the 20 most populated countries retain the capital punishment.

13) "On 1 October 2020, 37 members of the House of Representatives of the Philippines introduced a new bill amending the Comprehensive Dangerous Drugs Act of 2002 to increase the penalties for drug-related offences, including by re-introducing the death penalty. Several other measures to reinstate this punishment filed in previous years remained pending before the House of Representatives (13) and Senate (10)." (Amnesty International, *ibid.*, Footnote 3, p.31)

14) In Turkey, there have been statements by the Speaker of the Grand National Assembly Mustafa Sentop indicating that the death penalty could

At a global level, as of the end of 2020, over 28,567 people were known to be under sentence of death¹⁶⁾ and at least 483 executions were reportedly carried out in 2020 compared to 2019 when at least 657 executions were carried out,¹⁷⁾ though there were no figures available for countries with a history of carrying out high number of executions like Vietnam, North Korea, China, where information related to death penalty is a State secret and official figures related to death penalty including executions, numbers of people under sentence of death are not available in countries that frequently use the death penalty like Saudi Arabia, Egypt, Iraq, Iran, Syria.

One gets a better sense of the geo-political aspect of death penalty, when we look at the regional perspective. In Europe, all countries have abolished the death penalty except Belarus, which is the only State to carry out executions.¹⁸⁾ In Africa, 23 countries

be restored for some offences. See International Federation for Human Rights (FIDH), “Death Penalty Cannot be Reinstated in Turkey,” at <https://www.fidh.org/en/region/europe-central-asia/turkey/death-penalty-cannot-be-reinstated-in-turkey> accessed on November 9, 2021.

¹⁵⁾ In 2018, the then-President of Mongolia Khaltmaa Battulga reportedly intended to initiate draft amendments to the Criminal Code of Mongolia reinstating the capital punishment, where he sought to introduce death sentence for crimes against children and submit the bill to the Parliament during that spring session. (See <https://akipress.com/news:604435/> accessed on November 9, 2021).

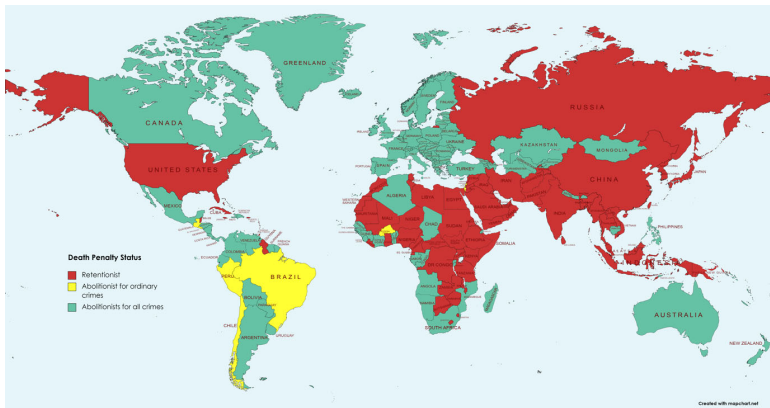
¹⁶⁾ Amnesty International, *ibid.*, footnote 3, p.13.

¹⁷⁾ *Ibid.*, p.9.

¹⁸⁾ In June 2021, Amnesty International expressed concern of an execution of a man, Viktor Paulou, having been carried out by authorities in Belarus. The execution has not been officially confirmed, as of date. See “Belarus: Rare clemencies overshadowed by latest suspected

have abolished the death penalty, with four countries carrying out executions in 2020. In Asia, 19 countries retain the death penalty with six countries having carried out executions in 2020; its most populous countries China, India, Indonesia, Pakistan, Bangladesh, Viet Nam still carry out executions. In Central Asia including Mongolia, all countries, except Tajikistan, have made international commitments to abolish the death penalty; Tajikistan has an official moratorium since 2004. In the Pacific region, most countries have abolished capital punishment except for two countries, Papua New Guinea and Tonga. In the Americas, including the Caribbean, region the USA is the only country that continues to carry out executions, while most of the English-speaking countries in the Caribbean region and Cuba still retain the death penalty.

The map shown below gives a pictorial image of the current global situation of the death penalty.



execution,” Amnesty International Public Statement, AI Index Number: EUR 49/4306/2021

June 17, 2021 at <https://www.amnesty.org/en/documents/eur49/4306/2021/en/> last accessed on August 23, 2021. The last confirmed executions were carried out in 2019.

II. The abolitionist perspective

A brief history of abolition of death penalty

The abolition of the death penalty is not new as one finds reference to Emperor Shōmu, in Japan, who abolished capital punishment in 724 A.D. followed by Emperor Saga in 818 A.D. wherein the abolition lasted until 1156. In China, Emperor Xuanzong of the Tang dynasty abolished the death penalty in 747 A.D., which lasted for 12 years, replacing it with whipping and exile.

In Europe, the scholar Moses Maimonides wrote in the 12th century that the legitimacy of the justice system was being eroded by the widespread use of the death penalty in Europe, which resulted in countless innocent deaths. He concluded that, “It is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death.” In England, a 1395 public statement titled ‘The Twelve Conclusions of the Lollards’ opposed the death penalty stating that the Christ was for forgiveness and mercy.¹⁹⁾ The 1440 Poljica Statute recognized that life was a basic right in the Republic of Poljica (in current-day Croatia). In 1764, Cesare Beccaria, in his influential work *Dei Delitti e Delle Pene (Crimes and Punishments)*, argued for the abolition of the death penalty noting that it was characterised by injustice, futility and that it was counter-productive, as it often incited greater unrest among the population. Beccaria's work

¹⁹⁾ See Harvard University, Harvard's Geoffrey Chaucer Website. “The Twelve Conclusions of the Lollards. <https://chaucer.fas.harvard.edu/pages/twelve-conclusions-ollards> accessed on November 9, 2021.

influenced Grand Duke Leopold II of Habsburg, the future Emperor of Austria, to promulgate an amended penal code to abolish the death penalty, the first permanent abolition, in the then-independent Grand Duchy of Tuscany on 30 November 1786, after a *de facto* moratorium since 1769. He also ordered the destruction of all the instruments for capital execution. In 1849, the short-lived revolutionary Roman Republic banned capital punishment. San Marino, where the last execution was carried out in 1468, ended capital punishment in 1865. Portugal abolished the death penalty in 1867 following legislative proposals in 1852 and 1863.

In the Americas, Venezuela was the first country to abolish the death penalty in 1863. In Brazil, the last execution was carried out in 1876; following which, all death sentences were commuted by Emperor Pedro II until its abolition for civil offences and military offences in peacetime in 1891.²⁰⁾

The pace of abolition has accelerated in the second half of the 20th century. In 1948, when the Universal Declaration for Human Rights was adopted, eight countries had abolished the death penalty. By the end of 1978, it had risen to 19 countries. Since then, the number has increased more than five and half times when we note that as of November 2021, 109 countries are abolitionist for all crimes.

From an abolitionist viewpoint, concerns focus on the manner of the punishment, the human rights violations emanating from this practice including:

²⁰⁾ The penalty for crimes committed in peacetime was then reinstated and abolished again twice (1938 -1953 and 1969 -1978), but on those occasions it was restricted to acts of terrorism or subversion considered “internal warfare” and all sentences were commuted and not carried out.

- the systemic flaws, especially when viewed from the prism of the respect and protection of the right to life.
- the ever-present risk of carrying out an execution of an innocent person.
- the inherent discrimination as a majority of people under sentence of death come from the economically and socially marginalised sections of society.
- the overwhelming number of cases where the persons sentenced to death did not receive a fair trial.
- where the execution sentence was adjudicated based on evidence gathered from forced confessions as a consequence of subjecting torture and grievous ill-treatment on those charged of the crime.
- the act of execution being a form of cruel, inhuman and degrading practice however ‘civilized’ the method of carrying out of an execution.
- increasing concerns of executions of people who are juvenile offenders or mentally/intellectually disabled.
- the lack of transparency which cloaks the death penalty system with several countries either considering death penalty-related information to be a secret or not revealing officially the number of executions carried out, the names of the persons executed or announcing the executions after it has been carried out. The secrecy extends, on several occasions, to the cases decided by trials which are often held away from the public limelight.

Hakamada Iwao's case, in Japan, is an example raising many of these concerns. In 2014, Hakamada, who is now 85 years-old, “became the world’s longest-serving person under sentence of death after he was found guilty, in 1966, of robbery, arson and the murder of his boss, his boss’ wife and their two children in Shizuoka. Hakamada initially admitted to all charges before changing his plea at trial. He was sentenced to death in 1968 in a 2-1 decision by judges, despite repeatedly alleging that police had fabricated evidence and forced him to confess by beating and threatening him after some 20 days of long hours of interrogation by police where he had no access to legal defence. The one dissenting judge stepped down from the bar six months later, demoralized by his inability to stop the sentencing. The sentence was finalized by the Supreme Court in 1980. Hakamada and his family had long sought retrials to prove his innocence, but to no avail. But a new development came in 2014 when the district court accepted the DNA test result that revealed that blood on the clothing matched neither Hakamada nor the victims’ blood type. The court noted the possibility that evidence could have been fabricated by police. In 2014, the Shizuoka District Court ordered a retrial and released Hakamada on the grounds of his age and fragile mental state. Hakamada’s ordeal has sadly continued when, on 11 June 2018, the Tokyo High Court overturned the lower court’s ruling granting the retrial, questioning the credibility of the DNA analysis method...There is a possibility that Hakamada could go back to prison and face the death penalty once again. His legal team launched an appeal to get a retrial.”²¹⁾ In December 2020, the Supreme Court

reportedly ruled against the High Court judgment opening the possibility of a retrial.

International legal framework paving the road away from the death penalty

The United Nations

A legal framework has emerged, since the Second World War, which has reduced incrementally the scope of the death penalty. Let us begin at the United Nations. The Universal Declaration of Human Rights (UDHR), which was proclaimed on 10 December 1948, recognizes each person's right to life in Article 3: "Everyone has the right to life, liberty and security of person." This right is underlined in Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which was adopted by the UN General Assembly in 1966, and which states in its paragraph 1 that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." There has been an evolution of international standards aiming to reduce executions by excluding more categories of people from being sentenced to face the death penalty including juvenile offenders, mentally ill or intellectually disabled people; pregnant women, new mothers; people over 70 years old.

Furthermore, the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of

21) Rajiv Narayan, "Situation of the death penalty in the Asia-Pacific region: One step forward, two steps back," in Ioanna Kuçuradi (ed.), "The Death Penalty: Justice or Revenge?," Lit Verlag GmbH&Co. KG Wien: Zurich, October 2020, pp.186-187.

the death penalty, was adopted by the UN General Assembly in 1989. It, however, allows States Parties to retain the death penalty in time of war. As of August 2021, there are 89 countries who are State Parties to this Protocol,²²⁾ the last one being Armenia who deposited the documents for ratification on 18 March 2021. According to General Comment 36 on Article 6 of the ICCPR (GC36), which was adopted on 30 October 2018 by the UN 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, and the abolition of the death penalty is legally irrevocable.²³⁾ The latest State Signatory to the Protocol is Kazakhstan on 23 September 2020, with the condition that the country would retain the death penalty during wartime. On 2 January 2021, President Kassym-Jomart Tokayev signed to bring into effect the vote by the country's National Assembly to ratify the Protocol on 29 December 2020. Kazakhstan still retains the death penalty in its legal statutes and has indicated that it will change its domestic legislation in line with its

²²⁾ See Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Status at June 6, 2021) at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY & mtdsg_no=IV-12&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4) accessed on August 29, 2021.

²³⁾ Paragraph 34, GC36, p.9: States parties to the Covenant that have abolished the death penalty, through amending their domestic laws, becoming parties to the Second Optional Protocol to the Covenant or adopting another international instrument obligating them to abolish the death penalty, are barred from reintroducing it. Like the Covenant, the Second Optional Protocol does not contain termination provisions and States parties cannot denounce it. Abolition of the death penalty is therefore legally irrevocable.

ratification of the Second Optional Protocol.

Besides the Second Optional Protocol, there are regional legal protocols.

Regional legal protocol - Europe

The right to life is guaranteed by Article 2 of the European Convention on Human Rights (Convention), which was drafted in 1950 by the then-newly established Council of Europe and which came into force in September 1953. When the Convention was drafted, the death penalty was not considered to violate international standards. An exception was therefore included to the right to life, so that Article 2§1 provides that “no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” Since then, there has been an evolution towards the complete *de facto* and *de jure* abolition of the death penalty within the member States of the Council of Europe.

The Council of Europe's 1982 Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”)²⁴⁾ abolishes the death penalty in peacetime for its State Parties. Protocol No. 6 to the Convention, which was opened for signature in April 1983, and which came into force on 1 March 1985, has been ratified by 46 member States. The next step was taken with Protocol 13 of

²⁴⁾ Chart of signatures and ratifications of Treaty 114, *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*: Status as of 06/06/2021 at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=0AFWyhAb accessed on June 6, 2021.

the European Convention on Human Rights, which commits its State Parties to the abolition of the death penalty in all circumstances, even in war time or imminent danger of war.²⁵⁾ Protocol No. 13, which was signed on 3 May 2002 and came into force on 1 July 2003, has been signed and ratified by 44 member States; Azerbaijan and the Russian Federation have not yet signed it, while Armenia has signed but not ratified this Protocol.

The Parliamentary Assembly of the Council of Europe now requires a commitment to abolition as a condition of entry into the organization.²⁶⁾ Moreover, the European Union has adopted a policy for promoting, awareness-raising, advocating for abolition in non-member States.

Moreover, the case-law of the European Court for Human Rights reflects that the death penalty is unacceptable and European countries do not extradite prisoners to countries where they face the possibility of being executed. Interestingly, South Korea has been a Party of the European Convention on Extradition (European Treaty

²⁵⁾ Chart of signatures and ratifications of Treaty 187, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*: Status as of 06/06/2021 at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=0AFWyhAb accessed on June 6, 2021.

²⁶⁾ The Parliamentary Assembly stated in its Resolution 1807 (2011) that “... It takes pride in its successful contribution to eradicating this inhuman and degrading punishment from almost all of Europe, by having made abolition of the death penalty a condition for accession to the Council of Europe.” Parliamentary Assembly of Council of Europe, Resolution 1807 (2011). The death penalty in Council of Europe member and observer states: a violation of human rights at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17986> accessed on April 15, 2021.

Series No.24) and its two Protocols (ETS Nos.86 and 98), the Convention on Mutual Assistance in Criminal Matters (ETS No.30) and its Protocol (ETS No.99) since 29 September 2011 and which came into force since 29 December 2011. At the time of acceding to the Convention on Extradition, South Korea declared “that if it gives assurance pursuant to Article 11 of the Convention (relating to capital punishment)²⁷⁾, the death penalty will not be carried out even if it is imposed by a court of the Republic of Korea.”²⁸⁾

27) “Article 11 - **Capital punishment**: If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.” (<https://rm.coe.int/168048bd42> accessed on May 8, 2020.)

28) European Convention on Extradition (ETS No. 024), Paris 13/12/1957 at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/declarations> accessed on 8 May 2020. At the time of ratifying ETS 30 and 99, the Republic of Korea declared “that if the offence for which assistance is sought is punishable by death under the law of the Republic of Korea, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, the Republic of Korea, if requested, shall give assurance that the death-penalty will not be carried out even if it is imposed by a court of the Republic of Korea. **Period covered: 29/12/2011 -**” (See European Convention on Mutual Assistance in Criminal Matters (ETS No. 030), Strasbourg: 20/04/1959 at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030/declarations> and Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 099), Strasbourg: 17/03/1978 at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/099/declarations?p_auth=S1L8nFNc&desktop=false accessed on May 8, 2020.)

Regional legal protocol - the Americas

The American Convention on Human Rights does not prohibit the imposition of the death penalty but establishes specific restrictions and prohibitions regarding its application. As the Inter American Court of Human Rights (“Inter American Court”) indicated in 1983: “Without going so far as to abolish the death penalty, the [American] Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance.”²⁹⁾ In its 2010 study on the death penalty, the Inter-American Commission on Human Rights (Commission or IACHR) clarified that

(p)artly by reference to the drafting history of the American Declaration (of the Rights and Duties of Man) as well as the terms of Article 4 of the American Convention on Human Rights, the Commission has found that Article I of the Declaration, while not precluding the death penalty altogether, prohibits its application when doing so would result in an arbitrary deprivation of life or would otherwise be rendered cruel, infamous or unusual punishment.³⁰⁾

²⁹⁾ I/A Court H.R., *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC 3/83 of September 8, 1983. Series A No. 3, para. 57 cited in THE DEATH PENALTY IN THE INTER AMERICAN HUMAN RIGHTS SYSTEM : FROM RESTRICTIONS TO ABOLITION , Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 68, 31 December 2011, p.1. (<https://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf> accessed on May 8, 2020.

³⁰⁾ Ibid, p.3.

On the basis of the recognition of the right to life, and the restrictions on the death penalty set forth in Article 4 of the American Convention, and considering the “tendency among the American States [...] to be in favour of abolition of the death penalty,” in 1990 the OAS General Assembly adopted the Protocol to the American Convention to Abolish the Death Penalty.³¹⁾ As of 31 December 2019, there are 13 States Parties to this Protocol who have undertaken that they will not apply the death penalty, although a reservation is possible to allow for its application in war time.

Regional legal protocol - Africa: a work in progress

In 1981, the African Union adopted the African Charter on Human and Peoples’ Rights, which provides for the right to life and integrity of the person for every human being; Articles 4 and 5 prohibits a State Party from arbitrarily depriving a person of the right to life and undertaking “(a)ll forms of... torture, cruel, inhuman or degrading punishment and treatment” respectively. In 1999, the African Commission on Human and Peoples' Rights (African Commission) adopted Resolution 42, its first resolution on the death penalty which calls on states parties to “a) limit the imposition of the death penalty only to the most serious crimes; b) consider establishing a moratorium on executions;” and “reflect on the possibility of abolishing the death penalty”. Reflecting its focus on the death penalty, in 2005, the African Commission established the Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa.³²⁾ In 2008, the African Commission

³¹⁾ Preamble, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted on 8 June 1990, at the 20th Regular Session of the General Assembly, Asuncion, Paraguay.

adopted Resolution 136, which calls on States Parties to observe a moratorium on executions with a view to abolishing the death penalty and calls on States Parties to ratify the Second Optional Protocol to the ICCPR. In 2014, the African Commission adopted the Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa (the Cotonou Declaration).³³⁾ In 2015, the African Commission adopted General Comment No.3³⁴⁾ on the African Charter on Human and Peoples' Rights on the right to life (Article 4) and adopted the draft Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa. Its Article 1 requires signatory states to commit to protecting the right to life and abolishing the death penalty. The

³²⁾ The Working Group was mandated, among other things, to monitor the use of the death penalty in Africa, to develop plans for abolition and to carry out a study on the death penalty in the region.

³³⁾ The Declaration “calls on legislators in Africa to review their national laws and enact legislation abolishing the death penalty and to support the ratification of the Additional Protocol to the African Charter on Human and Peoples’ Rights on the Abolition of the Death Penalty in Africa”, while calling on them to ratify the Second Optional Protocol to the ICCPR and vote in favour of future UNGA Moratorium Resolutions.

³⁴⁾ In November 2015, the African Commission adopted General Comment No. 3 on the African Charter on Human and Peoples’ Rights on the right to life (Article 4) which had been drafted by the Working Group and which emphasizes that the African Charter does not include any provision recognizing the death penalty, even in limited circumstances, and states that: “The vast majority of African States have now abolished the death penalty in law or in practice. International law requires those States that have not yet abolished the death penalty to take steps towards its abolition in order to secure the rights to life and to dignity, in addition to other rights such as the right to be free from torture, and cruel, inhuman or degrading treatment.”

draft Protocol is yet to be formally adopted by the African Union. In 2017, the African Commission adopted a “Resolution on the Right to Life in Africa”³⁵⁾ and, more recently in May 2019, passed Resolution 416 on the abolition of the death penalty in Africa,³⁶⁾ which urges States that still retain the mandatory death penalty to abolish it as it breaches the right to life and the right to human dignity.

III. The retentionists' perspective

Of the 89 countries that still retain the death penalty, many countries believe that the approach, its treatment, its implementation, or not, of capital punishment is within the realm of its national interest and is a sovereign decision.

Sovereignty and a reductionist viewpoint of death penalty and anti-colonial sensitivities and contradictions

Many retentionist countries “increasingly adopt a reductionist perspective in their approaches to their ‘wars’ against crimes by removing it from human rights considerations and viewing it largely

³⁵⁾ The Resolution on Right to Life in Africa urged states parties to the African Charter on Human and Peoples’ Rights, which have established a moratorium on executions to take steps towards the abolition of the death penalty, and those states parties that have not abolished the death penalty to immediately establish a moratorium on executions.

³⁶⁾ See African Commission on Human and People's Rights, Resolution on the Abolition of the Death Penalty in Africa - ACHPR / Res. 416 (LXIV) 2019 at <https://www.achpr.org/sessions/resolutions?id=440> accessed on November 9, 2021.

from the viewpoints and frameworks of their domestic criminal laws.”³⁷⁾ This approach has been manifested internationally in the above-mentioned incorporation of the sovereignty clause/amendment in the biennial UN General Assembly Resolutions on a moratorium on the use of the death penalty since 2016. In the latest vote, the amendment was adopted with a majority of 26 votes, while in 2016, the sovereignty amendment was adopted by a majority of four votes and in 2018, it was adopted by a majority of 23 votes. At the UN Human Rights Council, during the adoption of the UN resolution on the question of the death penalty, the sovereignty amendment was rejected but by a majority of just one vote.

The nationalist discourse backing the sovereignty amendment has further sensitized diplomatic relations when the issue of abolition of the death penalty arises. When the former colonializing countries, especially from Europe, call on retentionist countries - their former colonies - to abolish the death penalty or criticize the carrying out of executions, there is a sharp response that the request to abolition and critique of executions are impositions by the former colonizers.

This discourse contradicts the position adopted by countries highlighting their sovereignty in applying the death penalty, as the original laws that carry the death penalty were drafted and applied by their colonial powers, whose administrators carried out executions of hundreds, if not thousands, of persons on charges of fighting for anti-colonial, independence movements.

ICDP Commissioner Sylvie Kayitesi and Prof Iya add that,

In post-colonial Africa there were no significant changes in penal policies because the policies of independent African

³⁷⁾ Rajiv Narayan in Ioanna Kuçuradi, *ibid.*, pp.194-195.

governments showed a remarkable continuity with those of their colonial predecessors. They still emphasized retribution and general deterrence rather than the rehabilitation of the offender.³⁸⁾

One finds resonance to this attribution in the laws of death penalty retentionist countries in Asian and Caribbean regions, many of whom were former colonies. In fact, in most of these countries, while the death penalty continues to remain a punishment based on colonial policies and legislation, its scope has been expanded to include crimes in the realms of economic and political offences including espionage, corruption, aggravated kidnapping, aggravated theft among offences that are seen as a threat to national security.

In the Caribbean region and this is a common thread of justification in other regions,

(s)everal retentionist governments ... defend capital punishment, arguing that this practice is based on traditional societal values which support retributive justice and the death penalty. That is to say that if their constituency and public opinion are in favour why should they not accept the voice of the majority? This is even evoked by some as a way to cater to their electorate.³⁹⁾

³⁸⁾ Coldham, S., “Criminal Justice Policies in Commonwealth Africa: Trends and Prospects”, in *Journal of African Law*, 44, p. 223, footnote 24 cited by Sylvie Zainabo Kayitesi and Philip F. Iya, “The Death Penalty and its Abolition in Africa: Current Status, Challenges, and Future Prospects,” in Ioanna Kuçuradi, *ibid.*, p.111.

³⁹⁾ Michèle Duvivier Pierre-Louis, *ibid.*, in Ioanna Kuçuradi, p.153.

A populist angle to retention of death penalty: penal populism, retribution, victim-centered policies

This resonates at a domestic level with death penalty retentionist governments justifying the retention of capital punishment to address calls for retribution and public anger, responding to calls to achieve closure for the victims of the crimes and to deter serious crimes. This narrative fits well with the increased nationalism and the phenomenon of penal populism that we witness in many countries. According to Pratt and Miao,⁴⁰⁾ penal populism, first identified as a characteristic of English-speaking Western democracies around the end of the twentieth century—specifically, the USA, UK, New Zealand, Australia and Canada,⁴¹⁾ demands a much more punitive approach to combat crimes. Penal populism can be seen as an emotive, retributive development against an elite whose humanitarianism, enlightenment, science, rationale influenced the abolition of the death penalty in these English-speaking societies during the 1960s and 1970s. According to the UK Hansard, which reflected the policymakers' justification to end capital punishment,

“[the death penalty] is the one remaining relic in our penal world of the old system of complete repression which was tried against criminals and so badly failed ... these instruments have no proper place in the institutions of a free democracy ... repressive punishments belong to the systems

⁴⁰⁾ John Pratt and Michelle Miao, “Penal Populism: The End of Reason,” Working Paper•January 2017, p.3, <https://www.researchgate.net/publication/312594772> accessed on November 9, 2021.

⁴¹⁾ See John Pratt, 2007. *Penal Populism*, Routledge.

of totalitarian states and not democracies. It was no accident that the chief exponents of violence and severity in the treatment of criminals in other times were the Nazi and Fascist states.”⁴²⁾

The neo-liberal restructuring of the 1980s, subsequent persistent economic insecurity, a sense of deep disenfranchisement has been attributed to have created tensions and legitimacy-deficit of governments. This has led to a deep sense of disenchantment and disillusionment amongst large sections of society with the manner in which political power has been exercised by governments, seemingly in collusion with liberal elites. The criminal justice system, dominated by this elite, is seen to prescribe generous treatment and lenient sentences to those who broke the law while ignoring the well-being of crime victims and law-abiding citizens, who in turn began to be represented by emergent angry social movements. In a bid to compensate and restore their legitimacy, governments opted to target this anger towards the law-breakers and prisoners.

Five underlying causes have been attributed to the rise of this retributive, get tough-on-crime penal populism: (i) the decline of deference; (ii) the decline of trust in politicians and existing democratic processes; (iii) the rise of global insecurities and anxieties; (iv) the influence of the mass media (there is considerable pressure put on authorities by the 24/7 media, in all its dimensions including social media, that support victims' rights and for 'eye for an eye' vengeance); (v) the symbolic importance of crime victims.⁴³⁾

⁴²⁾ UK Hansard 449, 14 April 1948, col. 1014-1015 cited in Pratt and Miao, *ibid.*, pp.6-7.

Mainstream politicians increasingly expressed support for retributive crime control policies that would punish those persons for not only committing crimes but also if they represented a crime risk, rather than safeguarding the individual rights of offenders and potential offenders. This phenomenon has resulted in increased rates of imprisonment and calls for reinstatement of capital punishment or its continued retention in the USA, in Japan,⁴⁴⁾ despite its socio-economic detrimental effects, the inconclusive evidence about its deterrence. As former Prime Minister of Haiti Michèle Duvivier states:

“The most common argument used by those in favor of continuing the application of the death penalty is the deterrence effect. Yet, there is no evidence to support the idea that the death penalty prevents crime more effectively than other punishments. With a few exceptions, statistics from countries that have abolished the death penalty show that the absence of the death penalty has not resulted in an increase in crime.”⁴⁵⁾

Rise of nationalist authoritarian ‘strong-man’ leaders

This populism calling for increasing punitive penal punishment as a solution to crime has helped the rise of anti-democratic nationalist

⁴³⁾ Pratt and Miao, *ibid.*, pp.13-14.

⁴⁴⁾ See DT Johnson. (2006). Japan's secretive death penalty policy: Contours, origin, justifications, and meanings. *Asia-Pacific Law & Policy Journal*, 7, pp.62-124.

⁴⁵⁾ Michèle Duvivier Pierre-Louis, *ibid.*, in Ioanna Kuçuradi, pp.152-53.

‘strong man’ politics. For instance, in the Philippines, President Duterte has adopted a very tough anti-drug crime approach which has resulted in extrajudicial executions of hundreds, if not thousands and demands to reinstate the death penalty. In India, the provisions of death penalty-applicable laws were expanded to include those charged with serious sexual assaults. In China, penal populism underlined the Party-state’s determination to protect its citizens from crimes and the uncertainties associated with the rapid, systemic transformation of the Chinese society to a market economy from the late 1970s.⁴⁶⁾

In some countries, “(t)he death penalty is used as a political tool. Authorities in some countries, such as Iran Sudan, Saudi Arabia and Egypt, have been known to use the death penalty to punish political opponents.”⁴⁷⁾ In the USA, the Trump administration reinstated federal level executions and carried out an unprecedented execution of 13 persons between July 2020 and January 2021 to enhance his administration's strong law-and-order message, to bolster President Trump's ‘strong man’ image, prior to the November 2020 Presidential elections.

IV. Routes adopted by countries to abolish the death penalty

A 2018 study by the International Commission against the Death Penalty (ICDP) titled, “How States Abolish the Death Penalty: 29

⁴⁶⁾ See Michelle Miao. 2013. “Capital punishment in China: A populist instrument of social governance. *Theoretical Criminology*, 17(2), pp.233-250.

⁴⁷⁾ Asunta Vivó Cavaller, “Towards the Worldwide Abolition of the Death Penalty: Trends, Challenges, Achievements,” in Ioanna Kuçuradi, *ibid.*, p. 237.

Case Studies,”⁴⁸⁾ identified some of the routes that were undertaken by countries as they moved away from retaining the death penalty towards ending it. These routes were shaped by a historical context at the end of a very destructive war or at the fall of authoritarian rulers, both of which had witnessed grave, widespread, systemic human rights violations. In some cases, leaders adopted abolition despite large support for retaining capital punishment. It is interesting to note that few countries have brought back the death penalty once they have abolished it.

Constitutional Courts

The role of Constitutional Courts has been crucial in leading several countries - in Africa, Europe, the Americas - to end the practice of capital punishment by declaring this punishment as incompatible to the Constitutions of these States. The Courts, given the high societal respect for their professional conduct, has provided legitimacy to abolish death penalty with their rulings, especially when the legislative and executive organs of government were hesitant to move for abolition.

The Constitutional Court of South Africa ruled on 6 June 1995, in the *State v T. Makwanyane and M. Mchunu* case, that the death penalty for ordinary crimes was inconsistent with the “human rights culture” which respected the right to life and to dignity as cornerstones of the then new interim Constitution. In November

⁴⁸⁾ The report can be accessed at “How States Abolish the Death Penalty: 29 Case Studies,” <https://icomdp.org/wp-content/uploads/2020/10/ICDP-2018-MAYO-PENA-DE-MUERTE-V3-1.pdf>. Disclaimer: the authors are staff at the International Commission against Death Penalty.

2006, the Constitutional Court ruled that the Government had fully complied with its 1995 judgement on the unconstitutionality of the death penalty. In 1997, the South African Parliament endorsed the opinion of the Constitutional Court by formally abolishing the death penalty for all crimes by passing the Criminal Law Amendment Act, which removed all references to the death penalty from the statute book. It entered into force in 1998 and prisoners under sentence of death were re-sentenced to terms of imprisonment.⁴⁹⁾ There is still widespread support for capital punishment in South Africa, including many leaders, but the country remains abolitionist.

The Constitutional Court has played an important part in abolishing the deathpenalty in Hungary (24 October 1990), in Lithuania (9 December 1998), in Albania, (10 December 1999), in Ukraine (December 1999), in Benin (July 2012; the decision confirmed the country's abolition after its accession to the Second Optional Protocol), in Guatemala (March 2016 and October 2017 rulings abolishing capital punishment for ordinary crimes).

The Constitutional Court of Korea could play an important role on the situation of the death penalty in South Korea. The Court is considering, for the third time, a case on the constitutionality of the death penalty in Korea following an appeal by a person facing the death penalty in 2019.

The Constitutional Court has on two occasions taken decisions concerning the issue of the unconstitutionality of

⁴⁹⁾ The Court, which had held hearings on the death penalty in February 1995, firmly dismissed the argument of deterrence and held that the way to reduce violence in South Africa was to create that human rights culture which respects human life.

the death penalty. In the first decision⁵⁰⁾ of 1996, the Court declared by a majority of 7 to 2 that it was constitutional, and the second decision⁵¹⁾ was taken by 5 to 4 in 2010. The dissenting opinion, which argued the unconstitutionality of death penalty, invoked human rights treaties including the ICCPR... Whereas the number of states abolishing the death penalty tends to be on the rise in the world, and as the number of justices objecting to the death penalty in the Constitutional Court seems to be increasing, the likelihood of a decision that the death penalty is determined to be unconstitutional is a real possibility depending upon the composition of the justices on the Court.⁵²⁾

Constitutional amendments

Countries including Cambodia, Haiti, Kyrgyzstan, Republic of Congo, Turkey, Uzbekistan abolished the death penalty by amending their Constitutions, before removing it from their laws. In Mexico, the death penalty was first abolished by law and then reinforced by constitutional amendment. The inclusion of the abolition of the death penalty in the Constitution, in general, are difficult to reverse, making it harder to reinstate the capital punishment.

⁵⁰⁾ Constitutional Court [Const. Ct.], 95Hun-Ba1, Nov. 28, 1996 (8 KCCR, 537).

⁵¹⁾ Constitutional Court [Const. Ct.], 2008Hun-Ga23, Feb. 25, 2010 (22 KCCR, 36).

⁵²⁾ Whiejin Lee, "The Enforcement of Human Rights Treaties in Korean Courts," *Asian Yearbook of International Law*, Volume 23 (2017), p.104.

Second Optional Protocol to ICCPR

As described above, countries like Mongolia, Benin initially became State Parties to the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty and thereby made an international commitment towards ending the capital punishment. This was followed in Mongolia by the abolition of the death penalty in its legal statutes and in Benin by the Constitutional Court deciding that the death penalty was incompatible following this international commitment. More recently, in September 2020, Kazakhstan became the latest State Signatory to the Second Optional Protocol (abolishing the death penalty during peacetime) and is expected to follow this international commitment by abolishing the death penalty in its domestic statutes before ratifying the Protocol.

International Criminal Courts and Tribunals

Since the Nuremberg and Tokyo Tribunals, the Statutes of successive international tribunals, courts have excluded the death penalty from the punishments that these institutions are authorized to impose for crimes including genocide, crimes against humanity and war crimes. They include the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993), for Rwanda (ICTR, 1994), the UNTAET Regulation establishing the Special Panels for Serious Crimes in Dili, Timor-Leste (2000), the Statute of the Special Court for Sierra Leone (2002), the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (2004) and the Rome Statute of the International

Criminal Court (ICC, which came into force on 1 July 2002), all of whom exclude the application of the death penalty as a sanction. They have played an important role in the abolition of capital punishment in Rwanda, Timor Leste, Cambodia.

As of January 2021, there are 123 countries that are State Parties to the Rome Statute of the ICC; 19 of whom are from the Asia-Pacific region including South Korea.⁵³⁾ Life imprisonment, as provided by Article 77, is the maximum sentence provided. Article 80, however, includes an article stating that the penalties provisions in the Statute are without prejudice to domestic criminal law sanctions. Interestingly, many of these State Parties retain the death penalty.

Breaking with a repressive past

Countries including Cambodia, Germany, Haiti, Rwanda, South Africa, Spain have abolished the death penalty as a means to move away from a repressive past. In a sense, Europe, as a region, moved away from the death penalty after its harrowing experiences of the two World Wars where thousands of executions were carried out and as a strong gesture to never return to that brutal past.

⁵³⁾ South Korea signed the Rome Statute on 8 March 2000 and deposited its instrument of ratification of the Rome Statute on 13 November 2002. According to the instrument, the ICC may exercise jurisdiction over crimes listed in the Rome Statute committed on the territory of the Republic of Korea, or by its nationals on or after 1 February 2003. Under article 12(2)(a) of the Rome Statute this includes jurisdiction over vessels or aircraft registered to the country. (<https://www.icc-cpi.int/korea>, accessed on May 7, 2020.)

Role of National Assemblies/Parliaments

National Assemblies/Parliaments play an important role in voting death penalty abolitionist bills into law. At times, they have taken the lead in abolishing the death penalty. For instance, in Suriname, the Parliament voted for the abolitionist bill in 2014 breaking a deadlock, that had lasted years. From the international community, the International Commission against the Death Penalty was officially acknowledged in its role in helping this process. The bill was signed by then-President Bouterse into law. In the US state of New Hampshire, the legislature comprised of the Senate and the House of Representatives voted, in May 2019, for the abolition bill by a two-thirds majority thereby overruling the veto by Governor Sununu. In December 2020, Kazakhstan's legislature voted the bill to ratify the Second Optional Protocol. More recently in February-March 2021, the legislature in the US state of Virginia voted to abolish capital punishment, and which was signed by Governor Northam into law in March 2021. On 23 July 2021, Sierra Leone's Parliament voted unanimously to abolish the death penalty. This vote followed its delegation stating on 12 May 2021 during its National Report, which was submitted to its recent Universal Periodic Review at the UN Human Rights Council. The bill was signed into law President Julius Maada Bio on 8 October 2021.

Parliamentarians have also been involved in advocacy, such as the UK's All-Party Parliamentary Group on the death penalty who engage with their fellow Parliamentarians in retentionist countries to encourage peer-to-peer discussions to support and vote bills to abolish the death penalty, into legislation. This is an important

channel of engagement as there appears to be a lack of political will, especially among the 27 countries, which observe long-term death penalty moratoria including Korea.

Importance of the international community

Since the Second World War, the abolitionist movement gained momentum, driven by increased public awareness about the dignity of human beings, the risk of judicial errors and the fact that execution involves several human rights violations including torture. Professional organizations, notably bar associations, medical associations and law enforcement associations, have worked in a number of countries to abolish the death penalty, as have some national human rights institutions. Domestic civil society organizations (CSOs), sometimes in partnership or alliance with international CSOs, professional organizations and academics, have provided detailed and impartial information about the lack of deterrent effect of the death penalty and its arbitrary and discriminatory use. Such information and studies contributed to abolition in Mongolia, the Philippines, South Africa and the US state of New Mexico. The role played by religious organizations in opposing capital punishment was significant, for example in the Americas, the Philippines and South Africa. The international community - including the UN, the EU, international CSOs including Amnesty International, the World Coalition against Death Penalty, ECPM, Hands off Cain, International Commission against the Death Penalty, Reprieve, Death Penalty Project, FIDH and several local organizations - has played decisive roles in different countries, in moving them away from the death penalty.

International pressure had an impact in the abolitionist processes of countries including Mongolia, Madagascar, Spain, Rwanda, Timor Leste, Suriname, Chad, Sierra Leone. In the case of Equatorial Guinea, following requirement of abolition of the death penalty by the Community of Portuguese Language Countries (CPLP) where it is the latest Member-State, President Teodoro Obiang Nguema has made a commitment to move his country to abolish the death penalty.

Establishing a moratorium on executions

The establishment of an official moratorium on death sentences and executions has been the first step taken by several retentionist countries in their journey to abolition including Kazakhstan, Kyrgyzstan, Mongolia, South Africa, the Philippines. Other countries including Fiji, Guatemala, Guinea, Congo, Suriname, Turkey did not carry out executions for a long period of time. The moratoria have usually been accompanied by commutations of death sentences to terms of imprisonment in countries including Mongolia, Guatemala and the Philippines. It would appear that governments adopted this incremental approach to abolition while providing for a period of informed discussions which included awareness-raising on issues related to the death penalty to ease criticisms from retentionist groups.

In Korea, there has been an unofficial moratorium since 30 December 1997 when 23 executions were carried out, though sentences of death have been passed on individuals and at least 60 persons face the death penalty currently. As mentioned earlier, the Constitutional Court of Korea is considering an appeal on a capital

punishment case and is shortly expected to make a ruling on the constitutionality of the death penalty in the country.

Reducing the scope of the death penalty

The scope of the use of the death penalty has been reduced in different ways, and has been chosen by some countries in their move towards the eventual abolition of capital punishment. Countries including Argentina, Fiji, Guinea, Portugal, South Africa decided to abolish the death penalty first for ordinary crimes before becoming fully abolitionist, while Turkey gradually reduced the crimes applicable to death penalty. In a sense, this incremental abolitionist approach provided governments to gauge the reactions, especially from the retentionist groups and provided ground for discussions on this issue.

Political leadership

Underlying all these initiatives and experiences is the important role of political leadership. In some cases it is shaped by personal belief and commitment of the leaders: for instance, in France (led by then-Minister of Justice Badinter), Mongolia (led by then-President Elbegdorj), the Philippines (led by then-President Gloria Macapagal-Arroyo), as well as the decisive role of Governors in abolishing the death penalty in their respective USA states, such as in New Mexico (led by then-Governor Richardson) and in Maryland (by then-Governor Martin O'Malley). In other cases, political leadership ensures the implementation of the abolition by moving away from an authoritative past, beyond conflict, or in

consolidating democratic institutions like national assemblies and the rule of law.

Leadership is key in the abolition of capital punishment as it increases respect and protection of the fundamental right to life. It thereby constitutes principled leadership by heads of State, and often includes important contributions by heads of Government, heads of the Parliament, heads of the Constitutional Court, Governors and Attorney Generals.⁵⁴⁾

V. Conclusions

The article shows that the current global situation of the death penalty: a majority of countries do not carry out executions; more than half the countries are abolitionist and more than two-thirds have not carried out executions for over a decade. But the world's most populous countries are among those that still retain capital punishment.

From the perspective of the legal framework for abolition of the death penalty, there has been an evolution in the form of international covenants, conventions, protocols, resolutions at the UN, in regional bodies like the European Union, the Organization of American States and in practice as international courts no longer sentence people to face the death penalty. These international standards have also sought to reduce the scope of the death penalty in terms of crimes and specific sections of population.

However, there are challenges in this trend moving towards a

⁵⁴⁾ ICDP, How States Abolish the Death Penalty: 29 Case Studies, p.63.

world free of the death penalty. At the multilateral stage, there is a gap in the numbers of countries that have abolished capital punishment (109) and those who have become State Parties to the Second Optional Protocol (89) which is the only international treaty abolishing capital punishment. Similarly, while 144 countries do not use the death penalty in law and practice, there appears to be a shortfall as 123 countries supported the 2020 UNGA resolution on a moratorium on the use of the death penalty.

Another challenge emanates from a political leadership perspective supporting abolition or, rather the lack of it. Parliamentarians, leaders appear to consider that there is little political capital for them to move their countries, even those who have not carried out an execution for over a decade including Korea, towards ending capital punishment unless it is complemented by external developments including court decisions, international pressure.

A possible reason of the lack of political will could be the mainstreaming of penal populism, which has led to governments, parliaments adopting increasingly punitive legislations to address crime. They appear to react to narratives that are anti-establishment, victim-centric, emotive calling for eye-for-an-eye retribution. The implementation of these tough-on-crime measures also appear to enhance the 'strong man' image of the increasing number of populist leaders who want to show that capital punishment is a tool in their 'war' against crime. It has also been targeted against the marginalised sections of society, the 'outsiders'. The increasing influence and rise of these authoritarian, populist, nationalist strong-men leaders who profess strong opposition to the globalisation of liberal values, to which abolition of capital punishment is linked, could be attributed to present a challenge to

the abolitionist trend.

States justify capital punishment for its deterrent effect, even if there is little evidence to this effect, to meet the calls and demands of retribution, as a means of closure, by the victim's families and that the decision is only used rarely and against the most serious offenders.

The article also notes these factors appear to have contributed to a hardening position among the States that retain the death penalty as is evident from the increasing popularity of the sovereignty amendment at the UNGA resolution on a moratorium on the use of the death penalty.

There are contradictions here as the nationalist promises of these leaders often drive them, especially those who lead migrant labour-exporting countries to lobby hard with migrant labour-hosting countries for granting clemencies for their nationals who face the death penalty. The leaders see political capital in the rescue of their nationals at the expense of the principle of 'sovereignty', which they use to justify capital punishment in their countries. An argument could be that moving away from death penalty towards abolition could give these countries greater moral leverage for their calls for saving their nationals.

Despite these challenges, It is noteworthy that in the Philippines, Turkey, Mongolia where there have been calls to reinstate the death penalty, at times by their leaders, these countries continue to remain abolitionist and State Parties to the Second Optional Protocol and that could be due to substantial opposition to move away from abolition. Moreover, an increasing number of countries carrying out executions have reduced the death penalty applicable laws as also the number of executions. One reason for this decline, specifically

since 2020, could be attributed to COVID-19 health pandemic. But it also could be attributed to the increased concern expressed by the international community, especially in countries where there is some level of transparency.

It would appear that the tipping point still eludes the abolitionist movement, but it may not be for much longer. While noting the gradual increase of countries abolishing the death penalty, the abolitionist movement needs to develop more creative narratives and to establish new engagements with emerging stakeholders to nurture alternative views to the criminal justice system and the death penalty. More comprehensive research and advocacy is needed to prove convincingly that the death penalty does not deter crime; that capital punishment may not meet the demands for retribution demanded by media, or achieve closure to victims. Moreover, noting that the majority of the global population will continue to live under the shroud of the death penalty, the abolitionist movement needs a narrative to convince the most populous countries to end the use of capital punishment.

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<국문요약>

사형제도가 변곡점에 도달했는가?

: 전 세계의 점진적 폐지 추세, 집행 감소, 그러나 중대한 도전의 직면

라지브 나라얀* · 아순타 비보 카발레르**

이 글은 국제적인 사형제도의 현황에 초점을 맞춘다. 연구는 사형제 폐지 국가가 점진적으로 증가하는 가운데, 이 추세가 중요한 과제에 직면해 있다는 사실에 주목한다. 연구의 서두에서는 사형제의 국제적인 현황을 지도 및 숫자로 나타낸다. 이어 사형제 폐지의 역사에서 시작하여 사형제 폐지론자의 관점을 설명한다. 또한 사형제 폐지를 궁극적 목적으로 해서 사형제의 범위를 축소하려는 국제법 체제의 진화에 관하여 간략한 설명을 덧붙인다. 유럽과 아메리카대륙 국가들에서 지역적 사형폐지 법규의 채택 움직임이 있으며, 아프리카대륙에서는 그러한 시도가 있다. 연구에서는 국가들이 사형제도를 왜 유지하는지에 대한 논치론자들의 관점을 설명한다. 사형제를 유지하는 국가들의 입장이 강화되는 이유에는 형벌적 포퓰리즘, 포퓰리스트의 부상, 권위주의적 리더십, 희생자에 대한 관심 증가와 같은 여러 요인이 존재할 수 있다. 또한 사형제가 국가 주권상의 형사법적 문제이며 사형이 범죄억지 효과를 가진다는 관점이 반영된 것일 수도 있다. 이 연구는 또한 사형제 폐지를 위해 각국이 채택한 몇 가지 노선을 확인한다. 절반 이상의 국가들이 사형제도를 폐지했고, 2/3 이상이 법률 및 관행상 사형을 집행하지 않는다. 사형 집행의 건수 또한 줄어들고 있으며, 사형제 존치국가들 사이에서도 사형 적용이 가능한 범죄의 종류가 감소 추세에 있다. 그러나 인구가 많은 국가들은 여전히 사형제도를 유지하는 경우가 많다. 이러한 한계를 넘어서기 위해서는 신흥 이해당사

* 국제사형제반대위원회 정책국장.

** 국제사형제반대위원회 총괄국장.

국들과의 관계를 형성하기 위한 새롭고 더 창의적인 서사가 요구된다.

주제어: 사형제, 사형제 폐지론자, 사형제 존치론자, 국제법 체계,
주권, 사형제 폐지노선