Expanding Influence: Regional Human Rights Courts and Death Penalty Abolition

By Kelly Parker

A. Introduction

Great strides have been made in abolishing the death penalty throughout the world. Although a largely post–World War II effort, an increasing number of nations have moved toward death penalty abolition. So many nations, in fact, that Schabas asserts “[t]he day when abolition of the death penalty becomes a universal norm, entrenched not only by convention but also by custom and qualified as a peremptory rule of jus cogens, is undeniably in the foreseeable future.” However, another perspective on the numbers reveals the daunting challenges abolitionists face. Seventy-one nations still retain the death penalty, and large numbers of people live in the shadow of its use. Large swaths of Asia and

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1 At the time the Universal Declaration for Human Rights was adopted, only eight countries had “abolished the death penalty for all crimes.” Amnesty International, Eric Prokosh, Theme Research Coordinator, Human Rights Versus the Death Penalty, ACT 50/13/98, Dec. 1, 1998, available at http://web.amnesty.org/library/Index/ENGACT500131998. The countries of South and Central America have long been at the forefront of this trend, several having abolished the penalty in the late nineteenth and early twentieth centuries. Roger Hood, The Death Penalty: A Worldwide Perspective 55 (3d ed. 2002).

2 William A. Schabas, The Abolition of the Death Penalty in International Law 3 (3d ed. 2002) [hereinafter SCHABAS, ABOLITION]. Amnesty International reports that, as of June 27, 2006, 125 countries are abolitionist. Amnesty International, The Death Penalty, Abolitionist and Retentionist Countries, http://web.amnesty.org/pages/deathpenalty-countries-eng [hereinafter ABOLITIONIST AND RETENTIONIST COUNTRIES]. The organization breaks this down into three categories of abolition: (1) abolitionist for all crimes (87 countries); (2) abolitionist for ordinary crimes only, i.e., “Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances” (11 countries); and (3) abolitionist in practice (27 countries).

3 ABOLITIONIST AND RETENTIONIST COUNTRIES, supra note 2.
Africa retain the death penalty, as do many Muslim nations.\textsuperscript{4} The United States is also among these nations, despite some noted retreats,\textsuperscript{5} and remains steadfast in its support of the sanction, to the chagrin of its allies.\textsuperscript{6} Even where abolition has been achieved, it has sometimes been on weak foundations. Some nations new to abolition, for example, have done so “against the grain of strong public and political sentiment” merely to gain membership in the Council of Europe (COE), seen as a “stepping stone” to European Union (EU) accession.\textsuperscript{7} There also exists the problem of “extra-legal killings” in nations that have abolished the death penalty.\textsuperscript{8} Furthermore, the nose-counting of abolitionist organizations includes

\textsuperscript{4} See id. at 35–55. An argument frequently made by cultural relativists in these regions is that the notion of human rights is “the product of western individualism, and that trying to impose human rights on other cultures is a form of imperialism.” David Manasian, \textit{Survey: Human-Rights Law}, \textit{Economist}, Dec. 3, 1998. The “Asian Way” is among the better known of these arguments, “advanced principally by leaders of Singapore, Malaysia, Indonesia and China,” especially around the time of the 1993 World Conference on Human Rights. \textit{A Turn in the ‘Asian Way’}, \textit{N.Y. Times}, Nov. 17, 1996 at 12. The central tenet of this perspective is that “Asians value social order and family over individual rights. Economic growth and social harmony require a strong government that can make unpopular choices. It must be able to control the press and arrest strikers, protesters and dissenters. The decadent West, torn by crime, racial tensions, drug abuse and other social disorders, should mind its own affairs.” \textit{Id.} This view is reflected in the fact that the “death penalty remains most entrenched in East Asia. China alone regularly accounts for more executions than the rest of the world combined, and applies it to a wide range of crimes beyond murder.” \textit{The Cruel and Ever More Unusual Punishment}, \textit{Economist}, May 13, 1999.

Manasian finds the arguments of cultural relativists “unconvincing,” saying “[i]t assumes that there is a single set of western, Islamic or Asian cultural values respectively. This is patently untrue.” He also deems the arguments disingenuous: “It tends to be the people in power who use Islamic or Asian values to justify political repression and restriction of rights, and it tends to be the people they are repressing who appeal to the outside world to uphold those rights.” Manasian, supra.

\textsuperscript{5} See, e.g., Atkins v. Virginia, 536 U.S. 304 (2002) (rendering unconstitutional execution of mentally retarded defendants) and Roper v. Simmons, 543 U.S. 551 (2005) (rendering unconstitutional execution of defendants who were minors at the time they committed their crime). A widely publicized example at the state level was the moratorium on the death penalty by former Illinois governor George Ryan. \textit{Illinois Hesitates}, \textit{Economist}, Feb. 3, 2000. Other states dogged by controversy have taken similar measures.


\textsuperscript{7} Id. at 31.

\textsuperscript{8} Id. at 155. Hood stated that “[w]hile the true extent of such executions worldwide cannot be verified, they cannot be ignored in the context of any discussion of the death penalty.”