

Democracy, Democratization and the Death Penalty

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Introduction

One of the most significant global trends of the last few decades has been the movement towards ending the death penalty. Describing this as the ‘age of abolition,’ Garland observes that, ‘what was once an unproblematic institution, universally embraced, is fast becoming a violation of human rights, universally prohibited’.¹ This surge towards *de facto* and *de jure* abolition has approximately coincided with the worldwide shift towards democracy, inaugurated by the ‘third wave’ of democratization.² The significant overlap in the timing of these two global movements has led many scholars to conclude that democratization has had a positive impact on the abolitionist cause.³ Despite glaring counter-examples – most notably the United States – abolitionists regularly argue that the death penalty contradicts basic democratic principles. From this perspective, it is perhaps not so surprising that democratization has often been accompanied by partial or full abolition. Within the death penalty literature this correlation is taken as relatively robust. Notably, Neumayer has argued that the global trend towards abolition has been driven primarily by political factors, with

¹ David Garland, ‘Modes of Capital Punishment: The Death Penalty in Historical Perspective’ in David Garland, Randall McGowen, and Michael Meranze (eds), *America’s Death Penalty: Between Past and Present* (NY: NYU Press, 2011), 61.

² See Samuel Huntington, *The Third Wave: Democratization in the late twentieth century* (Norman: University of Oklahoma Press 1991).

³ For example: Carsten Anckar, *Determinants of the Death Penalty: A comparative study of the world* (Routledge, Milton Park 2004); Eric Neumayer, ‘Death Penalty: The Political Foundations of the Global Trend Towards Abolition’, *Human Rights Review*, 9:2 (2008); Roger Hood, ‘Abolition of the Death Penalty: China in World Perspective’, *City University of Hong Kong Law Review*, 1:1 (2009); David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford: OUP 2009).

democratization being particularly consequential.⁴ His analysis leads him to the strong conclusion 'that the continuation of the abolitionist trend is contingent on a further spread of democracy around the world'.⁵

The purpose of this chapter is effectively to challenge the kind of interpretation proposed by Neumayer, and instead suggest a more complicated set of relationships exist between democracy, democratization and the death penalty. While the significance of democracy and democratization for the likelihood of abolition has been extensively commented on in passing, there is much less work that focuses in detail on how they relate. It is argued here that as a result there has been a tendency in the death penalty literature to misunderstand contemporary democracy, with important consequences for the conclusions reached. By missing the constitutive role played by liberalism – a strange omission given how deeply liberal this scholarship is – abolitionist scholars place too much weight on democratization, and too little on liberalization. Ultimately it is the latter, and not the former, that is far more significant for the fate of capital punishment. A superficial understanding of liberal democracy, and what elements in it are doing the work in securing abolition, does not bode well for understanding the global movement away from the use of the death penalty.

The chapter proceeds as follows: First, the relationship between democracy and the death penalty will be outlined in more detail. Building on this discussion, the second part will focus on two 'dilemmas' for democracy that are commonly identified by death penalty scholars in regards to the way abolition is secured. It is argued that these concerns are misplaced, and are based on a misreading of contemporary democracy. The third part of the chapter proposes a more nuanced interpretation of democracy that focuses on the role of liberalism in creating the conditions necessary for abolition. When considering transitional states, this suggests that it is ultimately liberalization, rather than democratization, which is more important. In concluding, it is argued that democratization *may* lead to abolition, but it is unlikely that this will occur until *liberal* democracy has been more fully established. It is also suggested that abolitionist scholars need to take a broader view that focuses on the larger system of punishment that the death penalty is embedded within.

⁴ Eric Neumayer, 'Death penalty: The political foundations of the global trend towards abolition', *Human Rights Review* 9:2 (2008). See also: Eric Neumayer, 'Death Penalty Abolition and the Ratification of the Second Optional Protocol', *The International Journal of Human Rights*, 12:1 (2008).

⁵ Neumayer, 'Death Penalty', 242.

Democracy and Abolition

Capital punishment goes against the foundation of democracy. Democracy regards the life of a human being as the most cherished thing in the world, and to end a person's life even in the name of law clearly runs counter to the basic principle of human rights.⁶

This statement by Kim Dae Jung, former president of South Korea and Nobel Peace Prize recipient, is representative of the dominant account of the relationship between democracy and the death penalty. Simply put, capital punishment does not belong in contemporary democratic society. Perhaps the most prominent proponent of this argument has been the Council of Europe (CoE), which has played a central role in advancing abolition throughout Europe. According to the CoE, the 'death penalty has no place in a civilized democracy'.⁷ The death penalty is framed as a direct violation of inviolable human rights, which democracies are meant to protect and uphold. Emblematic of the CoE's approach is this judgment from a recent report pointedly entitled, *The Death Penalty in Council of Europe Member and Observer States: A Violation of Human Rights*: 'a democratic society dedicated to human rights cannot allow completely arbitrary factors to determine whether a person lives or dies at the hands of the state.'⁸ Democracy and human rights are taken to be fundamentally linked, and insofar as the death penalty is a violation of human rights, it also violates core democratic principles. This perspective leaves no room for debate, as human rights effectively trump any other concerns. As Zimring puts it, 'as soon as the human rights / limited government premise is accepted, the policy conclusion is automatic. There are no contingencies, no balancing of costs and benefits, and no reasons to consult public sentiments about crime'.⁹ It is a deeply normative – and liberal – argument that suggests a major component of what being a democracy means is protecting and upholding basic individual rights, and maintaining the death penalty goes against this on an existential level.

The rights-based argument is not simply normative, it also has empirical grounds. Overall, democracies *do* have much better track records of protecting human rights, and many

⁶ Kim Dae Jung quoted in Johnson and Zimring, *The Next Frontier*, 147.

⁷ Council of Europe, 'Resolution 1179 (1999): Honouring of Obligations and Commitments by the Ukraine', <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta99/ERES1179.htm> (accessed 4/9/11).

⁸ Committee on Legal Affairs and Human Rights, *The Death Penalty in Council of Europe Member and Observer States: A Violation of Human Rights*, Doc. 12456, 03/01/2011,

<http://www.assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12456.pdf>, 13 (accessed 4/9/2011).

⁹ Franklin Zimring, *The Contradictions of American Capital Punishment* (Oxford: Oxford UP, 2003) 45-6.

democracies have stopped using capital punishment. Meanwhile, both theoretically and empirically, there is a closer link between authoritarian forms of government and the death penalty. In comparison to democracies, they are more likely to retain, and enforce, the death penalty. Reliant more on force than legitimacy to ensure their rule, execution remains a valuable weapon against dissent. Furthermore, the concern found in democracies with controlling the exercise of power is largely absent, which can be particularly consequential when it comes to the death penalty. Johnson and Zimring put this relationship in strong terms: 'there is a natural affinity between executions and authoritarian ideology because authoritarian governments are little concerned with limiting their own powers.'¹⁰ One certainly does not have to dig very deeply into the history of the twentieth century to find examples of the way totalitarian and authoritarian regimes made use of executions. Authoritarian regimes continue to rely most heavily on this form of punishment, if not to the same extent as previously. In 2010, China, Iran and North Korea executed the highest number of people.¹¹ All three countries were rated by Freedom House as 'not free', which is defined as a 'country is one where basic political rights are absent, and basic civil liberties are widely and systematically denied'.¹² Even if democratization does not guarantee abolition, it can be expected to help advance this objective.

Political regime type thus presents itself as an important factor in determining the likelihood of abolition occurring. There are important exceptions on both sides that prevent a direct correlation. There are examples – admittedly less common – of authoritarian regimes that have dispensed with the death penalty.¹³ Angola and Azerbaijan are two abolitionist countries that in 2010 remain classified as 'not free' by Freedom House.¹⁴ Such cases are outliers, with the link between authoritarianism and capital punishment being relatively robust. Yet it is not simply 'uncivilized' authoritarian regimes with scant regard for the human rights of their citizens that still employ the death penalty. To the consternation of abolitionists, the United States retains capital punishment and continues to use it with remarkable frequency. In 2010,

¹⁰ Johnson and Zimring, *The Next Frontier*, xiii.

¹¹ Amnesty International, *Death Sentences and Executions in 2010*, <http://www.amnesty.org/en/news-and-updates/report/death-penalty-2010-executing-countries-left-isolated-after-decade-progress> (accessed 4/9/11).

¹² Freedom House, *Freedom in the World 2011*, <http://www.freedomhouse.org/template.cfm?page=594> (accessed 4/9/11).

¹³ Christian Boulanger and Austin Sarat, 'Putting Culture into the Picture: Toward a Comparative Analysis of State Killing' in Austin Sarat and Christian Boulanger (eds), *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford: Stanford UP, 2005), 32; Anckar, *Determinants of the Death Penalty*, 118-121, 167.

¹⁴ Amnesty International, *Death Sentences and Executions in 2010*; Freedom House, *Freedom in the World 2011*.

America had the fifth highest number of executions.¹⁵ The United States is apparently left as the great exception: 'alone among the Western democracies, state governments in the United States authorize and conduct executions as criminal punishment and show no clear indication of a willingness to stop doing so'.¹⁶ Another scholar proposes that, 'the United States is the final liberal democracy to implement the death penalty'.¹⁷ Such observations tend to foster the erroneous hope that ending the death penalty in the United States is the key to unlocking global abolition.¹⁸ It is also misleading to present the United States as a 'spectacular exception'.¹⁹ Japan has an established democracy, the world's third largest economy, is highly developed, and continues to send people to death. India's unique and complex democracy is the world's largest, and despite not executing anyone since 2004, it retains the death penalty and continues to hand out death sentences.²⁰ Meanwhile, Indonesia is a notable example of where successful democratization has not lead to abolition. One also finds further examples with the Caribbean democracies. The United States might be the most prominent democracy to retain the death penalty, but it is certainly not alone.

A majority of established democracies may not be using the death penalty, but one must resist the common tendency to downplay the exceptions, especially given that India, the United States, Indonesia and Japan respectively have the second, third, fourth and tenth largest populations in the world.²¹ A different picture emerges if one instead focuses on the number of people living in legal systems that retain the death penalty, as opposed to focusing on the number of states that have ended capital punishment. Furthermore, when the CoE talk of 'the growing consensus among democratic countries that protect human rights and human dignity by abolishing the death penalty', it is worthwhile remembering how recent this consensus is. As late as 1977 France was still making use of the guillotine, and formal abolition only occurred in 1981. Without discounting the remarkable shift that has occurred, it is advisable to avoid over confidence. One particularly damaging consequence of the 'global war on

¹⁵ Amnesty International, *Death Sentences and Executions in 2010*.

¹⁶ Zimring, *The Contradictions of American Capital Punishment*, 5.

¹⁷ Jon Yorke, 'Sovereignty and the Unnecessary Penalty of Death: European and United States Perspectives', in Austin Sarat and Jürgen Martschukat (eds), *Is the Death Penalty Dying? European and American perspectives* (Cambridge: Cambridge UP, 2011), 247-8.

¹⁸ Given that China is the leading countries for executions and has emerged as a global power, it is at least as important as the United States. This perspective also over-estimates the impact external forces can have in bringing about change.

¹⁹ Franklin E. Zimring, *The Contradictions of American Capital Punishment* (Oxford: Oxford University Press, 2003), 39.

²⁰ Amnesty International, *Death Sentences and Executions in 2010*, 20.

²¹ Population Reference Bureau, *2011 World Population Data Sheet*, http://www.prb.org/pdf11/2011population-data-sheet_eng.pdf (accessed 4/9/11).

terror' has been a significant challenge to the human rights regime, especially the weakening of the international prohibition against torture. The manner in which the United States – the world's most prominent democracy – has led the way in undermining this seemingly robust norm should act as a cautionary tale for abolitionists.²² On a more general level, it is important to note that democratization and abolition – both essentially liberal projects (at least in the form they have taken) – have been closely tied to a liberal *zeitgeist* that now appears to be on the wane. These observations collectively suggest that one should not extrapolate too much from the approximate correlation between the global movements towards abolition and democratization. These two might have been inter-related, but this could be a considerably more contingent connection than some may hope. To properly appreciate the linkages one must develop a deeper understanding of how democracy and democratization operate in the contemporary world.

Where democratization and abolition have occurred together, a number of contributing factors have been identified as important. For transitional states, ending capital punishment has symbolic value both domestically and internationally. Internally, it has been a way of identifying the new democratic regime from its predecessor. As Schabas notes, 'abolition of the death penalty is generally considered to be an important element in democratic development for states breaking with a past characterized by terror, injustice and repression.'²³ Perhaps the most unambiguous example of this was South Africa, where the apartheid regime had been buttressed through the use of the death penalty. Even if South Korea remains only *de facto* abolitionist, it currently represents another significant case in which stopping the use of the death penalty was an important component of the democratization process. To what extent this kind of break is needed as part of democratization will be highly contextual, however. Indonesia and Taiwan are examples of countries that have successfully democratised without abolishing the death penalty. Externally, renouncing the death penalty can be tied to a desire for regional and international recognition of their freshly acquired democratic status. For transitional states, abolishing the death penalty is one way of asserting their 'membership' in the 'club' of 'civilized

²² Michael Meranze, 'The Death Penalty: Between Law, Sovereignty, and Biopolitics' in David Garland, Randall McGowen, and Michael Meranze (eds), *America's Death Penalty: Between Past and Present* (New York: New York University Press, 2011), 77.

²³ William Schabas, *The Abolition of the Death Penalty in International Law*, Third edition (Cambridge: Cambridge UP 2002), 2-3. Also see Sangmin Bae's chapter.

democracies'.²⁴ The desire to be recognized as being democratic and being part of Europe – symbolized by membership in the CoE – played a role in engineering the remarkable transformation of the region into a death penalty free zone.²⁵

Symbolism and identity issues have not been the only forces encouraging abolition amongst democratizing states. In the case of Europe, a mixture of carrots and sticks has also pushed transitional countries in this direction. In 1996 the CoE determined that a moratorium on executions, and subsequent abolition, was an 'essential precondition for accession' for countries seeking membership.²⁶ For states wanting to become part of the CoE and the EU, the abolition of the death penalty was simply not a choice. This has led some observers to note a contradiction between the CoE's proclamations that the death penalty is not compatible with democracy, and the rather undemocratic manner in which it pushed states towards abolition.²⁷ Regardless of the means used, the desired end was achieved. The manner in which the CoE has framed its policy against the death penalty is universal in scope, but the means at its disposal are essentially limited to Europe and nowhere else do similar kinds of regional incentive structures exist. At an international level, the reputational costs from states not joining the ranks of 'civilized' abolitionists will remain limited as long as world powers like the United States and China still execute people.

Acknowledging some important exceptions and contextual factors, overall it appears that democracy and democratization play positive roles in bringing about abolition. Nonetheless, to properly appreciate these dynamics it is necessary to develop a more nuanced understanding of democracy than is generally present in the death penalty literature. This chapter will now do so in two steps. The next section will examine, and refute, a number of potential problems identified in the way abolition is achieved in democracies. The following section will argue that a closer analysis of contemporary democracy reveals liberalism as the key ingredient for driving abolition. Recognizing this has important consequences for the

²⁴ Despite the deeply problematic historical role of 'civilization' in justifying and perpetuating colonialism, the CoE and other representatives of Europe have explicitly employed the language of 'civilization' with remarkable consistency. For the larger role democracy plays in distinguishing between states in international relations, see Christopher Hobson, 'Democracy as Civilisation', *Global Society*, 22:1 (2008).

²⁵ See Agata Fijalkowski, 'European Policy on the Death Penalty' in Austin Sarat and Jürgen Martschukat (eds), *Is the Death Penalty Dying? European and American perspectives* (Cambridge: Cambridge UP, 2011).

²⁶ Rick Fawn, 'Death Penalty as Democratization: Is the Council of Europe Hanging Itself?', *Democratization*, 8:2 (2001), 69.

²⁷ Fawn, 'Death Penalty as Democratization'; Fijalkowski, 'European Policy on the Death Penalty'.

usual conclusions reached about the relationship between democratization and the death penalty.

Abolishing the Death Penalty: A Problem for Democracies?

Abolitionists argue that stopping the use of the death penalty makes sense for democracies as it removes a practice that undermines basic human rights, which democracies are meant to uphold and protect. The manner in which capital punishment is ended may create problems in relation to democratic legitimacy, however. Abolition is generally pursued through political or juridical channels, both of which are insulated from the direct input of the wider public. In regards to the former path, a common concern raised is that political elites push ahead with abolition, despite popular opinion remaining in favour of the death penalty. In cases where a juridical route has been taken, this is also seen as problematic as it has been undertaken by unelected officials. In different ways both are identified as creating situations where the democratic will of the people is overridden in order to reach the goal of abolition. To what extent are these valid concerns?

Even if abolitionists are convinced that the death penalty is a practice that contradicts democracy and must be abolished, much to their consternation public opinion polls suggest that in most countries a strong majority remain in favour of the death penalty. Schabas formulates this as a 'paradox' in the following terms: 'democracy leans towards abolition, but retentionists defend the death penalty in the name of the will of the people. Should human rights need to protect itself from public opinion?'²⁸ Writing in 2009, Johnson and Zimring describe an 'irony' in the way public opinion functioned in two of their case studies:

At the heart of any coherent theory of democracy is some conception of majority rule, yet in nations such as Taiwan and South Korea where governments have pushed for abolition, large public majorities continued to support capital punishment...²⁹

Meanwhile, Fawn notes a 'contradiction' in the means and ends used by the CoE in removing the death penalty, insofar as it 'demands through Protocol No. 6 that abolition be enacted even though it contravenes popular support for the retention of the death penalty.'³⁰ And in comparing Europe and the United States, Marshall does not even try to dress it up as a

²⁸ William Schabas, 'Public opinion and the death penalty', in Hodgkinson and Schabas (eds), *Capital Punishment: Strategies for Abolition*, 309.

²⁹ Johnson and Zimring, *The Next Frontier*, 213

³⁰ Fawn, 'Death Penalty as Democratization', 70.

contradiction, bluntly concluding that 'Europe doesn't have the death penalty because its political systems are less democratic'.³¹ These examples are representative of a common perception that pursuing abolition against the will of the majority is necessary insofar as it achieves the desired end of stopping capital punishment, but the process is problematic in regards to democratic legitimacy.

By focusing on the will of the majority – as determined through public opinion polls – abolition does seem to cause troubles for many democracies. Too much has been made of this issue, however. It is much more of a red herring than a 'contradiction' or 'paradox'. Ignoring the majority will would be a problem in a system of direct democracy, but we do not live in ancient Athens. When democracy reappeared in the late eighteenth century, it adopted the representative form that is still found today.³² Admittedly the representative system does not function as well as it should in theory, but a defining characteristic of liberal democracy is that the popular will is mediated and represented by a ruling elite of politicians. It is also important to consider the *kind* of representation that occurs in liberal democracy.³³

Delegation – whereby the representative directly fulfils the mandate of their constituents – is one form of representation, but it is a cul-de-sac that leaves little room for politics and compromise. The dominant model of representation is trusteeship. This approach is associated with Edmund Burke, who famously explained:

Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *parliament*.³⁴

Elected politicians are expected to follow the general interests of their constituents, as well as consider the electorate as a whole, but they are not strictly bound by a specific mandate. This

³¹ Joshua Micah Marshall, 'Death in Venice: Europe's Death-Penalty Elitism,' *The New Republic*, July 31, 2000. Available at: <http://mcadams.posc.mu.edu/blog/TNR%20Online%20%20Death%20in%20Venice.htm> (accessed 22 August 2011)

³² Christopher Hobson, 'Revolution, Representation and the Foundations of Modern Democracy', *European Journal of Political Theory*, 7:4 (2008).

³³ See Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006).

³⁴ Edmund Burke, 'Speech to the Electors of Bristol', *The Works of the Right Honourable Edmund Burke*, Volume 1 (London: Henry G. Bohn, 1854–56), 446-48.

leaves room for politicians to engage in debate, change their minds and compromise. Simply put, public opinion remains important, but it is not the be all and end all of modern democracy.³⁵

Appreciating the role representation plays in contemporary democracy has important consequences for considering how abolition comes about. Many death penalty scholars have been understanding democracy in too literal a sense. Politicians pursuing abolition against the will of the majority does not create a 'contradiction' or an 'irony'; it simply reflects the way modern democracy functions. Indeed, by applying this observation to transitional countries a rather different conclusion is reached. Abolition being advanced in the face of majority opinion may be a sign of *progress* in the democratization process. To understand why, it is necessary to turn to the democratization literature. There has been extensive work on the way many transitions have not resulted in consolidated liberal democracies. This literature has demonstrated that there has been a rise in 'hybrid regimes', which exist in a 'gray area' between authoritarianism and democracy.³⁶ One commonly noted cause is the failure of core liberal democratic institutions to securely develop. Reflecting on incomplete and stalled transitions in Latin America, O'Donnell identified the emergence of 'delegative democracies', a form of regime that is lacking institutionalized representative structures and is based on a more immediate relationship between the elected leader and the majority.³⁷ This kind of regime may be more likely to follow public sentiment on an issue like the death penalty, as it lacks mediating institutions. In situations where abolition has gone ahead – even where it contradicts with public opinion – it may be evidence that important democratic institutions are becoming more secure and fully developed. Poland and South Korea could be two examples of this phenomenon.

Concerns have also been raised about the consequences for democracy when abolition is achieved through a juridical route. By leaving it to the courts, it means the decision is ultimately taken by unelected officials that operate outside of direct democratic control. This is an easier alternative for politicians not willing to go against public sentiment, instead passing the buck to the judges. Albania, Hungary, Latvia, South Africa, and Ukraine are

³⁵ Public opinion has become much more important in shaping the behaviour and policies of politicians in many established democracies in recent years, but this may actually be taken as a sign of the breakdown of representative democracy.

³⁶ Thomas Carothers, 'The End of the Transition Paradigm', *Journal of Democracy*, 13:1 (2002).

³⁷ Guillermo A. O'Donnell, 'Delegative Democracy', *Journal of Democracy*, 5:1 (1994).

relevant examples of this path to abolition, and one can also include the moratorium imposed by Russia's constitutional court. Boulanger and Sarat suggest that the fact that the decision was made by unelected judges 'creates a greater legitimacy problem' compared with the political route considered above.³⁸ Reflecting on East Central Europe, Fawn suggests there is a contradiction, given that 'in many countries the death penalty has been ended through what can be called non-democratic channels, such as judicial reviews and decisions of Constitutional Courts. This gives governments an option, and certainly the Courts the power by which to bypass popular will.'³⁹ Reflecting on the South African case in which the death penalty was ruled to be unconstitutional, Kende describes this as the 'counter-majoritarian dilemma' in which 'unelected courts act undemocratically when they declare a statute unconstitutional'.⁴⁰

Like with public opinion, this is not the great 'contradiction' or 'dilemma' for democracy that these observers suggest. Again the confusion stems from taking a too literal, or limited, reading of democracy. In a strict sense, the judiciary does operate directly outside of democratic control. That is not necessarily a problem, however: modern democracy is meant to be a mixed regime that combines democratic and undemocratic elements.⁴¹ Elections as an expression of the popular will are a fundamental component of modern democracy, but so are constitutionalism, the rule of law, and the protection of basic rights. These are not necessarily democratic in the sense of being a direct manifestation of the popular will, but they are vital elements that work to allow democracy to be more than the tyranny of the majority. There can be cases where the judiciary may act in a way that undermines democracy,⁴² but in theory, and generally in practice, an independent judiciary plays an important, constitutive role in liberal democracy.

From this perspective, abolition being achieved through the courts is not necessarily a problem for democracy. An independent judiciary, separation of powers, constitutionalism,

³⁸ Christian Boulanger and Austin Sarat, 'Putting Culture into the Picture: Toward a Comparative Analysis of State Killing', in Austin Sarat and Christian Boulanger (eds), *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford: Stanford UP, 2005), 9-10.

³⁹ Fawn, 'Death Penalty as Democratization', 70-1.

⁴⁰ Kende, *Constitutional Rights in Two Worlds*, 66.

⁴¹ Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge UP, 1997).

⁴² One clear recent example of this was the U.S. Supreme Court decision in *Citizens United v. FEC* in January 2010, which essentially allows corporations and unions to spend as much money as they want on election advertising. See Ronald Dworkin, 'The Decision That Threatens Democracy', *New York Review of Books*, 13 May 2010, <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/> (accessed 9/9/11).

representation, rights – these are all inter-related and thoroughly liberal ideas that shape liberal democracy. A juridical route to abolition does not directly challenge or undermine these, it may actually reinforce them. Extending these observations specifically to democratizing countries allows a similar conclusion to the discussion above. In the context of a country undergoing transition, successful abolition through the courts could actually indicate the successful institutionalization and embedding of the role of the judiciary, and more generally constitutionalism and the rule of law. As will be considered further below, transitional regimes have had considerable trouble properly institutionalizing these elements of liberal culture.

To summarize this discussion: abolition does not create any great contradictions with the principles and institutions of democracy, if we recall that we are concerned with *liberal* democracy. In both theory and practice, elites – be they politicians or judges – making decisions that go against public opinion is not *ipso facto* a problem for liberal democracies. Modern democracy is based on a representative system in which politicians are delegated power and are not bound to follow the popular will. As such, elected politicians determining to stop capital punishment – potentially against the wishes of the majority – are not the 'paradox' it is often presented to be. Likewise, the judicial route to abolition does not create a 'contradiction' for modern democracies. Constitutional rule and an independent judiciary are important components of contemporary democracy. They act as a balance, preventing democracy being the tyranny of the majority. Building on these clarifications, abolition being successfully pursued in transitional countries through either avenue may actually be taken as a sign that liberal democratic principles and institutions are being more deeply embedded. What some scholars identify as a 'paradox' or a 'contradiction' may instead be a positive sign. The problem, however, is that a majority of transitional states have struggled to establish these liberal democratic institutions.

Liberalism and Democratization

The traits identified above as shaping modern democracy – representation, constitutionalism, the rule of law, the separation of powers, the protection of basic civil and political rights – are fundamentally liberal principles. This reflects that a defining feature of modern democracy is that it is paired with, and moderated by, liberalism. In this regard, it is important to recall that liberal democracy is a relatively recent phenomenon, only emerging in the late nineteenth

century as the previously separate doctrines of democracy and liberalism were reconciled and combined.⁴³ Liberal democracy is the dominant form of democracy at present, but it is certainly not preordained, and many recent attempts at democratization have led elsewhere. In this regard, Fareed Zakaria has identified the emergence of what he has termed 'illiberal democracies'. He has suggested that the recent wave of democratization that swept across the globe has had much more mixed results due to many of these countries lacking liberal cultures and institutions that have worked to shape democracy in the West. Zakaria's reading of the situation is as follows:

For people in the West, democracy means 'liberal democracy': a political system marked not only by free and fair elections but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property. But this bundle of freedoms – what might be termed 'constitutional liberalism' – has nothing intrinsically to do with democracy and the two have not always gone together, even in the West. ... Today the two strands of liberal democracy, interwoven in the Western political fabric, are coming apart in the globe. Democracy is flourishing; liberty is not.⁴⁴

Recognizing the composite nature of liberal democracy is necessary in order to better identify that it is liberalism – rather than democracy – that is the key to understanding the fortunes of abolition. In Garland's historical analysis of the movement away from the death penalty, one of the most important reasons he identifies is the rise of liberalism.⁴⁵ This insight carries over into contemporary times. It is liberalism's concern with individual rights and the need to protect minorities against the majority will that are the primary sources for driving abolition in modern democracies.⁴⁶ Connecting this to Zakaria's observations, it suggests that democratization will only be likely an influential factor in fostering abolition if it is also accompanied by the development and embedding of liberal values.

⁴³ Christopher Hobson, 'Beyond the End of History: The Need for a "Radical Historicisation" of Democracy in International Relations', *Millennium*, 37:3 (2009).

⁴⁴ Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W.W. Norton & Co., 2003), 17.

⁴⁵ David Garland, 'Modes of Capital Punishment: The Death Penalty in Historical Perspective', in David Garland, Randall McGowen, and Michael Meranze (eds), *America's Death Penalty: Between Past and Present* (New York: New York University Press, 2011), 31-2.

⁴⁶ Obviously there are exceptions to this argument, most notably the United States, which has a very strong tradition of liberalism and retains the death penalty. Nonetheless, insofar as we are dealing with trends, and not suggesting fixed laws or definite patterns, it does appear that on the whole liberalism is more important than democracy when it comes to the political factors influencing the likelihood of abolition.

If one accepts this argument that it is the liberal component of liberal democracy that does the work in enabling abolition, then the common suggestion that democratization is an important factor in bringing about the end of the death penalty needs to be qualified. Where democratization takes place in a culture that has weak liberal institutions and values, the chances for successful abolition will be much lower.⁴⁷ In such contexts popular sentiment being in favour of retaining the death penalty will become a more significant impediment towards abolition, and some politicians may seek to take advantage of populist rhetoric around law and order issues. In most consolidated democracies majority opinion may remain in favour of the death penalty, but core liberal values and democratic institutions are sufficiently robust that political elites have been able to abolish capital punishment without major consequences. In transitional countries that lack strong liberal values or external incentive structures, any confidence that democratization will be a likely trigger towards abolition needs to be strongly tempered.

Zakaria's analysis of 'illiberal democracies' also offers a useful cautionary note for situations where abolition has occurred in transitional countries. If this process has been driven primarily as a result of external forces – either through direct pressure in the form of conditionality, or more indirectly in states wanting to be recognized as 'civilized' – the shift may be far more superficial, and thus less secure, than abolitionists would hope. To paraphrase Zakaria, there is a danger of 'illiberal abolitionists': states that remove the death penalty without altering the system of punishment that it embodied. Indeed, this possibility exists for any state – transitional or otherwise – that abolishes the death penalty because of external pressure. In this regard, it must be asked: how successful an outcome is it if a state removes the death penalty, but maintains life imprisonment in completely inhumane conditions? 'Giving up the habit of lopping off a few heads ... is relatively easy',⁴⁸ but much more difficult is changing the culture of punishment that exists around the death penalty. Especially if arguments against the death penalty are being made on human rights grounds, it is necessary to deal with difficult issues about replacement sanctions that should follow. As Coyle observes, 'advocates for abolition cannot content themselves with arguing against the negative aspects of capital punishment. They must also have a clear idea about what should

⁴⁷ Abolition may still occur, but this will more likely be due to external pressures and/or incentives. The obvious case here is Central Eastern Europe, where a mixture of carrots and sticks held by the CoE and the EU, pushed countries towards abolition. A comparable situation cannot be found elsewhere, however.

⁴⁸ James Faubion (ed), *Michel Foucault: Power, Essential Works of Foucault 1954-1984* (London: Penguin Books, 2002), 459.

happen to people who commit terrible offences'.⁴⁹ If the liberal culture of protecting human rights is not present, the replacement punishments are likely to not be much of an improvement from a human rights perspective. The development of core liberal values – especially those centred on the basic rights of individuals to be free from violence and harm – are going to act as the foundation not only for ending the death penalty, but making sure that what follows are more in accordance with the human rights concerns that drive the abolition movement in the first place. In this sense, abolitionists need to be careful not to lose sight of the forest from the trees: it is deeply problematic to simply push for the end of the death penalty without considering the wider culture of punishment that it has embodied.

Zakaria's response to 'illiberal democracies' was to call for a sequenced approach to transitions: liberalism first, democracy later; effectively mirroring the way liberal democracy successfully developed in Great Britain and the United States. This suggestion was roundly criticised, with a number of prominent scholars denying that it is possible or desirable for sequencing to occur in contemporary circumstances.⁵⁰ While recognizing this, one can still take from Zakaria the basic point that greater emphasis should comparatively be placed on promoting liberalism. Given that it is the liberal component of liberal democracy that helps to facilitate abolition and the protection of human rights more generally, Zakaria's argument suggests that promoting liberal values may be a more effective approach in the long run. Democracy by itself will likely not be enough if it is not accompanied by core liberal principles, such as constitutionalism, the rule of law and the protection of basic rights. This kind of approach places less emphasis on legal change, and focuses more on how liberal institutions can be more deeply embedded in transitional countries. Institutionally this would prioritise separation of powers, a strong judiciary and legal system, the protection of basic rights, as well as a functioning representative system. Separate from the state, the development of civil society through NGOs and other actors is an obvious way of encouraging a more liberal culture. Facilitating debate and civil society action in regards to abolition – both for *and* against – is a way of fostering the kind of environment needed for liberal democracy to grow and become more fully established. Within democracy assistance and development aid there has been a noticeable shift towards civil society support, while

⁴⁹ Andrew Coyle, 'Replacing the Death Penalty: the vexed issue of alternative sanctions', in Peter Hodgkinson and William A. Schabas (eds), *Capital Punishment: Strategies for Abolition* (Cambridge: Cambridge University Press, 2004), 93.

⁵⁰ Thomas Carothers, 'The 'Sequencing' Fallacy', *Journal of Democracy* 18:1 (2007); Larry Diamond, 'The Illusion of Liberal Autocracy', *Journal of Democracy* 14:4 (2003); Marc Plattner, 'Liberalism and Democracy: Can't Have One Without the Other', *Foreign Affairs*, 77:2 (1998).

maintaining a concern with institution building. Abolitionists and death penalty scholars would benefit from engaging more seriously in these trends, especially if there is a concern with promoting not just the end of the death penalty, but advancing the protection of human rights, especially in regards to more humane forms of punishment.

Conclusion

The purpose of this chapter has been to examine more closely the relationship between democracy and the abolition of the death penalty. More specifically, it has sought to interrogate two approximately concurrent global trends: the spread of democratization and the rapid shift towards ending capital punishment. Abolitionists have tended to view these processes as being connected. One scholar concludes that, 'the pace of abolition of the death penalty increased rapidly at exactly the same time as the process of democratization reached its peak. The connection between a newly installed democratic form of government and the abolition of the death penalty is strong, albeit not without exception.'⁵¹ Without necessarily denying this claim, the chapter has sought to complicate it by presenting a more detailed account of democracy and democratization, which has been largely lacking from the death penalty literature. To take one representative example, Boulanger and Sarat propose that:

'...elite-driven abolition seems, from the perspective of democratic theory, highly problematic, no matter whether abolition comes through the initiative of a parliamentary vanguard or a constitutional court. This dilemma needs to receive more attention than it currently does.'⁵²

It has demonstrated that this is not the 'dilemma' it is regularly portrayed to be, and there is no need to be spending more time on these false paradoxes. Neither the political nor judicial route to abolition contradicts democratic theory, far from it. In the context of democratization, a decision being made against the popular will may actually be a sign that liberal democracy is being further consolidated.

It has been argued that it is necessary to recall the role liberalism plays in shaping and moderating contemporary democracy. Constitutionalism, representative rule, the separation of powers, and the protection of individual and minority rights – these are fundamentally

⁵¹ Carsten Anckar, *Determinants of the Death Penalty: A comparative study of the world* (Milton Park: Routledge, 2004), 176.

⁵² Boulanger and Sarat, 'Putting Culture into the Picture', 32.

liberal precepts that help lay the foundation not only for contemporary democracy, but for the possibilities of abolition. Understanding the centrality of liberalism provides a more nuanced perspective than Neumayer's suggestion that, 'if democracy spreads further around the world then indeed the trend [towards abolition] can continue. Democratization thus represents one of the greatest promises to the abolitionist camp.'⁵³ This is an incomplete, and overly optimistic, reading. Democratization *may* play an important role, but only if it results in the successful consolidation of *liberal* democracy. As noted, however, a considerable number of transitions have instead resulted in different kinds of 'hybrid regimes'. The chapter highlighted one particular form, 'illiberal democracies', which have basic democratic practices but lack a culture of liberalism. Such regimes are not conducive to abolition, if anything they are likely to be more prone to following popular opinion and maintaining the death penalty.

Building on Zakaria's argument, the chapter warned of 'illiberal abolitionists' – countries that abolish the death penalty because of external pressures and lack the liberal foundations necessary to sustain a culture of humane punishment. In such case, abolitionists may have achieved the more immediate aim of removing the death penalty from the statutes, but have lost sight of the need to also alter the larger system of punishment within which the death penalty was embedded. The abolition of the death penalty has to be part of a much larger societal and cultural change. In this sense, it is directly related to democratization, which is also an ongoing process. Developing a more nuanced conception of the way democracy and democratization interact with abolition forces us to move beyond laws and to consider the practices and meanings that they represent. A rare example of this perspective in the death penalty literature comes in a study on Kyrgyzstan by Botagoz Kassymbekova. It is worth quoting at length:

If abolishing the death penalty in order to please international donors allows a corrupt government to continue being supported with loans and donations, then the conditions for more humane and democratic governance are more likely to be ignored in a situation where rising poverty and corruption contribute to problems of overall violence and criminality.⁵⁴

⁵³ Neumayer, 'Death Penalty', 264.

⁵⁴ Botagoz Kassymbekova, 'Capital Punishment in Kyrgyzstan Between the Past, "Other" State Killings and Social Demands' in Austin Sarat and Christian Boulanger (eds), *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford: Stanford UP, 2005), 189.

Kassymbekova's core insight is straightforward, but significant: 'the abolishment of the death penalty should signify a humanization of society and its structures, not simply of the legal domain.'⁵⁵ It qualifies the common assumption made by many death penalty scholars that abolition is an important part of a democratizing country breaking from its dark past.⁵⁶ This can only occur if abolition is part of a deeper transformation and democratization of the state and society.

Where death penalty scholars have been correct in regards to the significance of democracy is in identifying the political realm as being particularly important for abolition.⁵⁷ They have failed to fully understand the significance of this conclusion for their work, however. On a more obvious level, contestation surrounding the death penalty reflects a healthy, pluralist democracy – this in itself is not a problem if it can be reconciled with core liberal democratic principles, such as basic individual rights and so on. Recognizing this political dimension fosters an understanding that moves beyond the moral absolutist language of 'civilization' that is oddly common in abolitionist rhetoric, and instead recognizes that the issue of the death penalty is deeply interconnected to the way a society defines and governs itself. As Garland observes, 'the death penalty is not an isolated practice standing alone. It functions as an element in a larger system of sanctions, and its place in this system needs to be considered a part of its meaning'.⁵⁸ Developing a functioning liberal democracy that respects and preserves basic human rights is a difficult task, especially for countries that have long histories marked by different forms of rule that showed scant regard for the lives of their citizens. Yet this is what is necessary for abolition to occur in a way that has real meaning, where it takes place as part of a larger and deeper shift towards more humane forms of governance and punishment. Simply put, just as democratization involves more than elections, abolition must involve more than changing the law.

⁵⁵ Kassymbekova, 'Capital Punishment in Kyrgyzstan', 173.

⁵⁶ William A. Schabas, *The Abolition of the Death Penalty in International Law*, Third edition (Cambridge: Cambridge University Press, 2002), 2-3.

⁵⁷ Johnson and Zimring, *The Next Frontier*, 297; Randall McGowen, 'Getting the Question Right? Ways of Thinking about the Death Penalty', in David Garland, Randall McGowen, and Michael Meranze (eds), *America's Death Penalty: Between Past and Present* (New York: New York University Press, 2011), 19; Neumayer, 'Death Penalty', 263.

⁵⁸ David Garland, 'The cultural uses of capital punishment', *Punishment Society* 4:4 (2002), 474.