

argue that almost all countries that abolished the death penalty did so through judicial or political leadership, despite public support for the death penalty.²⁵ In my view, these criticisms do not disprove the value of survey evidence as a social barometer to inform policy decisions. If, contrary to expectations based on survey results, countries have abolished the death penalty without eroding the legitimacy of the criminal justice system, this should cause us to question the reliability of those survey results—and more importantly, their interpretation—not to negate a role for public opinion in the death penalty debate.

Concluding remarks

The Japanese government's justification for retaining the death penalty is that abolition would erode the legitimacy of and public trust in the criminal justice system, leading to victims' families taking justice into their own hands. This justification is based on the results of a regularly administered public opinion survey, which is said to show strong public support for the death penalty. However, a close analysis of the results of the 2014 survey fails to validate this claim. Just over a third of respondents were committed to retaining the death penalty at all costs, while the rest accepted the possibility of future abolition, with some of them seeing this as contingent on the introduction of life imprisonment without parole as an alternative sentence. These findings hardly describe a society that expects the strict application of the death penalty and whose trust in justice depends on the government's commitment to retaining it. My reading of the 2014 survey is that the Japanese public is ready to embrace abolition. Japan, after all, is a signatory to the International Covenant on Civil and Political Rights, which calls on states not to delay or prevent abolition, so this should be welcome news for the Japanese government!

25 P. Hodgkinson, "Replacing capital punishment: an issue of effective penal policy", in *The International Leadership Conference on Human Rights and the Death Penalty, Conference Brochure 1* (European Commission, American Bar Associations, and Japan Federation of Bar Associations, unpublished, 2005); R. Hood and C. Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford, Oxford University Press, 2015); D. T. Johnson and F. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford and New York, Oxford University Press, 2009). Hodgkinson (p. 46) argued that "universally public opinion supports the death penalty and this is important in that politicians many of whom are mesmerised by such polls are reluctant to question them or to encourage a more authoritative evaluation. . . . Few countries would have abolished the death penalty if they had waited for public approval."

LEADERSHIP THROUGH DIALOGUE

Didier Burkhalter¹

Each country has its own way of dealing with the death penalty, and Switzerland is no exception. In the Swiss case, use of the death penalty had been steadily declining when legal experts working on the unification of the Swiss penal code in the 1930s decided that it was time to end the problematic punishment. Thus, abolition of the death penalty for ordinary crimes entered into force in 1942 and for military crimes in 1992. Since 2000, the Swiss Constitution has forbidden the use of the death penalty. The Swiss experience demonstrates the length of time an abolition process can take, from initial questioning to full *de jure* abolition. This is a process that needs to be driven by leadership.

Switzerland's ambition is to act as a catalyst in the universal abolitionist movement. One cannot create political will in countries where there is none, nor can one impose abolition where there hasn't been a mature and serious debate on the death penalty. But we can kindle the flame already burning in those countries that have yet to complete their abolition process. As foreign minister, I have set universal death penalty abolition as a Swiss foreign policy priority and as a goal, shared with many colleagues around the world, to be reached by 2025.

Switzerland's strategy is straightforward. Bilaterally, we foster and support discussions between key actors who are open to sharing their views on the death penalty. We nourish those discussions with facts, expert analyses and technical support. Where there is growing agreement that steps can be taken towards abolition, we remain ready to provide pragmatic assistance when appropriate. Multilaterally, we also play a proactive role in shaping international norms and standards towards a more restrictive use of the death penalty.

There is increasing awareness that the death penalty cannot be carried out without violating international human rights law. Executions

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constitute inhumane and degrading treatment and fundamentally contradict Article 10 of the International Covenant on Civil and Political Rights, which states that the essential aim of any penitentiary system shall be the reformation and social rehabilitation of prisoners. The death penalty also takes a heavy toll on prisoners' families, particularly their children, violating the fundamental right of each child to have a family. These are but a few of the principles that Switzerland defends in international forums, foremost the United Nations Human Rights Council and General Assembly.

Through the strength of its convictions and its openness to sharing ideas and experiences, Switzerland is committed to remaining active in efforts to abolish the death penalty.

THE MANY FACETS OF THE DEATH PENALTY DEBATE

The global trend towards abolition of the death penalty is undeniable. In December 2014, Madagascar adopted a bill to abolish the death penalty. In February 2015, Fiji completed its full de jure abolition process. In March, Côte d'Ivoire and Suriname both scrapped the death penalty. Whilst a few countries have resumed executions, there is a growing international consensus that the death penalty is neither a useful nor a viable sentence.

In the handful of countries where there seems to be little or no hope of abolition in the near future, what we confront is not a hard bedrock of unshakable opposition, but rather a sturdy door. Trying to break down the door will only alienate those on the other side. But by respectfully ringing the doorbell and showing patience, one can engage in productive conversations with those who disagree. However strong the differences, it is the experience of Switzerland that when it comes to the death penalty, there is always room for discussion. Sometimes the exchanges can be technical, on topics such as criminal justice reform and alternative sentencing. Other times they are ideological, philosophical, or even theological, for instance on the purpose of criminal justice. Overall, though, abolition of the death penalty is a human rights issue that transcends cultural barriers and speaks to our common humanity. Compassion is common to every civilization, religion and region. Rehabilitation as the central goal of the criminal

justice system is an accepted norm of international law, enshrined in the International Covenant on Civil and Political Rights. Countries from every region of the world have set an example in ending the use of capital punishment, including Benin, Cambodia, Canada, Cap Verde, Costa Rica, Latvia, Mexico, Mongolia and Timor-Leste.

CHALLENGING THE MYTH OF DETERRENCE

Though a conversation on abolition is always possible, it isn't always easy. There are often technical issues that need to be resolved, such as penal code reform. In countries willing to revisit the death penalty issue, revising sentencing practices and finding alternatives to capital punishment can be a lengthy but necessary process. And there is always a need for local experts to lead the work on legal reform, at times also to exchange experiences with international experts from countries with similar justice systems, before abolishing the death penalty.

The persisting myth of deterrence is a challenge almost everywhere. It is tempting to assume that the threat of execution must discourage heinous crimes. However, compelling research has shown that the death penalty does not deter violent crime any more than harsh alternative sanctions such as life imprisonment. Other factors, such as having an efficient police force, are the ones that actually matter in effectively fighting crime.

Executing drug mules would not stop the flow of illicit drugs. Trafficking will continue as long as there are consumers, as well as people desperate enough to risk entering the drug trafficking business for rapid but often small economic gain. Executing the mentally ill would not make the community safer, but putting in place programs to address mental illness will. Both of these scenarios would not only violate international law, they would also be unethical, inhumane and ultimately pointless.

Yet one of the most common arguments in defence of the death penalty is linked to the same illusion of deterrence. Executing individuals who are incarcerated, and thus have already ceased to be a threat to society, is not being tough on crime. Emphasizing the deterrence rationale is fear mongering, and it is dishonest towards citizens who have legitimate concerns about their safety. We need to move away from reliance on this cruel punishment and to focus instead on effective and efficient crime prevention.

For Switzerland, leadership is expressed in action rather than grand discourse. My country is opposed to the death penalty everywhere and under all circumstances, but it is unrealistic to expect that retentionist countries will accept this stance immediately. Long-term engagement, incremental action, attentiveness and fact-based discussion are the means by which to move forward. With the right amount of research, and dissemination to the right actors, it is possible to revive dialogue everywhere, even where it seems to be dying out.

THE INTERNATIONAL MOVEMENT FOR ABOLITION

Finding the right interlocutor and the proper approach can be daunting challenges, as every abolition process is different, with its own context and opportunities. In some countries, abolition requires the political courage of a few committed leaders. This was famously the case in France, where Robert Badinter, then minister of justice, spearheaded abolition through incisive and eloquent prose. In most countries, however, there is no single event or single politician that changes the political landscape. Instead it is often a lengthy process, edged forward by the tenacity of committed parliamentarians and political leaders. These commendable women and men deserve the support of the international community.

In other countries, the judiciary can be the best entry point for addressing capital punishment. Though the death penalty is technically permitted under international law, legally putting someone to death is impossible. International law restricts the use of the death penalty to only the most serious crimes, while mandatory death sentencing is illegal. In the rarest-of-the-rare cases where the death penalty could be applicable, there has to be due process. Every prisoner has the right to appeal up to the highest judicial body of his or her country, as well as to request clemency. Appeal and clemency procedures invariably take years, during which the condemned is subjected to the intense psychological hardship of impending death. Any individual would be severely psychologically affected by such a process, which amounts to cruel and degrading treatment. In addition, in every country that still practices the death penalty, it is disproportionately imposed on the marginalized, the weak, the poor and the vulnerable. Though capital punishment may at first seem consistent with international law, there

is a strong empirical argument to be made that its use inevitably violates human rights—a case Switzerland is making with a broad coalition of like-minded countries in international forums.

Public opinion is important, but can be a double-edged sword in the push for universal abolition, as few people are genuinely committed to learning about the death penalty's true consequences. To make matters worse, some politicians misuse perceived majority support for the death penalty as the primary justification for not opposing it. In the numerous countries where abolition took place in spite of majority opposition, opinions evolved gradually to favour abolition. Indeed, opinions can change quickly when people are presented with facts. This has for instance been the case in California, the most populous state in the United States, where there has been a gradual shift in public attitudes towards the death penalty. Support for capital punishment dropped from 63% in 2000 to 52% in 2012, when the state voted on abolition. Criminologists in particular have been instrumental in demonstrating that public support for capital punishment, even in the most hard-line countries, is limited at best.

“DEATH PENALTY CANNOT BE CARRIED OUT WITHOUT VIOLATING INTERNATIONAL HUMAN RIGHTS LAW.”

—Didier Burkhalter

Transparent reporting and public action can be a substantial force for abolition. Victims' families in countries including the United States and Japan have been vocal in saying that the death penalty does not offer closure for the loss of a loved one; rather, it perpetuates violence and hatred. Hundreds of innocent people have now been exonerated from death row because of wrongful convictions and, knowing better than anyone the pain of that experience, several have been touring the world to tell their story or have it recorded by the media. Hearing about the injustice of wrongful convictions and executions is uncomfortable, but it is important to realize the implications of what can otherwise be too easily forgotten: No criminal justice system is without error. Prosecutors and judges are human, and despite the best efforts and safeguards, they make mistakes like anyone else.

SMART LEADERSHIP

The death penalty debate is complex, multifaceted, politically sensitive and often misunderstood. Doing research, disseminating information and holding conferences, seminars and workshops – all of these are important, but they are not sufficient to achieve abolition. Leadership is always necessary to instigate major change.

The abolitionist movement needs to adapt to remaining challenges and move forward by committing to a new, smart form of leadership, in which governments, parliamentarians, judges, academics, members of the media, artists and activists all build on each other's complementary strengths. An unwaveringly principled stance needs to be combined with inclusive and respectful engagement. Switzerland has been proactive in consolidating a network of smart leaders, many of whom have years of experience working for universal abolition of the death penalty. To facilitate the emergence of new leaders, especially where nearly everything has yet to be done, is a gratifying task.

Dialogue may not be what immediately comes to mind when talking about leadership. Yet some of the greatest progress towards abolition has been achieved thanks to individuals willing to engage in productive dialogue. Spending time and resources, fostering dialogue, providing facts, listening to arguments and striving to find a way forward is in itself a valuable form of leadership. There is enough work remaining to be done for each of us to have a leadership role to play. There is also potential for complementarity between gentle support and full-throated advocacy, as long as actors in both these roles take the time to study and strategize together. This collaborative planning is the essence of smart leadership.

I am personally convinced that there are no good arguments in favour of the death penalty. Quite the contrary: the death penalty creates more problems than it purports to solve. I believe that under no circumstances is it just for a human being to take the life of another human being. We are all flawed, we make mistakes, and our imperfection needs to be acknowledged in the way in which we construct our criminal justice systems. The death penalty does not make the world safer, and it most certainly does not make it better.

Switzerland will continue to lead through dialogue in the years to come. We are counting on the support of many partner countries interested in open and comprehensive engagement. I believe additional partners will join us soon, and working together with the few countries still using the death penalty, we can achieve universal abolition by 2025.