The Effects of the U.S. Death Penalty on International Relations

Elizabeth Nolen
Conflict Management and Resolution Graduate Program
University of North Carolina Wilmington
Wilmington, NC 28412
ekn4424@uncw.edu

Abstract

The death penalty is a contentious ruling that several countries condemn, however, the United States still uses it arbitrarily. The use of the death penalty towards foreign nationals and minors is the main aspect of the research conducted for this paper and it discusses how the U.S. is divided in its approach on the matter. With the U.S. being at the forefront of the human rights debate in the international community, they are finding themselves unable to speak freely due to their domestic issues. Extradition is also of concern for the U.S. because of the death penalty. With states having their own legislation versus the federal laws, the solution of an alternative to the death penalty is a continuous debate throughout the country.

Keywords: Death Penalty, International Relations, U.S. Constitution

Introduction

Throughout the years a majority of countries have begun to abolish the use of the death penalty due to it being cruel and unusual and violates people's human rights. The U.S. is one of a few nations that still use capital punishment not only in the case of their own citizens but on foreign nationals as well. The moral debate regarding what is right and what is wrong is an ongoing issue whether on a domestic level or an international level. However, the disagreement comes to a head in the international community. Article 36 of The Vienna Convention directs that foreign nationals must have access to their consulate while under arrest. The U.S. has not been abiding by this and they have put to death several foreign nationals. The U.S. did sign The Vienna Convention yet they still enforce capital punishment and that is giving the U.S. a contradictory stance in the international community. The death penalty is seen as wrong by several U.S. allies, so it is questionable why they still have it. There are several countries that have abolished capital punishment largely due to its arbitrariness and mistakes and the fact that there are alternatives for it. The U.S. seems to be leaning toward abolishing capital punishment as well; often it is the individual states that are in violation of Article 36 and not the Federal Government. So the question becomes, is the U.S. ready for alternatives for the death penalty, or are our state governments going to continue driving the issue? There is also the question and legality of executing minors. According to the International Covenant on Civil and Political Rights (ICCPR), executions of juveniles are illegal but the U.S. still executes minors (Dieter 15). The U.S. is walking a fine line with the international community and ultimately an agreement will have to be achieved.

Foreign Nationals and the U.S. Constitution

The U.S. States are bound by its Constitution and all of its citizens are to abide by this Constitution. The Vienna Convention governs the U.S. at the Federal level. This divide is causing a lack of knowledge amongst the state's police and legislative forces, thus causing the violations to the Vienna Convention. However, some authorities will still not abide by the Vienna Convention even when they do find out about it and they will still proceed with executing a foreign national; for example: Carlos Santana of the Dominican Republic who was convicted of armed robbery and murder and Roman Montoya of Mexico who was convicted of murder, were both executed in Texas in 1993 (Dieter 24) (Quigley 722). Mexico became outraged by the execution of Roman Montoya, so they began intervening earlier in death penalty cases and realized that neither Mexico nor the defendants were being notified at the time of arrest of their rights under the Vienna Convention. Another major case occurred in 1998 in Virginia. A Paraguayan national, Angel Breard had been arrested for murder in 1992 and at trial; he rejected advice from his appointed American lawyers along with the plea deal and testified in his own defense causing him to admit to the murder saying that he was compelled to do it due to a satanic curse that his father-in-law placed on him and, in Paraguay, that type of confession would have garnered him some leniency, but not in Virginia. He was found guilty and sentenced to death in 1993. Paraguay attempted to step in and appeal the ruling, but intervention was barred because of the Eleventh Amendment of the Constitution, which forbids suits by foreign countries against a state. Paraguay then appealed to the International Court of Justice at The Hague, but they determined that there was not enough time for the appeals process to occur, so they unanimously ruled that the execution should be delayed until the court could fully review the matter. The U.S. Supreme Court then reviewed several petitions made by Paraguay and Breard himself, but found that he did not raise his claim regarding the Vienna Convention in a timely manner, so that barred all individual claims by Breard and also by the International Court of Justice, thus leading to his execution on April 14, 1998 (Dieter 24). The U.S. is making strides to further commit to international human rights. In 1998, President Clinton signed an Executive Order on the 50th anniversary of the U.N.'s Declaration on Human Rights. The order stated:

> It shall also be the policy and practice of the Government of the United States to promote respect for international human rights, both in our relationships with all other countries and by working with and strengthening the various international mechanisms for the promotion of human rights, including…those of the United Nations…

Even with that said, the U.S. normally does not refer to someone's human rights, but more so their "unalienable rights' as worded in the U.S Constitution (Dieter 6). This word discrepancy and disconnect is how the U.S. justifies using the death penalty. Furthermore, the death penalty was in use at the time the Constitution was written which is another reason why the U.S. justifies using it. If their forefathers did not consider the death penalty as cruel and unusual punishment, as described in the 8th Amendment, then why should the U.S. consider it such now? The U.S. states are bound by the U.S. Constitution as stated in the 14th Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

> of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (US Const., art. XIV, sec.1).

The states are also bound by the 5th Amendment which is the right to due process. This due process clause is another way that states justify executing foreign nationals because they received their due process rights therefore they received a fair trial as stated in the 6th Amendment. However, if the death penalty was considered a violation of unalienable rights (comparable to "human rights"), it would be possible (though difficult) to amend the Constitution so that the government could not take a person's life as punishment for a crime. The more likely path towards abolition is that individual states will have to abolish it, so starting from the bottom up. In fact, 12 states and the District of Columbia already do not allow the death penalty (Dieter 8).

Figure 1.

States that allow the death penalty			States that *do not* allow the death penalty		
Alabama	Louisiana	Pennsylvania	Alaska (1957)	Michigan (1846)	West Virginia (1965)
Arizona	Mississippi	South Carolina	Connecticut (2012)	Minnesota (1911)	Wisconsin (1853)
Arkansas	Missouri	South Dakota	Hawaii (1957)	New Jersey (2007)	**ALSO**
California	Montana	Tennessee	Illinois (2011)	New Mexico (2009)	Dist. of Columbia (1981)
Colorado	Nebraska	Texas	Iowa (1965)	New York (2007)	
Delaware	Nevada	Utah	Maine (1887)	North Dakota (1973)	
Florida	New Hampshire	Virginia	Maryland (2013)	Rhode Island (1984)	
Georgia	North Carolina	Washington	Massachusetts (1984)	Vermont (1964)	
Idaho	Ohio	Wyoming			
Indiana	Oklahoma				
Kansas	Oregon	**ALSO**			
Kentucky		- U.S. Gov't			
		- U.S. Military			

Death Penalty Information Center (http://www.deathpenaltyinfo.org/states-and-without-death-penalty)

Extradition

It is clear that this divide between the states and the federal government is hindering international affairs and could potentially hinder treaties with other nations, especially with extradition treaties. It has been seen throughout the years that people commit capital offenses in nations that enforce capital punishment and then flee to other nations that do not have capital punishment so that they will not be executed, but that is not always promised. Extradition is very technical and can be a long process. There have been several extradition cases that have encountered this battle of the death penalty, the most notable ones being the *Soering, Kirkwood*

and *Einhorn* murder cases. The European Court of Human Rights made clear in these murder cases that the European Convention states could not extradite individuals to retentionist states, i.e. the U.S. without first ensuring that the death penalty was off the table (Bassiouni 177). This agreement also has to be made by the states' prosecutor to ensure the follow through of barring the death penalty as an option of conviction for the person being extradited. Another murder case that required action was the Ng v. Canada case where the United Nations Human Rights Committee held that Canada had violated its obligations under Article 7 of the ICCPR which prohibits cruel, inhuman or degrading treatment or punishment. The Committee stated that extradition of Ng to the U.S. was wrong because it could be reasonably foreseen that, if sentenced to death in California, he would be executed by gas asphyxiation, a form of punishment in violation of that prohibition (Wyngert 192). The European Convention also excludes the extradition where the requested state

> has substantial grounds for believing that a request for extradition for an ordinary criminal offense has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

This clause along with Article 7 has been implemented in several extradition agreements among different nations since World War II (Wyngert 192). States can decide not to extradite an individual based on the above grounds when there is no treaty in place. Ultimately, extradition is based upon the involved states' human rights stance and if there is a treaty in place for extradition or not. Another example is the *Netherlands v. Short* case. Short was an American soldier suspected of murdering his wife and his surrender was requested under the terms of the 1951 NATO Status of Forces Agreement between the Netherlands and the U.S. The U.S. authorities refused to give a definitive answer that the death penalty would not be sought; the trial court held that there was irreconcilable conflict of international obligations between the NATO Status of Forces Agreement and the 6th Protocol (abolishing the death penalty) to the European Convention on Human Rights, to which the Netherlands was a party. On this basis, it held that Short's interest in not being extradited to the U.S. should prevail over the Government's interest. It was not until the U.S. assured the Netherlands that Short would not be charged with a capital offense that they agreed to extradite him back to the U.S. (Wyngert 193). With that said, countries do not need to be in a direct treaty with one another in order to allow or deny extradition. Certain extradition treaties specifically state that where the death penalty is likely to be imposed, extradition for that offense shall be denied. An exception could be made if the surrender is conditional and the requesting state agrees not to impose the death penalty. One example is the 2003 United States-United Kingdom extradition treaty, which states in Article 7:

> When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if the imposed, will not be carried out.

The United States-Brazil treaty of 1961 also provides in Article VI:

> When the commission of the crime or offense for which the extradition of the person is sought is punishable by death under the laws of the requesting state and the laws of the requested state do not permit this punishment, the requested state shall not be obligated to grant the extradition unless the requesting state provides assurances satisfactory to the requested state that the death penalty will not be imposed on such person.

The exemption from the obligation to extradite can be total or partial, as reflected in the 1962 treaty between the U.S. and Israel, which states in Article VII:

> When the offense for which the extradition is requested is punishable by death under the laws of the requesting state and the laws of the requested state do not permit such punishment for that offense, extradition may be refused unless the requesting state provides assurances as the requested state considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed.

Extradition is based on the views of the two countries involved and that determines whether or not a person can be extradited if the death penalty could be sought out (Bassiouni 650).

Juveniles

The execution of juveniles is widely controversial in the international community and the ICCPR has regulations against it, i.e. Article 6 of the International Covenant on Civil and Political Rights: 'Every human being has the inherent right to life' (Schabas 95). This again is where the disconnect occurs between the U.S. and the international community. Despite the argument about how the death penalty in general violates human rights, there has been an additional loud uproar because the U.S. still executes minors. The U.S. Supreme Court had held that it did not violate the 8th Amendment which references cruel and unusual punishment to impose the death penalty on juvenile offenders, as long as those offenders were at least sixteen years of age at the time of the offense. In 2002, twenty-two of the thirty-eight U.S. states that provided for the death penalty permitted the execution of juveniles and of an approximate 193 nations, only seven, including the U.S., had executed a juvenile since 1990. The other six nations are the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen (Bradley 489). As of 2005, the U.S. Supreme Court ruled that in Roper v. Simmons[1], the execution of juveniles was cruel and unusual punishment (Borra 715). One of the major oppositional stances against the juvenile death penalty is that they cannot be held accountable for their actions because their brains are not fully developed. Another is that they can be rehabilitated so sentencing them to death is a disproportionate conviction to their crimes. The U.S. Supreme Court held that they are categorically less capable than the average criminal. Thus:

[1] In 1993, Christopher Simmons was sentenced to death by the Missouri Supreme Court for murder, but was eventually appealed and the U.S. Supreme court affirmed that it was unconstitutional to sentence juvenile offenders to death (*Roper v. Simmons)*.

> When a juvenile commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. While drawing the line at 18 is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood and the age at which the line for death eligibility ought to rest. *Stanford*[2] should be deemed no longer controlling on this issue.

In effect, the base-line had been moved up from 16 to 18 years of age (Hoyle 193). The majority of the U.S. Supreme Court also noted the international influence on this issue:

> The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under the age of 18. The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage and freedom.

This judgment has not resolved all the issues between the U.S. and the international community though (Hoyle 193). In July 2006, the UN Human Rights Committee noted that 42 states and the federal government had laws allowing people who committed their crimes under the age of 18 to be sentenced to life without parole and that some 2,225 youth offenders were serving such sentences in U.S. prisons. They ruled that sentencing children to life without parole was a violation of Article 24 (1) of the ICCPR. International human rights law prohibits life without parole for those who commit their crimes before the age of 18 and the UN Convention on the Rights of the Child states explicitly that:

> No child who was under the age of 18 at the time he or she committed an offense should be sentenced to life without the possibility of release or parole…the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offenses committed by persons under the age of 18.

The U.S. and Somalia have failed to ratify the United Nation's Convention on the Rights of the Child (Hoyle 399). The underlying resolution seems to be rehabilitation rather than incarceration for juveniles no matter what the crime was.

The Abolishment Movement

In the current era, the death penalty is widely unacceptable and other nations are abolishing it. It is included in almost all treaties among different nations that the death penalty is inhumane and will not be tolerated. The '*right to life*' was even noted when the *Virginia Bill of*

[2] In 1989, the U.S. Supreme Court ruled in *Stanford v. Kentucky* that the juvenile death penalty was constitutional for ages sixteen and seventeen. Kevin Stanford was found guilty at 17 years old by a Kentucky jury of murder, sodomy, robbery, and the receipt of stolen property (*Stanford v. Kentucky*).

Rights was drafted by George Mason at the dawn of the American Revolution, but he referred to it as 'inherent rights' and 'the enjoyment of life.' The *Declaration of Independence,* which followed by a few weeks, stated:

> We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.

So it shows that even the U.S.'s *Declaration of Independence* enforces the right to life and they still enforce the death penalty. They even stated that the ICCPR was the "most complete and authoritative articulation of international human rights law that has emerged in the years following World War II." The U.S. did ratify the ICCPR in 1992 but with reservations due to Article 6. The U.S. Reservation to Article 6 is quite broad and reads:

> The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on *any person* (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, *including such punishment for crimes committed by persons below eighteen years of age.*

Eleven countries formally protested the U.S.'s reservation as: "incompatible with the object and purpose of the Convention" (Dieter 17). The U.S.'s actions did not stop other nations from agreeing and abolishing the death penalty. In 1995 Spain stated that "the death penalty has no place in the general penal system of advanced, civilized societies…What more *degrading or afflictive punishment* can be imagined than to deprive a person of his life…?" Switzerland also concurred because it constituted "a flagrant violation of the *right to life and dignity…"* In South Africa, Justice Chaskalson stated in the historic opinion banning the death penalty under their new constitution that: "The rights to life and dignity are the most important of all human rights…And this must be demonstrated by the State in everything that it does, including the way it punishes criminals" (Dieter 4) Abolishing the death penalty has continuously been a tough fight because the retentionist countries do not see it as a human rights issue which is the first critical step. In 1997, the UN High Commission for Human Rights approved a resolution stating that the "abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights" (Dieter 4). There are two complementary theories that help explain the international diffusion of abolition: transnational activists and world society. The transnational activist theory consists of domestic groups that favor the new norm and establish coalitions with like-minded groups, sometimes within the same country, but more so internationally and with Non-governmental Organizations (NGOs). These alliances form transnational activist groups that put pressure on national governments, both internationally and domestically (Sandholtz 276). The website, Amnesty International is a resource used by these groups, which since 1989, has published execution rates from around the world. Human Rights Watch (HRW) has also opposed the death penalty for many years and has also placed pressure on governments. THE HRW and Amnesty are a part of the World Coalition Against the Death Penalty, an alliance of approximately 99 organizations founded in 2002. The world society approach is the sociologist's way of suggesting that "worldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors in virtually all of the domains of rationalized social life." World society

establishes models for legitimate nation-state identities and purposes which they then use to help initiate rationalization, progress and justice. World society theory posits that international governmental organizations and NGOs are primary carriers of world cultural ideals and models into domestic contexts (Sandholtz 277). It is suggested that anti-death penalty norms diffuse better when they are institutionalized in regional organizations and that abolition only occurs in democracies. It is known that autocratic societies use capital punishment as a tool of social and political repression, but democratic societies do not immediately take the abolitionist stance. In fact, some countries had to go against public opinion to enforce abolishment: France, Germany, the United Kingdom, Canada, etc. Nevertheless, they still abolished the death penalty (Sandholtz 278). This growing acceptance for an anti-death penalty stance is becoming the norm and until all countries and their individual states agree that this is a human rights issue, it will never be fully abolished. Even if the international law arguments were more persuasive, they still would not provide a basis for relief in the U.S. because of the separation of powers. Courts would properly decline to apply international law to override the considered choices of the president and Senate in their ratification of treaties. In addition, courts would properly decline to apply customary international law to override state criminal punishment, especially when the political branches have expressly declined to do so by treaty because of the separation of powers and federalism. This means that difficult issues such as the juvenile death penalty must be resolved through the U.S. democratic and constitutional system rather than through international law (Bradley 492).

Conclusion

The death penalty is a serious, convoluted issue that continues to stir strong feelings in the international and domestic societies of the world. Some say that it is a legal and fitting sentence for certain crimes and is strictly a domestic issue. Others say that it is a human rights issue thus involves all the nations equally. One thing that can be said is that there is a growing amount of documents that are being ratified that are abolishing the death penalty thus making it harder for those retentionist nations to remain legal. Throughout the years, the U.S. specifically has been inching closer to abolishing the death penalty and it seems to be only a matter of time before they actually do it. They are a democratic society that still has not fully grasped the anti-death penalty norm even though they confirmed that it was unconstitutional for juveniles. The ultimate goal is to rehabilitate offenders no matters what age but definitely for juveniles. The Supreme Court has said that they may refer to international law in resolving other constitutional questions which may become interesting amongst the justices. The reputation of the U.S. is at stake in the international community. If they abolish the death penalty, they will reaffirm their Super Power status in the world and create more harmonious relationships with other nations.

References

Bassiouni, M. Cherif. *International Extradition*. New Yoork: Oxford University Press, 2014.

Borra, Jennifer Eswari. "Roper v. Simmons." *Journal of Gender, Social Policy and the Law* (2005): 707-715.

Bradley, Curits A. "The Juvenile Death Penalty and International Law." *Duke Law Journal* (2002): 485-557.

Dieter, Richard C. "The Death Penalty and Human Rights: US Death Penalty and International Law." *Oxford Round Table*. 2002. 34.

Hoyle, Roger G. Hood and Carolyn. *The Death Penalty: A Worldwide Perspective*. Oxford University Press, 2008.

Quigley, S. Adele Shank and John. "Foreigners on Texas's Death Row and the Right of Access to a Consul." *St. Mary's Law Journal* (1995): 720-753.

ROPER v. SIMMONS. The Oyez Project at IIT Chicago-Kent College of Law. 15 July 2014. <http://www.oyez.org/cases/2000-2009/2004/2004_03_633>.

Sandholtz, Anthony McGann and Wayne. "Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors." *Internatioanl Studies Quarterly* (2012): 275-289.

Schabas, William. The Abolition of the Death Penalty in Iternational Law. Cambridge: Cambridge University Press, 2002.

STANFORD v. KENTUCKY. The Oyez Project at IIT Chicago-Kent College of Law. 17 July 2014. <http://www.oyez.org/cases/1980-1989/1988/1988_87_5765>.

U.S. Const. art. XIV. 14. Section 1. 1866

Wyngert, John Dugard and Christine Van den. "Reconciling Extradition with Human Rights." *The American Journal of International Law* (1998): 187-212.