

The Death Penalty and Human Rights . By Sir Fred Phillips, Q.C. Kingston, Jamaica:
Caribbean Law Publishing Company. 2009. 101 pp.

Death, Justice Thurgood Marshall famously wrote for the US Supreme Court in *Ford v. Wainwright* (477 U.S. 399 (1986)), is different. What cannot escape the attention at least of any American reader of Sir Fred Phillips's brief, impassioned discussion of death penalty jurisprudence in the Caribbean nations is that the United States, in its approach to this loaded subject, is different too. And not in a good way.

Phillips makes a compelling case for the abolition of capital punishment in general, and suggests numerous anomalies, inconsistencies, and absurdities in its application on the islands that are the subject of his study. He points out, for example, that membership in the Organization of American States requires states to endorse the contents of that body's Charter, including respecting the right to life and avoiding the subjection of those in official custody to cruel, inhuman, or degrading treatment. Those rights are negated if a state claims the right to kill.

When all is said and done, as this small book powerfully demonstrates, the most compelling argument against the death penalty is not that it fails to deter homicides (numerous studies have shown that deterrence is a myth). It is not the specter of an innocent person being executed (although that is a statistical near certainty, no matter how carefully appellate judges perform their task). The single most important reason for abandoning judicial executions, Phillips argues, is that when states tinker with the machinery of death, they betray their most cherished principles, as enshrined in international law (*Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari)).

It is in fact the business of the state to hold itself out as an exemplar, respecting the rights of all people within its borders (94). As the author reminds the reader repeatedly, capital punishment cannot be administered fairly. It will always be imposed disproportionately on those who are disadvantaged, disabled, or dysfunctional. Every state that employs the death penalty thereby commits itself to enshrining a perpetual inequality among those subject to its laws.

Phillips focuses on three specific issues: delays in carrying out executions that are so protracted as to constitute cruel and unusual punishment in themselves; that mandatory death penalties are incompatible with applicable treaty obligations; and the broader question of when international human rights treaty regimes obligate member states to change their domestic legal systems. He does this by reviewing nine Caribbean capital prosecutions in great detail. As he pointedly observes, of the sixty-nine judges who opined in those nine cases, fifty found the death penalty as

applied to be unconstitutional, because they were inconsistent with obligations binding on the state not only as a matter of conscience but also in international law.

Caribbean appellate courts in many instances reacted with shock and horror to the prospect of a condemned prisoner being forced to live on death row for more than six months: this was cruel and inhuman state action in direct contravention of such treaties as the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture. Judges made easy work of instructing executives that they could not carry out a sentence of death without according the prisoner the rights to which he was entitled under treaty law, including notably the right to petition international adjudicatory mechanisms (e.g., the UN Human Rights Committee) for review.

To Phillips, the Caribbean Community (CARICOM) states' participation in human rights regimes has provided a civilizing influence, dragging them away from colonial pasts in which judicial punishment could take the form of sheer revenge clothed in judicial impunity. By reflecting the conscience of humankind as a whole, he writes, international instruments challenge us to keep faith with the basic commitments of societies and their judicial systems, and not with easily-manipulated and mercurial public opinion.

Here, again, the United States is different. Americans do not consider even decades on death row to be constitutionally suspect. While the US has abandoned mandatory capital sentencing, it does not recoil from arbitrariness: juries are poorly and inconsistently instructed, and in some states judges may, and do, override their decisions. And Americans steadfastly reject the intrusion of international law into its constitutional jurisprudence. The US manifestly fails to meet the standards of civilization with which Sir Fred Phillips reminds us it has solemnly undertaken to comply.

The greatest value of this charming book is not its discussion of individual cases, however well presented. It is the argument that international law calls us to honor our fundamental values. The Caribbean nations that Phillips discusses have taken this conception to heart inconsistently, but they have done it and are doing it. Sadly, the United States continues to resist that same challenge.

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