



GOVERNMENT OF INDIA
LAW COMMISSION OF INDIA

Following is the text of the lecture delivered by Prof. Roger Hood on 10th July 2015 at the India International Centre, Max Mueller Marg, New Delhi, in an event organized by the Law Commission of India. The title of the lecture was “*World-wide Abolition of Capital Punishment: a Human Rights Imperative*”

World-wide Abolition of Capital Punishment: a Human Rights Imperative

Delhi 10 July 2015

Roger Hood¹

Thirty-six years ago, in 1979, India ratified the International Covenant on Civil and Political Rights. As most of you will know, the covenant which had been adopted by the General Assembly in 1966 and came into effect in 1976, was the attempt by the United Nations to put into treaty form the principles proclaimed in the Universal Declaration of Human Rights of 1948, including the right to life and ‘freedom from torture, cruel, inhuman or degrading treatment or punishment’

A compromise between the ideals of the UDHR and what could be agreed in Article 6 of the ICCPR in relation to the death penalty was inevitable, because when the Covenant was drafted in the early 1950s, none of the great powers had by that time abolished capital punishment for all crimes in all circumstances.

Although Article 6 (1) of the Covenant declared that ‘Every human being has an

¹ Professor Emeritus of Criminology, University of Oxford and Emeritus Fellow of All Souls College Oxford. In this lecture I have drawn on the Fifth Edition of Roger Hood and Carolyn Hoyle, *The Death Penalty: A World-wide Perspective*, Oxford: Oxford University Press 2015. I am most grateful to Professor Hoyle for her contribution.

inherent right to life', this was qualified by the phrase 'No one shall be arbitrarily deprived of this life', which has come to mean, broadly, that no one shall be sentenced to death without a fair trial guaranteed by Article 14, including being subject to a mandatory death sentence. Furthermore, Article 6(2) stated that 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes'. However article 6(2) was not meant to set in stone the continuance of the death penalty as many retentionist states appeared to have assumed. The term 'most serious crimes' was soon given a more restricted interpretation in the Safeguards established to *Guarantee Protection of the Rights of those Facing the Death Penalty*, which were adopted with no opposition by the UN Economic and Social Council in 1984. It was to be understood that 'their scope should not go beyond intentional crimes with lethal or other extremely grave consequences' Furthermore Article 6(6) stated 'Nothing in this Article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covenant' and Article 7 embodied article 5 of the Declaration, protecting people from torture or cruel, inhuman or degrading treatment or punishment. The direction that the development of the principles incorporated in the ICCPR should take was emphasised 44 years ago, in 1971, when a resolution adopted without dissent declared: 'in order to fully guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the

number of offences for which capital punishment might be imposed, with a view to the desirability of abolishing this punishment *in all countries*'. Thus, the ICCPR was meant to be a 'living document' not a permanent justification for a restricted use of capital punishment, or a justification for judicial executions so long as they followed trials based on strict rules of due process which without fail avoided any possibility of wrongful convictions. Furthermore, as Article 4(2) stipulated — and this is of special significance as regards India's debate on whether to abolish the death penalty completely in all circumstances or to retain it for 'terrorist crimes'— there could be no derogation from Articles 6 and 7 even 'in time of public emergency which threatens the life of the nation'.

In this talk I shall endeavour to identify the forces and ideas that have been at work to promote the objective of abolishing the death penalty in all countries; and what barriers remain to achieving this, including this great nation.

Where does India now stand on this issue? How far has its policy and practices developed to conform to the aims of the Covenant and UN Resolutions? Although it is arguable whether all the offences for which under Indian law the death penalty can be imposed fall within the UN 'most serious crimes' category, in practice the infliction of capital punishment has been restricted to murder, terrorist offences aimed to undermine the integrity of the state, and then only the

‘rarest of the rare’, the ‘worst of the worst’ cases. Thus, in relation to the number of murders recorded and the number of convictions for murder, the number of death sentences imposed is very small —only 97 persons were admitted to prison under sentence of death in 2012 (78+ according to Amnesty International)— a year when 34,434 murders were recorded and 7,714 persons convicted of murder. This is a probability of only 0.3 per cent that a murder will lead to a death sentence being imposed; a probability, if convicted of murder, of being sentenced to death of 1.3 in a 100; and of execution for murder in any of the past 10 years of zero. Furthermore, even though the Supreme Court confirms only three or four death sentences a year, the broad guidelines set out in the landmark cases of Bachan Singh, Macchi Singh and Santosh Bariyar, have not avoided arbitrariness in the selection of prisoners who are or are not sentenced to death – in violation it could be argued of India’s obligation to respect article 6(1) of the ICCPR. In addition, as you know, the Supreme Court in 2014 in the case of Shatrughan Chauhan ruled that unreasonable, unexplained and exorbitant delays waiting for the outcome of a clemency appeal will render imposition of a death sentence unconstitutional.

Thus, enforcement of the penalty has become exceptionally rare: only one execution for an ‘ordinary murder’ since 1995 – that was an execution in 2004 for a ‘rape-murder of a juvenile: a rate of one execution for murder in 20 years among 1.2 billion people. Thus, despite the introduction of the death penalty for

aggravated rape and repeated gang rape in 2013 (which is almost certainly a violation of article 6(2) of the ICCPR and the first UN Safeguard), the death penalty for ‘ordinary murder’ is in effect moribund. Indeed India could be regarded as ‘abolitionist de facto’ for ordinary crimes as there have been no executions for murder for at least 10 years. Yet death sentences continue to be imposed, subjecting at least 477 prisoners at present to the pains and psychological stress of being on death row. What is the point of this?

Pressure for the death penalty to be imposed and for its enforcement by executions will continue so long as the issue is not removed from the political agenda. That was our experience in the UK. Since the government committed itself to complete abolition of capital punishment and not to reintroduce it by ratifying the protocols to the European Convention on Human Rights and the Second Optional Protocol to the ICCPR, the issue has been settled. There is now no longer contentious debate on the reintroduction of capital punishment even for the gravest crimes, including acts of terrorism.

As you know, only two executions have been carried out since 2004, both for terrorist attacks (Ajmal Kasab in 2012 and Afzal Guru in 2013). In these cases the executive was criticised for carrying out the executions in secrecy and failing to ensure that due regard was accorded to the human dignity of the prisoners. [On May 28 2015 the Supreme Court ruled that executions cannot be carried out in an arbitrary, hurried and secret manner].

Is it justifiable to retain the death penalty for such crimes? And if so, should it be restricted solely to them? In the past there was usually a substantial period of years (for example 112 years in the case of the Netherlands) between abolition for 'ordinary crime' such as murder and final abolition for all crimes against the state or under conditions of war and in military law. The pattern is now completely different. The majority (85%) of those who abolished the death penalty for the first time since 1989 did so completely for all crimes, in 'one go' so to speak, and many of them did so within a very few years after the last execution had taken place: for example, in Turkmenistan after just two years and South Africa after only four years. Thus, the view holds sway that the death penalty is an unacceptable violation of the right to life and to be free of any cruel, inhuman or degrading punishment, however serious the crime. Even those countries that did move to abolition in 'two stages' soon followed abolition for murder with total abolition. Thus, the proportion of abolitionist countries that have abolished the death penalty for 'ordinary' crimes' but retained it for crimes against the state, such as terrorism, or in time of war under the military code, has fallen dramatically. In 1988 there were 17 such countries (one in three) among the total of 52 countries that had abolished the death penalty for murder. There are now only six such countries among the 108 abolitionist nations. Only one of these countries, Israel in 1962, executed a person, namely Adolph Eichmann, for a politically or war related atrocity since abolishing the death penalty for all ordinary offences. In other words, even the tiny number of

abolitionist countries that have retained the death penalty for political crimes have not found it necessary to carry out executions.

Despite its very occasional, indeed sporadic, recourse to capital punishment, on the international stage at the UN General Assembly, India has opposed all five resolutions put forward between 2007 and 2014, and supported by an ever increasing majority of nations, calling for a worldwide moratorium on the death penalty and executions. Perhaps even more significant is the fact that while India was not a signatory to the *Note Verbale* sent to the UN Secretary-General after the resolutions passed in 2007, 2008 and 2010, which protested that ‘there is no international consensus on whether the death penalty is a violation of human rights’, it changed policy and signed the *Note* submitted after the 2012 resolution. Perhaps this was because India was determined to retain the death penalty for, and execute, those convicted of terrorist offences against the state?

oOo

The consideration of whether and if so how quickly, India might move forward to embrace total abolition of capital punishment can be assisted by a review of how this issue has been approached by other countries and international institutions, particularly within the past quarter of a century. Beginning in 1989—the year the Berlin Wall came down—the number of countries embracing abolition began to expand at an unprecedented rate, such that those that have abolished it completely for all crimes in all circumstances

has increased to 102 plus another six that have abolished it for all ‘ordinary’ crimes: 108 in all. There are now only 39 countries that have carried out an execution in the last 10 years since 2005, most of them very infrequently. Whereas in 1998 37 countries carried out a judicial execution and 78 imposed at least one death sentence, the number doing so in 2014 was 22 of 55 that imposed a death sentence. In fact only 7 (or possibly 8) of these countries have executed as many as 10 people every year since 2011—China, Iran, Iraq, Saudi Arabia, Somalia, Yemen, probably secretive North Korea, and the USA. I need hardly say that the only liberal democracy among them is the USA, but as I shall show, executions have been steadily declining in the few states that still carry them out. Only four nations have been executing on a grand scale: China (although the number has declined substantially in recent years), Iran, Saudi Arabia, and Iraq, They have been joined this year by Pakistan and, it is feared, may be joined too by Egypt.

Fifty countries, compared with only 27 at the end of 1988, maintain capital punishment in law but have not carried out executions for at least a decade and often much longer. They are all classified by the United Nations as ‘abolitionist de facto’, and 31 of them are accepted as ‘abolitionist in practice’ by Amnesty International, meaning that there appears to be a settled policy not to carry out any executions. Thus, altogether 139 countries have forsaken the death penalty in law and practice and a further 19 have for various reasons not

found it desirable or possible to execute anybody for at least 10 years: together they constitute 80 per cent of all nations.

We have therefore witnessed a growing consensus amongst countries from different parts of the world that the death penalty cannot be enforced without violation of the human right not to be arbitrarily deprived of life and/or the right not to be subjected to a cruel, inhuman or degrading punishment. At the international level, the number of countries that voted in favour of the UN resolution for a moratorium on death sentences and executions has increased over the five year period since it was instigated in 2007. It has risen from 104 (54%) of those voting in 2007 to 117 (61%) of those voting in 2014, while the number voting definitely against the resolution has fallen between the same dates from 54 to 38 (from 28% to 20%) of those voting. Of these 38 countries, more than a third (15) had not executed any person for at least 10 years leaving only 24 of the 39 that have executed in the last 10 years as opponents of a moratorium. Furthermore the number of countries that have signed the dissenting *Notes Verbale* has steadily declined.

How and why has this happened? Over the past 24 years a ‘new dynamic’ has been at work: one which has sought to move the debate about capital punishment beyond the view that each nation has, if it wishes, the sovereign right to retain the death penalty as a repressive tool of its domestic criminal justice system on the grounds of its purported deterrent utility or the cultural

preferences and expectations of its citizens, and instead to persuade countries that retain the death penalty that it inevitably, and however administered, violates universally accepted human rights embodied in the International Covenant on Civil and Political Rights (ICCPR), as interpreted and developed by International Human Rights institutions, by domestic Supreme or Constitutional courts and embodied in constitutions. The human rights approach to abolition rejects the most persistent of justifications for capital punishment: retribution and the need to denounce, expiate and eliminate through execution those whose crimes shock society by their brutality. It holds that all human beings have a right to be able to redeem themselves and that a State has no necessity and no right to take the life of a captive citizen. Furthermore, it holds that no system of capital punishment can be devised which does not inevitably produce error and punishment which is arbitrary, cruel and inhumane.

It has needed political leadership on a trans-national scale to bring about abolition. The Council of Europe and the European Union, both of which in the 1990s made membership conditional on abolition of the death penalty, have been particularly active, as have several individual European nations. Indeed, in 2003 the European Court of Human Rights endorsed the view that capital punishment amounts to a form of inhuman treatment which can “no longer be seen as having any legitimate place in a democratic society.” NGOs, especially but not only Amnesty International, have been prominent and effective in the

campaign. New international bodies have developed such as the World Coalition against the Death Penalty and the International Commission against the Death Penalty, composed of former heads of State of a variety of countries. Political will has been the key and political discourse through human rights dialogues and concern for a country's political reputation have been forces turning that key.

The influence exerted by the weight of numbers as more and more countries have embraced the human rights case for abolition has itself strengthened the *normative* legitimacy of the case against capital punishment. Thus the movement has been attempting to generate a global *moral* force among the nations of the world, not unlike that which swept away the institutions of slavery in the nineteenth century. Sixty-three per cent of the 54 countries that have joined the abolitionist camp since the end of 1988 have specifically banned the death penalty in their democratically inspired constitutions. Altogether, 81 countries have now ratified, and three others have signed, the Second Optional Protocol to the ICCPR which bans the death penalty and does not permit its reintroduction.

It is also notable that since 1961 only two nations have reintroduced the death penalty and carried out executions: the Philippines in 1999 and Gambia in 2012. The Philippines abolished it again in 2006 by a huge parliamentary majority and Gambia withdrew its threat to carry out further executions following

international condemnation notably from the African Union (whose Commission on Human and People's Rights favours an Optional Protocol to the African Charter). As William Schabas has remarked, the point appears to have been reached where the death penalty once abolished is abolished forever.

Of great significance was the decision by the UN Security Council to exclude capital punishment when it established the International Criminal Tribunals to deal with atrocities in the former Yugoslavia in 1993 and Rwanda in 1994, and later in Sierra Leone and Lebanon. Nor is it available as a sanction for genocide, other grave crimes against humanity and war crimes in the Statute of the International Criminal Court established in 1998. If it is not available for these atrocious crimes why should it be inflicted as a disproportionate punishment for lesser crimes?

Nor has the abolitionist movement been restricted to western democratic nations as once was the case. It has been embraced across the globe by many different political systems, peoples, religious creeds and cultures. In Europe only Belarus retains and in some years enforces the death penalty, but the government has informed the UN Human Rights Council that it will abolish capital punishment after it has moulded public opinion to accept it. Russia has maintained a moratorium since May 1996. In South and Central America only two small countries (Belize and Guyana) hang on to it, although neither has carried out an execution for at least 10 years. There have been no executions in Cuba since

2003. The Commonwealth Caribbean island States, grimly maintain it in law, although successful challenges by dedicated human rights lawyers have made executions exceptionally rare: only one in the last 10 years, St Kitts in 2008.

At the end of 1988, when I published my first report to the UN, in the African region only two island states—Seychelles and Cape Verde—had abolished capital punishment, whereas 17 countries are now completely abolitionist (the most recent being Burundi, Togo, Gabon and Benin, perhaps soon to be followed by Ghana where the Constitutional Review Commission has recommended that the new Constitution should prohibit the death penalty). Another 21 have not executed anyone for at least 10 years or have more recently imposed a moratorium. Judicial executions were carried out in 2014 south of the Sahara only in Equatorial Guinea, Somalia and Sudan.

Although all countries in the Middle East and North Africa (the MENA region) where the population is overwhelmingly Muslim, retain the death penalty in law, three of them – Tunisia (1991), Algeria (1993) and Morocco (1993) – have not carried out any judicial executions for 18 years and at the end of 2011

Tunisia indicated that it would ratify the Protocol to the ICCPR abolishing the death penalty. Abolition has also been under consideration in Jordan, Morocco and Lebanon. Furthermore several states elsewhere with large Muslim majorities have already joined the abolitionist movement: such as Albania,

Azerbaijan, Bosnia-Herzegovina, Kyrgyzstan, Turkey, Turkmenistan and Senegal.

Only four retentionist Muslim countries have made regular and large scale use of capital punishment as a crime control measure, all in the Middle East: Iran, Saudi Arabia, Iraq and Yemen. As already mentioned, they have this year been joined by Pakistan in the wake of the Taliban massacre of children at the Army school in Peshawar in December 2014. An example of how a ‘moratorium’ provides no guarantee that it will be a decisive step to abolition.

While only five Asian states (Nepal, Bhutan, Cambodia, Philippines and Mongolia) have so far completely abolished the death penalty, five others are now abolitionist *de facto*. In January 2010 President Elbegdorj of Mongolia called on the Parliament to follow the path of the majority of the world’s countries and abolish the death penalty, declaring that “The road a democratic Mongolia has to take ought to be clean and bloodless”. Two years later Mongolia ratified the 2nd Optional protocol to the ICCPR. Voices protesting against the death penalty, and its infliction on their fellow citizens in foreign countries, are now being raised in

Indonesia, Malaysia and Thailand. In Japan and Taiwan a return to executions (after short moratoria connected with the appointment of Justice Ministers who were opposed to the death penalty) has brought the subject more acutely into political debate and highlighted the issue as one that affects adversely the international reputations of both countries. The President of Taiwan in April

2012, when introducing his country's first human rights report stated that he would 'seek public consensus on the issue to move towards the abolition of capital punishment'.

The attitude of the Communist Party of China is changing. China had defended its use of the death penalty on the grounds that Chinese society is still in a state of post-revolutionary social transformation, claiming that public security and stability could not be guaranteed without the general deterrent impact of the death penalty. But, there are recent signs that the worldwide trend has not been ignored. In 2007 the Chinese delegate at the UN Human Rights Council declared: 'The death penalty's scope of application was to be reviewed shortly ... with the final aim of abolishment'. The return of the review of all death penalty sentences to immediate execution from the Provincial High Courts (to which it had been delegated during the 'strike hard' campaigns that began in the 1980s) to the Supreme People's Court (SPC) in 2007, followed by a reduction in the number of capital crimes in 2011 marked the beginning of a law reform movement. Although regrettably China still refuses to publish data on its use of the death penalty (a practice which has been declared by the UN Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions, as 'a violation of human rights standards.')

it is claimed that the number of executions has been reduced by at least a half since 2007. It cannot be doubted that the international movement has had a strong influence. As the leading academic

authority, Professor Zhao Bingzhi of Beijing Normal University put it in 2011: ‘Abolition is an *inevitable international tide and trend* as well as a signal showing the broad-mindedness of civilized countries ... *[abolition] is now an international obligation*’. I could not have imagined that anyone would have said this publicly in 2000 when I first went to China to discuss the death penalty.

The position taken by the United States, to be specific by the retentionist States and the United States Supreme Court, is in my opinion crucial to achieving the goal of world-wide abolition, because many countries that retain the death penalty point to the USA in support of their position that the death penalty is *not* a human rights issue. How could it be if the great democratic champion of human rights still retains it?

So what, briefly, are the prospects that the USA as a whole will abandon capital punishment? As in most of the rest of the world the death penalty in the US is in decline and distributed unevenly in frequency of use. Since 2007 the death penalty has been abolished in seven States: New Jersey, New York, New

Mexico, Illinois, Connecticut, Maryland, and most recently Nebraska, bringing the total number of abolitionist states to 19. The number of death sentences imposed annually in the US has fallen from 315 in 1996 to only 72 in 2014. Just seven states executed anyone in 2014 compared with 20 states in 1999. Texas, Missouri and Florida accounted for 80 per cent of the 35 executions, in the

USA. Indeed, in only 14 per cent of over 3,000 counties in the USA had there been an execution between 1976 and 2010. Despite the fact that the US Supreme Court has attempted to set 'super due process' standards for death penalty trials, wrongful convictions, error, arbitrariness and discrimination persist, as well as great disquiet at a number of seriously 'botched executions'.

The influential American Law Institute decided in 2009 that it would withdraw its support for the death penalty 'in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.' According to opinion polls, public support for capital punishment had fallen from 80 per cent in 1994 to 63 per cent in January 2013. In my opinion it will not be long before the US Supreme Court holds that the death penalty is inevitably a 'cruel and unusual punishment'.

oOo

In moving forward it is clear that three barriers to abolition will have to be overcome. But, as I shall show, all can be objected to on human rights grounds.

First, the belief in the necessity of capital punishment as a general deterrent to control the number of murders or other serious crimes for which it may be appointed.

Second, the view that abolition must first be sanctioned by public opinion, usually as recorded in opinion polls or voiced by pressure groups, or these days by 'netizens'.

Third, that the death penalty is a criminal justice issue determined by cultural and religious values and social structures and conditions, and thus a matter which must be subject to national sovereignty, not to human rights principles.

First: general deterrence:

Although it appears self-evident that the death penalty may well be a deterrent to committing murder in some circumstances, this is not to say that a lesser penalty, such as life imprisonment, would not also be as effective a deterrent in the same circumstances, nor that in some circumstances threat of death might lead to more murders to escape detection and capture. And as is obvious, general deterrence depends on calculation of risk that one might be executed and that this fear outweighs any factors, personal, social, emotional, or situational that might lead to an intentional violent act that causes death in circumstances that would be classified as murder. As I have noted earlier the probability of a murder leading to execution (even when restricted to a 'rarest of rare' crime is so low in India, that the common argument that I heard from a distinguished Indian judge not long ago that it is essential to retain it for general deterrent purposes lacks, in my view, any credibility.

The real question therefore is whether capital punishment a marginally more effective general deterrent than an alternative severe punishment.

What evidence would be required? Setting aside for the moment the great methodological difficulties of measuring any added general deterrent effect of capital punishment, when all other factors that influence the rate of murder and the rate of executions have been taken into account, the following has been found:

First: When executions cease it is not inevitable that the number of murders committed increase. In fact there are many examples of falling rates. Prior to the abolition of the death penalty in Canada the homicide rate had been increasing, but 40 years after abolition it was 44 per cent lower than it had been in the year of abolition. According the UN, the rate of homicide per 100,000 of the population has not increased at all in India since the last execution for murder was carried out a decade ago. **Second:** Comparisons between states that have similar demographic and socio-economic profiles show no greater reduction in homicides in those which employ the death penalty. For example, those who

claimed that a deterrent effect was proven in the USA when a decline in homicides followed resumption of executions and an increase followed a moratorium, were faced with the fact that almost precisely the same fluctuations were recorded at the same times in Canada where there is no death penalty. A recent review of the literature shows that between 1974 and 2009, the homicide

rates of Texas, California and New York have followed almost exactly the same fluctuating rates even though Texas had executed 447 people compared with 13 in California and none in New York. In Asia, a comparative study of the homicide rates of Singapore and Hong Kong between 1968 and 2007 showed that the rate had declined greatly, in lock-step, in both cities despite the fact that the former was a high executing-rate city with a mandatory death penalty for murder, and the latter had executed no person since 1966 and abolished capital punishment in 1993.

Third: Sophisticated statistical attempts in the United States to take all variables into account that may affect both the rate of executions and the rate of those ‘capital’ murders threatened with death (that is not with all homicides) have failed to provide a clear answer to the deterrent issue. A recent report in 2012 by the National Research Council of the USA by a distinguished group of social scientists and statisticians came to the conclusion that:

‘Research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore the Committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide and ... should not influence policy judgments about capital punishment’.

As far as human rights are concerned, most supporters of abolition would not favour the state having the power to kill certain convicted individuals in order to try to effect the actions of other citizens, preferring other policies far more likely to reduce the incidence of murders. In public opinion polls I conducted in Trinidad and Malaysia respondents put ‘Greater number of executions of murderers’ as the least likely of five crime prevention policies to be able ‘to reduce very violent crimes leading to death’. Even if capital punishment could produce a marginal deterrent effect, it could only be achieved by a complete reversal of the policy of restraint characteristic of countries that maintain the international safeguards for those facing the death penalty. It would necessitate mandatory sentences to death and high rates of execution speedily enforced, increasing the probability of innocent or wrongfully convicted persons being executed as well as those for whom, given mitigating circumstances, would be disproportionately severely punished, solely as a means to an end, namely to discourage other citizens. Thus occasional infliction of the death penalty, solely in order to try to affect the conduct of *other* persons—without any certainty that it will reduce rate of murders— in my view is not only ineffective but constitutes an arbitrary deprivation of life in violation of Article 6(1) of the ICCPR.

Public Opinion:

It is common for countries to justify their retention of capital punishment on the grounds that it is demanded by a large majority of the population: a demand that governments claim can only be ignored by politicians at their peril because without public support abolition would undermine confidence in the law and the criminal justice professionals who impose it; would 'degrade' the crime of murder in the eyes of the citizenry; and perhaps lead to private vengeance. More broadly, it is argued that in a democracy political leaders must represent the 'the will of the people', or at least of their constituents, if they are to remain in power.

The abolitionist stance is that a government committed to human rights should instead regard its task as informing and leading the general public to appreciate and then to accept the human rights case for abolition, namely in the words of the EU Guidelines on the Death Penalty that it 'contributes to the enhancement of human dignity and the progressive development of human rights'. The plain fact is that experience of administering capital punishment throughout the world has shown that no perfect system has been devised that can avoid arbitrariness, error and cruelty in its administration. It was of great significance that in post-apartheid South Africa, the newly created Constitutional Court abolished the death penalty in 1995, in face of public opinion in its favour.

The majority of persons in retentionist countries usually support the death penalty because they have become socialized and conditioned to accept it as a legal and cultural norm, the legitimate penalty for murder. Surveys that have attempted to test the strength of this support suggest that only a minority would oppose the death penalty very strongly. In Taiwan for example, 85% said they opposed abolition of the death penalty but only 32% that they strongly opposed it. It has also been found that public opinion is often based on ignorance or misconceptions about the assumed deterrent effect of capital punishment, the fairness rather than the arbitrariness of its application, absence of error rather than evidence of mistakes, and other human rights considerations. Thus, a large scale survey in China carried out in 2007 found that only 1.3% of over 3,000 respondents said they had a lot of knowledge and less than a third that they possessed 'some knowledge'; in Malaysia a mere six per cent felt they were 'very well informed' about the death penalty in their country and around a half (53%) said that they were not well informed at all. When respondents in China, Malaysia and Taiwan were asked whether they would still favour the death penalty if it were proven to their satisfaction that an innocent person had been executed, the proportion changing their minds was such as to bring the total favouring the death penalty in general down from 58% to 25% in China, and in Malaysia from 91% to 33% for murder. In Taiwan the proportion that was *strongly* opposed to abolition shrank from 32% to 6%. In the United States the fall in support for the death penalty from 80% in 1996 to 60% recently has been

attributed to increased knowledge and concern about how the death penalty has been administered, fueled in particular by more and more cases of wrongful conviction for murder coming to light. Thus, there is consistent proof that support for the death penalty rests on a mistaken belief that the system will and can be administered without arbitrariness, cruelty and error, all violations of human rights.

It has been clear for many years in the USA that asking whether people favour the death penalty will reflect what proportion accepts it as *an appropriate* punishment but not whether they think it is the *most appropriate*, or *necessary* punishment. The large-scale study of public opinion in China in 2007 also found that that the proportion favouring death fell from 58% to 38%, if the alternative would be life imprisonment with early release and declined further to 29% if it were life imprisonment without parole and only 24% if the alternative punishment would be life imprisonment without parole plus restitution to the families of victims. The recent Taiwan survey produced very similar findings. Thus the majority favoured alternative punitive penalties that were, in their opinion, *sufficiently severe* to mark the gravity of the crime rather than *demanding* ‘a life for a life’, while at the same time giving the public greater protection from the most dangerous offenders.

There is good evidence that public opinion is shaped by the use made of capital punishment, not vice versa, so that when capital punishment is abolished and is no longer legitimated by the State, public support for it begins to wither away as expectations of what should be the most severe punishment change. For example, in Britain support for the reintroduction of capital punishment fell from 74% in 1986 to 45% in 2014, and was considerably lower among respondents aged 18-24 (27%) than those aged 60 or older (52%). Experience shows that a generation that has grown up with the *expectation* that death will be the punishment for murder is relatively slow to abandon this idea, but after abolition the next generation, growing to maturity with no such experience and therefore any expectation, is far more likely to regard capital punishment as a barbaric relic of the past, abandoned as civilization has progressed.

Reflecting on the issue of public opinion and abolition of the death penalty a few years ago, the distinguished international human rights lawyer, William Schabas pointed to a paradox: ‘Democracy leans towards abolition, but retentionists defend the death penalty in the name of the will of the people. Do human rights need to be protected from public opinion?’ His answer to this question was unequivocal, echoing the sentiment of the South African Constitutional Court in 1995 when declaring capital punishment unconstitutional:

Human rights instruments . . . are, first and foremost, aimed at protection of individuals from the state . . . If public opinion were to be canvassed each time individual rights were in jeopardy, there would be little doubt that human rights would come out the loser. Yet it would contradict the *raison d'être* of human rights law to make its efficacy contingent on public opinion, one of the very forces it is aimed at counteracting and neutralising.

3. A Matter of National Sovereignty: 'Not a Human Rights Issue'

The steadily diminishing number of countries that continue to oppose the attempt by abolitionist nations to bring about a universal end to capital punishment have stigmatised their efforts as a form of cultural imperialism, as an attack on national sovereignty and an attempt to turn a 'domestic criminal justice issue' into a 'human rights issue'. This implies that if it is one it cannot also be the other. In my opinion this is a false antithesis. There are international treaties that limit the powers of all governments in relation to how they treat their citizens. For instance it is now agreed that no country should enforce or permit slavery or use torture. The same case can be made as regards the weight and brutality of punishments inflicted on captive convicted citizens. In other words there should be limits to the power that the state can be permitted to exercise over persons accused of and convicted of crimes, however serious:

limits defined by universal human rights principles which should apply to all citizens of the world. So although the choice of a system and implementation of punishments is a matter for national sovereignty and countries may legitimately reject interference from other nations, they should not impose punishments that are inflicted arbitrarily and inhumanely such that they breach the human rights of the convicted. In almost all the countries that retain and enforce capital punishment, the human rights dynamic has at least produced great restraint.

To sum up:

The key to the argument of whether abolition of the death penalty should now be regarded as a goal that *all* countries committed to human rights should pursue lies in the interpretation of Articles 6 and 7 of the ICCPR which all but a few states that retain capital punishment, such as Saudi Arabia, Malaysia and Singapore, have ratified. As mentioned already, it is absolutely clear what the aspiration of this treaty is, as spelled out in Article 6(6)—‘Nothing in [article 6] shall be invoked to delay or to prevent the abolition of capital punishment by

any State Party to the present Covenant’ and in the UN Resolution of 1971 which aimed to fully guarantee the right to life. Those countries that still favour capital punishment ‘in principle’ or believe that it is a necessary weapon in their penal armoury are being faced with convincing evidence of the abuses, discrimination, arbitrariness, unfairness, error, and inhumanity which inevitably

accompany it in practice whatever attempts have been or may be made to reform the system. Abolition of capital punishment and its replacement by a humane and flexible system of imprisonment is clearly the litmus test for all countries that purport to respect international human rights norms.

Despite set-backs and delays, abolitionist have good reason to be confidently optimistic that the final destination is not now far off when all countries will have come to accept that the killing of captive criminals should be outlawed forever.

References

Garland, David, *Peculiar Institution. America's Death Penalty in an Age of Abolition*, Oxford: Oxford University Press, 2010.

Hood, Roger, *The Death Penalty in Malaysia. Public Opinion on the Mandatory Death Penalty for Drug Trafficking, Murder and Firearms Offences*, London: The Death Penalty Project, 2013.

Hood, Roger and Hoyle Carolyn, *The Death Penalty: A World-wide Perspective*, 5th edition, Oxford: Oxford University Press 2015, especially chapters 1('The Abolitionist Movement, Progress and Prospects'), 9 (The Question of Deterrence), 10 ('A Question of Opinion or A Question of Principle') and 11 (The Challenge of a Suitable Replacement).

Hood, Roger and Deva, Surya (eds.), *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion*, Oxford: Oxford University Press, 2013.

Hood, Roger and Seemungal, Florence, *Public Opinion on the Mandatory Death Penalty in Trinidad*, London: The Death Penalty Project, 2012.

Nagin, D.S. and Pepper, J.V. (eds) *Deterrence and the Death Penalty*, Washington, D.C., The National Academies Press, 2012.

Oberwittler, Dietrich and Shenghui Qi, *Public Opinion on the Death Penalty in China. Results from a General Population Survey Conducted in Three Provinces in 2007/08*. Forschung Aktuell/research in brief 41, Freiburg: Max Planck Institute for Foreign and International Criminal Law, 2009.

Sato, Mai, *The Death Penalty in Japan. Will the Public Tolerate Abolition?* Weisbaden: Springer VS, 2014.

Schabas, William, 'Public Opinion and the Death Penalty', in Peter Hodgkinson and William A. Schabas (eds.), *Capital Punishment: Strategies for Abolition*, Cambridge: Cambridge University Press, 2004, 309-31.

Taiwan Alliance to End the Death Penalty, *Survey of Public Attitudes on the Death Penalty* (forthcoming 2015)

Zimring, Frank and Johnson, David, 'Public Opinion and Death Penalty Reform in the People's Republic of China', *City University of Hong Kong Law Review*, vol. 3, 2012, 189-96.

Zimring, Frank, Fagan, Jeffrey and Johnson, David, 'Executions, Deterrence and Homicide: A Tale of Two Cities' *Journal of Empirical Legal Studies*, vol, 7, 2010, 1-29.