

CENTRE FOR CAPITAL PUNISHMENT STUDIES
CCPS

CAPITAL PUNISHMENT BRIEFING PAPER

PETER HODGKINSON,
LINA GYLLENSTEN AND DIANA PEEL

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Peter Hodgkinson, Lina Gyllensten & Diana Peel

The Centre for Capital Punishment Studies

The Centre for Capital Punishment Studies (CCPS) based at the Law school, University of Westminster, London, UK, was founded in 1992 by the Centre's Director, Peter Hodgkinson OBE, who is Council of Europe expert on the death penalty and a founding member of the UK Foreign Secretary's Death Penalty Panel. The CCPS undertakes numerous pioneering activities within the field of capital punishment and penal research, with the overall aim of informing and supporting moves to replace capital punishment. It has developed a number of important principles and strategies absent from the traditional discourse.

The CCPS promotes a holistic approach in preparing for abolition and its aftermath; an approach which requires that attention and resources are given to improving legal services, prison and police practices, crime victims' services, and humane and proportionate alternatives to the death sentence, as well as developing a political philosophy that avoids reinforcing the death penalty mythology.

Crucial to the successful implementation, capacity building and sustainability of our approach, is the active engagement of civil society, NGOs and the state. All our activities have this embedded in their planning. Our work is directed towards the political community; the prison and police services; the human rights and education community; legal and medical professions; religious organisations; victims groups and NGOs through such activities as: scholarship, applied research, lecture and seminar programmes, vocational and professional training, collaboration and dialogue with victims groups and supporters of the death penalty. Many of these objectives are pursued through our internationally recognised internship programme.

All the Centre's international activities stem from invitations from governments and domestic organisations to provide objective data about capital punishment and to share the experiences of countries that have removed the death penalty. In our experience, adopting the moral high ground is unhelpful, rather, it is essential to understand the stance and the concerns held by those who live with the death penalty.

The Centre's work on the death penalty worldwide has contributed to its growing specialist library which holds information on capital punishment globally. This comprehensive and wide-ranging collection includes academic and non-academic literature, media coverage, films and documentaries.

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Peter Hodgkinson entered the university world [1989] via employment as a Probation Officer in Inner London where he developed an interest and expertise in working with life sentenced and mentally disordered offenders. He has an honours degree in Psychology [1973] and a Certificate of Qualification in Social Work [1974] and these together with his experience of working with offenders and a stint as a Forensic Social Work Adviser [Denis Hill Secure Unit, 1989-92] have informed both his teaching and the establishment of the Centre for Capital Punishment Studies [CCPS] which he founded in 1992. In H. M. Queen's Birthday Honours of 2004 he was appointed an Officer of the Most Excellent Order of the British Empire [OBE] for his work promoting human rights.

He has been Honorary Secretary, British Society of Criminology [1978 – 1983]; Newsletter Editor, Division of Criminological and Legal Psychology, British Psychological Society [1980- 1984]; Cropwood Fellow, Institute of Criminology, University of Cambridge [1983]; Member of the Policy Co-ordinating Group and Council of the Howard League for Penal Reform [1982 – 1999]; Editorial Board- Journal of Criminal Behaviour and Mental Health [1989-1993]; Written Evidence to the House of Commons, Home Affairs Select Committee on The Year and a day Rule & the Mandatory Life Sentence [Howard League 1983]; Judge for the Observer Mace Schools Debating Competition [1993]; Member of the Steering Committee to the Death Penalty in Commonwealth Africa Project, British Institute of International and Comparative Law [2004 -2006].

Since 1996 he has been Expert and Adviser on capital punishment to the Council of Europe and since 1997 a founding member of the British Foreign Secretary's Death Penalty Panel. Council of Europe missions were undertaken in collaboration with governments and NGOs in Albania, Armenia, Azerbaijan, Belarus, Lithuania, Russian Federation, Serbia, UNCHR Geneva, UN Congress Vienna, and the Ukraine. He has also conducted missions on behalf of the FCO to the People's Republic of China, Taiwan, Nigeria, South Korea, Papua New Guinea, Vietnam and Japan. Additionally missions to Kazakhstan, the Philippines and Vietnam were undertaken at the invitation of the OSCE, the Embassy of the Netherlands, Manila and the Embassy of Switzerland, Hanoi.

The majority of his research and writing is based on the diversity of issues that comprise capital punishment scholarship and its applied relationship to penal policy and practice. To this end he has authored numerous policy papers, which are embedded in the literature of the countries to which he has consulted. The CCPS in addition to its research and consultancy activities stages a number of humane

advocacy projects in its target countries covering such topics as crime victims, alternatives to capital punishment and public information.

Selected publications

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- “Capital Punishment and Mental Health Issues: Global Examples”, with Nicola Browne, Seema Kandelia, Rupa Reddy, Saint Louis University Public Law Review, Vol. XXV, No. 2, 2006
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Policy papers

Numerous on all aspects of penal policy and capital punishment

Miscellany

- Foreword for the book ‘On the Gallows’, published in Nigeria by the organisation HURILAWS [May 2005] ISBN 978 376 15 8 7
- Preface to 'Towards the Abolition of the Death Penalty in Uganda' by Orlando Fernandez, CCPS Intern, published by The Civil Society Coalition of the Abolition of the Death Penalty in Uganda. Spearheaded by the Foundation for Human Rights Initiative (FHRI) Fountain Publishers, Kampala, Uganda ISBN 978-9970-02-615-9

Preamble	6
Chapter One <i>Penal policy justifications for the retention / abolition of capital punishment</i>	8
Chapter Two <i>Public Opinion –v- Public Education</i>	11
Chapter Three <i>Innocence and wrongful convictions</i>	18
Chapter Four <i>Alternatives to the death sentence</i>	20
Chapter Five <i>Disparity and discrimination in the administration of capital punishment</i>	28
Chapter Six <i>The value and purpose of a moratorium</i>	30
Chapter Seven <i>Victim issues and the death penalty</i>	34
Chapter Eight <i>Religion and capital punishment</i>	37
Chapter Nine <i>The role of medicine in the administration of capital punishment</i>	43
Chapter Ten <i>Methods of execution</i>	52
Chapter Eleven <i>Capital Punishment and the Law</i> <i>Issues arising from litigating capital crimes</i> <i>Aspects of International, regional and domestic law</i>	56
Chapter Twelve <i>Morocco and francophone Africa</i>	65
Chapter Thirteen <i>North Africa</i>	70
Chapter Fourteen <i>Vietnam and South East Asia</i>	74
Chapter Fifteen <i>Drugs and the death penalty- confusion and inconsistency</i>	77
Appendix One <i>Global status of the Death Penalty</i> <i>Global ratification of international human rights treaties</i>	81
Appendix Two <i>Comments of national and international celebrities on capital punishment</i>	92

Preamble¹

This briefing paper is offered as a critique of the received wisdom of abolition strategies against the background of an evidence based analysis of the literature. A point of interest to begin with is to try to tease out the motivation of individuals and groups that consider themselves death penalty abolitionists – they are a mixed bunch. On the one hand, there are those who oppose capital punishment based on the offence, and others, based on the characteristics of the defendant or on the death penalty process itself. Some individuals and countries restrict their support to murder; others for crimes including rape, child sexual abuse, drug trafficking, kidnapping, bribery, corruption, adultery, apostasy and arson. There is neither clarity, agreement, nor consistency worldwide about which, crimes attract the death sentence, nor, as to why a particular crime should be distinguished as deserving of death. ‘Abolitionists’ influenced by this approach remain so only until the ‘unacceptable’ crimes have been removed from the purview of capital punishment.

Further opposition to capital punishment is based on specific characteristics of the defendant, for example, they oppose sentencing to death those under the age of eighteen at the time of the offence, those with mental impairment or mental illness, women, pregnant women, or those over a certain age (e.g. 65 years). Some oppose its mandatory imposition, the possibility of wrongful convictions, the mode of execution, or policies with their roots in religious beliefs (Islam, Mormonism and some schools of Christianity).

Examples of dissonance within the abolitionist camp are provided by such occasions as the trial and execution of Timothy McVeigh, the Oklahoma City bomber. A poll conducted shortly before Timothy McVeigh’s execution showed that 20% out of the 80% that supported his execution were ordinarily opposed to capital punishment². In another report, Richard Dieter, Director of the Death Penalty Information Centre, is reported as saying, ‘With McVeigh, you don’t have the questions of innocence or lack of counsel or some of the others things that have particularly troubled folks about (other recent) executions. It’s nothing like the typical death-penalty case.’³

Another example of this ‘exceptionalism’ is demonstrated by Australia’s policy regarding the death penalty and the case of the Bali bombers. In an ABC News broadcast⁴ Philip Alston, Professor of Law at New York University and the UN spokesman on the death penalty described the stance taken by the Federal Government of Australia over the execution of the Bali bombers as ‘Australian exceptionalism strategy’, as it appears to support a position inconsistent with its apparent opposition to the death penalty in cases involving Australian citizens. The next government formed by the Australian Labour Party, after a slow start, has brought a note of optimism with statements from government ministers and the PM

¹ This passage is taken from a chapter written by Hodgkinson, Kandelia & Gyllensten for the Ashgate Press publication Against the Death Penalty [2008]

² Sundby, S. E. (2006), ‘The Death Penalty’s Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor’, *Texas Law Review*, Vol. 84, No. 7, 1929-1972

³ Willing, R. (2001), ‘Foes of death penalty say McVeigh is an exception’, *USA TODAY*, 20 June 2001, available at: <http://www.usatoday.com/news/nation/2001-05-03-mcveigh-cappunish.htm#more>,

⁴ ABC News (2006), ‘Council perfect forum for death penalty debate, UN official says’, 18 September 2006, available at: <http://www.abc.net.au/am/content/2006/s1743119.htm>,

reflecting their support for total abolition and a decision to table a resolution at the UN along these lines. Other examples of exceptionalism are provided by certain countries which consistently excuse or commute the death penalty for citizens of powerful and influential countries – Vietnam provides a good example of such an approach.

The execution of Saddam Hussein in Iraq led to the unseemly spectacle of governments and individuals worldwide falling over themselves to avoid making unequivocal statements opposing it. Some disguised their obvious approval by restricting their criticism to the process not the principle. In the UK, then Foreign Secretary, Margaret Beckett, was reported as saying that she welcomed the fact that Saddam Hussein 'has been tried by an Iraqi court for at least some of the appalling crimes he committed against the Iraqi people' and that his execution meant that he had been 'held to account'. In the same statement, she did, however, also state that the British government remained opposed to the death penalty⁵. Another example of exceptionalism?

The vast majority of death penalty scholarship and scholars are based in the USA and on its use in the United States of America and despite the fact that the USA represents the experience of only 5% of the world's population, its data and debate tends to dominate the Western approach to capital punishment. Whilst one should not ignore the wealth of information and scholarship the US experience provides the reality is that there is precious little authoritative material on capital punishment in other countries though in recent years attempts have been made by some, including the CCPS, to redress the balance. The crucial distinction that needs to be made is between the valuable contribution the US data makes to the general debate and its relevance to understanding the death penalty worldwide.

The core reasons for retaining or removing the death penalty differ from country to country but generally include such issues as deterrence, public opinion, rights of victims, religious doctrine and alternative penalties - all this against a background of understandable concern of its citizens that an explosion in violent crime would follow the removal of the death penalty.

Professor Roger Hood identifies several factors that he believes have influenced the increase in the number of abolitionist countries: the spread of international treaties and of the human rights movement; political pressure; political leadership; and rejection of injustices associated with totalitarian regimes. He proposes four main objections to the death penalty, 1] capital punishment violates the fundamental right to life, 2] capital punishment is not a unique deterrent, 3] the administration of the death penalty, even in developed legal systems, is inherently and irredeemably flawed, and 4] its effect is counter-productive in that it gives out very confused moral messages.⁶

⁵ BBC News (2006). 'Saddam has been 'held to account'', 30 December 2006, available at: <http://news.bbc.co.uk/1/hi/uk/6218533.stm>,

⁶ R. Hood, 'Capital Punishment – a global perspective', *Punishment & Society*, Vol 3[3]: 331-354, [2002]

Chapter One

Penal policy justifications for the retention / abolition of capital punishment

- **Deterrence**

Deterrence claims for the death penalty make occasional appearances in the academic literature, often in the rhetoric of activists and politicians who favour capital punishment, prompting equally ill-informed rebuttals from those opposed to capital punishment. Most informed commentators have now put the deterrence justification aside because it usually creates more heat than light and is essentially a politically motivated distraction deployed to reassure an electorate fearful of crime that are receptive to any solutions on offer.

As Roger Hood notes, ‘the issue is not whether the death penalty deters some – if only a few – people but whether, when all the circumstances surrounding the use of capital punishment are taken into account, it is associated with a marginally lower rate of the kind of murders for which it has been appointed.’ The reliance on deterrence assumes that a person who is about to commit a crime, most likely murder, would take into account what the likely punishment will be, once detected and convicted⁷.

Even so, the issue of deterrence continues to be relied on by governments to justify their support. The evidence most commonly relied on is based on Isaac Ehrlich’s⁸ econometric analysis, though usually without any reference to the many authoritative refutations of his findings and methodology. Ehrlich set out to refute earlier studies by criminologist Thorsten Sellin⁹ who had argued that his research showed that the death penalty is no better a deterrent to murder than life imprisonment. Ehrlich used sophisticated economic statistical analysis when looking at the relation between the death penalty and murder and came to the conclusion that from 1933 to 1965, ‘an additional execution per year ... may have resulted on the average in seven or eight fewer murders’. However, he did concede that this alone was not necessarily sufficient justification to use the death penalty over other punishments.

There are several recent studies, currently subject to the scrutiny of legal and economist scholars that claim that each execution reduces homicides by between three and eighteen. These include the work of Dezhbakhsh *et al*¹⁰ who claim that capital punishment has a strong deterrent effect, and that each execution contributes on average to eighteen fewer murders. In fact, as recognised in the same study, an increase in any of three probabilities – arrest, sentencing or execution – tends also to

⁷ Hood, R. (2002), *The Death Penalty: A worldwide Perspective*, 3rd Edition (Oxford: Oxford University Press) (p.208)

⁸ Ehrlich, I. (1975), ‘The Deterrent Effect of Capital Punishment: A Question of Life and Death’, *The American Economic Review*, Volume 65, Issue 3, June 1975, 397 – 417

⁹ Sellin, J. T. (1959), *The Death Penalty* (Philadelphia: American Law Institute)

¹⁰ Dezhbakhsh, H., Rubin, P.H. and Shepherd, J. M. (2002), ‘Does Capital Punishment have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data’, *American Law and Economics Review*, Vol. 5, No. 2, 2003, 344-376.

reduce the murder rate. On the other hand, Sorenson *et al*¹¹ examined executions in Texas between 1984 and 1997 and speculated that if a deterrent effect were to exist, it would be found in Texas because of the high number of death sentences and executions. Using patterns of executions across the study period and the relatively steady rate of murders in Texas, the authors found no evidence of a deterrent effect. The study concluded that the number of executions was unrelated to murder rates in general, and that the number of executions was unrelated to felony rates.

However, any lingering doubts about deterrent effects should be dispelled when introduced to the evidence of the multiple inherent flaws in the administration of the death penalty revealed annually by the US research. A deeper appreciation of the issues and the research generated by the deterrence debate is provided by Bailey and Peterson¹², Hood¹³ and Bowers and Pierce¹⁴ who used Ehrlich's model and did not find any deterrent effect.

A recent and very telling contribution to this debate was made by Jeffrey Fagan of Columbia Law School in his testimony to the hearings on the future of capital punishment in the State of New York. Fagan noted that there appears to have been a resurgence in studies examining execution rates linking it with reduced number of murders; the alleged deterrent effect is then used as a foundation for the argument of increasing the use of capital punishment. It is not unexpected that these studies should receive acclaim as they give a highly emotive and political issue a scientific twist. However, as Fagan points out 'These new studies are fraught with technical and conceptual errors: inappropriate methods of statistical analysis, failures to consider all the relevant factors that drive murder rates, missing data on key variables in key states, the tyranny of a few outlier states and years, and the absence of any direct test of deterrence.'¹⁵ Assertions of 'strong causal effects' are not uncommon even in the legal sphere as most such claims of 'new deterrence' disintegrate once examined in greater detail¹⁶.

Nevertheless, a recent New York Times article surveyed the current spate of analyses and concludes from the research and the comments of several of its authors, many of whom are abolitionists, that the deterrent justification warrants re-visiting¹⁷

¹¹ Sorenson, J., Wrinkle, R., Brewer, V., and Marquart, J. (1999). Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas. *Crime and Delinquency*, 45(4), 481-493

¹² Bailey, W. C., Peterson, R. D. (1997), 'Murder, Capital Punishment, and Deterrence: a review of the literature' in Bedau, H. A. (ed.) (1997) *The Death Penalty in America. Current Controversies* (Oxford: Oxford University Press)

¹³ Hood, R. (2002), *The Death Penalty: A worldwide Perspective*, 3rd Edition (Oxford: Oxford University Press) (p.208)

¹⁴ Bowers, W. J. and Pierce, G. L. (1975), 'The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment', *Yale Law Journal* 85, 187 – 208

¹⁵ Fagan, J. (2005), 'Deterrence and the death penalty: a critical review of new evidence,' Testimony to New York hearings on the future of capital punishment in the State of New York, Columbia Law School, New York, 21 January 2005 (p.2)

¹⁶ Fagan, J. (2005), 'Deterrence and the death penalty: a critical review of new evidence,' Testimony to New York hearings on the future of capital punishment in the State of New York, Columbia Law School, New York, 21 January 2005

¹⁷ Liptak, A. (2007), 'Does death penalty save lives? A new debate', *New York Times*, 18 November 2007

Finally, it is worth noting that whilst there is no clear evidence that the death penalty is a more effective deterrent than the usual alternative of long-term imprisonment, it would be incorrect and grossly misleading to characterise the death penalty as having no deterrent effect.

- **Retribution**

Retribution and deterrence are the principal justifications for capital punishment given in any survey of popular opinion about the death penalty. In fact, since the recent demise of the deterrence justification, retribution has become the key reason for supporting the death penalty. It is best summarised by the scriptural invocation to take ‘an eye for an eye, a tooth for a tooth’, and in the case of the death penalty, a ‘life for a life’.¹⁸ As a consequence of public and political pressure, retribution is all too frequently confused with revenge; confused because retribution differs from revenge as legal constraints are placed upon its severity in the interests of justice and proportionality. Retribution unlike deterrence does not need to meet any statistically measurable outcomes in terms of its effectiveness; it is an entirely subjective measure of people’s feelings of deserved punishment, which is what makes it difficult to distinguish from the popularly expressed need for revenge. As Justice Chaskalson in *The State v Makwanyane*¹⁹ said:

The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily translated into a call for vengeance. But capital punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. We have long outgrown the literal application of the biblical injunction of “an eye for an eye, and a tooth for a tooth”. Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it.²⁰

- **Incapacitation**

Finally, in the menu of punishment philosophies, putting aside rehabilitation, we come to incapacitation, a purpose of punishment that is generally associated with an outcome of imprisonment. In the context of the death penalty, incapacitation is frequently confused with individual deterrence. Inherent to deterrence policy, is the intention to influence future behaviour and whilst the execution of offenders certainly ‘incapacitates’ them, thus bringing an end to their criminal careers, it is not deterrence. Surely it is unacceptable for any society to rely on such actions in the guise of penal policy? Incapacitation in the imprisonment context is favoured by some to support calls for whole of life imprisonment as the alternative to the death sentence, which itself raises profound questions, which we will address later, not least because preventative claims applied to either imprisonment or the death sentence are complex and controversial.²¹

¹⁸ Indeed, a number of passages in the Bible codify notions of justice and retribution: “Eye for eye, tooth for tooth” (Leviticus 24:20 and Exodus 21:24), “He that smiteth a man, so that he die, shall be surely put to death” (Exodus 21:12), and “Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image” (Genesis 9:6).

¹⁹ *State v Makwanyane* & Anr (1995) 6 BCLR 665

²⁰ *State v Makwanyane* & Anr (1995) 6 BCLR 665 [Paragraph 29]

²¹ See Dieter (1997).

Chapter Two

Public Opinion –v- Public Education

Overwhelmingly, public opinion supports the death penalty, which is of importance because politicians, many mesmerised by such polls, are reluctant to challenge them or to undertake an authoritative evaluation. The public's concern that in the absence of the death penalty security will be eroded and that there will be a resurgence of disorder is understandable given that they have been assured by governments for generations that the only solution to serious violent crime is capital punishment. Compared to the number of people who are in fact executed each year worldwide²², the death penalty has arguably attained an unhealthy prominence in politics as well as in the popular press; consequently, appeals to the populist support for capital punishments will in many countries be politically beneficial.

Few countries would have abolished the death penalty if they had waited for public approval though²³ a number do claim to have removed capital punishment with the public's support, for example, after the downfall of the totalitarian regime, the Parliament of the former Czechoslovakia voted in 1990 to abolish capital punishment in response to public opinion and in the same year, as a result of the collapse of the communist dictatorship and in response to public opinion, Romania abolished the death penalty by decree (Economic and Social Council 1995). Nevertheless, the death penalty maintains its popularity in most countries so the argument goes abolishing it without public support is undemocratic. Naturally, legislators should reflect public opinion to some degree, however, it is imperative that governments lead and inform the debate, not hide behind the views of a largely ill-informed majority. Nobody suggests, for example, that fiscal policy should be lead by popular opinion.²⁴

It is not uncommon for decisions about capital punishment to be transferred from elected representatives to the judiciary, as it is not only politicians rely on public opinion polls. Courts may also refer to them as an indication of public support.²⁵ Rulings on the constitutionality of capital punishment may involve conceptual terms such as 'cruel', 'inhuman' or 'degrading', all subject to subjective interpretation varying between different societies and evolving over time with public opinion being taken into account in this process.²⁶ However, it should not be relied upon too heavily as the purpose of human rights is to protect the individual, regardless of the views of the majority. In *The State v Makwanyane*²⁷ the Constitutional Court of South

²² Amnesty International estimate that at least 1,591 people were executed in 25 countries in 2006.

²³ In the referendum in Ireland in 2001 62% voted for an amendment abolishing the death penalty.

²⁴ Schabas, W. A. (2004), 'Public Opinion and the death penalty' in Hodgkinson, P. and Schabas, W. A. (eds), *Capital Punishment – Strategies for Abolition* (Cambridge: Cambridge University Press)

²⁵ Schabas, W. A. (2004), 'Public Opinion and the death penalty' in Hodgkinson, P. and Schabas, W. A. (eds), *Capital Punishment – Strategies for Abolition* (Cambridge: Cambridge University Press)

²⁶ Schabas, W. A. (2004), 'Public Opinion and the death penalty' in Hodgkinson, P. and Schabas, W. A. (eds), *Capital Punishment – Strategies for Abolition* (Cambridge: Cambridge University Press)

²⁷ *State v Makwanyane & Anr* (1995) 6 BCLR 665

Africa, commenting on the significance of public opinion, held that the purpose of the system was to protect minorities and the marginalised in the democratic process and 'if public opinion were to be decisive there would be no need for constitutional adjudication'.²⁸ Practices which are now found to be deplorable once had widespread support and crucial to a mature democracy is a properly functioning judicial system where the legitimacy of law can be tested.

Regular polls have been undertaken on the death penalty in the US since the 1930s with 1966 standing out as the only year when the opposition to the death penalty was greater than the support.²⁹ Notably, this was just a few years before *Furman v Georgia*³⁰ in which Supreme Court Justice Thurgood Marshall stated, 'the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available'.³¹ This hypothesis has to some extent been tested. In studies undertaken in the US respondents were presented with various issues in relation to the death penalty, such as the mental condition of the offender, disproportionate sentencing based on race or financial status, innocent people being sentenced to death and the availability of life without parole. With each example, as the awareness or knowledge of the issue increased, the support for the death penalty dwindled.³²

Public support for the death penalty fluctuates and whilst exposure to the academic research that dispels the myths surrounding capital punishment may not of itself be sufficient, some programmes of reassurance and information will help. Even though it may not change the views of many who support the death penalty what it will do if responsibly conducted is to provide an authoritative basis on which governments can explain their reasons for moving towards abolition. The Centre for Capital Punishment Studies (CCPS) has developed a protocol to address this which has been piloted in Malawi, Nigeria, the Philippines and Trinidad & Tobago. Drawing on the available literature the CCPS designed a model of information dissemination and awareness raising that is readily adaptable by different cultures and jurisdictions in addressing the issue of public opinion. Earlier models that influenced its thinking are provided by the consultations undertaken by the Commissions on capital punishment in the UK and Sri Lanka (then Ceylon).³³ The Commission in Ceylon referred to the debate on abolition in the House of Commons in July 1948 when the Attorney-General of Great Britain cautioned reliance on public opinion urging that any reliance must be founded on the confidence that the public opinion under consideration is 'well informed and instructed'.³⁴ Their view was that whilst politicians might be faced with the dilemma of political practicality and / or social wisdom of a

²⁸ *State v Makwanyane & Anr* (1995) 6 BCLR 665 [paragraph 88]

²⁹ Newport, F. (2007), 'Sixty-Nine Percent of Americans Support Death Penalty', *Gallup News Service* [website], published 12 October 2007, available at: <http://www.gallup.com/poll/101863/Sixtynine-Percent-Americans-Support-Death-Penalty.aspx>,

³⁰ *Furman v. Georgia*, 408 U.S. 238 (1972)

³¹ *Furman v. Georgia*, 408 U.S. 238 (1972) [paragraph 362]

³² Vollum, S., Longmire, D. R. and Buffington-Vollum, J. (2004), 'Confidence in the death penalty and support for its use: Exploring the value-expressive dimension of death penalty attitudes', *Justice Quarterly*, Vol. 21, No. 3, September 2004, 521-546

³³ Royal Commission on Capital Punishment 1949-1953, cmdn. 8932 [London, HMSO, 1953]. For Ceylon, 'Report of the Commission of Inquiry on Capital Punishment,' Sessional paper XIV –1959, Government Press, Sri Lanka, September 1959.

³⁴ Ibid. Sri Lanka Report at para.19

course of action it was the duty of members of a Commission of Enquiry to concentrate on the social wisdom.³⁵

Eliciting people's 'belief' in the death penalty does little to inform the debate and large percentages in support of the death penalty are by and large predictable. However, establishing how important the death penalty is in the 'fight' against serious violent crime reveals altogether different responses with the majority of respondents placing the death penalty low on the list of effective remedies to crime. Another way to approach this issue of 'beliefs' and the death penalty is to ascertain what measures 'the public' considers necessary in the battle against serious crime. An example of this is a recent analysis undertaken by Market and Opinion Research International (MORI) of four social surveys conducted in the UK in 1994, 1996, 2000 and 2001. Subjects were asked: 'Which two or three of the following [measures] do you think would do most to reduce crime in Britain?' In the first three surveys, the police were ranked as the most important (51%, 58%, 54%). In 2001, 'better parenting' was considered the most important measure with 55% support. Capital punishment for murder was rated third with 38% support in 1994 and third with 35% support in 1996. By 2000, capital punishment was tied for fourth place with tougher institutions for young offenders, at 25%, and in 2001 it had fallen to seventh place with 20%.³⁶

The CCPS project addresses a number of priorities by targeting the public and key opinion makers regarding the principal arguments on the death penalty and alternative punishments and helping to establish a dialogue with policy makers on these issues. This in turn lends support to the arguments of those seeking policy options for reforms to limit or abolish the death penalty. This is an approach that can be adopted not just with the general public but also with those pivotal agencies that comprise the 'machinery of death' an example of which is the poll taken of police chiefs in the USA³⁷ who were of the opinion that the death penalty played little part in the fight against serious crime.

Australia: A poll by Roy Morgan International in October 2007 showed that, when asked whether the penalty for murder should be death or imprisonment, only 24% of Australians supported the death penalty, whereas 67% opted for imprisonment. The same poll found that a majority of 55% thought that when a country set the penalty for drug trafficking as death, the penalty should be carried out, compared to 41% who thought it should not. The poll was taken via a telephone survey of 660 people aged 14 and over.³⁸

³⁵ Ibid. Sri Lanka Report at para. 21

³⁶ MORI Crime and Punishment Polls of 1994, 1996, 2000 and 2001. In the 2001 poll in rank order Better Parenting (55%), More police (53%), better discipline in schools (49%), more constructive activities for young people (40%), introduction of a national identity card (29%) and in 6th place more effective programmes to change behaviour (21%).

³⁷ Peter D. Hart, Research Associates, conducted a national opinion poll in January 1995 of randomly selected police chiefs in the United States giving them the opportunity to express what they believe really works in fighting crime. The poll is available and discussed in R. Dieter, 'On the Front Line: Law Enforcement Views on the Death Penalty', Death Penalty Information Centre, February 1995 at <http://www.deathpenaltyinfo.org/dpic.r03.html> The police chiefs surveyed considered the death penalty to be the least relevant factor in reducing violent crime. See <http://www.deathpenaltyinfo.org/po.html>.

³⁸ <http://www.roymorgan.com/news/polls/2007/4225/>

Brazil: The Datafolha poll in March 2008 found that 47% of respondents would vote to have the death penalty reinstated, compared to 46% who would vote against such a move. Support for the return of capital punishment is down from 55% in March 2007. The poll was conducted through interviews with 4,044 Brazilian adults – the margin of error is 2%.³⁹

Czech Republic: A June 2008 poll by CVVM found that 62% of respondents were in favour of reinstating the death penalty, compared to 58% the year before. Opposition to the reinstatement of the death penalty was also up, however, at 32%, compared to 28% in the 2007 poll. The poll was carried out by interviewing 1,066 Czech adults.⁴⁰

Finland: A poll conducted by Suomen Gallup in November 2006 revealed that 29% of Finns would support the death penalty for certain crimes in times of peace. 36% of male respondents were in favour, compared to 22% of female respondents. The greatest support for capital punishment came from those between the ages of 35 and 49, with 41% in favour of its return.⁴¹

France: In September 2006, a poll by TNS Sofres showed that 42% of those surveyed favoured the reinstatement of capital punishment in France, versus 52% who were against it.⁴²

Great Britain: An online survey of 2,011 Brits in February 2008 by YouGov found that 50% of respondents felt that the death penalty should be instated, compared to 40% who did not.⁴³

Jamaica: A Johnson poll, commissioned by the Jamaica Gleaner, in January 2008 found that 79% of respondents supported the resumption of hangings on the island, compared to 18% who did not. 43% even went so far as to support the death penalty even if it meant the execution of innocent people. The survey consisted of 1008 participants, and there was a margin of error of 3%.⁴⁴

Japan: A Government survey in December 2004 found that 81.4% of respondents were in favour of capital punishment, compared to the 79.3% proponents in the 1999 survey. 3,000 people over the aged of 20 were polled, with a valid response rate of 68.3%. It is the first time that support for the death penalty has gone over the 80% mark.⁴⁵

³⁹ http://www.angus-reid.com/polls/view/death_penalty_splits_views_in_brazil/

⁴⁰ http://www.angus-reid.com/polls/view/31003/more_czechs_favour_death_penalty

⁴¹ <http://www.hs.fi/english/article/Poll+Nearly+one+in+three+Finns+would+support+capital+punishment/1135223110525>

⁴² <http://www.deathpenaltyinfo.org/international-polls-and-studies>

⁴³ http://www.angus-reid.com/polls/view/30111/half_of_britons_would_reinstate_death_penalty

⁴⁴ <http://www.jamaica-gleaner.com/gleaner/20080217/lead/lead1.html>

⁴⁵ <http://search.japantimes.co.jp/cgi-bin/nn20050220a2.html>

Malaysia: An on going poll on the Malaysian Bar website, which has run since March 2006, shows that 60.07% of the 611 respondents think the death penalty should not be abolished, compared to 36.5% who think it should be.⁴⁶

Mexico: A poll by Parametria in February 2008 asked respondents whether the death penalty should be reinstated for certain crimes. 68% felt that rape merited death, compared to 28% who did not. 64% supported the death penalty for homicide, versus 32% who did not; 60% felt kidnapping warranted the death penalty, compared to 37% who did not, and 23% wanted to execute armed robbers, compared to 73% who did not. The poll was conducted through interviews with 1,200 Mexican adults. The margin of error is 2.8%.⁴⁷

Palestinian Territories: A poll by the Palestinian Centre for Public Opinion in October 2008 which asked whether respondents oppose the imposition of the death penalty found that 66.9% did oppose it, compared to 28.5% who supported capital punishment. The poll was conducted through face to face interviews with 1,020 Palestinian adults. The margin of error is 2.8%.⁴⁸

Poland: A poll by GfK Polonia in September 2007 revealed that 46% of respondents would support the reintroduction of the death penalty, versus 52% who would not. The survey was conducted by interviewing 500 Poles. The margin of error is 4.5%.⁴⁹

Russia: According to the official Russia Information Agency, latest opinion polls show that 65% support the death penalty.⁵⁰

South Korea: A state conducted survey in March 2004 found that 65% of respondents believe the death penalty should remain on the statute books, although only 49% believed that it was an effective deterrent. 90% of respondents thought that executions served no benefit for the victim's family.⁵¹

Taiwan: A poll conducted by Fu Jen University in May 2001 found that 79.7% of respondents support the death penalty, compared to just 11.2% who oppose it. However, 50.1% of respondents said they would support abolition if life imprisonment was the alternative.⁵²

Tajikistan: In 2002, a poll was conducted "at the initiative of international organisations and NGOs" which found that 73.4% of respondents supported the death penalty.⁵³

Thailand: Assumption University conducted a poll of 1,357 Bangkok residents in April 2001 and found that 89% felt that executions were 'necessary' and only 4% felt

46

http://www.malaysianbar.org.my/component/option.com_pollxt/task.results/id.30/Itemid.213/?mosmsg=Thanks+for+your+vote%21

47

[http://www.angus-](http://www.angus-reid.com/polls/view/31537/mexicans_want_death_penalty_for_some_crimes)

48

[reid.com/polls/view/31537/mexicans_want_death_penalty_for_some_crimes](http://www.angus-reid.com/polls/view/31537/mexicans_want_death_penalty_for_some_crimes)

49

http://www.angus-reid.com/polls/view/31911/palestinian_majority_opposes_death_penalty

50

http://www.angus-reid.com/polls/view/28354/poles_divided_on_death_penalty

51

<http://en.rian.ru/russia/20080117/97201779.html>

52

<http://www.deathpenaltyinfo.org/international-polls-and-studies>

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<http://www.taipeitimes.com/News/local/archives/2001/06/25/91427>

<http://www.eurasianet.org/resource/tajikistan/hypermail/200301/0010.shtml>

they were 'unnecessary'. 71% thought that executing drug traffickers would have an impact on the drug trade, compared to 23% who did not.⁵⁴

United States: The Gallup Poll in October 2008 found that 64% of respondents supported the death penalty for convicted murderers, compared to 30% who opposed it. Support is down from 69% last year. 48% of respondents felt the death penalty was opposed "not enough", versus 21% who felt it was used too often. 54% thought the application of the death penalty was fair; 38% thought it was unfair. Support for the death penalty fell to 47% when respondents were given the option of life imprisonment, which received 48% support.⁵⁵

Uzbekistan: A poll conducted by the Uzbek Public Opinion Study Centre in July 2008 found that 92.8% of respondents supported the abolition of the death penalty, although only 90.3% supported the presidential ordinance that abolished the death penalty.⁵⁶

Cross-National Poll: A poll by Ipsos-Public Affairs of nine countries in February-March 2007 found the following results with regards to the death penalty:

	For	Against
South Korea	72%	28%
Mexico	71%	26%
US	69%	29%
Britain	50%	45%
France	45%	52%
Canada	44%	52%
Germany	35%	62%
Italy	31%	64%
Spain	28%	69%

The poll was conducted through telephone interviews with 9,146 people in the nine countries. The margin of error is 3.1%.⁵⁷

⁵⁴ Amnesty international, email correspondence

⁵⁵ <http://www.gallup.com/poll/1606/Death-Penalty.aspx>

⁵⁶ <http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=23&nome=uzbekistan>

⁵⁷ http://www.angus-reid.com/polls/view/15608/death_penalty_backed_in_four_countries

Death Penalty for Murder

Red = majority support

Italics = results when offered an alternative punishment

	FOR	AGAINST	ALTERNATIVE
Australia	24%		67%
Brazil	47%	46%	
Canada	44%	52%	
Czech Republic	62%	32%	
Finland	29%		
France	42%	52%	
Germany	35%	62%	
Great Britain	50%	40%	
Italy	31%	64%	
Jamaica	79%	18%	
Japan	81.4%		
Malaysia	60.1%	36.5%	
Mexico	64%	32%	
Palestinian Territories	28.5%	66.9%	
Poland	46%	52%	
Russia	65%		
South Korea	65%		
Spain	28%	69%	
Taiwan	79.7%	11.2%	50.1%
Tajikistan	73.4%		
Thailand	89%	4%	
United States	64% (47%)	30%	48%
Uzbekistan		92.8%	

Chapter Three

Innocence and wrongful convictions

Any legal system, being a product of human construction will have flaws and shortcomings inherent to it. In October 2003 President Kibaki of Kenya found it necessary to suspend half of Kenya's most senior judges, while tribunals investigated corruption allegations. A report released the month previously had said that corruption was rampant in the Kenyan system. The country's corruption caused the International Monetary Fund to cease lending to Kenya in 2000.⁵⁸ As legal systems cannot be deemed to be foolproof, it follows that mistakes in the administration of justice will be made. This was underlined by the overturning of the conviction of Joan Chebichii Sawe, wife of Alexander Kiptanui Sawe, former Permanent Secretary in the Office of the President, whom she was convicted of murdering. The judge observed that Chebichii had been convicted and sentenced on circumstantial evidence.⁵⁹

'No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real', wrote Justice Thurgood Marshall in the celebrated *Furman* case in 1972. 'We have no way of judging how many innocent persons have been executed, but we can be certain that there were some.'⁶⁰ During the Parliamentary debate on restoration of the death penalty in the United Kingdom, in 1994, Home Secretary Michael Howard explained that he had consistently voted for capital punishment, but that he had changed his mind. Referring to celebrated miscarriages of justice cases, such as that of the Birmingham Six, he said that 'the fault lies not in the machinery but in the fallibility and frailty of human judgment'.⁶¹

The earliest effort in the United States to identify cases in which the innocent were executed (or nearly executed) was conducted in 1912 by the American Prison Congress.⁶² After devoting almost a year to this task it concluded that there were no such cases since when there have been numerous academic studies of wrongful convictions conducted.⁶³

A classic case – but only one of many – is that of Walter MacMillian, an African-American who was tried, convicted and sentenced to death for the murder of an eighteen year-old white woman in Monroeville, Alabama in 1986. MacMillian was a likely target for a zealous prosecutor in a hostile community anxious that the crime be punished, as he had a white girlfriend and his son had married a white woman. The Alabama authorities held him on death row prior to trial, an unprecedented act. The only evidence against him was provided by three witnesses, all known to the

⁵⁸ BBC News 'Kenya wields axe on judges' 16 October 2003 <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/3195702.stm>

⁵⁹ 'Former PS Sawes wife freed from death row' 7 June 2003, East African Standard
⁶⁰ *Furman-v-Georgia*, 408 U.S. 238, 367-68 [1972]

⁶¹ This is an edited extract of Michael Howard's speech in the debate concerning the restoration of the death penalty in the House of Commons. Criminal Justice and Public Order Bill, 21st February 1994. Hansard cols. 45-46.

⁶² Gault, 'Find no unjust hangings,' 3 Journal of the American Institute of Criminal Law & Criminology 131 [1912-1913]

⁶³ E.M. Borchard, [1932] *Convicting the Innocent*. New Haven: Yale University Press; M. Hirschberg, [1940] 'Wrongful convictions,' *Rocky Mountain Law Review* 13: 20-46; R.C. Donnelly, [1952] 'Unconvicting the Innocent,' *Vanderbilt Law Review* 6: 20-40

police, all who had received favours from the prosecutors in exchange for their testimony. MacMillian had an alibi defence with witnesses to prove it. But Alabama's determination to get a conviction prevailed, and MacMillian was duly condemned to death, the trial judge overruling a jury recommendation that he be sentenced to life in prison.

Four and a half years and seven Alabama executions later, Bryan Stevenson, Attorney and Director of the former Alabama Post-Conviction Defender Organization, took on MacMillian's case and, in so doing, the whole of the Alabama legal community. The three witnesses, including the only eyewitness, recanted their testimony, stating that they had been pressured by the prosecutor to implicate MacMillian. It was also discovered that the prosecutors had withheld evidence, which would have exonerated MacMillian. Finally the authorities agreed that a grave mistake had been made, and Walter MacMillian was released on 3 March 1993.

The important research of Bedau, Radelet and Putnam identified 416 cases in which the wrong person had been convicted and sentenced to death in the United States between 1900 and 1991. By the time of publication of their book in 1992, sixty-six more wrongful convictions had been confirmed. According to their research, twenty-four death sentences were actually carried out on the wrongfully convicted.⁶⁴ Their research indicates that the two most frequent causes of error are perjury by prosecution witnesses and mistaken eyewitness testimony, followed by what they term 'passion' roused against vulnerable defendants and, finally, failures in police work and overzealous prosecution.

Much of this pioneering miscarriage work was overlooked during the 1980s and early 1990s, and it is only recently that the issue of possible innocence has taken centre stage, largely as a result of recent advances in DNA technology. Since 1973 - 139 people released from death row with evidence of their innocence. <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> .

Despite its many shortcomings, the United States justice system is among the most sophisticated in the world. All of which is to say that the wrongful conviction, whose virtual inevitability is now being demonstrated with the help of modern science is surely also present, and probably more present, in less developed justice systems. If it has proved impossible to put in place a legal system that is without flaws, then we must decide whether the mistakes that it makes are acceptable to society. The balance of 'moral advantage' and 'moral disadvantage' articulated by Professor van den Haag⁶⁵ may be acceptable and even unavoidable when contemplating the generality of offending and offenders but surely it is not at all acceptable when the mistake leads to either the wrongful conviction or execution of an innocent person.⁶⁶

⁶⁴ See preface to the revised edition of M. Radelet, H.A.Bedau & C.Putnam, 'In Spite of Innocence' [Northeastern University Press: Boston, 1995]

⁶⁵ 'Unless the moral drawbacks of an activity or practice, which include the possible death of innocent bystanders, outweigh the moral advantages, which include the innocent lives that may be saved by it, the activity is warranted.' E. van den Haag & J.P. Conrad, *The death Penalty: a debate* [New York: Plenum, 1983]

⁶⁶ Hodgkinson, P. (2004b). *Capital Punishment: Improve it or Remove it?* In P. Hodgkinson and W. A. Schabas (Eds.), *Capital Punishment: Strategies for Abolition*. Cambridge: Cambridge University Press

Chapter Four

Alternatives to the death sentence

- **An overview of life sentences**

A significant flaw in many abolitionist campaigns is the lack of attention given to the issue of an alternative sanction to the death penalty. Demands to abolish the death penalty are all very well, but the lack of an informed discussion about alternative punishments weakens any such campaign. In its absence it is more likely that governments may opt for the draconian penalties in the belief that they will placate a public hostile to abolition – for example 75 years with hard labour in Trinidad & Tobago.

In those countries that have abolished the death penalty, the most common alternative has been a form of life imprisonment, although the term life imprisonment itself is a source of much confusion. In the USA, life without parole⁶⁷ is generally taken to mean exactly that. Forty-eight states, the Military and the Federal system have the option of life without parole; the exceptions being New Mexico, a death penalty state, and Alaska, a non-death penalty state.⁶⁸ For certain crimes, particularly first-degree murder, life without parole is the only sentence available in states that have abolished the death penalty.⁶⁹ What is more, forty-one states and the federal government apply life without parole provisions to juvenile offenders despite international consensus against such practice.⁷⁰ The result is that there are now over 2,200 juvenile offenders who will spend the rest of their lives in prison⁷¹. Of these, seventy-three were 13 or 14 years old when they committed their crimes.⁷²

The prison population in the USA has increased exponentially in the last few decades, as has the lifer population. A comprehensive study carried out by The Sentencing Project in 2004 revealed that the number of lifers in prison rose by 83% from 69,845 in 1992 to 127,677 in 2003. One in every eleven (9.4%) offenders in state/federal prison, that is 127,677 persons, is now serving a life sentence. Of these, one in four (26.3%) is serving a sentence of life without parole, having increased from one in six (17.8%) in 1992.⁷³

⁶⁷ Other jurisdictions may use different terminology such as “life without the possibility of parole”, “life without the possibility of release”, “whole life tariff” and “natural life”. For the purposes of this chapter, all terms are treated as being synonymous, unless otherwise stated.

⁶⁸ Death Penalty Information Centre. (2007b). *Life Without Parole*. Available from <http://www.deathpenaltyinfo.org/article.php?did=555&scid=59>

⁶⁹ In Illinois, Iowa, Louisiana, Maine, Pennsylvania, and South Dakota, all life sentences are imposed without the possibility of parole. See Marc Mauer *et al* (2004) and Appleton and Grøver (2007).

⁷⁰ See Article 6(5) of the International Convention on Civil and Political Rights; Article 37a of the UN Convention on the Rights of the Child; and paragraph 31(a) of UN General Assembly resolution on the rights of the child, A/RES/61/146, passed by 185 votes to 1. The USA has not signed up to these provisions.

⁷¹ Human Rights Watch. (October 2005). *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*; Pilkington, E. (4th august 2007). Life without Hope. *The Guardian*.

⁷² Equal Justice Initiative. (November 2007). *Cruel and Unusual: Sentencing 13 and 14 Year Old Children to Die in Prison*.

⁷³ Mauer, M., King, R. S. and Young, M. C. (May 2004). The Meaning of “Life”: Long Prison Sentences in Context. *The Sentencing Project*.

By comparison, Europe is almost entirely a death penalty free zone.⁷⁴ The Council of Europe requires all member states to impose a moratorium on the death penalty with a view to abolition. Similarly, all member states of the European Union are required to abolish the death penalty before their accession. Most member states have adopted a form of life imprisonment as the alternative sanction, though few anticipate that those sentenced to life will in fact remain in prison for the rest of their natural lives. However, the process of selecting the alternative penalty appears not to have been the subject of much discussion and lacks consistency. Life sentences vary considerably in terms of their length⁷⁵ and their use across Europe. The UK makes the greatest use of life sentences, followed by Luxembourg. The countries that tend to use it the least include Bulgaria, Estonia, Latvia, Lithuania, Moldova, the Netherlands, Romania, Slovakia and the Former Yugoslav Republic of Macedonia.⁷⁶

Currently, only a handful of countries in the Council of Europe have provisions for whole life imprisonment including Armenia, Bulgaria, Sweden, Ukraine, the Netherlands, Estonia and Turkey.⁷⁷ Although normally a whole life tariff will only be imposed under special circumstances, such as multiple murders or prior convictions, in some cases, it is possible to petition the president for a pardon (e.g. Bulgaria⁷⁸ and Estonia⁷⁹) or the court for a determinate tariff (e.g. Sweden⁸⁰) after a certain period of time has elapsed.

England & Wales recently joined the list of those countries with whole life tariffs. Stricter penalties brought in under the 2003 Criminal Justice Act means that for the first time for generations courts have the powers to hand down a whole life sentence to be distinguished from the power of the executive to 'impose' whole life tariffs.⁸¹ After abolition of the death penalty in 1965, the tariff introduced for all murders was a mandatory life sentence, and at the time was never intended to be whole of life. When sentencing a person convicted of murder, the judge would set a

⁷⁴ Belarus is an exception. Although a reference to the temporary nature of the death penalty has been incorporated into law, the death penalty is currently in use for cases of premeditated murder with aggravating circumstances. See OSCE Office for Democratic Institutions and Human Rights (2006, 54-7). Other European and Central Asian states have imposed a moratorium on executions even though the death penalty may still exist *de jure*.

⁷⁵ See Hodgkinson (2004a, 160).

⁷⁶ Newcomen, N. (2005). Managing the Penal Consequences of Replacing the Death Penalty in Europe. In N. Browne and S. Kandelia (Eds.), *Managing Effective Alternatives to Capital Punishment* (24th June 2005). Conference Papers, Occasional Paper Series – Special Edition, Volume 3, Centre for Capital Punishment Studies.

⁷⁷ Article 38.a. (New, SG 50/95) (1) of the 1968 Penal Code of Bulgaria, amended 13 September 2002; Chapter 3, Section 1 of the 1962 Swedish Penal Code, Ds 1999:36, published 1999; see Articles 51, 64 and 115 of the Criminal Code of Ukraine, entered into force 1 September 2001; Article 31 of the Dutch Penal Code, adopted 3rd March 1881, updated by amendments up to 1994; Article 45 of the Penal Code of Estonia, RT I 2001, 61, 364; consolidated text RT I 2002, 86, 504, Passed 6 June 2001, entered into force 1 September 2002; Articles 47(1) and 48(1) of the Criminal Code of Turkey, Law Nr. 5237, passed on 26 September 2004. Whilst every effort has been made to ensure that the correct articles and dates have been cited in this note, due to translation issues, some errors might remain undetected.

⁷⁸ Article 74 of the 1968 Penal Code of Bulgaria, amended 13 September 2002.

⁷⁹ Article 77 of the Penal Code of Estonia, RT I 2001, 61, 364; consolidated text RT I 2002, 86, 504, passed 6 June 2001, entered into force 1 September 2002.

⁸⁰ See Kriminalvården (2007a; 2007b).

⁸¹ Section 269 (4) and Schedule 21.

period of imprisonment that should be served to meet the needs of retribution and deterrence (punishment phase) prior to consideration for release (risk phase). In the 1950s and 60s, the average time a person would spend in prison was nine years. Since then, the average time a person spends in prison has increased to around fifteen years.⁸²

Under the new guidelines, persons convicted of murder after December 2003 are sentenced in accordance with the four starting points set out in the 2003 Criminal Justice Act. The starting points depend on the seriousness of the crime and the age of the offender. For offenders under the age of 18, the starting point is twelve years imprisonment. For adult offenders the entry points are 15 years, 30 years or in the case of offenders over the age of 21, whole of life imprisonment. Mitigating and aggravating factors then come into consideration, which could increase or decrease the tariff.

The new provisions have placed a huge burden on prison populations in England & Wales. A further concern is that even prior to the new provision coming into force, in 2002, England & Wales already had a higher lifer population (5,268) than the other twenty-four members of the European Union combined (5,046) and just short of the total of the forty-six member states of the Council of Europe. By the end of 2005, the number of life sentenced inmates rose to 6,431 in England & Wales, a 12% rise on the year before.⁸³ As of 30 September 2007, there were thirty-five prisoners serving a whole life tariff, seventeen of whom had received their sentence after the Criminal Justice Act came into force.⁸⁴

The impact of indeterminate sentences in England & Wales [E&W] was further compounded by the introduction in 2003 of yet another indeterminate sentence for public protection [IPP]⁸⁵ which by 2008 was responsible of an increase to 13,200 [15% of the total population of 86,000 in 2010] prisoners serving indeterminate sentences of which approximately 6,922 were mandatory, discretionary or whole life sentences.⁸⁶ Comparing E&W with other Council of Europe states show Turkey with 2,571; Germany 1985; Italy 1396 and France 531.

These data should be a consideration for other countries when constructing penal strategies as they represent a wholly unnecessary and disproportionate response to the crimes and the offenders for which they are reserved – a humanitarian cost. An average annual cost for adult prisoners in E&W is roughly £45,000 but the cost of the special provisions necessary for life sentenced prisoners will be significantly higher [Ministry of Justice were not able to provide a detailed breakdown of costs]. £45,000 annual costs per life sentenced prisoner amounts to a huge drain on the criminal justice budget of some £315 million.

⁸² Blom-Cooper, L. & Morris, T. (2004). With *Malice Aforethought: A Study of the Crime and Punishment for Homicide*. Oxford, UK: Hart Publishing

⁸³ Prison Reform Trust (April 2006a). *Bromley Briefings: Prison Fact File*. The November 2006 update reveals that at the end of August 2006, there were 7,628 people serving indefinite sentences (life sentenced and indeterminate sentenced prisoners), a rise of 27% on the year before: Prison Reform Trust 2006b).

⁸⁴ Hansard. (24 October 2007). House of Commons Debates. Available from <http://www.publications.parliamenr.uk/pa/cm200607/cmhansrd/cm071024/text/71024w0013.htm>

⁸⁵ Criminal Justice Act 2003 introduced the Indeterminate detention for Public Protection [IPP]

⁸⁶ Prison Reform Trust, Bromley Briefings, Prison Fact File [2010]. www.prisonreformtrust.org.uk

With the lifer population in England & Wales rising at a considerable rate, it is perhaps useful to consider what the perceived benefits of life without parole are.

The rationale for life meaning life⁸⁷

The advantages of a life sentence without the possibility of parole are attractive to governments who require a punishment that achieves the same 'benefits' as the death penalty. In particular, a life term without the possibility of release is believed to fully protect the public as it incapacitates offenders for the rest of their lives. It also appeals to those members of the public who have become increasingly frustrated at offenders being sentenced to 'life' being released early on parole, while at the same time giving the anti-death penalty movement more credibility by showing that they are not soft on crime. Yet, if we consider the public protection element, lifers eligible for parole tend to have very low rates of recidivism after release.⁸⁸ Data on reconviction rates in England and Wales reveals that of the 1,719 lifers released between 1 April 2000 and 31 March 2007, 73 (4.2%) were reconvicted of an offence, of which 30 (0.5%) were convicted of a serious offence such as offences against the person or sexual offences.⁸⁹

A life sentence with or without the possibility of parole also eliminates the danger of executing innocent people. The irreversibility of the death penalty is a factor that has greatly reduced its support in recent years. A recent survey conducted by the Death Penalty Information Centre highlighted that 87% of Americans believe that an innocent person has been executed in recent years, with 55% saying that this fact has either made them more sceptical of capital punishment or more opposed to it. However 31% said that knowing an innocent person may have been executed has had no effect on their death penalty views.⁹⁰

The results reflect a growing discomfort among the American population with the death penalty and may explain in part why Americans are less likely to support the death penalty if there is a suitable alternative. The October 2007 Gallup poll shows that 69% of Americans are in favour of the death penalty for a person convicted of murder. This figure has remained more or less consistent since 1999. However, when presented with an alternative of 'life imprisonment, with absolutely no possibility of parole', support for the death penalty in previous years had dropped to between 47% and 54%.⁹¹

Life without parole is also attractive because of its strong retributive element. Keeping someone locked up for the rest of his or her life is as harsh a punishment as the death penalty, if not harsher. In fact, Hugo Bedau, arguably the most influential

⁸⁷ Abei, M., [2010], Council of Europe Annual Penal statistics [2008 survey]

⁸⁸ Mauer, M., King, R. S. and Young, M. C. (May 2004). The Meaning of "Life": Long Prison Sentences in Context. *The Sentencing Project*.

⁸⁹ Home Office. (2007). *Analysis of True Life Reconviction. 1 April 2000 - 31 March 2007*, obtained via personal communication between the CCPS and the Home Office, Pre-release Section.

⁹⁰ Dieter, R. (June 2007). *A Crisis of Confidence: Americans' Doubts About the Death Penalty*. A Death Penalty Information Centre Report Based on A National Opinion Survey.

⁹¹ Newport, F. (12th October 2007). Sixty-Nine Percent of Americans Support Death Penalty. *Gallup News Service*. Available from <http://www.gallup.com/poll/101863/sixtynine-percent-americans-support-death-penalty.aspx>

thinker and activist in the abolitionist debate in the US, has questioned abolitionists who favour this alternative, stating that it too is an 'unreasonably severe' punishment: 'The dilemma of the opponent of the death penalty, if current research survey is a reliable guide, is that at present the public is prepared to accept the abolition of capital punishment only if the alternative to it is itself a morally unacceptable deprivation of liberty.'

Even in nineteenth century England, the severity of whole life imprisonment was considered by some to be a worse punishment than the death penalty. In an 1868 parliamentary speech, John Stuart Mills, argued unequivocally for the retention of the death penalty, as the alternative – natural life imprisonment with hard labour – subjected offenders to a 'living tomb' and was therefore 'far more cruel in reality'.⁹² Mills speech apparently rocked the death penalty abolition movement to such an extent that it did not recover for many years.⁹³

In Trinidad and Tobago, as a result of several Privy Council decisions⁹⁴, a number of death row inmates have had their death sentences commuted to a prison term of seventy-five years or natural life with hard labour.⁹⁵ It has frequently been reported that many inmates would, however, prefer the death penalty given that the alternative is spending the rest of their life in prison, often in harsh conditions.⁹⁶ Some have argued that the severity of a natural life sentence and the quality of life in prison has as strong a deterrent effect as the death penalty, if not stronger.⁹⁷

The severity of life without parole is perhaps recognised in the decisions of some states not to extradite offenders to countries where they might be subjected to a whole life tariff. Uruguay refused to extradite a suspected terrorist following his part in the 1997 attack at a temple in Luxor unless Egypt guaranteed that he would not receive the death penalty or a natural life sentence.⁹⁸ Mexico too has in the past refused to extradite suspects to the USA without securing an undertaking that neither

⁹² Mill, J. S. (1986). Speech in Favour of Capital Punishment. In P. Singer (Ed.), *Applied Ethics* (p. 98-103). Oxford: Oxford University Press.

⁹³ Radzinowicz, L. and Hood, R. (1986), *A History of English Criminal Law and its Administration from 1750*, Vol. 5 (London: Stevens and Sons) cited in van Zyl Smit, D. (2002), *Taking Life Imprisonment Seriously in National and International Law* (The Hague: Kluwer Law International).

⁹⁴ For example, *Earl Pratt and Evan Morgan v The Attorney General for Jamaica and The Superintendent of Prisons, Saint Catherine's Jamaica* [1993] UKPC 10; *Balkissoon Roodal v The State of Trinidad and Tobago* [2003] UKPC 18; *Charles Mathews v The State of Trinidad and Tobago*, [2004] UKPC 12.

⁹⁵ The actual meaning of a life sentence in Trinidad and Tobago however remains largely undefined in the statute books. See Cook (2004, 59-60). Although it is a discretionary sentence, 75 years or natural life with hard labour has emerged as the norm particularly for those whose death sentence has been commuted to life. There is currently a constitutional motion scheduled to be heard in 2008 on the meaning of a life sentence, following the *Mathews* decision. See Holland and Chidgey (2007, 117) and Charan and Swamber (2007).

⁹⁶ Ní Ghrálaigh, B. (2005). CCPS Internship Reports 2005. *Centre for Capital Punishment Studies*; Black, K. (2005), CCPS Internship Reports 2005, *Centre for Capital Punishment Studies*; Choudhury, N. (2005), CCPS Internship Reports 2005. *Centre for Capital Punishment Studies*; West, F. (2006), CCPS Internship Reports 2006. *Centre for Capital Punishment Studies*.

⁹⁷ Katz, L., Levitt, S. D. and Shustorovich, E. (2003), 'Prison Conditions, Capital Punishment, and Deterrence', *5:2 American Law and Economics Review* 2003,318–343.

⁹⁸ US Department of State (2004), 'Patterns of Global Terrorism – 2003', Office of the Coordinator for Counterterrorism, 29 April 2004.

http://www.globalsecurity.org/security/library/report/2004/pgt_2003/pgt_2003_31640pf.htm

the death penalty nor whole life sentences will be imposed. Regrettably, Mexico's Supreme Court overturned this policy.⁹⁹

It will be interesting to see how the practice regarding the principle of whole life imprisonment develops. There already seems to be some trends emerging. Constitutional Courts in Germany (1977), France (1994), Italy (1987) and Namibia (1996) have recognised that life sentenced offenders have a 'fundamental right to be considered for release'.¹⁰⁰ Edward Fitzgerald QC, a leading British human rights lawyer, also notes that 'in Europe there is a growing trend to recognise that there must always be recognition of the capacity for redemption and the capacity for rehabilitation and that any sentence that effectively closed the door forever would be contrary to Article 3 of the European Convention on Human Rights prohibiting cruel and inhuman treatment or punishment'.¹⁰¹ This issue came before the European Court of Human Rights in 2008 in the case of *Kafkaris v Cyprus*.¹⁰² The Grand Chamber held that a whole life tariff would not violate Article 3 as long as there was some possibility that a life sentence was *de jure* or *de facto* reducible. The possible grounds for the release of a prisoner serving a whole life sentence in England and Wales is, however, extremely limited. Moreover, it is the Home Secretary who has the power to release a whole life sentenced prisoner; a judicial process is not required. This could be a potential breach of Article 5(4) of the ECHR which requires the lawfulness of detention to be decided by a court.¹⁰³

It is important to note that neither the Council of Europe recommendations on the management of long term prisoners,¹⁰⁴ nor the UN recommendations on life imprisonment,¹⁰⁵ concede the possibility of whole life sentences, although both acknowledge that following regular and rigorous review, some life sentenced prisoners may never be deemed safe for release. One of the reasons is that the guidelines envisage rehabilitation as an integral part of the penal process; sentencing someone to a whole life tariff takes away that possibility. Similarly, article 10(3) of the ICCPR stipulates that 'the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. It is also important to note that under the 1998 Rome Statue of the International Criminal Court, although life imprisonment is the maximum penalty for crimes such as genocide, crimes against humanity and war crimes, an assessment

⁹⁹ BBC News. (30th November 2005). *Mexico Alters Extradition Rules*. Available from <http://news.bbc.co.uk/1/hi/world/Americas/4483746.stm>

¹⁰⁰ Van Zyl Smit, D. (2002). *Taking Life Imprisonment Seriously in National and International Law*. The Hague: Kluwer Law International.

Fitzgerald, E. (2005), 'A Review of the Litigation Concerning the UK's Alternative to the Death Penalty – The Mandatory Reviewable Life Sentence and the Contentious Issue of Whole Life Imprisonment', in Browne, N. and Kandelia, S. (eds), 'Managing Effective Alternatives to Capital Punishment. 24th June 2005 – Conference Papers', Occasional Paper Series – Special Edition, Volume Three, Centre for Capital Punishment Studies.

¹⁰² *Kafkaris v. Cyprus*, ECHR Application No. 21906/04, 12 February 2008.

¹⁰³ Our thanks to Seema Kandelia, Westminster Law School for access to her as yet unpublished Research on life sentenced prisoners.

¹⁰⁴ Recommendation Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoners, adopted by the Committee of Ministers on 9 October 2003 at the 855th meeting of the Ministers' Deputies.

¹⁰⁵ United Nations (1996) *The Life Sentence*, Report of the Criminal Justice Branch of UNOV, UN Publication Geneva.

to determine whether the sentence should be reviewed must take place after 25 years.¹⁰⁶

Important to recognise that locking more people up for life will have an enormous impact on the management of the prison service. Not only will whole life imprisonment result in an increased and ageing prison population but in most jurisdictions, keeping someone in prison for the rest of his or her life clearly costs more [see above]. It also creates a dangerous environment for those managing lifers. With no prospect of release, what incentives are available to ensure the co-operation and compliance of prisoners who have neither hope nor anything to lose? There has to be light at the end of the tunnel.¹⁰⁷

Despite its flaws, one reason why death penalty opponents might argue for or accept life without parole as an alternative sanction is the belief that it will reduce the number of executions. Whilst it is true that the number of death sentences and executions have dropped significantly in the USA in recent time this needs to be viewed in context as over the last decade or so, the number of violent crimes has also decreased considerably. It follows that lower incidents of crime will result in less people being eligible for the death penalty. Furthermore, declining public support for the death penalty and increased judicial scrutiny of death penalty provisions, particularly for certain groups such as juveniles and the mentally impaired have also contributed to the decrease in execution.¹⁰⁸ A recent state-by-state analysis conducted on this issue concludes that life without parole statutes 'are a relatively minor factor in the reduced number of executions over the past several years. The data demonstrate that life-without-parole statutes do not account for the decreased number of *executions*, although they may play a part in the reduction of *death sentences*. Even though the number of death sentences decreases after the passage of life-without-parole statutes, the number of people executed remains unchanged.'¹⁰⁹

With this mind, consideration needs be given to the effect life without parole provisions have had on non-capital defendants. Most life without parole statutes in the USA affect not just those defendants that would have received the death penalty, they also impose permanent incarceration on all those death penalty eligible defendants that would never have received the death penalty. As the Harvard Law Journal article notes:

While a death sentence and a life-without-parole sentence are surely not equivalent, declining to compare their costs is unjust. To refuse to look at the effect of life-without-parole statutes on non-capital defendants is to sanction or encourage a law that holds twenty five men in prison until their natural deaths in order to spare one man the death penalty. That has been the position of many death penalty abolitionists, and it is a troubling one. [ibid, 1854]

¹⁰⁶ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. (Articles 77 and 110).

¹⁰⁷ Hodgkinson, P. (2004a). Alternatives to the Death Penalty – The United Kingdom Experience. In *Death Penalty: Beyond Abolition*. Strasbourg: Council of Europe Publishing

¹⁰⁸ Harvard Law Journal. (2007). *A Matter of Life and Death: the Effect of Life Without Parole Statutes on Capital Punishment*, 119(6), 1838-1854

¹⁰⁹ Harvard Law Journal. (2007). *A Matter of Life and Death: the Effect of Life Without Parole Statutes on Capital Punishment*, 119(6), 1838-1854

The purpose of this Note is not to argue that life-without-parole statutes should be abolished. Rather, it is to argue that such statutes are neither a necessary nor a particularly useful step toward eliminating the death penalty, and that death penalty abolitionists have a responsibility to consider carefully the effects of such laws on non-capital defendants before they engineer or encourage their passage.

While some death penalty opponents may regard the acceptance of whole life sentences as the only way of getting the death penalty off the statute books, they should consider the fact that they may be trading one severe punishment for another.

Chapter Five

Disparity and discrimination in the administration of capital punishment

There is a great deal of literature dedicated to the issue of racial disparity in the application of the death penalty in the United States, but little or no data on this topic from death penalty jurisdictions elsewhere in the world. There is certainly no shortage of evidence, anecdotal and even scientific, showing the presence of racism in the administration of justice in many parts of the world but as with wrongful convictions it may be that this research still needs to be done and if that is the case there are some obvious candidate countries such as South Africa, Australia and New Zealand where there is evidence of the disproportionate number of black South Africans, and aboriginals being subject to prosecution.¹¹⁰ Other countries where examples of ethnic and / or religious disparities may exist are Singapore, Malaysia, Indonesia, Trinidad & Tobago and Ceylon. Here too, research in the American 'laboratory' is surely of considerable universal relevance.

It is not sufficient to point out that members of ethnic or racial minorities are prosecuted and convicted in percentages that far exceed their proportion in the population of the United States the really damning conclusion, and one that appears to be uncontested in the literature, is that the justice system in the United States is skewed by the race of the victim.¹¹¹ In other words, the murderer of a white victim is far more likely to receive a death sentence than the murderer of an African-American victim.

The issue of racism in the United States death penalty system has dominated the case law of the Supreme Court. In two cases within the past three decades, the Court has come within a hair's breadth of judicial abolition. In 1972, in *Furman*, it invalidated virtually every death penalty statute in the country, holding capital punishment was being applied in an arbitrary and capricious manner.¹¹² A few years later, it outlawed the use of capital punishment for rape.¹¹³ Many damning studies had indicated the role of racial bias in rape prosecutions¹¹⁴; Amnesty International reported that 89% of those executed for rape between 1930 and 1967 were black.¹¹⁵ In 1986, the Supreme Court considered the case of prosecutors who systematically strike blacks from jury panels, ruling this to breach the right to a fair trial.¹¹⁶

¹¹⁰ See I. Potas and J. Walker, '*Trends and Issues in Crime and Criminal Justice: No 3, Capital Punishment*' (1987) (Canberra: Australian Institute of Criminology), Footnote 3, discussing *The Sydney morning Herald* 1st March 1985 which shows that in 1984 "of those executed in South Africa, 2 were white, 87 black, 24 coloured and 1 Indian".

<http://www.aic.gov.au/publications/tandi/ti03.pdf>. This is confirmed by Amnesty International, '*When the State Kills: The Death Penalty v. Human Rights*' (1989) (London: Amnesty International), p. 205, arguing that "on of the most notable aspects of the use of the death penalty in South Africa is its disproportionate imposition on the black population . . . by an almost entirely white judiciary". By contrast, racial breakdowns of Australian execution statistics, including the number of executions of those from the aboriginal and indigenous populations, do not appear to be available.

¹¹¹ D.C. Baldus, G.G. Woodworth, and C.A. Pulaski, [1990] 'Equal Justice and the Death Penalty: A Legal and Empirical Analysis' Northeastern University Press: Boston.

¹¹² *Furman-v-Georgia*, 408 U.S. 238 (1972)

¹¹³ *Coker-v-Georgia*, 433 U.S. 584 (1977).

¹¹⁴ E. Johnson, [1957] 'Selective Factors in Capital Punishment' *Social Forces* 35(2):165-169

¹¹⁵ Amnesty International USA [1987] 'The Death Penalty' p 11

¹¹⁶ *Batson-v-Kentucky*, 476 U.S. 79 (1986)

This compelling statistical evidence formed the basis of a challenge to the death penalty in *McCleskey*. Although the Supreme Court conceded evidence of racism, it said this was simply a fact of life of American justice, and that if it called into question the death penalty, it would ultimately condemn the entire judicial system.¹¹⁷ The vote to dismiss the application was very close – five judges to four – one member of that majority, Justice Powell, later recanted.

More recent evidence suggests that racism continues to plague the administration of the death penalty. The comprehensive study conducted by David Baldus and colleagues between 1996-98¹¹⁸ examined a large sample of the murders, which were eligible for the death penalty in the state of Pennsylvania between 1983 and 1993 and found that, even after controlling for case differences, African-Americans in Philadelphia were substantially more likely to get the death penalty than non-blacks who had committed similar murders. Black defendants faced odds of receiving a death sentence that were 3.9 times higher than other similarly situated defendants. What this study identified that was different from earlier racial disparity research was that there was a race of defendant factor separate to race of victim factor though a combination of a black defendant and a non-black victim still recorded the largest disparity.

Another piece of research that might throw some light onto the causes of this persistent racial disparity was conducted by Jeffrey Pokorak¹¹⁹ who amassed data relating to the race and gender of all lawyers authorized to prosecute capital cases in the 38 states with the death penalty. His findings reveal that 98% of attorneys are white with almost all being male.

Further evidence of racial disparity is to be found within the administration of the federal death penalty where minorities are over-represented at every stage.¹²⁰ Racial discrimination is one of the great human rights issues of our time. A legacy of colonialism and slavery, it continues to manifest itself in the often violent ethnic conflicts that have proliferated in Europe, Africa and elsewhere in recent years.

The preponderance of Islamic terrorism in the North African region has led to alleged discrimination against those who fit the stereotype of an Islamic terrorist. For example, Omar Maarouf, a suspected member of Salafia Jihadia, an Islamic terrorist group, was sentenced to death in connection with the Casablanca bombings in Morocco. He claimed his innocence, saying he was only arrested because he wore long robes, and had a full beard; a uniform that is associated with the Taliban.

The mandatory nature of sentencing in several South East Asian countries¹²¹ limits the possibility of discrimination regarding the implementation of the death penalty.

¹¹⁷ *McCleskey-v-Kemp* 107 S. Ct. 1756 (1987)

¹¹⁸ D.C.Baldus & G. Woodworth, D.Zuckerman, N.Weiner & B.Broffitt, [1998] 'Racial discrimination and the death penalty in the post-Furman era: an empirical and legal overview, with recent findings from Philadelphia', *Cornell Law Review*, Volume 83, Issue 6. Death Penalty Information Centre, www.deathpenaltyinfo.org

¹¹⁹ J. Pokorak, [1998] 'Probing the capital prosecutor's perspective: race of the discretionary actors' *Cornell Law Review*, Volume 83, Issue 6, pp. 1811-1820

¹²⁰ *The Federal Death Penalty: a statistical survey [1988 – 2000]*. This report was released in September 2000. Full details can be found at www.usdoj.gov/dag/pubdoc/dpsurvey

¹²¹ Murder and drug offences carry a mandatory death sentence in Malaysia, Singapore and Thailand.

Chapter Six

The value and purpose of a moratorium

The focus of abolitionist activity in recent years has been the push for a moratorium on executions. The idea of a moratorium as a campaign demand dates to early activity in the United Nations in the late 1960s. Treaty bodies like the Human Rights Committee have frequently recommended that states still using the death penalty consider a moratorium in an attempt to further the goal of abolition set out in article 6(6) of the ICCPR. The moratorium demand was revived in 1994, in the doomed United Nations General Assembly resolution, and again in 1999.

In December 2007, a resolution calling for a global moratorium on executions with a view to total abolition was passed by the UN General Assembly. The resolution which asks member states to progressively restrict the use of the death penalty and ensure that international standards on the death penalty are met was adopted with 104 votes in favour, 54 against and 29 abstentions. Even though the resolution has been passed by the full Assembly, its impact is difficult to judge. The General Assembly is only empowered to make non-binding recommendations so, although adoption of the moratorium resolution conveys a strong political message to retentionists, there is no legal obligation stopping states handing down death sentences or carrying out executions. During the debate on the resolution, many states that voted against it reiterated the fact that capital punishment is not against international law and that they retained the right to set their own criminal and penal policies.¹²²

Similarly, the African Commission on Human Rights passed a resolution in 1999 urging state parties to adopt a moratorium on the death penalty.¹²³ The resolution calls upon member states to limit the imposition of the death penalty only to the most serious crimes, to consider establishing a moratorium on executions of death penalty and to reflect on the possibility of abolishing death penalty.

Retentionists, on the other hand, use the opportunity of a moratorium period to 'fix' capital punishment's flaws. In the USA, religious fundamentalist supporters of the death penalty, like Pat Robertson, Jerry Falwell and members of the Christian Coalition, were aligned to the Moratorium 2000 movement solely for the purpose of tidying up capital punishment's worst excesses, to make it more palatable for both domestic and international audiences. That the two sides found some common ground presents those who seek the replacement of the death penalty with both opportunity and danger.¹²⁴

Is there any evidence for the claim that abolition will follow a period of review? In the 1960s, executions in the United States were halted *de facto* and between

¹²² UN Department of Public Information. (2007). General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty. *Sixty-Second General Assembly Plenary, 76th & 77th Meetings (AM & PM)*, GA/10678, 18th December 2007. Available from <http://www.un.org/News/Press/docs/2007/ga10678.doc.htm>

¹²³ ACHPR /Res.42(XXVI)99: Resolution Urging the State to Envisage a Moratorium on Death Penalty (1999).

¹²⁴ Hodgkinson (2004b), 'Capital punishment: improve it or remove it?' in Hodgkinson, P. and Schabas, W. A. (eds), *Capital Punishment – Strategies for Abolition* (Cambridge: Cambridge University Press) (p.5-8)

1972 and 1976 there was a *de jure* halt to executions.¹²⁵ On that occasion we know that the death penalty system was 'fixed', not abolished and although the ruling in *Furman v Georgia*¹²⁶ had the effect of rendering forty death penalty statutes unconstitutional, the success of the legal argument was not matched with a political will to abolish capital punishment. In response to the *Furman* ruling, states drew up new regulations to ensure that the death penalty was not applied arbitrarily. So despite the numerous calls for moratoriums at the national, regional and international level, little attention has thus far been paid to states' experiences of death penalty moratoria. The effect a suspension of executions has had and what can be learned from these experiences to evaluate the role of moratoria has still to be quantified. Some abolitionists believe that a period without capital punishment will show its folly or that it is unnecessary and that it bears unnecessary political and financial costs thus eventually leading to abolition. The American Bar Association (ABA) has called for a nationwide moratorium on executions for the purpose of studying the flaws inherent in the USA's death penalty system. Although the ABA clearly states that it takes no position on the question of the death penalty itself, some scholars have suggested that there are underlying abolitionist notions in the ABA's call.¹²⁷

Perhaps the most cited moratorium recently is that implemented in January 2000, by Governor George Ryan of Illinois, which suspended executions until a thorough review of the administration of the death penalty had been conducted. His decision was based on his realisation that over a ten year period, thirteen wrongfully convicted inmates had been released from death row, which was more than the number of those executed. Governor Ryan's Commission, presented its findings in April 2002, making eighty-five recommendations, all with the objective of correcting the flaws and weaknesses identified in the Illinois system. While not in the Commission's brief, a narrow majority of its members were inclined to the position that the death penalty should be replaced believing that the system was incapable of correction. Those who favour the death penalty in Illinois and elsewhere view the experience of Illinois not as a weakness but as a measure of the rigour of the present capital punishment process in identifying such flaws. Two days before he left his office, Governor Ryan commuted the death sentences of 157 people on death row.¹²⁸ To this extent, the suspension of executions has been beneficial but, and it is a big but, the future in Illinois seems to be concerned with improving the death penalty, not removing it.

The moratorium remains in place in Illinois, but recent calls to halt executions have centred on the use of lethal injection as an execution method. As of 17 November 2007, twenty jurisdictions have suspended executions following claims that the combination of drugs used in the execution process can leave the condemned in excruciating pain, thereby violating the constitutional prohibition on cruel and unusual punishment.

¹²⁵ For further discussion of the moratorium approach in this era, see Haines (1996).

¹²⁶ *Furman v. Georgia*, 408 U.S. 238 (1972)

¹²⁷ Sarat, A. (2001). *When the State Kills: Capital Punishment and the American Condition*. New Jersey: Princeton University Press. (p.255)

¹²⁸ Ryan, G. (2003). *Gov. George Ryan's Commutation Announcement*. Announcement in a lecture at the School of Law, Northwestern University, 11th January 2003. Available from <http://www.law.northwestern.edu/news/spring03/ryanspeech.html>

While the recent enthusiasm for moratoria may be welcomed by death penalty opponents as it indicates fewer executions, for the time being at least, it should be noted that if the lethal injection method of execution is found to be unconstitutional, there is nothing to prevent states searching for a different method of execution.

Many countries do, of course, go through periods of *de facto* abolition before they proceed to eliminate it from their statute books. However, to describe the status of such countries as *de facto* abolitionist, as some groups do, is misleading. It would be more correct to describe their status as having suspended executions as, in general, the rest of the panoply of death penalty legislation continues. For example, although there had been no declaration of a moratorium in India, between April 1995 and July 2004 no executions had taken place. According to the criteria applied by some groups to *de facto* abolition status, India has nearly made the list. However, during this period, death sentences continued to be handed down and in August 2004 Dhananjay Chatterjee was executed for the rape and murder of a 16-year-old girl.

Similarly, in February 2004, President Levy Mwanawasa of Zambia declared that he would not sign any death warrants for those convicted of capital crimes as long as he was in office. The last execution in Zambia was in 1997 and following his re-election in 2006, the *de facto* moratorium will continue until 2011. The question remains though, what will happen when President Mwanawasa leaves his office? In December 2005, the Constitutional Review Commission recommended that Zambia retain the death penalty on its statute books and last year, the Supreme Court rejected a challenge to the death penalty on the grounds that it did not have the power to strike it down. On both occasions, the government remained silent.¹²⁹

The Zambian experience and the resumption of hangings in India highlights the importance of special scrutiny on *de facto* abolition countries as their status is entirely quixotic and vulnerable to swift changes in personnel. This observation highlights a shortcoming in the reliance on the moratorium as a tool for abolition. The important lesson to be learned from these examples is that the moratorium should never become a goal in itself, and that it be continually presented, by abolitionists at any rate, as a step towards total and permanent replacement of capital punishment. Even more desirable, would be to obtain a complete suspension of the death penalty process [no prosecutions, no sentences and no executions] while the raft of essential changes to legislation and infrastructure to prepare society for a life without capital punishment, are put in place. The period of this suspension is one that should be agreed at the outset with a timetable for action.

The Council of Europe model of requiring suspension of executions immediately on accession followed by an agreed timetable to the signing and ratification of the Protocol No. 6 to the European Convention on Human Rights comes closest to this model. However, it falls short in not requiring a suspension of the total apparatus of capital punishment or providing sufficient support (technical and financial) for the necessary infrastructure changes in areas such as prisons, probation, victims, alternatives and public reassurance.

¹²⁹ Sibanda, N. (25th June 2007). Death Penalty: Concerned Zambian Activists Look Beyond Moratorium. *Inter Press Service*. Available from <http://www.ipsnews.net/news.asp?idnews=38311>

In the Northern African region, unofficial moratoriums on executions have been observed in seven countries – Morocco, Tunisia, Mauritania, Algeria, Mali, Niger and Burkina Faso - none of whom have carried out any executions in at least the last ten years¹³⁰. Of the five active retentionist countries in the region (Libya, Guinea, Egypt, Chad and the Sudan), two have observed moratoriums before resuming their use of the death penalty, both to combat increasing crime rates. Guinea had a moratorium on executions for seventeen years, between 1984 and 2001. 'Increased lawlessness' in the country led to a resumption of executions, and in 2001 five people were put to death for offences including armed robbery and murder¹³¹. Chad, too, did not carry out any executions between 1991 and 2003. The twelve year moratorium came to an end with the execution of eight people, four for the crime of murder¹³². A government crack down on 'unrest' was the reason behind their recommitment to the death penalty¹³³.

¹³⁰ Amnesty International. (2009). *Retentionist and Abolitionist Countries*. Available from <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>

¹³¹ BBC News. (5 February 2001). *Guinea's First Executions for 17 Years*. Available from <http://news.bbc.co.uk/1/hi/world/africa/1154792.stm>

¹³² BBC News. (6 November 2003). *Chad Firing Squad Shoots Killers*. Available from <http://news.bbc.co.uk/1/hi/world/africa/3246867.stm>

¹³³ News24. (10 November 2003). *9th Execution in Chad*.

Chapter Seven

Victim issues and the death penalty

Crime victims are invariably ignored and when remembered too often exploited in the interest of political imperatives rather than victims' needs. They are a constituency almost universally overlooked by the traditional abolitionist movement, which has proved a significant obstacle to their campaigns for replacing the death penalty. Politicians the world over justify the retention of the death penalty, in part, because of their concerns about crime victims though frequently little or no provision for them has been made by the state.¹³⁴

The victims' needs and rights issue is increasingly having an influence on the shape and direction of legal and penal policy and we see evidence for this in all our current country activities. For example, victims' rights are enshrined in Sha'ria law, which provides for the homicide victims' family to accept financial compensation from the defendant in lieu of execution. In some Islamic countries, the victim's family are entitled to perform the execution. There is some evidence from research in the USA that certain victims lobbies are enjoying a number of procedural gains such as being consulted about prosecution policy, victim impact statements, intervention at parole and clemency hearings and witnessing executions. The most vociferous of these are based in the United States where such groups have made considerable inroads into influencing legal and penal policy. Groups such as Justice for All¹³⁵ and Parents of Murdered Children¹³⁶ characterise the pro-punishment victim movement in the US and both enjoy considerable political support. The justification politically for these significant procedural rights is that they are responses to the spoken needs of victim groups and that the right to witness the execution provides the final 'closure' to a very painful episode despite the wealth of anecdotal evidence to suggest that any benefit or 'closure' is illusory. It is crucial to ensure that the victim services model that is adopted is one that addresses victims' identified needs and not one that is punishment focussed or uses victims as part of the prosecution process - the latter is characteristic of the approach in the USA.

There has been an exponential growth in victim research and services over the past two to three decades with international and regional bodies such as the United Nations¹³⁷ and the European Commission¹³⁸ dedicating research and resources to improved practice and guidelines. These have developed largely through the improvement in understanding of the issue initiated by International

¹³⁴ This section draws from Hodgkinson (2004c, 332-358). By 'victims' the author includes the primary victim as well as secondary victims, i.e. close friends and family of the victim and the condemned.

¹³⁵ Justice for All announces on its website that it is a criminal justice reform organisation that "shall act as an advocate for change in a criminal justice system that is inadequate in protecting the lives and property of law-abiding citizens." www.jfa.net. Other sites supported by Justice for All – www.prodeathpenalty.com and www.murdervictims.com.

¹³⁶ National Organisation of Parents of Murdered Children, Incorporated
www.pomc.com.

¹³⁷ United Nations Victim Charter, www.odccp.org/crime_cicp_sitemap.html.

¹³⁸ Commission of the European Communities, "Crime victims in the European: reflections on standards and action",; European Commission, Brussels, 1999. COM (1999) 349 Final. http://europa.eu.int/comm/justice_home/pdf/com1999-349-en.pdf

Victimology,¹³⁹ the World Society of Victimology¹⁴⁰ and the European Forum for Victims Services.¹⁴¹ We would refer you to the excellent text by Paul Rock,¹⁴² which provides a wealth of information in a very sympathetic format about how homicide affects individuals and the range of responses that have been developed to address the pain and suffering experienced by the families and friends of homicide victims.

The victim issue, rather like the offence issue, receives too little attention in both the scholarship and the debate, given that both have developed to a great extent around the paradigm offence of murder, its victims and their families. We should remind ourselves when considering victims' needs that for many crimes that attract the death penalty there is some difficulty in identifying just exactly who has been victimised, as in most countries where the death penalty is available, it is not reserved for the offence of murder alone.

Some commentators argue that there is no need for a separate victim service as the state prosecutes not on behalf of individuals but of society as a whole and the 'victim' loss or suffering is already factored into the decision to prosecute and the final sentence. Whilst this is a good argument for not including the victim's perspective into the trial process, it should not replace the development of services to meet the material and psychological needs of individuals who are primary or secondary victims of crime.

In Trinidad and Tobago, the Caribbean Centre for Human Rights (CCHR), founded and funded by the CCPS in 2006, established a Victim Support Programme (VSP). The VSP started in November 2006 has already established a model for good practice for such initiatives with the recruitment and training of counsellors and volunteers to service the first pool of homicide victims' families whose needs were identified by the CCPS instrument. The VSP provides on-going training and counselling support to all its volunteers. The victims initiative in Trinidad & Tobago is an example of a traditional needs based service, which is able to offer emotional support, supermarket hampers and refer victims to counselling where appropriate.

The survey used by the CCHR to identify victims' needs can be readily adapted to evaluate the experiences and needs of the families of the condemned as well. Though meeting the needs of the families of the condemned is much more politically contentious, it is nonetheless important and the success of a victims' initiative is enhanced by addressing both groups in parallel. The CCHR focuses on

¹³⁹ The International Victimology website (IVW) was launched in June 1999 as a resource for all those interested in improving justice for victims of crime and abuse of power. Through IVW, the UN Centre for International Crime Prevention, the Research and Documentation Centre of the Netherlands Ministry of Justice and the World Society of Victimology aim to promote the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. www.victimology.nl.

¹⁴⁰ World Society of Victimology (WSV). The purposes of the WSV are to promote research on victims and victim assistance; advocacy of their interests throughout the world; to encourage interdisciplinary and comparative research in victimology; to advance the co-operation of international, regional, and local agencies, groups, and individuals concerned with the problems of victims. www.world-society-victimology.de/frameset.html.

¹⁴¹ European Forum for Victim Services, "Statement of victims' rights in the process of criminal justice." Victim Support, London (1996). www.victimology.nl/onlpub/eurforvicrts96a.html.

¹⁴² Rock, P. (1998). *After Homicide: Practical and Political Responses to Bereavement*. Oxford, Clarendon Press.

these 'secondary' victims with the aim of establishing a protocol with its roots in restorative justice principles and practice.

Chapter Eight

Religion and capital punishment

[sections extracted from an unpublished paper, Capital Punishment –Issues of victims, religion and politics, Nicola Browne, Seema Kandelia, Rupa Reddy and Peter Hodgkinson ©]

‘Justice’ is a common justification in support of the death penalty, and essential dimensions of justice require that the punishment is not just about protecting society but should also be proportionate and lead to the restoration of social order. Many supporters of capital punishment have argued that the public harm created by crimes such as murder can only be adequately addressed through retributive means, thus ensuring that such crimes are punished in a deserving and equal manner. In a 2001 Gallup Poll, of the 67% of American public who favoured the death penalty, 48% claimed that their justification for supporting it was “an eye for an eye/punishment fits crime”¹⁴³. Indeed, a number of passages in the Bible codify notions of justice and retribution: “Eye for eye, tooth for tooth” (Leviticus 24:20 and Exodus 21:24), “He that smiteth a man, so that he die, shall be surely put to death” (Exodus 21:12), and “Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image” (Genesis 9:6). Even in the New Testament, whilst Jesus refrains from condoning violence, he acknowledges that the State has the authority to impose capital punishment. Jesus praises the thief on the cross next to him for accepting that he and his accomplice are receiving the due reward of their deeds (Luke 23:41).¹⁴⁴ The focus of these teachings is based not on hatred but rather on values of fairness, equity and righteousness, and on this premise Pope Innocent III supported the administration of the death penalty as long as it was carried out in the name of justice rather than hatred, and with prudence rather than precipitation.

Another dimension of justice relevant to victims is that it helps bring some kind of finality to the various stages of the legal process of bringing the guilty person to account for the crime. This finality is frequently referred to as ‘closure’ in the US, a highly charged phrase meaning different things to different people - a creation of politics to provide solutions and thus to encourage murder victims’ families to support the use of the death penalty.¹⁴⁵ The case of Timothy McVeigh, the Oklahoma City bomber who drove a truck loaded with explosives into a federal office building in April 1995, killing 168 people, demonstrates that this is a complex issue for those touched by murder. After witnessing McVeigh’s execution Kathleen Treanor, whose daughter died in the bombing, stated “It’s a demarcation point...It’s a period at the end of a sentence. It’s the completion of justice and that’s what I’ll remember about today.”¹⁴⁶ A survey carried out by ABC News/Washington Post in April 2001

¹⁴³ Office of the Clark County Prosecuting Attorney. (2001). Available from <http://www.clarkprosecutor.org/html/death/death.htm>

¹⁴⁴ Avery Cardinal Dulles, S. J., “The Death Penalty: A Right to Life Issue”. Laurence J. McGinley Lecture, 17 October 2000. <http://pewforum.org/deathpenalty/resources/reader/17.php3>.

¹⁴⁵ Hodgkinson, P. (2004) [Capital Punishment: Meeting the Needs of the Families of the Homicide Victim and the Condemned](#). In P. Hodgkinson and W. A. Schabas, (Eds.) *Capital Punishment: Strategies for Abolition*. Cambridge, UK: Cambridge University Press.

¹⁴⁶ CNN. (11th June 2001). *McVeigh Execution: A ‘Completion of Justice’*. Available from <http://archives.cnn.com/2001/LAW/06/11/mcveigh.02/>

reported that 60% of the adults surveyed in America think the death penalty is fair because it gives satisfaction and closure to the families of the victims.¹⁴⁷

However, not all victims' families find that retribution, in the form of execution of the criminal, gives them 'closure'. In contrast to Kathleen Treanor's view, one survivor of the Oklahoma bombing acknowledged that, "Killing Timothy McVeigh 168 times wouldn't fill the void in my heart."¹⁴⁸ For some, bringing finality to the painful aftermath of homicide involves forgiving the perpetrator of the crime. Principles of forgiveness, compassion and mercy are addressed in a number of religions. In Christianity, Jesus teaches "love your enemies, do good to those who hate you, bless those who curse you, pray for those who mistreat you. If someone strikes you on one cheek, turn to him the other also."¹⁴⁹

Forgiveness is a fundamental part of Judaic doctrine referred to in the Scriptures and to some extent in the Old Testament. Judaism, however, is not limited to Biblical passages; it extends to the oral tradition of religious leaders who are authorised to interpret the law. This has allowed Rabbis to interpret the Scriptures and place stringent limitations on the Biblical law governing capital punishment. Rabbinic opinions on the death penalty resulted in its removal from the statute books in 30 C.E.¹⁵⁰ It was thought that punishment as severe as taking someone's life should not be carried out by fallible human beings, but only by divine agencies.¹⁵¹ The reasoning is outlined in the *Mishna*, compiled in the late second century C.E.: "He who destroys one life is as though he destroys a whole world".¹⁵² Alan Lubert, a Reform Jew whose wife was attacked and robbed outside their home, asserts that the notion of justice is *tikkun olam*, Hebrew for "to mend or repair the world". From a Jewish point of view it is important to forgive a person in the hope that no matter what a person has done, that person can change his or her life. Lubert goes on to say "If someone hurts me and I don't forgive that person, then I am the one who still carries around that burden, who lives with the anger or bitterness".¹⁵³

Forgiveness is also encouraged in the Islamic faith, and although the Qur'an does not rule out the use of the death penalty, it is not applied automatically. For example, in cases of murder, the death penalty is one of three possible punishments to be decided by the family of the victim: 1) execution of the offender, 2) payment of compensation ('blood money') to the family of the victim, or 3) forgiving the offender. According to Islamic theology forgiveness is superior to the other options. Any Muslim who has murdered is encouraged to ask forgiveness from the victim's family. In fact, Islamic penal law is characterised by values of mercy and compassion rather

¹⁴⁷ Langer, G. (2nd May 2001). Death Penalty Ambivalence: Poll Points to Support for Execution Moratorium in US. *ABC News*. Available from http://abcnews.go.com/sections/us/dailynews/poll010504_deathpenalty.html

¹⁴⁸ Carlson, J. (23rd January 2002). Justice Religion and the Death Penalty. *Divinity School at University of Chicago, Publications*. Available from http://divinity.uchicago.edu/martycenter/publications/sightings/archive_2002/0123.shtml

¹⁴⁹ Luke 6:27-29

¹⁵⁰ Soncino Talmud, Sanhedrin 161

¹⁵¹ Sanhedrin 37B; Ketubot 30A & 30B

¹⁵² Polish, Rabbi D. (2002) "Does Judaism Condone Capital Punishment?" *Reform Judaism Magazine*, Summer 2002.

¹⁵³ Gray, H. T. (2001) "McVeigh's Execution Raises Questions of Forgiveness". *News & Observer* 22 June 2001. <http://www.againstdp.org/question.html>.

than vengeance or punishment. Moreover, if there is any doubt about a person's guilt, Islamic law states that clemency should be favoured.¹⁵⁴

It is useful to note that while the Islamic view of the relationship between the victim and offender is, for the most part, focussed on forgiveness and avoiding use of the death penalty where possible, there are other reasons why a number of states still use harsh punishments under the *Shari 'a* law. For example, scholars with expertise in matters of Islamic law and human rights such as Abdullahi Ahmed An-Na'im may point to the Islamic belief that:

. . . the next life is the true and ultimate reality, to which this life is merely a prelude. In the next eternal life, every human being will stand judgement and suffer the consequences of his or her actions in this life. A religiously sanctioned punishment, however, will absolve an offender from punishment in the next life because God does not punish twice for the same offence.¹⁵⁵

Whereas Professor Ahmed Abaddi, President of the Mohammedia League of Moroccan Ulama, has recently stated that whilst *Shari 'a* law makes provision for the death sentence it also provides 'doors and windows' through which its implementation can be avoided.¹⁵⁶ Thus use of punishments such as amputation of the hand for stealing or the death penalty for murder are warranted under Islam because "however severe the *Qur'anic* punishment may appear to be, it is in fact extremely lenient and merciful in comparison to what the offender will suffer in the next life should the religious punishment not be enforced in this life."¹⁵⁷ In this context the victim-offender relationship may be re-assessed, and it could well be the case that the victim might view the imposition of the death penalty, rather than a superficially less harsh solution such as imprisonment, as being in the wider spiritual best interests of the offender.¹⁵⁸

Although some religions do not rule out the death penalty, they emphasise the sanctity of human life albeit sometimes to justify the application of the death penalty for crimes such as murder. Concepts of non-violence, compassion and human dignity are prevalent in many faiths. Hinduism, for example, teaches the principle of *Ahimsa*, frequently asserted by Mahatma Ghandi, which refers to the belief that it is wrong to hurt any living being. While the civil and criminal law set out in the *Dharmasasbras* and *Arthasastras* allow for the death penalty, the teachings from the

¹⁵⁴ "Religions and the Death Penalty", Amnesty International Austrian Section, at <http://www.members.magnet.at/ai.dornbirn/rel-dp.htm> W. Schabas, "Islam and the Death Penalty", *William and Mary Bill of Rights Journal* 9:1, December 2000, 223-237.

¹⁵⁵ A. A. An-Na'im, "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment", in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, Philadelphia: University of Pennsylvania Press, [1992], p.35

¹⁵⁶ Ahmed Abbadi, Capital punishment in the Islamic jurisprudence (in Arabic). In, CCDH & ECPM (Ed): Seminar on the death penalty (Rabat, October 11-12, 2007), 2008, pp 29-34 Article in French to be found at www.westminster.ac.uk/ccps

¹⁵⁷ A. A. An-Na'im, "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment", in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, Philadelphia: University of Pennsylvania Press, [1992], p.35

¹⁵⁸ A. A. An-Na'im, "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment", in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, Philadelphia: University of Pennsylvania Press, [1992], p.35

Mahabharata spell out the consequences of such actions: Prince Satyavan says to his father who is contemplating the execution of a number of men, “Sometimes virtue assumes the form of sin and sin assumes the form of virtue. It is not possible that the destruction of individuals can ever be virtuous”. He goes on to say: “By killing the wrongdoer the King kills a large number of his innocent men. Behold by killing a single robber, his wife, mother, father and children, all are killed”.¹⁵⁹ Many victims’ families have used this reasoning to call for an end to all executions. They assert that killing another person will only result in more victims, causing pain and loss to the families of the condemned.¹⁶⁰

In the administration of punishment, therefore, Hinduism teaches that anger and revenge should not come into play. Instead, the focus ought to be on restoring the proper social order and protecting the innocent. Thus, issues such as the age of the offender and the fact that he or she may be the main breadwinner should be taken into consideration when deciding on the gravity of the punishment. In addition to punishment, Hinduism dictates that in order to be restored to society the criminal should also expiate their guilt. In this sense, the administration of the death penalty could be seen as depriving the criminal of the opportunity to expiate his guilt.¹⁶¹

Principles of non-violence and compassion are also strongly emphasised in Buddhism. Buddhism does not focus on the concept of a God, but rather it teaches that all human beings are guided by their own moral and spiritual efforts. Depending on these efforts they have the potential to achieve enlightenment or be reborn into a life of suffering.¹⁶² Buddhist teachings outline the expected moral behaviour that human beings should follow in order to achieve enlightenment. It has five precepts, the first being the precept of not killing or harming. Capital punishment clearly contravenes this precept. With regard to the nature of punishment, the Buddhist scriptures, the *Dhammapada* texts of the *Pali Canon*, declare that “everybody fears punishment; everyone fears death, just as you do. Therefore, do not kill or cause to kill. Everyone fears punishment; everyone loves life, as you do. Therefore do not kill or cause to kill”.¹⁶³ Buddhism also teaches that all human beings are fundamentally good and that they possess a capacity to transform themselves no matter how corrupt an individual act is. Thus, if punishment is to be administered, it should be done in a spirit of compassion with a view to rehabilitation.

The idea of rehabilitating an offender goes to the heart of the debate about the purpose of the penal system and has been acknowledged by a number of religious leaders. In a statement supporting a moratorium on the death penalty, His Holiness, Tenzin Gyatso, The Fourteenth Dalai Lama, expressed his concern about the revengeful nature of the death penalty. Although fulfilling the preventive function, he emphasised that it is an especially severe form of punishment because it is so final and because the person is deprived of the opportunity to change, to restore the

¹⁵⁹ The Mahabharata Santi Parva, chapter 257

¹⁶⁰ For instance, see Murder Victims Families for Reconciliation 2003. Available from http://www.mvfr.org/?page_id=3

¹⁶¹ Amnesty International Austrian Section (n. d.) “Religions and the Death Penalty”. <http://www.members.magnet.at/ai.dornbirn/rel-dp.htm>.

¹⁶² Amnesty International Austrian Section (n. d.) “Religions and the Death Penalty”. <http://www.members.magnet.at/ai.dornbirn/rel-dp.htm>.

¹⁶³ Blackman, S. (n. d.) “Buddhism and the Death Penalty”. http://www.healthekids.net/course.phtml?course_id=270.

harm done or to compensate for it.¹⁶⁴ Similar statements have been made in the Catholic Church: in 1999 Pope Jean Paul II, on a visit to Missouri, USA, affirmed that the “dignity of human life must never be taken away, even in the case of someone who has done great evil. Modern society has the means of protecting itself, without denying criminals the chance to reform”¹⁶⁵.

In light of these teachings, it is surprising that countries with predominantly Buddhist populations such as China, Thailand, Korea, Taiwan and Japan continue to apply the death penalty. Of course, it is necessary for any society, including those with large Buddhist populations, to have some codes relating to crime and punishment, which are administered by human beings on other human beings. Indeed, fishermen engage in killing other creatures, as do some farmers. The way a person earns his or her livelihood may not sit comfortably with the first Buddhist precept of not killing or harming. As one author notes, even during the time of Buddha both Buddhism and secular organisations did coexist; important military chiefs and public figures were devout followers of Buddhism. Although from a Buddhist point of view the destruction of life can never be condoned, a person can only practice his or her religion according to his or her ability, opportunity and duty. With regard to law enforcement officials, one should recognise that their occupation may involve killing in the line of duty, directly or indirectly. While killing would not be conducive to their spiritual well-being, it is possible to practice the Buddhist precepts in other areas of their life.¹⁶⁶

There are concerns that in the world’s most populous country Indonesia other religious minorities are treated differently under the law. One such example which has been highlighted is the aftermath to the wave of violence which broke out between Christians and Muslims in the Sulawesi region in 1998, where several people from the Christian militia were sentenced to death, whereas only a handful of Muslims were convicted and sentenced, and none to more than 15 years.¹⁶⁷

In Japan there have been unofficial moratoria on executions when the sitting Minister of Justice has refused to sign death warrants due to religious, Buddhist beliefs. When the Philippines abolished capital punishment in 2006, this was deemed to be heavily influenced by the President Gloria Arroyo's devotion to Catholicism.

Both Indonesia and Malaysia have a majority Muslim population.¹⁶⁸ While Indonesia does not incorporate any Islamic jurisprudence in to its legal code, Muslims in Malaysia are subject to Islamic Law in matters of family law and religion.¹⁶⁹ Neither country applies Islamic Law to its criminal justice system, and the Indonesian Constitutional Court recently turned down an appeal by the Bali Bombers

¹⁶⁴ Gyatso, T., His holiness, The Fourteenth Dalai Lama (n. d.) “Message Supporting the Moratorium on the Death Penalty”. <http://www.engaged-zen.org/HHDLMMSG.html>.

¹⁶⁵ Papal Mass, St. Louis, Missouri, 27 January 1999.
<http://www.nccbuscc.org/sdwp/national/criminal/stlouissmt.htm>.

¹⁶⁶ Plamintr, S. (n. d.) “Getting To Know Buddhism”.
<http://www.geocities.com/Athens/Academy/9280/getting.htm>.

¹⁶⁷ ‘Executions spark Indonesia unrest’ published 22 September 2006
<http://news.bbc.co.uk/1/hi/world/asia-pacific/5368922.stm>

¹⁶⁸ Hooker, M. (2002). Islamic Law in South East Asia. *Asian Law*, 4, 213-231

¹⁶⁹ <https://www.cia.gov/library/publications/the-world-factbook/geos/my.html>

to have their execution carried out by beheading, which they had requested on the grounds that beheading is more 'Islamic'.¹⁷⁰

170

<http://www.telegraph.co.uk/news/worldnews/asia/indonesia/3239078/Bali-bombers-lose-their-plea-to-be-beheaded.html>

Chapter Nine

*The role of medicine in the administration of capital punishment*¹⁷¹

The role of doctors and other health professionals has been, paradoxically, both important and marginal in the development of the death penalty. It has been important to the extent that physicians have contributed to the development of execution techniques, to the acceptability of execution in the public eye, and to pressure for reform. But it has been marginal inasmuch as the state does not *need* the presence of a physician to bring about the death of the condemned. The oscillation between importance and marginality covers the territory of a very important human rights and ethical discussion. In this chapter we [Ferris & Welsh] discuss the evolution of professional ethics towards a restrictive view of physician participation and examine future challenges posed by the death penalty to the ethics of health professionals. Our viewpoint reflects our belief that the most humane and life-affirming position that could be adopted by health professionals would be to work for the abolition of capital punishment.

Information on the role of health professionals in the contemporary application of the death penalty in most retentionist countries is sketchy, and even in the country which is the most openly reported on, the USA, there remain dark corners into which the light of scrutiny does not reach. Photographs of public executions in some countries show men in white coats, presumably doctors, examining corpses tied to stakes—doctors playing the traditional role of verifying death by execution. Apart from this there has been virtually nothing to report for most of the world. The principal exceptions (outside the USA) have been in China and Taiwan where the issue of organ transplantation involving the organs of executed prisoners has focussed attention on the medical role, and Guatemala and the Philippines where introduction of lethal injection laws stimulated discussion among medical professionals. In the USA, the medical role has been discussed intensively for around two decades since the introduction in 1977 of laws providing for execution by injection of lethal substances into the body of the condemned.¹⁷² This debate has contributed to a clearer understanding of the role of health professionals in various facets of capital punishment.

In summary, the information available allows us to define the role of health professionals (including psychiatrists) in the following way:

Physicians are involved in the medical care of death row prisoners, in preparations for execution such as certifying fitness, procuring chemicals for lethal injection and sedating the prisoner on the day of execution, advising on or participating in the execution itself, pronouncing deathⁱ, certifying death, removing organs for transplantation, carrying out an autopsy.

¹⁷¹ This section taken from 'Doctors and the death penalty: ethics and a cruel punishment', Ferris and Welsh. Chapter in Capital Punishment: strategies for abolition, Eds. Hodgkinson and Schabas, CUP 2004

¹⁷² For background see: D. Denno, Getting to death: are executions constitutional? *Iowa Law Review*, 1997;82:319-464; Amnesty International, *Lethal injection: the medical technology of execution*, London, AI Index: ACT 50/01/98, January 1998

Psychiatrists carry out mental state evaluations, provide testimony in a number of contexts related to capital cases (including ‘fitness for execution’ determinations) and give or recommend treatment.

Other health professionals, notably nurses and paramedics, may be called upon to carry out a number of the roles requested of doctors where doctors refuse to participate or where the authorities prefer for whatever reason to use non-medical personnel.

Not all of these activities are unethical but some undoubtedly are, while the ethical status of others is disputed. In some cases the ethical requirements may be relatively clear but the context far from unproblematic. In one case in 1995, for example, emergency care physicians in a hospital in Oklahoma were brought a death row prisoner, Robert Brecheen, who had attempted suicide by drug overdose on the eve of execution after emergency resuscitation and stabilization he was taken by guards back to the prison and executed a few hours later.¹⁷³ The practice of states to ask doctors to save the lives of condemned men in order to allow the state to carry out their execution a matter of hours or days later is an act of considerable cynicism; moreover, the line between acting for the benefit of the acutely ill and acting solely to facilitate the state’s desire to carry out the killing itself is a fine one and imposes a serious strain on medical ethics.

Development of ethics against professional participation

The section that follows deals substantially with discussion of ethics taking place within medical professional bodies. We give less attention to a vigorous and important analysis of ethical issues within the wider professional community. For such analysis the reader is referred elsewhere.¹⁷⁴

From a historical perspective, one of the important influences on the relationship between physicians and the death penalty has been the development and refinement of codes of professional ethics. This in turn has been assisted by the establishment of international professional bodies.

- **Physicians**

While the issue of executions did not figure in any of the codes up to and including the nascent World Medical Association’s Declaration of Geneva (1949), subsequent codes have been adopted which are of greater relevance to this issue. In 1975, the World Medical Association (WMA) adopted the Declaration of Tokyo against medical participation in torture. While this did not explicitly apply to the death penalty, it encompassed clear guidance against medical participation in abuses and set the scene for the unrelated but congruent WMA position against medical participation in executions adopted six years later.

¹⁷³ *Pronouncing death* implies that a physician examines the prisoner for vital signs during or immediately after execution and declares the prisoner to be dead (or not, as the case may be). In the context of executions, *certifying death* requires a physician to examine a body already known to be dead and then providing formal certification of that death. The former is regarded as unethical since it makes the physician part of the execution process; the latter has been ruled ethical.

¹⁷⁴ See Amnesty International, *United States of America: Developments on the Death Penalty in 1995*, AI Index: AMR 51/01/96, 1996.

In September 1981, the WMA, fearing the imminent execution of a black prisoner in Oklahoma (which would have been the first execution by lethal injection), issued a press release expressing opposition to medical involvement and followed up with a declaration against medical participation in a lethal injection (or any other) execution outside of certifying death.¹⁷⁵ The WMA declaration was preceded a year earlier by a position statement adopted by the American Medical Association (AMA) opposing medical participation in executions. Public health physicians in the USA also adopted statements against capital punishmentⁱⁱ. (The AMA subsequently went on to develop a detailed statement against medical participation in which specific acts were ruled either as proscribed or acceptable; see Table 1 below.)

- **Psychiatrists**

In 1969 the Board of Trustees of the American Psychiatric Association (APA) adopted an anti-death-penalty resolutionⁱⁱⁱ and to the best of our knowledge this resolution has never been rescinded (though an attempt to “reaffirm” the resolution in 1998 was unsuccessful).¹⁷⁶ During the 1980s, both the APA and the World Psychiatric Association (WPA) adopted positions against direct involvement of psychiatrists in the death penalty. In 1980 the APA declared that:

The physician’s serving the state as an executioner, either directly or indirectly, is a perversion of medical ethics and of his or her role as a healer and comforter. The APA strongly opposes any participation by psychiatrists in capital punishment...in activities leading directly or indirectly to the death of a condemned prisoner as a legitimate medical procedure.¹⁷⁷

The WPA held that “the participation of psychiatrists in any ... action [connected to] executions is a violation of professional ethics”.¹⁷⁸ Both the APA and WPA were to return to these issues in the following decade.

¹⁷⁵ See for example: M.G. Bloche, Psychiatry, capital punishment, and the purposes of medicine, *International Journal of Law and Psychiatry*, 16 (1993), 301-357; J.K. Boehnlein, R.M. Parker, R.M. Arnold, C.F. Bosk, and L.F. Sparr, Medical ethics, cultural values, and physician participation in lethal injection, *Bulletin of the American Academy of Psychiatry and Law*, 23 (1995), 129-134; R.J. Bonnie, Dilemmas in administering the death penalty: conscientious abstention, professional ethics, and the needs of the legal system, *Journal of Law and Human Behaviour*, 14 (1990), 67-90; R.G. Salguero, Medical ethics and competency to be executed, *Yale Law Journal*, 96 (1986), 167-86; R.D. Truog and T.A. Brennan, Participation of physicians in capital punishment, *New England Journal of Medicine*, 329 (1993), 1346-1349; Groner J, Lethal injection and the medicalization of capital punishment in the United States. *Health and Human Rights* 2002; 6(1): 65-79.

¹⁷⁶ The resolution to have the APA affirm the 1969 position was discussed by the APA Assembly in November 1998 (Dr A Halpern, personal communication, November 1998).

¹⁷⁷ American Psychiatric Association, Position statement on medical participation in capital punishment. *American Journal of Psychiatry*, 137 (1980), 1487.

¹⁷⁸ World Psychiatric Association, Declaration on the participation of psychiatrists in the death penalty, 1989.

- **Nurses**

In 1989, the International Council of Nurses (ICN) adopted a particularly strong statement against professional involvement of nurses in executions which ended with an appeal by the ICN for “national nurses’ associations to work for the abolishment of the death penalty in all countries still practising this form of punishment”. In a 1998-revised declaration, the ICN called on “member national nurses’ associations [to] lobby for abolition of the death penalty”.¹⁷⁹

Developments in the 1990s

The organised medical profession has taken an increasingly abstentionist stand with regard to participation in the death penalty. This has been manifested in statements adopted by the AMA and by other national bodies¹⁸⁰ with support from medical and human rights NGOs.¹⁸¹ The position adopted by the AMA in 1992 is a model of clarity and, to the extent that it is possible, lack of ambiguity (though it has persistently not addressed the question of the death penalty itself). The guidelines prohibit:

- any action that would directly cause the death of the condemned
- any action which would "assist, supervise or contribute to" the action of another in bringing about death
- action which could automatically cause an execution to be carried out (for example by informing an executioner that an execution has not led to the death of the prisoner).¹⁸²

The AMA listed in detail specific activities, which did and did not breach ethics (see table) though they did not deal with key mental health related issues – certifying and restoring competence to be executed – nor with issues relating to transplantation of organs from executed prisoners. Persistent reports over several years suggest that Chinese surgeons take organs from executed prisoners for purposes of transplantation,¹⁸³ with the likely blurring of roles between executioner and surgeon.¹⁸⁴

¹⁷⁹ International Council of Nurses, *Torture, death penalty and participation by nurses in executions*. Geneva: ICN, 1998. [This statement replaces the earlier 1989 statement, *Death penalty and participation by nurses in executions*.]

¹⁸⁰ Both the Guatemalan Association of Doctors and Surgeons, and the Philippine Medical Association, adopted statements in 1997 against direct participation by their members in lethal injection executions. (Amnesty International, *Lethal injection...*)

¹⁸¹ For example, Physicians for Human Rights adopted a position against the death penalty in 1994 and subsequently joined other medical and human rights organisations in analysing aspects of the death penalty (*Breach of Trust: Physician Participation in Executions in the United States*, Boston: PHR, 1994); Amnesty International has published numerous reports on the death penalty and adopted in 1981 its Declaration on the Participation of Doctors in the Death Penalty [revised in 1988 to refer to “health professionals”].

¹⁸² Council on Ethical and Judicial Affairs, American Medical Association, *Physician participation in capital punishment*, *JAMA*, 270 (1993), 365-68.

¹⁸³ See, for example, Thomas Fuller, ‘An execution for a kidney: China supplies convicts’ organs to Malaysians’, *International Herald Tribune* 15 June 2000.

¹⁸⁴ The Transplantation Society, the leading international professional body of its kind, adopted a Position in 1995 against the use of organs from executed prisoners, reflecting the case put in a position paper by Prof. R. Guttman (On the use of organs from executed prisoners, *Transplantation Reviews*, 6 (1992), 189-93).

Table 1. The 1992 AMA policy on medical participation in the death penalty

Permitted	Not permitted	Undetermined by 1992 AMA policy
<ul style="list-style-type: none"> • testifying on competence to stand trial • testifying on relevant medical issues during the trial • testifying during the penalty phase of the trial • witnessing an execution in a non-professional capacity • relieving the acute suffering of the condemned • certifying death (after death has been declared by another) 	<ul style="list-style-type: none"> • prescribing or administering tranquillisers or other drugs which are part of the execution procedure • monitoring vital signs • attending or observing the execution as a physician • selecting injection sites • starting IV lines to administer LI chemicals • prescribing or administering the drugs • supervising LI devices or personnel • pronouncing death 	<ul style="list-style-type: none"> • providing evidence bearing on competence to be executed • treating incompetent prisoners to restore competence to allow execution • issues relating to transplantation of organs following execution

Unless sheer lack of availability of psychiatric practitioners precludes it, psychiatrists can be and are involved in the process leading up to capital sentencing and execution in many retentionist countries. Much literature is available concerning this involvement in the USA -- almost none concerning nearly a hundred other retentionist countries.

Mental health and the death penalty

Involvement of psychiatrists and other mental health professionals at some level in capital cases is inevitable because of the long standing and universal prohibition against executing the insane,¹⁸⁵ whether enshrined in customary international law,¹⁸⁶ in common law dating back centuries, in specific statutory provisions or in evolving human rights standards.¹⁸⁷

¹⁸⁵ G. Hazard and D. Louisell, Death, the state, and the insane: stay of execution, *UCLA Law Review*, 9 (1962), 381.

¹⁸⁶ W. Schabas, International norms on execution of the insane and mentally retarded, *Criminal Law Forum*, 1993; 4:95-117; W. Schabas, *The Abolition of the Death Penalty in International Law*, Cambridge: Cambridge University Press, 1993.

¹⁸⁷ International standards prohibit the use of the death penalty against "persons who have become insane" (Safeguard 6, UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted 1984), and recommend that it not be used against people of "extremely limited mental competence, whether at the stage of sentence or execution" (UN Economic and Social Council, resolution 1989/64, adopted 24 May 1989). A key ruling in the USA was the decision of the US Supreme Court in *Ford v Wainwright* (477

It is beyond the scope of this review to examine the merits of the arguments advanced as to why the insane or mentally handicapped should be spared execution, but wherever they are accepted and taken seriously the psychiatrist (or, perhaps, psychologist) will inevitably be brought in to help identify the insane—those mentally incompetent to be executed—and perhaps to treat them on death row or beforehand. As the psychiatrist is a physician, committed to promoting the health and well being of the patient, the ethical problems associated with “success” in restoring the sanity of the mentally incompetent—and thereby facilitating the patient’s death at the hands of the state—are obviously considerable.¹⁸⁸ Similar difficulties apply to the *evaluation* of mental competence to be executed, not to mention the problem of agreeing criteria that will be used in practice to facilitate a stark legal or administrative decision as to the competence or incompetence of a prisoner.

Although debate has very much focussed on the ethics of these two forms of involvement, all psychiatric involvement has come under scrutiny. Psychiatrists can come into contact with prisoners condemned or at risk of being condemned to death, in the following ways:

- Evaluation and testimony bearing on a defendant’s capacity to stand trial.
- Treatment to restore or maintain a defendant’s competency to stand trial.
- Evaluation and testimony bearing on a defendant’s criminal responsibility.
- Evaluation and testimony at the sentencing stage.
- Evaluation and testimony bearing on a defendant’s capacity to waive appeals.
- Evaluation and testimony bearing on a defendant’s competency to be executed.
- Treatment to restore a defendant’s competency to be executed.
- Treatment of symptoms not relevant to the defendant’s legal situation.

The case of Russell Weston Jnr. illustrates the ethical conundrums inherent in the most basic of concepts – that of fitness for trial. Weston was accused of shooting dead two police officers in the Capitol Building in Washington D.C. on 24 July 1998. However, he was adjudged by a forensic psychiatrist to be incompetent to stand trial though “there [was] a significant likelihood that competence [could] be restored” by administration of antipsychotic medication.¹⁸⁹ However when Weston refused medication and the issue of compulsorily administered drugs was raised, his lawyers took the matter to court, contending that involuntary medication would violate his constitutional rights. At the root of this case is the belief that Weston might be liable to the death penalty if convicted. A *Washington Post* editorial stated the lawyers’ dilemma clearly:

If they allow the treatment -- which Mr Weston rejected at a time he was deemed competent to make his own medical decisions -- they risk

US 399, 1986) that it is unconstitutional to execute insane prisoners. However no equivalent ruling has been made against executing the mentally retarded.

¹⁸⁸ M.L. Radelet and G.W. Barnard, Treating those found incompetent for execution: ethical chaos with only one solution, *Bulletin of the American Academy of Psychiatry and Law*, 16 (1988), 297-308; K. Heilbrun, M.L. Radelet and J. Dvoskin, The debate on treating individuals incompetent for execution, *American Journal of Psychiatry* 149 (1992), 596-605.

¹⁸⁹ Dr Sally Johnson, quoted in ‘A living hell or a life saved?’ *Washington Post*, 23 January 2001, page A01.

exposing him to a potential death sentence. If they resist, as they have to date, they consign him to indefinite isolation and madness.¹⁹⁰

The same dilemma faces psychiatrists. Weston spent more than two years untreated and kept in isolation before U.S. District Judge E.G. Sullivan ruled on 6 March 2001 that the prisoner could be involuntarily medicated.¹⁹¹ This ruling was appealed, but on 27 July 2001 the Appeals Court upheld the lower court's decision.¹⁹² Further legal initiatives to have the Supreme Court review the lower court rulings failed when, on 10 December 2001, the Court stated it would not hear the case.¹⁹³ In January 2002 medication commenced and further court rulings in August and November 2002 extended the period of medication^{iv}.

Professional ethics

It is only in the past ten years or so that the psychiatric ethics debate – prompted in part by the AMA's 1992 guidelines -- has come to grips with the details of the execution process and reflected a genuine attempt to grapple with the very serious moral difficulties posed by the death penalty. Beforehand, the attention paid to psychiatric involvement was relatively sparse and apparently limited to general discussion or specific elements of the death penalty. This contrasted with the attention paid to physician involvement, as mentioned earlier in this chapter. By 1989, national medical associations in at least 19 countries had formally stated their opposition to physician "participation" in capital punishment^v. In the same year, the World Psychiatric Association, as noted above, issued a statement declaring that the participation of psychiatrists in any action connected to executions is a violation of professional ethics though without specifying what such actions might comprise.

Within European countries, comment and criticism has been understandably limited because the countries of Europe are overwhelmingly abolitionist and, indeed, a commitment to abolition is a condition for entry into the Council of Europe.¹⁹⁴ Nevertheless some European bodies have adopted positions on psychiatrists' participation in the death penalty. In 1992, for example, the Royal College of Psychiatrists in the United Kingdom passed a series of resolutions, which included the following:

A psychiatrist can and should treat a person on a voluntary basis that requires psychiatric care while awaiting execution. The provision of involuntary care is much more problematic and should generally only be undertaken if the psychiatrist has obtained a legal guarantee that the patient has had his or her sentence commuted. Each case should be decided by the psychiatrist according to his/her judgement in the circumstances.

¹⁹⁰ 'Insanity and law', Washington Post, 11 March 2001, page B06.

¹⁹¹ Weston can be treated for trial, judge decides', *Washington Post*, 7 March 2001, page A01.

¹⁹² US Court of Appeals for Washington DC. *USA v. Weston*, No. 01-3027

¹⁹³ Schizophrenic can be forced to take anti-psychotics', *St. Louis Post-Dispatch*, 11 December 2001.

¹⁹⁴ Cf. Parliamentary Assembly of the Council of Europe. Resolution 1097 (1996), adopted 28 June 1996. See also: Council of Europe, Committee on Legal Affairs and Human Rights, *Europe: a death penalty-free continent*. Doc. 8340 revised 2, 20 May 1999. Available at: <http://stars.coe.fr/doc/doc99/edoc8340.htm>

On no account should the psychiatrist agree to state, after treatment, that that person is fit for execution. Treatment should never be given for the purpose of co-operating in, or expediting, the execution process.¹⁹⁵

The absence of the death penalty in Europe did not inhibit the British Medical Association from adopting a policy that the “BMA is opposed to the death penalty worldwide” at the organization’s Annual Representative Meeting in 2001.

In the USA, the wider ethical debate has been extensive, detailed and prolonged. The need to try to resolve the ethical dilemmas has intensified as the numbers of death sentences and executions has steadily increased. Since 1992 at least 30 prisoners have been executed in the USA each year.¹⁹⁶ In this regard it is interesting to note the relative rarity with which, for example, the issue of competency to be executed is reported as being raised in practice.¹⁹⁷ Yet all the evidence suggests that issues of mental disability and “competence” are a relatively common occurrence and prisoners, who are, by any measure, incapable of understanding their situation, are executed notwithstanding US legal protection for mentally ill prisoners and limited protection in certain states for the mentally disabled.

¹⁹⁵ Royal College of Psychiatrists, Resolution concerning the participation of psychiatrists in executions. *Psychiatric Bulletin*, 16 (1992), 457. For a broader statement on the subject see: Royal College of Psychiatrists. Capital punishment and the medical profession. *Psychiatric Bulletin*, 18 (1994), 250-1.

¹⁹⁶ The increase in the execution rate can be seen by comparing the numbers of executions in the first years after the first post-Furman execution and the number in more recent times. An Amnesty International report noted that the first 35 executions from that of Gary Gilmore in Utah by firing squad on 17 January 1977 took some seven years. By contrast, the last 35 executions in the period covered by the AI report (up to September 1997) took place in the space of less than five months. Amnesty International, *Lethal injection: the medical technology of execution*, London: AI Index: ACT 50/01/98, 1998, p.12. In 2000, 84 executions took place, all but 5 by lethal injection.

¹⁹⁷ Miller (1988) was able to find reference to only four cases in California where the issue of competency had been raised, from a total of 180 cases of people condemned to death between 1942 and 1956. Although the issue is raised more frequently today, it is still dependent to a significant extent on intervention by the attorney of the accused and in death penalty cases these are frequently inexperienced, poorly funded lawyers. (R.D. Miller, Evaluation of and treatment to competency to be executed: a national survey and an analysis, *Journal of Psychiatry and Law*, 1988 (Spring):67-90.

Table 2: Elements of death penalty policy of selected professional associations

Association	Policy
International bodies	
World Medical Association	It is unethical for physicians to participate in capital punishment, in any way, or during any step of the execution process. (Resolution on physician participation in capital punishment, 2000, revising 1981 resolution)
World Psychiatric Association	A psychiatrist [should never] participate in legally authorised executions nor participate in assessments of competency to be executed (Declaration of Madrid, 1996)
International Council of Nurses	Opposes nurses participation; calls on national nurses associations to work for abolition (1989, restated 1998 as ADD) ¹⁹⁸
Selected national organisations	
American Medical Association	Opposes all medical participation except certifying death;
American Psychiatric Association	Calls for moratorium (2000)
American Nurses Association	Opposes nurses' participation (1984)
American Public Health Association	Health personnel "should not be required nor expected to assist in legally authorised executions" (1985); calls for abolition (1986); reiterates opposition to health professional participation in executions (1994, 2000)
British Medical Association	Opposes the death penalty worldwide (2001)
Guatemala Medical Association	Opposes medical participation in judicial execution (1997)
Philippines Medical Association	Opposes medical participation in judicial execution (1997)
Nordic Medical Associations	Oppose all participation by doctors in the death penalty (1986)
Royal College of Psychiatrists	Resolution concerning the participation of psychiatrists [1992] ¹⁹⁹

¹⁹⁸ International Council of Nurses, Torture, death penalty and participation by nurses in executions. Geneva: ICN, 1998. [This statement replaces the earlier 1989 statement, Death penalty and participation by nurses in executions.]

¹⁹⁹ Royal College of Psychiatrists, Resolution concerning the participation of psychiatrists in executions. *Psychiatric Bulletin*, 16 (1992), 457. For a broader statement on the subject see: Royal College of Psychiatrists. Capital punishment and the medical profession. *Psychiatric*

Chapter Ten

Methods of execution

Morocco, Algeria and Mauritania use the firing squad as their sole method of execution. Tunisia has provisions for executions by both firing squad and hanging. As none of the four countries have carried out executions within the last decade, their execution protocol is not documented.

The firing squad is uniformly the method of choice in Northern Africa. All retentionist countries in the region²⁰⁰ have provisions for dispatching their condemned by firing squad and hanging is an alternative option in Libya, Egypt and the Sudan. Stoning is also permitted in the Sudan to punish transgressors of Islamic *Hadd* offences. Although there have been no known occurrences of a stoning ever having been carried out in the Sudan, such a sentence has been passed, as recently as 2007.²⁰¹ The Qur'an states that, in the case of homicide, the method of execution must match the manner in which the victim was killed, in order to attain retributive equivalence, so that punishment is only equal to the harm done:

"And if you punish, you shall inflict an equivalent punishment. But if you resort to patience (instead of revenge), it would be better for the patient ones" (16:126)

"During the Sacred Months, aggression may be met by an equivalent response. If they attack you, you may retaliate by inflicting an equitable retribution" (2:194)

Given that homicide is a private matter between the family of the deceased and the offender, over which the state may only play an auxiliary role, it is up to the victim's family to demand that the state carry out a death sentence - the Malikite and Shafi'ite schools of jurisprudence allow the relatives of the victim to carry out the execution themselves.²⁰² Such an execution occurred in Mogadishu, Somalia in 2006 when, under the brief rule of the Union of Islamic Courts, a sixteen year old boy publicly stabbed to death his father's killer, aping the manner in which his father had died.²⁰³

In capital cases besides homicide, the Shi'ite and Hanafite schools require that executions be carried out '**by the sword**'.²⁰⁴ Indeed, the trio of Islamic militants who were sentenced to death in Indonesia for their part in the 2002 bombings in the island resort of Bali – the so called Bali Bombers – requested that their execution be carried out by beheading instead of the firing squad on the grounds that beheading is more 'Islamic'.²⁰⁵ Their request was denied and they were duly shot to death. The only country that sanctions beheading as a method of execution is Saudi Arabia,

Bulletin, 18 (1994), 250-1. 'Under no circumstances should a psychiatrist participate in legally authorised executions nor participate in assessments of competency to be executed.'

²⁰⁰ Morocco, Algeria, Tunisia, Mauritania, Mali, Niger, Libya, Guinea, Burkina Faso, Egypt, Chad and the Sudan

²⁰¹ Amnesty International. (2008). *Sudan Report 2008*. Available from <http://www.amnesty.org/en/region/sudan/report-2008>

²⁰² Peters, R. (2005). *Crime and Punishment in Islamic Law*. Cambridge, UK: Cambridge University Press (p.31)

²⁰³ Freeman, S. (3rd May 2006). An Eye for an Eye, as Somali Boy Executes Father's Killer. *The London Times*.

²⁰⁴ Peters, R. (2005). *Crime and Punishment in Islamic Law*. Cambridge, UK: Cambridge University Press. (p.37)

²⁰⁵ <http://www.telegraph.co.uk/news/worldnews/asia/indonesia/3239078/Bali-bombers-lose-their-plea-to-be-beheaded.html>

which actually adheres to the Hanbali school. The condemned are executed – often in public – by a scimitar, which is a traditional Arab sword with a curved blade. They are forced to kneel, and the executioner swings at their neck.²⁰⁶ There is no record of how often the condemned are decapitated with a single blow.

Stoning is a controversial method of execution which nowadays is associated with strict Islamic law, but notably is not a punishment sanctioned in the Qur'an. It finds its validity, instead, in a *Hadith* (traditions of the Prophet), where it was prescribed as the punishment for adultery (*zina al-Mohsena*). The legitimacy of the punishment is highly questionable, as adultery is a *Hudood* offence, meaning it is a crime directly against God. As such, its remedy should be found within the Qur'an, and indeed it is – Sura 24, verse 2 states: "The adulteress and the adulterer you shall whip each of them a hundred lashes". It makes no mention of stoning.

Nonetheless, stoning remains on the statute books of many countries that apply strict Islamic law, including Afghanistan, Iran, Pakistan, Nigeria, the Sudan, Saudi Arabia, Somalia and the UAE.²⁰⁷ It is rare for the sentence to be passed, and even rarer that it be carried out, with the exception of Iran, where, despite a moratorium against the punishment, at least seven people have been stoned to death since 2002.²⁰⁸ Iran's Islamic Penal Code sets out the protocol for a stoning. Article 102 states that men must be buried up to their waists, but women to their necks, in order to prevent the stones hitting their breast. If the condemned is able to escape the hole in which they are buried, they are spared, meaning women, being buried deeper than men, are at a disadvantage. Article 104 states the size of the stones to be used – they must be not so large that they cause death with one or two strikes, but not so small that they cannot be defined as stones.

Lethal injection involves the intravenous assimilation of drugs designed to induce organ failure. The United States was the first country to use the lethal injection as a means of judicial killing in 1977. Since then, it has gained popularity, and - bar a handful of electrocutions - is the method by which the vast majority of America's condemned are put to death. The American method involves the injection of three drugs – a short acting barbiturate to anaesthetise the condemned; a paralysing agent to collapse their lungs, and an agent that stops the heart, causing death through a drug overdose, and respiratory and cardiac arrest.²⁰⁹

Lethal injection has received sparse attention outside of the US, with only a handful of countries (Guatemala, Thailand, China, Papua New Guinea) adopting it as a method of execution. This could in part be due to the involvement of a physician – the lethal injection is fundamentally a medical procedure that requires expert knowledge in order to render the 'painless' death it promises, and yet this is in direct conflict to the Hippocratic Oath. The US attempted to circumvent the ethical dilemma of a doctor's involvement in an execution, by having prison guards carry out the procedure. This, perhaps predictably, has led to prolonged and botched executions, and several constitutional challenges to the lethal injection. In 2006, a federal judge ruled that, in order for the state of California to lethally inject Michael

²⁰⁶ <http://www.capitalpunishmentuk.org/behead.html#Saudi>

²⁰⁷ Steiner, S. (20th August 2002). Shari'a Law. *The Guardian*.

²⁰⁸ Erdbrink, T. (14th January 2009). Iran Stones 2 Men to Death; 3rd Flees. *The Washington Post*

²⁰⁹ www.deathpenaltyinfo.org

Morales in keeping with the 8th amendments' ban on cruel or unusual punishment, two anaesthesiologists must attend the execution to ensure Morales was properly sedated and therefore unable to experience pain. The anaesthesiologists pulled out, unable to resign their ethical obligations with participating in taking human life, and Morales received an indefinite stay.²¹⁰

On 25 September 2007, the US Supreme Court agreed to hear a challenge on the constitutionality of lethal injection, with oral arguments scheduled for 7 January 2008.²¹¹ This led to a hiatus in executions starting on the 25 September 2007 awaiting the outcome of the US Supreme Court's deliberation, which, to the dismay of abolitionists and many in the medical profession issued a 7-2 decision on the constitutionality of Kentucky's lethal injection process on April 16th 2009. [Baze v. Rees {2009}]. This is despite mounting evidence that the lethal injection does involve great suffering on the part of the condemned. In 2005, the medical journal *The Lancet* published results of a study on autopsies performed on executed inmates in Kentucky, South Carolina and North Carolina, which revealed that there was not a high enough concentration of the barbiturate in the blood level to have caused unconsciousness. Of the 49 inmates studied, 43 had a low enough concentration of barbiturate to mean there was only a 50% likelihood that they were unconscious. This, the study concluded, was because of the lack of trained medical personnel involved in the procedure - a paradox, as trained medical personnel are barred from participating.²¹² This is currently an issue before the Supreme Court in North Carolina, where the state law requires the 'presence' of a physician during the administration of the lethal injection. The court has been asked to rule on whether 'presence' was a violation of the medical code of ethics.²¹³

The response to this in Kentucky and many other states was not an immediate resumption of executions based on the unsuccessfully challenged protocol. A variety of procedures have since been instituted generating numerous challenges and these continue into 2010. Ohio now uses a single drug, Sodium Thiopental instead of the traditional three chemical cocktail.²¹⁴ This followed the refusal of the Ohio courts to sanction the execution of Romell Broom following an earlier 'botched' attempt.

'On September 15 2009, for only the second known time in American history, a death-row inmate exited from an execution chamber alive. Prisoner 187 343, a convicted murderer and rapist named Romell Broom, had his sentence temporarily reprieved by Ohio Governor Ted Strickland, but only after enduring what Fordham Law Professor Deborah Denno, a death-penalty historian, calls "the worst botched execution that has happened in the history of this country." Over two-and-a-half hours, executioners jabbed Broom with a needle 18 times, trying to establish an IV while he cried. At one point, Broom screamed as a nurse

²¹⁰ <http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision>

²¹¹ See: 07-5439 Baze v. Rees, Lower Court Case Number: 2005-Sc-0543, Cert. Granted 25 September 2007, available at: <http://www.supremecourtus.gov/qp/07-05439qp.pdf> (accessed 3 December 2007).

²¹² Koniaris, L. et al. (2005). Inadequate Anaesthesia in Lethal Injection for Execution. *The Lancet*, 365, 1412-1414

²¹³ Burns, M. (18 November 2008). Death Penalty Debate Goes Before NC Supreme Court. *WRAL News*. Available from <http://www.wral.com/news/local/story/3979295/>

²¹⁴ Ohio to switch to one-drug lethal injection By JULIE CARR SMYTH (AP) http://www.google.com/hostednews/ap/article/ALeqM5jjqm49b-nlUteJMPUmp_gKOuxu6g

inserted a needle into the bone in his ankle; at another juncture, Broom helped to tie his own arm. Unable to establish access to a vein, officials offered Broom coffee and a cigarette while his arms bruised and swelled. Half an hour later, his execution was postponed.²¹⁵

Following Ohio's lead several states now use the single drug method with others reverting to the three chemical cocktail though it is doubtful that this nissue has been finally resolved.

By way of information it was on the grounds of physician involvement that the British Royal Commission on Capital Punishment decided against using a form of lethal injection to replace hanging, when it examined the issue between 1948 and 1953.²¹⁶

²¹⁵ <http://www.thedailybeast.com/blogs-and-stories/2009-10-23/doctors-in-the-death-chamber/?cid=hp:justposted1>

²¹⁶ October 23, 2009
<http://www.capitalpunishmentuk.org/injection.html>

Chapter Eleven

Capital punishment and the law

It does not help the credibility of the debate or the authority of the abolitionist industry when claims continue to be made that capital punishment is unlawful. On the contrary most international and regional human rights instruments expressly provide for it as an exemption to the right to life.²¹⁷ It only becomes unlawful when states decide to subject themselves to the aspirations, restrictions and protections that underpin all international law. Absent from these instruments is any form of legal sanction for those who breach them. What limited sanctions there are take other forms, for example, censure by the UN Committee on Human Rights or the International Court of Justice and any subsequent negative press that might cause embarrassment.

Four instruments aimed at abolishing the death penalty are currently in force. The Second Optional Protocol to the International Covenant to Civil and Political Rights (ICCPR)²¹⁸ has a worldwide scope and provides for the total abolition of the death penalty except in times of war. To date, 68 countries are state parties to the protocol. A further four countries have signed, but not yet ratified it.

Protocol No. 6 of the European Convention on Human Rights²¹⁹ places restrictions on the use of the death penalty in peace-time, an undertaking ratified thus far by 46 of the 47 member states of the Council of Europe with Russia being the exception. The only piece of legislation to be found in regional or international human rights treaties which outlaws the death penalty under all circumstances is Protocol No. 13 to the ECHR.²²⁰ Protocol No.13 was a long time aspiration of the Parliamentary Assembly of the Council of Europe (PACE) and it was eventually opened for signatories on 3rd May 2002 entering into force 1st July 2003. To date, 43 member states of the Council have signed it, with 29 ratifications.²²¹

²¹⁷ Article 6 of the International Covenant on Civil and Political Rights, (1976) 999 UNTS 171; Article 2 of the European Convention on Human Rights, (1955) 213 UNTS 221; Article 4 of the American Convention on Human Rights, (1978) 1144 UNTS. 123; and Articles 10-12 of the Arab Charter of Human Rights, 15 September 1994, Council of the League of Arab States, 102nd Session, Res. 5437 (unofficial translations in (1996) 56 Review of the International Commission of Jurists 57 and (1997) 4 International Human Rights Reports 850, revised May 2004. The Arab Charter reiterates the limitations on capital punishment in the other international instruments, but it is not in force and has found little support. Article 4 of the African Charter of Human and Peoples' Rights, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 recognises the right to life, but is silent on the subject of the death penalty although the African Commission did pass a resolution in 1999 urging states to consider a moratorium which indicates that the death penalty is permissible under the Charter.

²¹⁸ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, General Assembly resolution 44/128 of 15 December 1989.

²¹⁹ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, ETS no. 114.

²²⁰ Protocol No.13 to the Convention for the protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, CETS No. 187.

²²¹ Albania, Andorra, Austria, Belgium, Bosnia- Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova,

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty²²² provides for the total abolition of the death penalty, but allows states parties to retain it in wartime if a reservation is made to that effect. Currently, there are eleven state parties to the protocol, with a further two that have signed, but not yet ratified it.

There have been a number of legal challenges brought in relation to certain aspects of the death penalty. The issue of delay in carrying out executions, for example, was addressed by the Zimbabwean case of *Catholic Commission for Justice and Peace in Zimbabwe v. The Attorney General and Others*²²³ It was held that delay in implementation of death sentences of up to 72 months was contrary to Article 15(1) of the Zimbabwean Constitution, which provides that no person shall be subjected to 'torture or to inhuman or degrading punishment or other such treatment'. The decision relied on several US Supreme Court²²⁴ decisions as well as the opinions of Indian judges²²⁵ and those of the Judicial Committee of the Privy Council²²⁶ describing the effects of being on death row. More recently, the Constitutional Court of Uganda in *Kigula & Other v The Attorney General*²²⁷ held that persons on death row for three or more years, after all appeals have been exhausted, were entitled to have their death sentences commuted to life imprisonment, which was confirmed in the Supreme Court January 2009.

There have been other challenges brought to the courts on issues such as the mandatory nature of the death penalty²²⁸, the method of execution²²⁹ and particular

Monaco, Montenegro, Netherlands, Norway, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Sweden, Switzerland, Turkey, Ukraine, United Kingdom (40) signed but not ratified: Armenia, Italy, Latvia, Poland, Spain (5); not signed: Azerbaijan, Russia.

222 *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, adopted by the General Assembly of the Organization of American States in 1990, OASTS 73.

223 *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others* 1993 (4) SA 239 (ZS)

224 *People v Anderson* 493 P.2d. 8880 (1972) Wright CJ stresses the tortuousness of delay involved in the death penalty, at 892. *District Attorney for Suffolk District v Watson* Mass. 411 N.E. 2d 1274 (1980) held the death penalty to be a violation of the cruel punishment clause in the state's constitution.

225 *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746, held the right to live with basic human dignity implicit in the right guaranteed under Article 21 of the Constitution, included the right not to be subjected to torture or cruel, inhuman or degrading treatment. *Triveniben and Others v State of Gujarat and Others* (1989) 1 S.C.J. 383 held only the delay since the end of the judicial process was relevant. In *Madhu Mehta v Union of India* [1989] 3 S.C.R. 775 it was held that an eight-year wait for the outcome of a mercy petition to the President was too long and the sentence was commuted to life imprisonment.

226 *Riley and others v Attorney-General of Jamaica* [1982] 3 All ER 469 (PC). Although there was found to be no breach of the Jamaican Constitution in carrying out a death sentence it was stated: "Sentence of death is one thing: sentence of death followed by lengthy imprisonment prior to execution is another."

227 *Susan Kigula and 416 Others v. Attorney General*, Constitutional Petition No. 6 of 2003, 5 June 2005

228 *In Lennox Ricardo Boyce and Jeffrey Joseph v. The Queen* (Appeal No. 99 of 2002) and *Charles Matthews v. The State* (Appeal No.12 of 2004), 7 July 2004, the Privy Council upheld the constitutionality of mandatory death penalty in Barbados and Trinidad & Tobago respectively (overturning its decision in *Balkissoon Roodal v The State*, (Appeal No. 18 of 2003), 20 November 2003). The death penalty is no longer mandatory in Jamaica (*Lambert Watson v. The Queen* (Appeal No. 36 of 2003), 7 July 2004), St. Christopher and

offences that attract the death penalty.²³⁰ In all of these cases, however, the death penalty *per se* has been upheld.

Progress through the Constitutional Courts

An approach favoured by some politicians nervous of the political and personal repercussions of abolition is to actively encourage and support their supreme courts in reviewing the constitutional 'right to life' provision. This is an approach taken most notably by the provisional Constitutional Court in South Africa (*The State v. Makwanyane* 1995) and by courts in Lithuania (1999), Albania (1999), Hungary (1990) and Belarus (2004) among others.

An analysis of Morocco and regional constitutions with regard to the ambit of the 'right to life' debate indicates that there is no right to life enshrined in the Constitution of Morocco (adopted in 1996). Likewise, the Algerian Constitution (adopted in 1976, and amended in 1996), does not guarantee the right to life explicitly, although Article 32 does protect the "fundamental human and citizen's rights and liberties", and Article 33 states that "individual or associative defence of the fundamental human rights and individual and collective liberties are guaranteed". It does not however, go so far as to define what are considered "fundamental human rights".

The Constitution of Tunisia adopted in 1959, and amended in 1988, does not guarantee a right to life, nor does it protect human rights. Mauritania's Constitution of 1991, under Article 10, protects many "public and individual freedoms", such as the freedom of intellect, travel and association, but not the right to life.

Neither civil nor Islamic law – on which the Constitutions of all four countries are based – are orientated towards individual rights, as both view the relationship between the state and the citizen as non adversarial²³¹. The Qur'an is concerned with duties (*farud*) that a person has towards God and other people, rather than rights (*huquq*), and the emphasis is on the community rather than the autonomous individual. Further, as the individual is an integral part of the state, there is no need to outline rights for the individual distinct from the state.²³²

Issues arising from litigating capital crimes

There is some evidence that indicates that a strategy to remove the death sentence relying *solely* on litigation is as much a part of the problem as of the

Nevis (*Berthill Fox v R* (Appeal No. 66 of 2000), 11 March 2002), Belize (*Patrick Reyes v R* (Appeal No. 64 of 2001), 11 March 2002) and St. Lucia (*R v Peter Hughes* (Appeal No. 91 of 2001), 11 March 2002).

²²⁹ The US Supreme Court has recently agreed to hear a challenge on the use of lethal injection in the case of *Baze v. Rees*, No. 07-5439. The method of hanging in Uganda was upheld in *Kigula & Other v The Attorney General* (2005).

²³⁰ In *Coker v. Georgia* (1977), the US Supreme Court barred the death penalty for the crime of rape, and by implication, for any offence which did not result in the death of another person. A challenge to death penalty for drug related offences was recently turned down by the Indonesian Constitutional Court. See Nathalia (2007).

Artz, D. (1990) The Application of International Human Rights Law in Islamic States. *Human Rights Quarterly*, 12, 202-230

²³² Artz, D. (1990) The Application of International Human Rights Law in Islamic States. *Human Rights Quarterly*, 12, 202-230

solution.²³³ The unintended, though entirely foreseeable, consequences of legal victories can be illustrated by the experiences of the USA and the British Commonwealth Caribbean where reliance solely on litigation strategies has arguably had the effect of entrenching capital punishment as each legal ‘victory’ sets off a chain of further litigation and counter-litigation. In the USA, the effectiveness of the federally funded capital defence resource centres in stalling executions can be said to have led to an increase in capital punishment legislation, an increase in the number of capital crimes, severe restrictions to the appeal process and the removal of federal funding.²³⁴ The damage that this could have caused was in great measure mitigated by the presence of an otherwise richly resourced activist infrastructure available in the USA, which is not the case in other parts of the world.

For several decades, lawyers from the UK have been actively involved in capital litigation in the British Commonwealth Caribbean through representation in the Judicial Committee of the Privy Council and supporting local lawyers with challenges in the domestic courts. A consequence of these ‘victories’, which laudably had secured fundamental protections for their clients, has been to attract considerable hostility from all sectors of Caribbean society. Against this background and in a climate of endless litigation, it was only a matter of time before the region raised the stakes, which is precisely what happened in Belize, Barbados, Trinidad & Tobago and Jamaica, all of whom began the process of amending their Constitutions in such a way as to overturn the fundamental protections secured by the domestic and UK legal communities. The ‘retaliatory’ nature of their responses even found their way into the discussions about the recently established Caribbean Court of Justice, which was being characterised as a ‘hanging’ court, one of whose purposes was to restore ‘justice’ and the ‘will of the people’ to the region, though the framers refuted this.²³⁵ To date, Belize and Barbados have amended their Constitutions though it is only Barbados that has enacted the amendments. More recently Barbados’s Attorney General Freundel Stuart confirmed, in an interview that the government is moving to abolish the mandatory death penalty. There has not been a hanging - the method used to carry out the death penalty in Barbados - since 1984.²³⁶ In October 2009 the Inter-American Court of Human Rights [IACHR] quashed the death sentence imposed on Tyrone DaCosta Cadogan and declared that all mandatory sentences of death in Barbados are a violation of the right to life.

The Jamaican debate has taken place against a backdrop of an alarming number of homicides and other violent crimes, pressing the political imperative of being seen to do something – anything. Jamaica, with a population of 2.7 million recorded 1,671 homicides in 2005, 1,300 in 2006²³⁷ and 1574 in 2007. Jamaica has not carried out an execution since 1988 and thus sits very comfortably in the *de facto* abolition statistics. Leading up to the elections in 2007, both main parties focussed attention on the high homicide rate and the party then in opposition, the Jamaica Labour Party, chastised the governing party the Peoples’ National Party for failing to

²³³ Hodgkinson, P. (2005), The Unintended, Entirely Foreseeable Though Perhaps Unavoidable Consequences of Litigating the Abolition of Capital Punishment, 13 *Amicus Journal*, 2005

²³⁴ For example, the 1996 Antiterrorism and Effective Death Penalty Act, signed into law on 24 April 1996.

²³⁵ For a summary of some of the discussions, see Anthony (2003).

²³⁶ 05/05/2009 Caribbean360.com

²³⁷ Gayle, B. and Sinclair, G. (2007), ‘2006 Year in Review: Crime and Justice - Police gain ground but murders still high’, *Jamaica Gleaner*, 15 January 2007, available at: <http://www.jamaica-gleaner.com/gleaner/20070115/lead/lead9.html>,

reinstitute executions. The Jamaica Labour Party were returned to government after a lengthy period in opposition and have recently decided to hold a conscience vote on the question of whether the death penalty should be retained. If the vote supports the retention of the death penalty, the Jamaican government has said that it will work towards speeding up the appeal process²³⁸ so that executions can take place within the 5 year time limit imposed under *Pratt and Morgan*²³⁹. The resumption of executions is of even greater concern in Trinidad & Tobago, which is a friend of the death penalty.²⁴⁰

Other derogations from international human rights standards and protections have been undertaken, for instance, removal of the protections afforded by the First Optional Protocol of the ICCPR in Jamaica in January 1998, Trinidad & Tobago in May 1998, and Guyana in December 1998. This has the effect of denying to all citizens of these countries the right to individual petition of the Human Rights Committee. Both Guyana and Trinidad & Tobago attempted to re-accede to the First Optional Protocol on the day of withdrawing but with a reservation attempting to exclude all those on death row from taking up the right to individual petition. The Human Rights Committee concluded that to exclude a whole group of persons from this right was so discriminatory and contrary to the object and purpose of the ICCPR that the reservation was invalid.²⁴¹ Therefore, in the latter states, all citizens, not just those on death row, continue to be denied the right to individually petition the Human Rights Committee.

Thus a strong argument could be advanced that the 'victories' of the defence and the pique of the vanquished have led to an entrenchment of the death penalty, as well as the far reaching consequences of denying every citizen protection against violations of other human rights. It is difficult to know quite how this impasse can be negotiated without recourse to further resource-sapping litigation.²⁴²

Aspects of International, regional and domestic law

- African Charter of Human & Peoples' Rights

The African Charter falls short of prohibiting capital punishment. However Article 4 states: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right"

The Commission has never been presented with a direct challenge to the death penalty. In a meeting in Kigali in 1999 the African Commission adopted a 'Resolution Urging States to Envisage a Moratorium on the Death Penalty'. However this was more directed towards ensuring the death penalty was not being

²³⁸ Henry, B. (17th December 2007). More Death Penalty Delays. *Jamaica Observer*. Available from http://www.jamaicaobserver.com/news/html/20071217T010000-0500_130460_OBS_MORE_DEATH_PENALTY_DELAYS_.asp

²³⁹ *Pratt and Morgan v. Attorney-General of Jamaica* (1993, 4 ALL ER 769).

²⁴⁰ Trinidad and Tobago, with a population of 1 million recorded 386 homicides in 2005 (Seelal 2006) and 269 in 2006 (Ramnarine 2007).

²⁴¹ *Rawle Kennedy* (Communication 845, 1999).

²⁴² Mendes, D. and Delzin, G. (2005), 'Using the Bill of Rights to halt executions: A reply to Peter Hodgkinson', 15 *Amicus Journal*, 18-21

implemented without the safeguards provided in the Charter. The resolution indicates that the Commission did not regard capital punishment as contrary to the Charter.

A worrying tendency exists for states to go ahead with executions even though proceedings are pending at the African Commission. In 1998 the Commission held the trial of Nigerian activist Ken Saro-Wiwa violated the due process provisions of Article 7 of the Charter and thus was arbitrary (in violation of Article 4). Ken Saro-Wiwa had been executed in November 1995, despite the request of the Commission for his execution to be stayed while a decision was pending. In 2001 Mariette Bosch was executed in Botswana despite her petition invoking the Charter to challenge her death sentence being pending.²⁴³

- Delay

In the Zimbabwean case of *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General*²⁴⁴ the issue of delay in carrying out executions was considered. It was held that delay in imposition of death sentences of up to 72 months was contrary to Article 15(1) of the Zimbabwean Constitution, which provides that no person shall be subjected: “to torture or to inhuman or degrading punishment or other such treatment”.

The judgment relied on several US Supreme Court²⁴⁵ decisions as well as the opinions of Indian judges²⁴⁶ and those of the Judicial Committee of the Privy Council²⁴⁷ describing the effects of being on death row. The sentences were commuted to life imprisonment.

Chief Justice Gubbay stated: “Humaneness and dignity of the individual are the hallmarks of civilized laws. Justice must be done dispassionately and in accordance with constitutional mandates.”

The 28 prisoners released from death row in Kenya by President Kibaki had been detained for 15-20 years in Kamiti Maximum Security Prison after the rejection of their appeals. A reported 50% of death row prisoners in Kenya are waiting for their

²⁴³ Dirk van Zyl Smit, *‘Death Penalty in Africa’* 2003, Unpublished, 9

²⁴⁴ Supreme Court of Zimbabwe, 1993, Judgement No. S.C. 73/93, 14 Hum. Rts. L.J. 323 (1993)

²⁴⁵ *People v Anderson* 493 P.2d. 8880 (1972) Wright CJ stresses the torturousness of delay involved in the death penalty at 892, 894-5. *District Attorney for Suffolk District v Watson* Mass. 411 N.E. 2d 1274 (1980) held the death penalty to be a violation of the cruel punishment clause in the state’s constitution

²⁴⁶ *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746, held the right to live with basic human dignity implicit in the right guaranteed under Article 21 of the Constitution, included the right not to be subjected to torture or cruel, inhuman or degrading treatment. *Triveniben and Others v State of Gujarat and Others* (1989) 1 S.C.J. 383 held only the delay since the end of the judicial process was relevant. In *Madhu Mehta v Union of India* [1989] 3 S.C.R. 775 it was held that an eight-year wait for the outcome of a mercy petition to the President was too long and the sentence was commuted to life imprisonment.

²⁴⁷ *Riley and others v Attorney-General of Jamaica* [1982] 3 All ER 469 (PC). Although there was found to be no breach of the Jamaican Constitution in carrying out a death sentence it was stated: “Sentence of death is one thing: sentence of death followed by lengthy imprisonment prior to execution is another”

appeals to be heard. One prisoner in Shimo La Tewa prison was found to have been waiting 32 years for his appeal.²⁴⁸ The issue of delay in carrying out executions in Uganda was put before the Supreme Court in *Susan Kigula and 416 Others v. Attorney General*. The Justices held that it was unconstitutional to keep an inmate on death row for more than three year, after which the sentence must be reduced to life. The average stay on death row for Uganda's condemned is ten years. The Supreme Court ruling came the day after the President pardoned Chris Rwakasisi, who had spent over twenty years awaiting execution.²⁴⁹

- **Mandatory death penalty**

Indications prevail that African countries are moving away from the mandatory death sentence for certain crimes. Zambia reduced the scope of capital punishment by making it discretionary for the crime of murder, instead of mandatory.²⁵⁰ The mandatory nature of the death penalty can have a distorting effect on the criminal justice system. For example it is the only sentence available for armed robbery in several countries in Africa, including Kenya and Nigeria.²⁵¹ Those who call for the death penalty for those convicted of sexual offences, such as the recent Kenyan case involving a 4 year old child, Miss X, express anger that robbery with violence²⁵² is a capital offence, when other, seemingly more heinous crimes attract lesser punishment.²⁵³ The mandatory death penalty in Jamaica was declared unconstitutional by the Privy Council in the case of Lambert Watson²⁵⁴ In 2002 the Judicial Committee Privy Council case of Fox²⁵⁵ declared the mandatory death penalty of St. Christopher and Nevis unconstitutional, followed with Belize (Reyes²⁵⁶), St.Lucia – Hughes.²⁵⁷ In 2007 the High Court in Malawi declared the mandatory death penalty unconstitutional in the case of *Kafantayeni & Ors*²⁵⁸. However, the decision stands unappealed as the Attorney-General did not make a representation in the case. To our knowledge at the time of writing no alternative sentence has been handed down in murder cases²⁵⁹ and appeals against sentences are not forthcoming as there is a concern that the Supreme Court will not recognise the High Court's decision.²⁶⁰

²⁴⁸ Notes on the Death Penalty in Kenya, British High Commission, 30 September 2003

²⁴⁹ Afedraru, L. (22nd January 2009). Ugandan Supreme Court Upholds Death Sentences. *The Monitor*. Available from http://www.monitor.co.ug/artman/publish/news/Ugandan_Supreme_Court_upholds_death_sentence_78608.shtml

²⁵⁰ Op cit. Fn 8, 41

²⁵¹ Op cit. Fn 8, 173

²⁵² A mandatory capital charge of robbery with violence can be brought in Kenya if the defendant is found in possession of a penknife/scissors, which are deemed to be offensive weapons. Cases of robbery with violence or attempted robbery with violence are heard in the Kenyan Magistrate's courts where there is no legal aid. As a result many death row prisoners were condemned without access to legal representation.

²⁵³ Lucy Oriang, 'For Rapists, Death Penalty is Kind' Comment, Daily Nation, 12 December 2003

²⁵⁴ Watson v R (Jamaica) [2004] UKPC 34 (07 July 2004) Privy Council Appeal No. 36 of 2003

²⁵⁵ Berthill Fox v R (Appeal No 66 of 2000) St Christopher and Nevis, 11 March 2002

²⁵⁶ Patrick Reyes v R (Appeal No 64 of 2001) Belize, 11 March 2002

²⁵⁷ R v Peter Hughes (Appeal No 91 of 2001) St. Lucia, 11 March 2002

²⁵⁸ *Kafantayeni & Ors* Constitutional Case No. 12 of 2005

²⁵⁹ Sarah Steinhardt CCPS Internship Reports 2008

²⁶⁰ Tatyana Eatwell CCPS Internship Reports 2008

Murder carries a mandatory death sentence in Singapore²⁶¹, Malaysia²⁶² and Thailand²⁶³ – although Singapore is an anomaly in that the level of intent required for a death to be classified as murder is only the intent to injure, not kill.²⁶⁴

The mandatory death penalty does not exist in the Northern African region – death sentences are passed at the judge's discretion for all capital crimes²⁶⁵. Hypothetically, the mandatory death penalty does exist in Shari'a, whereby some Hadd offences (apostasy and adultery) carry a fixed sentence of death. However, that can be mitigated through repentance.²⁶⁶

In 2005, Uganda's Constitutional Court ruled, three to two, that the mandatory death penalty was unconstitutional.²⁶⁷ The justices ruled that judges should have the discretion to pass a death sentence as not all crimes are the same.²⁶⁸ Prior to the ruling, six crimes had carried a mandatory death sentence.²⁶⁹ Those were sentences under the mandatory provision may now seek redress in the High Court – an avenue previously not open to them – although they may be re-sentenced to death, once mitigating circumstances have been taken into account.²⁷⁰ On the 21st January 2009 the Uganda Supreme Court upheld the judgment of the Constitutional Court in Kigula by 6:1 that the mandatory death sentence was unconstitutional.

Arab Charter on Human Rights

The Arab Charter on Human Rights was originally adopted by the League of Arab States in 1994, but as no country was prepared to ratify it, a revised charter was adopted in 2004, coming into force on 15th March 2008, after it was ratified by the required seven countries. Members of the League of Arab States include Morocco, Algeria, Mauritania and Tunisia, as well as Libya, Egypt and the Sudan in the Northern African region, and all have adopted the Charter, with Algeria and Libya being amongst those who have ratified it. The ACHR seeks to reaffirm the UN Declaration of Human Rights, as well as the ICCPR, but also to balance the cultural relativism of the Western based UN charters. Many Muslim states have entered reservations to UN treaties on articles that they consider "incompatible with the laws of Islamic Shari'a".

²⁶¹ Penal Code (Cap. 224, 1985 Rev. Ed. Sing.), section 302

²⁶² Malaysian Penal Code (F.M.S. Cap 45), Section 302

²⁶³ Amnesty International (10 October 2003). Thailand: Executions Must Stop. AI Index: ASA 39/00/772003

²⁶⁴ Penal Code (Cap. 224, 1985 Rev. Ed. Sing.), section 302

²⁶⁵ Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd Ed). Oxford, UK: Oxford University Press. (p.172-6)

²⁶⁶ Hakeem, F. (2003). Alternative Perspectives on Penalty under Shari'a: A Review. *International Journal of Comparative and Applied Criminal Justice*, 27(1), 85-105

²⁶⁷ *Susan Kigula and 416 Others v. Attorney General*, Constitutional Petition No. 6 of 2003, 5 June 2005

²⁶⁸ Mail & Guardian. (10th June 2005). *Ugandan Court Upholds Death Penalty*. Available from <http://www.mg.co.za/article/2005-06-10-ugandan-court-upholds-death-penalty>

²⁶⁹ Fitzgerald, E., Starmer, K., A guide to Sentencing in Capital Cases, The Death Penalty Project, Oxford, UK: Holywell Press, 2007, pp. v-vi, 1-2. Also available at http://www.deathpenaltyproject.org/documents/A_Guide_to_Sentencing_in_Capital_Cases.pdf

²⁷⁰ Afedraru, L. (22nd January 2009). Ugandan Supreme Court Upholds Death Sentences. *The Monitor*. Available from http://www.monitor.co.ug/artman/publish/news/Ugandan_Supreme_Court_upholds_death_sentence_78608.shtml

Article 5 of the ACHR guarantees a right to life; however, the charter does not oppose the death penalty, it seeks only to clarify when it may be imposed. Article 10 states that only the “most serious crimes” merit a death sentence and that the condemned must have the right to seek clemency or a pardon. Article 11 prohibits the death penalty for political offences, and Article 12 states that the death penalty cannot be imposed on juveniles offenders (anyone under the age of eighteen at the time of the crime), nor on pregnant or nursing women.

There has been some controversy over the UNHRC's endorsement of the Charter, due to apparent anti-Semitic sentiments embedded within it. It calls for the rejection of Zionism, "which constitutes a violation of human rights and a threat to world peace", and Article 1B states that "Racism, Zionism, occupation and foreign control constitute a challenge to human dignity and are a fundamental obstacle to the human rights of people. It is a duty to condemn all such practices and to work towards their abolishment". The UN Watch objected to these “blatantly anti-Semitic” texts²⁷¹, without success.

- Cairo Declaration on Human Rights in Islam

The Cairo Declaration on Human Rights in Islam, which was adopted in 1990 by the Member States of the Organisation of the Islamic Conference, set out human rights in accordance with Shari'a. Article 2(a) states that “Life is a God-given gift and the right to life is guaranteed to every human being”. However, the issue of capital punishment is not addressed directly, due to the explicit support for the death penalty within the Qur'an. Article 2(c) states that “the preservation of human life *throughout the term of time willed by God* is a duty prescribed by Shari'a” (italics added), which leaves the possibility for the death penalty open, as it is condoned by God in the Qur'an.

²⁷¹ Ratzlav-Katz, N. (30th January 2008). UN Chastises Israel, Praises Arab States, and Disappoints Canada. *Israel National News*. Available from <http://www.israelnationalnews.com/News/News.aspx/125094>

Chapter Twelve

The situation in Francophone Africa

- Legal Systems

Morocco, Tunisia, Algeria and Mauritania are all Muslim countries. All four countries have legal systems that are based on French civil law, and incorporate aspects of Shari'a (Islamic) law. Their civil legal codes date back to occupation by France up until the last century – Morocco, Algeria and Mauritania were all colonies, Tunisia was a protectorate.

Article 6 of the Moroccan Penal Code declares Islam the official state religion,²⁷² although Shari'a is only applied to family law, including matters such as marriage, divorce and child custody. After gaining independence from France in 1956, the King Hassan of Morocco chose to maintain the secular legal system, but a year later implemented a Code of Personal Status (*Moudawana*) which ensured that principles of Islamic jurisprudence (*fiqh*) applied to family law.²⁷³

Tunisia, likewise, introduced a Code of Personal Status in 1956, after gaining autonomy from France that year. The post-independence Constitution of Tunisia was adopted in 1959, and Article 1 declared that Islam is the official religion of the country.²⁷⁴ Shari'a courts were abolished after independence, although Islamic law continued to be applied to family matters.

Algeria's legal system incorporated Islamic principles in matters of personal status and succession from 1916, under French rule. After Algeria gained independence in 1962, the Marriage Ordinance (1959) and its successor, the Family Code (1984) maintained Shari'a as a residual source of law in family matters under the new Constitution.²⁷⁵ Article 2 of the Constitution cites Islam as the official state religion²⁷⁶.

Mauritania gained independence from France in 1960, becoming an Islamic republic. Islamic law was introduced to Mauritania in 1980,²⁷⁷ although political upheaval has resulted in the current penal code currently embodying aspects of both civil and Islamic law.

- Terrorism

An upsurge in terrorist activities in North Africa – by and large linked to extremist Islamic groups – have stunted attempts to bring about the abolition of capital punishment. In Morocco, an abolition bill was supposed to be brought before parliament in April 2007; however, a bomb was detonated in an internet cafe in

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<http://www.law.emory.edu/ifl/legal/morocco.htm>

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<http://www.law.emory.edu/ifl/legal/morocco.htm>

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<http://www.law.emory.edu/ifl/legal/tunisia.htm>

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<http://www.law.emory.edu/ifl/legal/Algeria.htm>

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<http://www.law.emory.edu/ifl/legal/Algeria.htm>

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<http://www.unhcr.org/refworld/country,,USCIS,,MRT,456d621e2,3ae6a6a33c,0.html>

Marrakech, killing four, and the threat posed by similar terrorist activities in the region brought a halt to any abolition movement.²⁷⁸

Such terrorist activities have also brought about the passage of punitive - often capital - anti-terrorist laws. In May 2003, an anti-terrorism bill was passed in the Moroccan parliament that made crimes of terrorism eligible for the death penalty. This was in response to the terrorist attacks in Casablanca that year. Within two years of the passage of this bill, 17 people had been sentenced to death under the new statute.²⁷⁹ However, while terrorism seems the motivating factor for retaining the death penalty in Morocco, three defendants found guilty of planning terrorist attacks in 2003 were pointedly spared the death penalty, despite prosecutorial demands, and instead given life sentences.²⁸⁰ A Casablanca court sentenced four men to death in 2003 for the May bombings that had claimed the lives of 45 people (12 of whom were suicide bombers). The condemned were part of the Islamic extremist group Salafia Jihadia.²⁸¹

In 2008, an Algerian court sentenced to death three Islamic militants in absentia for crimes of murder, kidnapping and terrorism,²⁸² and that same year, the Tunisian Court of Appeals upheld the death sentences of 30 convicted terrorists.²⁸³ The continued presence of terrorist activity in the region appears to reinforce the believed necessity of the death penalty.

- Abolition

Moves have been made in Morocco, Tunisia and Algeria to abolish the death penalty. On 28th February 2007, the King Mohammed VI of Morocco granted clemency to fourteen offenders on death row to mark the birthday of the King's daughter – a move that was seen by many as a step towards abolition.²⁸⁴ In Algeria, in 2004, the Minister of Justice, Tayeb Belaiz, announced the desire to limit the scope of the death penalty due to the fact that a host of countries refuse to extradite criminals to Algeria on the grounds that they may face execution.²⁸⁵ In Tunisia, despite the fact that the courts continue to pass death sentences, President Ben Ali almost always grants clemency to the condemned.²⁸⁶

²⁷⁸ Ouali, A. (20 May 2008). Morocco: Suicide Bombings Delay Death Penalty Abolition. *IPS*
²⁷⁹ Arnold, J. (4th April 2008). Islamic Society, Human Rights and the Death Penalty: Capital Punishment in Morocco. *The Travel Source*. Available from <http://www.openpr.com/pdf/32838/Islamic-Society-Human-Rights-and-the-Death-Penalty-Capital-Punishment-in-Morocco.pdf>

²⁸⁰ BBC News. (19 September 2003). Three Get Life in Morocco Trial.

²⁸¹ BBC News. (19 August 2003). Death Sentences for Morocco Bombings. Available from <http://news.bbc.co.uk/1/hi/world/africa/3162285.stm>

²⁸² International Herald Tribune. (24 February 2008). Report: Algerian Court Sentences 3 to Death in absentia on Terror-Related Charges. Available from <http://www.iht.com/articles/ap/2008/02/24/africa/AF-GEN-Algeria-Terror-Trial.php>

Amnesty International. (22 February 2008). *Court Decision in Tunisia to Uphold Death Sentence is Injustice*. Available from <http://www.amnesty.org.au/news/comments/9486/>

²⁸⁴ Ouali, A. (12 March 2007). Morocco Edges Closer to Abolishing the Death Penalty. *Mail and Guardian Online*

²⁸⁵ Arborlaw. (16 July 2008). *The Death Penalty in Arabic Today*. Available from <http://arborlaw.com/blog/the-death-penalty-law-in-arabic-today/>

²⁸⁶ Chamass, M., World Coalition Against Death Penalty, June 2008, pp. 24-25. Also available at <http://www.worldcoalition.org/modules/wfdownloads/visit.php?cid=30&lid=205>, retrieved on 23 November, 2009

The Tunisian parliament introduced legislation to abolish the death penalty in 2008, which, if passed, would end the use of capital punishment within the next two years.²⁸⁷ Likewise, Morocco introduced a bill to abolish the death penalty in April 2007, although terrorists' activities brought it to a swift halt. Morocco abstained from the US General Assembly vote on an execution moratorium in December 2007, because the Moroccan government had not, according to the justice minister Abdelouahed Radi, resolved the issue.²⁸⁸ Algeria was the only Arab nation to vote in favour of the UN General Assembly moratorium on the death penalty.²⁸⁹

- Execution data and process

In Morocco, the mandatory waiting period between sentence and execution is two weeks.²⁹⁰ An appellate review is not automatic under Moroccan law – the condemned must trigger the appeal.²⁹¹ In Tunisia, the mandatory time between imposition of the sentence and it actually being carried out is two weeks.²⁹² Unlike Morocco, a death sentence is subject to an automatic review by an appeals court. Appeals can be based on questions of law, fact, procedure and severity of penalty.²⁹³ In Mauritania, upon sentence of death being imposed, the condemned may appeal, and then ask for a pardon. The execution cannot be carried out until the pardon has been denied.²⁹⁴

- Capital crimes

Morocco has death penalty provision for the crimes of aggravated murder, torture, armed robbery, arson, treason, desertion, attempt on the King's life and terrorist crimes under Article 16 of the penal code.²⁹⁵ The death penalty remains on the books in Mauritania for murder, rape, high treason, apostasy, homosexuality and torture.²⁹⁶ Mauritania is the only one of the four countries that punishes *Hadd* offences (crimes against Divine Will) - namely, homosexuality and apostasy. Apostasy is a crime in Algeria, although it is not punishable by death.²⁹⁷ Algeria retains the death penalty for a host of crimes, including terrorism, which came into effect in 1992. The Algerian penal code was modified in 2000, reducing the number

²⁸⁷ Oldfield, J. (2007). The Death Penalty in the Arab World. *ACHRS 2nd Annual Report*
²⁸⁸ Ouali, A. (20 May 2008). Abolitionists Resigned to Long Wait. *Inter Press Service News Agency*
²⁸⁹ Oldfield, J. (2007). The Death Penalty in the Arab World. *ACHRS 2nd Annual Report*
²⁹⁰ Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd ed.). Oxford, UK: Oxford University Press (p.103)
²⁹¹ Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd ed.). Oxford, UK: Oxford University Press (p.103)
²⁹² Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd ed.). Oxford, UK: Oxford University Press (p.103)
²⁹³ Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd ed.). Oxford, UK: Oxford University Press (p.157)
²⁹⁴ Hands Off Cain. (2008). Available from <http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=25&nome=mauritania>
²⁹⁵ <http://www.openpr.com/news/32838/Islamic-Society-Human-Rights-and-the-Death-Penalty-Capital-Punishment-in-Morocco.html>
²⁹⁶ Oldfield, J. (2007) The Death Penalty in the Arab World. *ACHRS 2nd Annual Report*
²⁹⁷ World Net Daily. (30 March 2006). *Anti-Conversion Law Passed in 'Tolerant' Algeria*. Available from http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=49495

of capital crimes.²⁹⁸ In Tunisia, murder, violence and aggression, and attacks against the internal or external security of the State are all punishable by death.²⁹⁹

All four countries are considered abolitionist in practice, as none have carried out executions within the last ten years. Morocco last used the death penalty in 1993, when the police commissioner, Mohammed Tabet, was executed by firing squad for the rape and murder of hundreds of women.³⁰⁰ Since Morocco gained independence from France in 1956, there are believed to have been about 40 executions.³⁰¹ Algeria has not carried out any executions since 1993, when all death sentences were commuted to life imprisonment.³⁰² Mauritania carried out its last execution in 1987, when three officers in the armed forces were put to death for attempting to overthrow the regime,³⁰³ and Tunisia last carried out the death penalty in 1991.³⁰⁴

Nonetheless, people continue to be sentenced to death in these countries with Algeria having one of the highest rates of death sentences passed in the world. In 2008, at least 300 people were sentenced to death, largely for terrorist crimes, and often in absentia. Only two other countries (China and Pakistan) passed more death sentences that year.³⁰⁵ In Tunisia, there are thought to be about 100 prisoners on death row,³⁰⁶ in Morocco, there are approximately 131 condemned prisoners.³⁰⁷

- Prison conditions

The conditions of Morocco's death row have been described as "catastrophic and inhumane...even worse than the execution itself".³⁰⁸ Most condemned prisoners are housed in the central prison of Kenitra, which is 130 km north of Casablanca, meaning that many of the inmates are situated miles apart from their families, who, in many instances, are too poor to travel to the prison to visit their loved ones, adding to the isolation felt by the condemned. Due to underfunding of the prison services, the standards of sanitary conditions in the prisons are appalling, meaning illness and disease is rife. The prison authorities are also unable to provide basic medical care for the prisoners. Death row inmates also contend with food that's "not even fit for

²⁹⁸ Oldfield, J. (2007). The Death Penalty in the Arab World. *ACHRS 2nd Annual Report*
²⁹⁹ Pomatto, V., Amman Centre for Human Rights Studies, ACHRS Statement against the Death Penalty, 2008, pp. 16-17. Also available at http://www.achrs.org/english/images/stories/news/pdf/Death_Penalty_Report_2008.pdf retrieved on 23 November, 2009
³⁰⁰ Arnold, J. (4th April 2008). Islamic Society, Human Rights and the Death Penalty: Capital Punishment in Morocco. *The Travel Source*. Available from <http://www.openpr.com/pdf/32838/Islamic-Society-Human-Rights-and-the-Death-Penalty-Capital-Punishment-in-Morocco.pdf>
³⁰¹ Hamilton, R. (23 January 2007). Morocco May Abolish Death Penalty. *BBC News*. Available from <http://news.bbc.co.uk/1/hi/world/africa/6291907.stm>
³⁰² Oldfield, J. (2007). The Death Penalty in the Arab World. *ACHRS 2nd Annual Report*
³⁰³ Oldfield, J. (2007). The Death Penalty in the Arab World. *ACHRS 2nd Annual Report*
³⁰⁴ Oldfield, J. (2007). The Death Penalty in the Arab World. *ACHRS 2nd Annual Report*
³⁰⁵ Racelma, K. (20 October 2008). Algeria: Death Sentences Follow Fugitives Thick and Fast. *IPS*. Available from <http://ipsnews.net/news.asp?idnews=44352>
³⁰⁶ Amnesty International (2008) *Tunisia – AI Report 2008*. Available from <http://www.amnesty.org/en/region/tunisia/report-2008>
³⁰⁷ Ouali, A. (12 March 2007). Morocco Edges Closer to Abolishing the Death Penalty. *Mail and Guardian Online*
³⁰⁸ Ouali, A. (19 August 2008). Firing Squads Silent – But Death Hovers. *IPS*. Available from <http://ipsnews.net/news.asp?idnews=43598>

sewer rats", and, as a result, many suffer from malnourishment.³⁰⁹ Furthermore, Moroccan death row inmates live in constant fear of execution, allegedly wedging pieces of wood behind their cell door so that they will be woken should a guard enter their cell while they sleep. They constantly fear being singled out for execution.³¹⁰

- Police treatment of suspects

An ex-convict at Essaouira prison reported that he met several death row inmates who claimed that they were innocent, and that the police investigating their crimes did not do so properly, having used violence to extract a confession.³¹¹ Abdelkebir Goumarra, serving life for the Casablanca bombings, made similar allegations of police brutality. He claimed that upon arrest he was handcuffed, blindfolded, and had a sack put over his head. For seven days, he alleges that he was tortured, being stripped naked, forced to sit on a coke bottle, and tortured in "sensitive areas". He also had water thrown over his head, cigarettes extinguished on his skin. The illiterate Goumarra was then forced to sign a document.³¹² In July 2007, a prisoner in Agadir, Dad Ould Hamma Ould Nafaa reportedly died as a result of not receiving adequate medical attention after suffering abuse at the hands of his interrogators.³¹³

³⁰⁹ Ouali, A. (19 August 2008). Firing Squads Silent – But Death Hovers. *IPS*. Available from <http://ipsnews.net/news.asp?idnews=43598>

³¹⁰ Ouali, A. (20 May 2008). Abolitionists Resigned to Long Wait. *Inter Press Service News Agency*

³¹¹ Ouali, A. (20 May 2008). Abolitionists Resigned to Long Wait. *Inter Press Service News Agency*

³¹² Faramarzi, S. (11 May 2006). Inmates Speak of Life in Morocco Prison. *Mail & Guardian Online*. Available from <http://www.mg.co.za/article/2006-05-11-inmates-speak-of-life-in-morocco-prison>

³¹³ U.S. Department of State. (11 March 2008). *Morocco: Country Reports on Human Rights Practice*. Available from <http://www.state.gov/g/drl/rls/hrrpt/2007/100602.htm>

Chapter Thirteen

The situation in North Africa

Only one Arab country, Djibouti, has abolished the death penalty for all crimes.³¹⁴ 77% of Arab countries retain the death penalty, compared to 32% of countries worldwide.³¹⁵ In the North Africa region, five countries still actively carry out death sentences: Libya, Egypt, Chad, Guinea and the Sudan. Along with Morocco, Tunisia, Algeria and Mauritania, three other countries are non-active retentionist - Mali, Niger and Burkina Faso - having not carried out executions in at least ten years. The last execution in Mali took place on 21st August 1980, when two people were hanged for murder and armed robbery.³¹⁶ On 10th December 1997, the president of Mali, Alpha Oumar Konare, commuted all death sentences to mark the international human rights day.³¹⁷ Niger carried out its last execution in 1976, when three military personnel were shot for their part in a failed coup d'etat,³¹⁸ and, more recently, the last execution in Burkina Faso took place in 1988, when seven people were shot for the murder of an army officer and his wife.³¹⁹ In 2003, a court in Burkina Faso passed death sentences in absentia on Pierre Soulgane and Mahamady Congo for the murder of a Belgian woman,³²⁰ although the sentences have not been carried out.

Capital crimes under the Egyptian penal code are premeditated murder, abduction and rape, drug related offences, hijacking, espionage, perjury that results in execution, as well as political and military offences.³²¹ Article 2 of the Egyptian national charter states that Shari'a is "the principle source of legislation", although, as in Mauritania, *Hadd* offences are not punished.³²² The death penalty is nonetheless defended as a punishment ordained by Shari'a.³²³ Hanafi is the school of Shari'a used in Egypt – unlike other Muslim states in Northern Africa, who uniformly follow the Maliki school.³²⁴ In 2007, over 20 people were sentenced to death³²⁵ in Egypt, and in 2006, four people were executed.³²⁶ Between 1996 and

³¹⁴ Amnesty International. (2008). Abolitionist and Retentionist Countries. Available from <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>

³¹⁵ Oldfield, J. (2007). The Death Penalty in the Arab World. *ACHRS 2nd Annual Report*

³¹⁶ Mail & Guardian. (18 October 2007). *Mali Plans to Abolish Death Penalty*. Available from <http://www.mg.co.za/article/2007-10-18-mali-plans-to-abolish-death-penalty>

³¹⁷ Franck, G., Nyman, K, Schabas, W., *The barbaric punishment: abolishing the death penalty*, Netherlands: Kluwer Law International, 2003, page 109.

³¹⁸ West Africa Time to abolish the death penalty, 10 October 2003 available at <http://asiapacific.amnesty.org/library/Index/ENGAFR050032003?open&of=ENG-CPV> (See section Niger)

³¹⁹ <http://www.amnesty.org/en/library/asset/AFR05/003/2003/en/6a245dca-d687-11dd-ab95-a13b602c0642/afr050032003en.html> (See section Burkina Faso)

³²⁰ <http://www.fin.dk/NR/rdonlyres/8D78F04C-D84C-44A8-8539-012759CABCFF/0/div050.pdf>

³²¹ Amnesty International. (15 October 2004). *Egypt: Increasing Use of the Death Penalty*.

³²² Morrow, A. (8 November 2007). Egypt: Controversy swirls over when to Execute. *IPS*. Available from <http://ipsnews.net/news.asp?idnews=39980>

³²³ Carr, S. (6 June 2008). Tantawy Reiterates His Support for Death Penalty. *The Daily News Egypt*. Available from <http://www.thedailynewsegypt.com/article.aspx?ArticleID=14266>

Artz, D. (1990). The Application of International Human Rights Law in Islamic States. *Human Rights Quarterly*, 12, 202-230

³²⁵ Oldfield, J. (2007) The Death Penalty in the Arab World. *ACHRS 2nd Annual Report*

³²⁶ Oldfield, J. (2007) The Death Penalty in the Arab World. *ACHRS 2nd Annual Report*

2001, at least 382 people were sentenced to death in Egypt, and 114 executions were carried out.³²⁷

Islamic law has also gained favour in Libya, where the Penal code provides for corporal punishment for *Hadd* offences such as fornication and theft,³²⁸ after Colonel Gaddafi called for stricter implementation of Shari'a law in 1993. In Sudan, Penal Code 1983 introduced penalties for *Hadd* offences, and the laws of *Qisas* (retaliation) and *Diya* (blood money) were instated in the Sudanese Criminal Act 1991. Under these laws, two women were sentenced to death by stoning in 2007 for committing adultery.³²⁹

The commitment to Islam and Islamic law has proved an obstacle to abolition, due to its perceived endorsement of the death penalty. In 2007, Malian President Amadou Toumani Toure introduced a bill to abolish the death penalty however, the Bill has come up against fierce opposition in the National Assembly, with Islamic groups claiming abolition is contrary to Islamic principles.³³⁰

- Executions

Executions resumed in Guinea in 2001 after a hiatus of 17 years, when five people were put to death for offences including armed robbery and murder. The executions came as a response to 'increased lawlessness' in the country.³³¹ Likewise, a twelve year unofficial moratorium on executions in Chad, between 1991 and 2003, was brought to a swift conclusion with the firing squad executions of eight people – four for the murder of a Sudanese executive.³³² A ninth person was executed 3 days later, on 9th November 2003, having been sentenced to death in July 1998.³³³ The executions came after the government vowed to crack down on unrest in the country.³³⁴ The last execution to occur in Chad prior to the unofficial moratorium in 1991 was held in public, when four people were shot.³³⁵

In 2007, at least 23 people were sentenced to death in the Sudan, and seven were hanged,³³⁶ and most recent figures [2005] indicate there were an estimated

³²⁷ Amnesty International. (15 October 2004). *Egypt: Increasing Use of the Death Penalty*.

³²⁸ Amnesty International. (25 June 1997). *Libya: Gross Human Rights Violation amid Secrecy and Isolation*. AI Index: MDE 19/08/97

³²⁹ Amnesty International. (2008). *Sudan Report 2008*. Available from <http://www.amnesty.org/en/region/sudan/report-2008>

³³⁰ All Africa. (11 June 2008). *Mail: Religious Leaders Oppose Abolition of Death Penalty*. Available from <http://allafrica.com/stories/200806111005.html>

³³¹ BBC News. (5 February 2001). *Guinea's First Executions for 17 Years*. Available from <http://news.bbc.co.uk/1/hi/world/africa/1154792.stm>

³³² BBC News. (6 November 2003). *Chad Firing Squad Shoots Killers*. Available from <http://news.bbc.co.uk/1/hi/world/africa/3246867.stm>

³³³ News24. (10 November 2003). *9th Execution in Chad*.

³³⁴ News24. (10 November 2003). *9th Execution in Chad*.

³³⁵ Amnesty International. (6 November 2003). *Chad: Execution*. AI Index: AFR 20/001/2003

³³⁶ Amnesty International. (2008) *Sudan Report 2008*. Available from <http://www.amnesty.org/en/region/sudan/report-2008>

300 people on death row.³³⁷ Sudan is believed to have executed people who were juveniles at the time of the crime.³³⁸

Four Ghanaians were executed in Libya by firing squad in early 2008 for murder.³³⁹ In April 2007, nine people were allegedly put to death in Libya,³⁴⁰ and between 1992 and 1992, at least 38 people were executed.³⁴¹ Libya famously sentenced 5 Bulgarian nurses and a Palestinian doctor to death for allegedly infecting 426 children with the HIV virus. In July 2007, the Libyan government dropped the sentences in return for *diya*.³⁴²

Under Libyan law, the mandatory waiting period between sentence of death being passed and execution is thirty days.³⁴³ There is no right of appeal for the condemned.³⁴⁴

Death sentences in Egypt must be approved by the Mufti (supreme religious leaders) before they can be implemented.³⁴⁵ Appeals against the death sentence are only allowed to the Court of Cessation on points of law, not fact. The condemned may also seek clemency from the President.³⁴⁶ There is no right of appeal for death sentences passed by military courts,³⁴⁷ or by the Emergency Supreme State Security Court.³⁴⁸ Similar 'emergency' courts were set up in the Sudan during 2001, in the Darfur region, featuring two military judges and one civil judge, which do not allow the accused legal representation until the appeals stage.³⁴⁹ In 2002, 14 men were hanged after being sentenced by these 'Emergency' courts.

In Mali, the mandatory waiting period between sentence of death being passed and execution is three days.³⁵⁰ Likewise, the condemned in Chad have a

337 HRW. (6 September 2005). *Sudan: Detainees Suffer Arbitrary Arrest, Execution*. Available from <http://www.hrw.org/en/news/2005/09/06/sudan-detainees-suffer-arbitrary-arrest-execution>

338 HRW. (6 September 2005). *Sudan: Detainees Suffer Arbitrary Arrest, Execution*. Available from <http://www.hrw.org/en/news/2005/09/06/sudan-detainees-suffer-arbitrary-arrest-execution>

339 Marma, N 22 February 2008
http://mijaku.com/index2.php?option=com_content&do_pdf=1&id=106

340 Amnesty International. (2008). *Libya: AI Report 2008*. Available from <http://www.amnesty.org/en/region/libya/report-2008>

341 Amnesty International. (25 June 1997). *Libya: Gross Human Rights Violation Amid Secrecy and Isolation*. AI Index: MDE 19/08/97

342 NY Times. (24 July 2007). *Libya Frees Bulgarian Nurses in AIDS Case*. Available from http://www.nytimes.com/2007/07/24/world/africa/24france.html?_r=1

343 Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd ed.). Oxford, UK: Oxford University Press (p.159)

344 Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd ed.). Oxford, UK: Oxford University Press (p.157)

345 Amnesty International. (5 December 2006). *Egypt: Death Penalty*. AI Index: MDE 12/019/2006

346 Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd ed.). Oxford, UK: Oxford University Press (p.157)

347 Article 117, Law 25 (1966)

348 Article 12, Law 162 (1958), as amended (Emergency Law)

349 Amnesty International. (28 June 2002). *Sudan: Alarming Increase in Executions in Darfur Region*. AI Index: AFR 54/011/2002

350 Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd ed.). Oxford, UK: Oxford University Press (p.159)

mere three days mandatory waiting period before they can be executed³⁵¹. There is no full right of appeal in capital cases in Chad – the condemned may submit a cassation plea on the grounds of gross legal or factual error to the Supreme Court. Otherwise, the only recourse is a plea for clemency to the President.³⁵² In the case of the four men who were executed for the shooting of a Sudanese executive, the murder took place on 25th September 2005; the four alleged killers were sentenced to death exactly one month later, on 25th October, and executed on 6th November. As such, there was a mere 12 days between sentence being passed and carried out.³⁵³ The four had not exhausted their appeals in those 12 days, and no autopsy had been performed on the body of their alleged victim, nor was the bullet used to kill him ever found.³⁵⁴

- Terrorism

In keeping with other North African nations, the Egyptian government introduced anti-terrorism legislation in October 1992, in response to the upsurge in political violence of the early 1990s. Within the next 12 years, 67 people were executed for terrorist offences, and 95 people were sentenced (many in absentia) to death under the legislation.³⁵⁵

³⁵¹ Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd ed.). Oxford, UK: Oxford University Press (p.159)

³⁵² Amnesty International. (6 November 2003). *Chad: Execution*. AI Index: AFR 20/001/2003

³⁵³ Amnesty International. (6 November 2003). *Chad: Execution*. AI Index: AFR 20/001/2003

³⁵⁴ Sudan Tribune. (5 November 2003). *Four Sentenced to Death in Chad to be Executed Thursday*. Available from <http://www.sudantribune.com/spip.php?article793>

³⁵⁵ Amnesty International. (15 October 2004). *Egypt: Increasing Use of the Death Penalty*.

Chapter Fourteen

The situation in Vietnam and in the Asia Pacific

Secrecy is a salient feature of the death penalty in Asia-Pacific. China and Vietnam both consider death penalty practices to be 'state secrets', and thus do not disclose data on who they execute, or with what frequency. Both North Korea and Japan are also reticent about their use of the death penalty. In North Korea, the death penalty is public property as it is believed that several executions have been carried out in public and yet outside the country the sole source of information on capital punishment come from the reports of people who have subsequently left North Korea.³⁵⁶ Japan, on the other hand, has always excluded even its own citizens from details of its death penalty, until 2010 when under the direction of the current Justice Minister who, though an opponent of the death penalty, has opened the death chamber to public view. She also presided over a couple of executions. It is only in the past few years that they have released not only the numbers of those executed but details about the executed.³⁵⁷ There is no life sentence without the possibility of parole in the Japanese penal code.³⁵⁸

In China the number of executions per annum is estimated to be greater than the best estimates gleaned by organisations like Amnesty International. No official records exist but Amnesty International estimates that over 1,250 people were executed in 2007 though it needs to be acknowledged that pro rata to its population China's rate of execution is lower than most executing countries.³⁵⁹ Singapore has the highest execution rate per capita.³⁶⁰

There are no official published statistics from Vietnam, but it is estimated that about 100 people are sentenced to death annually of which approximately 50% are eventually executed. Indonesia resumed executions on 26 June 2008 after a 14 month break, a total of ten being carried out in the year. According to the General Attorney's Office, there are currently 111 inmates on death row.³⁶¹

- Execution data and process

In Vietnam, after the sentence of death is passed, the condemned has the right to appeal to the Appeals Court, and subsequently the Supreme Peoples' Court. If the sentence is affirmed, they may appeal to the President for clemency within seven days.³⁶² The state is then obliged to carry out the execution as soon as

³⁵⁶ Amnesty International. (2006). *North Korea: Human Rights Concerns*. AI Index: ASA 24/002/

³⁵⁷ Daily Mail. (2007, December 7). Japan Executes Three Murderers – and for the First Time Reveals Their Names and Crimes.

³⁵⁸ Ibid.

³⁵⁹ Amnesty International. (2008). *World Death Penalty Figures Down But Secrecy Surrounds China Execution Figures*. Available from http://www.amnesty.org.uk/news_details.asp?newsid=17729

³⁶⁰ Singapore, The Death Penalty: A Hidden toll of Executions. AI Index: ASA 36/001/2004, 15th January 2004

³⁶¹ Andriyanto, H. (19th December 2008). Dead Men Walking: Firing Squad Awaits 111 Inmates in Indonesia. *The Jakarta Globe*. Available from <http://www.thejakartaglobe.com/news/article/3880.html>

³⁶² Ibid

possible if clemency is rejected.³⁶³ Amnesty International recorded the maximum time between sentence and execution was 4 years, the minimum was 5 months, although legislators have bemoaned this time lapse caused by the appeals process.³⁶⁴ Executions are carried out by firing squad at 4am in the morning. The condemned are not given any advanced warning being woken before dawn and driven to the execution ground – a desolate spot, where the condemned will also be buried. It has been reported that upon arrival at the grounds, the condemned are met with the sight of a coffin, and a freshly dug grave.³⁶⁵ There, they are tied to a wooden pole (reportedly with lemons in their mouths to prevent them from screaming), and shot at by a five man firing squad. The commander of the execution team delivers a final shot to the condemned's ear.³⁶⁶ In 2004, however, a human firing squad was abandoned in favour of a mechanised gun because 30% of the shooters missed their target due to nerves, according to a police study.³⁶⁷ In 2005, the justice minister investigated the possibility of adopting the lethal injection in order to eliminate human error in executions, although the proposal was never implemented³⁶⁸. In rare instances, the condemned are put to death in public. Most recently, the execution of notorious mobster Truong Van Cam and four of his associates took place in front of a crowd of 500 in Ho Chi Minh City on 4th May 2004.³⁶⁹

Eleven people were granted presidential clemency between January and July 2003, while 19 were executed, and 59 were sentenced to death.³⁷⁰

- Capital crimes

In 1999, the National Assembly reduced the number of capital offences from 44 to 29 in keeping with “an international trend of humanisation and democracy”³⁷¹ and in 2003, fraud and corruption ceased to carry the death penalty, bringing the total down to 27.³⁷² In 2009 the number of offences attracting the death penalty was reduced from 29 to 21 far fewer than the 14 that had been anticipated.

Like many Asia-Pacific countries, drug crimes merit capital punishment. Trading, possessing or trafficking drugs carries a discretionary death penalty, for 3 1/2 ounces (100 grams) heroin or 176 ounces (5 kilograms) opium³⁷³ - tough drug laws stem from the fact that Vietnam is used as a transit route for drugs originating

³⁶³ Death Penalty News (23rd July 2003). Radio Australia News

³⁶⁴ *Ibid*

³⁶⁵ Death Penalty News (4th May 2004). Ireland Online

³⁶⁶ FIDH. (9th October 2008). The Death Penalty in the Socialist Republic of Vietnam. Available from <http://www.fidh.org/spip.php?article5906>

³⁶⁷ 'Too Nervous' for Death Penalty. (21st October 2004). News 24, people.smu.edu/rhalperi/updates.html

³⁶⁸ Radio Australia News. (25th June 2005). Vietnam Examining Alternatives to Death by Firing Squad.

³⁶⁹ Death Penalty News (4th May 2004). Ireland Online

³⁷⁰ *Ibid*

³⁷¹ Associated Press. (8th November 2004). people.smu.edu/rhalperi/updates.html

³⁷² Amnesty International (10th October 2003). Socialist Republic of Vietnam: The death penalty – inhumane and ineffective

³⁷³ Hood, R. (2002). *The Death Penalty: A Worldwide Perspective* (3rd ed.). Oxford, UK: Oxford University Press (p.82)

from the 'Golden Triangle', which links Laos, Thailand and Burma. At least 40% of all publicised death sentences in Vietnam are imposed for drug related crimes.³⁷⁴

- Access to and quality of legal services for the accused

In the Vietnamese legal system, defendants are presumed guilty unless proven innocent.³⁷⁵ According to Amnesty International, “a lawyer will be assigned to them (the defendant), but often not until the very last moment before their case is heard. The defence is not allowed to call or question witnesses, and private consultation with counsel may be limited.”³⁷⁶

Lawyers appointed to the defendants may be influenced by the State, are not necessarily independent and they do not have a right to speak to their client without a police or prison officer present. In addition, with limited time for trial preparations effective counsel is very difficult to obtain.

- Prison conditions

The conditions on death row in Vietnam, according to Amnesty International, are poor. Leg irons and shackles are used with regularity.³⁷⁷ Three to four inmates share one cell, which is unventilated, and contains only one latrine bucket. According to the FIDH, the prisoners have their legs chained to a pole, and are lined up in order of execution, the one to die soonest is nearest to the door.³⁷⁸

³⁷⁴ Amnesty International (10th October 2003). Socialist Republic of Vietnam: The death penalty – inhumane and ineffective

³⁷⁵ Associated Press (17th March 1997). Canadian Woman Sentenced to Death in Hanoi Drug Case

³⁷⁶ Amnesty International (10th October 2003). Socialist Republic of Vietnam: The death penalty – inhumane and ineffective

³⁷⁷ Amnesty International (10th October 2003). Socialist Republic of Vietnam: The death penalty – inhumane and ineffective

³⁷⁸ FIDH. (9th October 2008). The Death Penalty in the Socialist Republic of Vietnam. Available from <http://www.fidh.org/spip.php?article5906>

Chapter Fifteen

Drugs and the death penalty – confusion and inconsistency

Opium is sourced primarily in two areas of the world - The Golden Crescent, which is made up of the border areas of Pakistan, Iran and Afghanistan is the world's largest producer of opium; the Golden Triangle, which consists of the border areas of Thailand, Laos and Burma, is the world's second largest producer of opium. Perhaps it is therefore no surprise that the countries in these regions enforce harsh penalties for all drug related crimes but the penal policy objectives warrant some scrutiny. The death penalty for narcotic crimes is restricted almost exclusively to the Middle East and South East Asia.

Opium from the Golden Crescent tends to be trafficked through the Middle East, Africa and Central Asia ending up on the European and American market. Iran is a central transit route, with an estimated 53% of Afghan grown opium going through it.³⁷⁹ As such, Iran exercises punitive means to stem the flow of traffickers through its borders – possession of 100 grams of heroin is a capital crime, and drug smugglers are regularly executed, sometimes in public.³⁸⁰ Many Middle Eastern countries prescribe the death penalty for drug crimes, including Bahrain, Egypt, Iran, Iraq, Jordan, Kuwait, Libya, Pakistan, Qatar, Saudi Arabia, the Sudan and the UAE.³⁸¹

Opium from the Golden Triangle is usually trafficked through South-East Asia and Southern China, to supply Australia, Canada and East Asia³⁸². Nigeria is sometimes used as a trans-shipment point for heroin destined for Africa or the US,³⁸³ and this may explain the disproportionate number of Nigerian drug traffickers who end up on death rows across South East Asia.³⁸⁴

Like the Middle East, South-East Asian countries boast a punitive approach to narcotic crimes. Of the eight death penalty states in the region³⁸⁵ all have some form of capital drug statutes. Trafficking varying quantities of certain drugs carry a mandatory death sentence in Malaysia, Thailand and Singapore. China, Indonesia, Laos, Taiwan and Vietnam all have provisions for the death penalty for drug traffickers though none are mandatory. Heroin is the only drug that carries the death penalty in all eight countries.

³⁷⁹ UN World Drug Report. (2007). www.unodc.org

³⁸⁰ Lliev, N. (28th January 2009). Bulgarian Lorry Driver Faces the Gallows in Iran. *Sofia Echo*. Available from http://www.sofiaecho.com/article/death-row-bulgarian-lorry-driver-faces-the-gallows-in-iran/id_34263/catid_66

³⁸¹ Line, R. (2007). *The Ultimate Price*. Drug Link. Available from <http://www.ihra.net/Assets/543/1/Lines-DrugLink0707.pdf>

³⁸² Degenhardt, L., Day, C., and Hall, W. (2004). *The Causes, Course and Consequences of the Heroin Shortage in Australia*. NDLERF Monograph Series No. 3. National Drug Law Enforcement Research Fund: Adelaide.

³⁸³ Chalk, P. (2000), Southeast Asia and the Golden Triangle's Heroin Trade: Threat and Response. *Studies in Conflict and Terrorism*, 23, 89-196

³⁸⁴ For example, of the 58 narcotic smugglers on death row in Indonesia, 18 are Nigerian - a further 2 Nigerians were executed for drug trafficking in June 2008. Singapore, likewise, hanged 2 Nigerian drug smugglers in January 2007.

³⁸⁵ Malaysia, Thailand, Singapore, China, Indonesia, Laos, Taiwan and Vietnam

Drug amounts in grams that trigger the death penalty

Blue = discretionary death penalty

Red = mandatory death penalty

	Opium	Heroin	Cocaine	Cannabis	Amphetamines
CHINA	1000	50			
INDONESIA	Yes	Yes	Yes	Yes	
LAOS		500			3,000
MALAYSIA	1,000	15		200	
SINGAPORE		15	30	500	
TAIWAN	Yes	Yes	Yes		
THAILAND		20			
VIETNAM	5,000	100			

The quantity of drug that triggers the death penalty is determined by the distinction between possession for personal use, and trafficking – a quantity deemed too great for personal use is automatically assumed to be for distribution, and is therefore classed as trafficking. However, there is much discrepancy between countries over what quantity of drug triggers a capital sentence. Importing a mere 15 grams of heroin results in a mandatory death sentence in both Singapore and Malaysia, compared to 500 grams in Laos, or 100 grams in Vietnam. Trafficking 1,000 grams of opium in China carries a discretionary death sentence, but it requires ten times as much opium in Vietnam for the trafficker to be eligible for the death penalty. It is interesting to note that the more stringent restrictions on quantity are in place in the three countries that have a mandatory death sentence for trafficking. Further, as in the Middle East, countries –like Vietnam - that are used as transit routes for opium sourced in the Golden Triangle tend to treat smugglers more severely. According to Amnesty International, more people are sentenced to death for narcotic crimes than for any other offence in South East Asia³⁸⁶ - for example, of the 111 people on death row in Indonesia, 58 are there for drug related crimes,³⁸⁷ and at least a third of all publicised death sentences in Vietnam are imposed for drug related crimes.³⁸⁸

Addiction rates amongst these countries' populations is the predominant reason given for the application of such stringent drug laws. Drug addiction is prolific in South East Asia. In China, police data show that between 2000 and 2005, the number of drug users in the country increased by 35%³⁸⁹, and Indonesia's National Police Chief estimated that 1.2% of Indonesia's 210 million population are drug users.³⁹⁰ The Nation Anti-Drugs Movement (Gannas) states that Rp 30 trillion (\$2.76 billion) is spent on illegal narcotics per year.³⁹¹ Thailand has the highest rate of

³⁸⁶ Amnesty International. (10 March 2007). Rise in Drug Sentences.

³⁸⁷ Gelling, P. (11 July 2008). Indonesia Widens use of Death Penalty. *International Herald Tribune*. Available from <http://www.iht.com/articles/2008/07/11/asia/indo.php>

³⁸⁸ Amnesty International (10th October 2003). Socialist Republic of Vietnam: The death penalty – inhumane and ineffective

³⁸⁹ Amnesty International. (10 March 2007). Rise in Drug Sentences.

³⁹⁰ Amnesty International. (10 March 2007). Rise in Drug Sentences.

³⁹¹ Osman, N. (9th January 2009). Drug Offences Jump 64% Since '06. *The Jakarta Globe*. Available from <http://www.thejakartaglobe.com/news/national/article/5568.html>

methamphetamine (yaba) abuse in the world³⁹² and the UN estimates that Laos has the most opiate addicts, with 0.5% of the population using it, whereas 0.3% of Vietnamese use opiates, and 0.2% of the Malaysian population do likewise.³⁹³

The Middle East has a more serious opiate addiction problem than South East Asia with the UN estimating that Iran has the highest drug addiction rate in the world³⁹⁴ where 2.8% of the populations are opiate users.³⁹⁵ Afghanistan has a similar opiate problem, with 1.4% of its population abusing it and in Pakistan 0.7% of its population use opiates.³⁹⁶ Cannabis (hashish) poses a similar problem in the region where 3.6% of Afghans are users, as are 3.9% of Pakistanis. Iran has a 4.2% addiction rate, which is the same as Morocco.³⁹⁷ Morocco was the world's largest producer of hashish, although drug production was cut by 50% between 2004 and 2007.³⁹⁸ As with many drug producing nations, growing cannabis plants was the main source of income for Moroccan farmers and finding a suitable – and financially productive – alternate crop is difficult. It is estimated that a quarter of the population in Morocco receive income from hashish production.³⁹⁹ Poverty is a compelling factor in the drug trade, as it provides a livelihood to farmers in impoverished regions.

In Afghanistan, the Russian invasion is attributed to causing a significant rise in the cultivation of opium poppies. The war plunged the country into economic crisis, left men unemployed, women widowed, and refugees displaced from home. The ensuing poverty meant people turned to poppy farming. Opium poppies are highly lucrative crops, bringing in seven times the profit of other crops.⁴⁰⁰ Between 2002 and 2004, the drug market generated \$6.8 billion in profit, accounting for 60% of Afghanistan's economy.⁴⁰¹ At one point, Afghanistan produced 75% of the world's opium, although the Taliban brought about a sharp drop in opium cultivation in 2001 through a fatwa that banned the production of opium poppies.

Corruption and government instability have both been cited as reasons for the continued growth of illegal narcotic markets.⁴⁰² Government and law enforcement officials often play an intrinsic part in facilitating the drugs trade, often through accepting bribes. In 1996, 34 Vietnamese police officers - including a number of high ranking officers - were found guilty of complicity in drug smuggling.⁴⁰³

³⁹² Amnesty International. (9 March 2004). Thailand's Anti-Drug Policy Should Not be Killing People. AI Index ASA 39/001/2004

³⁹³ UN World Drug Report. (2007). www.unodc.org

³⁹⁴ UN World Drug Report. (2005). www.unodc.org

³⁹⁵ UN World Drug Report. (2007). www.unodc.org

³⁹⁶ UN World Drug Report. (2007). www.unodc.org

³⁹⁷ UN World Drug Report. (2007). www.unodc.org

³⁹⁸ Hamilton, R. (9th March 2007). Morocco's War on Cannabis. *BBC News*. Available from <http://news.bbc.co.uk/1/hi/world/africa/6426799.stm>

³⁹⁹ Morrison, S. (1997). The Dynamic of Illicit Drugs Production. *Crime, Law and Social Change*, 27, 121-138

⁴⁰⁰ Morrison, S. (1997). The Dynamic of Illicit Drugs Production. *Crime, Law and Social Change*, 27, 121-138

⁴⁰¹ Rashid, A. (17th March 2005). Cold Exposes Afghanistan's Broken Promises. *BBC News*. Available from http://news.bbc.co.uk/1/hi/world/south_asia/4310863.stm

⁴⁰² Morrison, S (1997) The Dynamic of Illicit Drugs Production. *Crime, Law and Social Change*, 27, 121-138

⁴⁰³ Dupont, A. (1999). Trans-national Crime, Drugs and Security in East Asia. *Asian Survey*, 39(3), 433-455

Likewise, corruption is the motivation for increasing clamour in the Philippines - which abolished capital punishment in 2006 - for the return of the death penalty for narcotic smugglers after both the Philippines Drug Enforcement Agency and Department of Justice were embroiled in allegations of bribery after three affluent drug suspects, nicknamed the Alabang Boys, offered bribes to PDEA officials and prosecutors in return for all charges to be dismissed against them.⁴⁰⁴

The death penalty continues to be viewed as the only way to deal with the dual problems of drug addiction and drug trafficking in the nations that retain it with little or no evidence that the death penalty has had any impact on reducing the volumes of drug related offending or a reduction in the volume of drug abuse amongst their citizens.

The most recent comprehensive review of the practice of countries that have narcotic capital crimes was published by the International Harm Reduction Association in May 2010. One of the conclusions drawn by the authors was the link between some of these countries and the financial assistance they received for drug programmes from the UN and from the EC amongst others, which is potentially compromising.⁴⁰⁵

⁴⁰⁴ Lopez, T. (6th January 2009). The Alabang Boys. *The Manila Times*. Available from <http://www.manilatimes.net/national/2009/jan/06/yehey/opinion/20090106opi5.html>

⁴⁰⁵ Complicity or Abolition? The Death Penalty and International Support for Drug Enforcement, International Harm Reduction Association, 2010 www.ihra.net

APPENDIX ONE

STATUS OF THE DEATH PENALTY GLOBALLY

The following tables are taken from Amnesty International's website⁴⁰⁶

Death penalty: Countries abolitionist for all crimes

Countries whose laws do not provide for the death penalty for any crime

Abbreviations: **Date (A)** = date of abolition for all crimes; **Date (AO)** = date of abolition for ordinary crimes; **Date (last ex.)** = date of last execution; **K** = date of last known execution; **Ind.** = no executions since independence

Country	Date (A)	Date (AO)	Date (last ex.)
ALBANIA	2007	2000	
ANDORRA	1990		1943
ANGOLA	1992		
ARGENTINA	2008	1984	
ARMENIA	2003		
AUSTRALIA	1985	1984	1967
AUSTRIA	1968	1950	1950
AZERBAIJAN	1998		1993
BELGIUM	1996		1950
BHUTAN	2004		1964K
BOSNIA-HERZEGOVINA	2001	1997	
BULGARIA	1998		1989
CAMBODIA	1989		
CANADA	1998	1976	1962
CAPE VERDE	1981		1835
CHILE	2008	2001	1985
COLOMBIA	1910		1909
COOK ISLANDS	2007		
COSTA RICA	1877		
COTE D'IVOIRE	2000		
CROATIA	1990		1987
CYPRUS	2002	1983	1962
CZECH REPUBLIC	1990		

⁴⁰⁶

Available from <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>

DENMARK	1978	1933	1950
DJIBOUTI	1995		Ind.
DOMINICAN REPUBLIC	1966		
ECUADOR	1906		
ESTONIA	1998		1991
FINLAND	1972	1949	1944
FRANCE	1981		1977
GEORGIA	1997		1994K
GERMANY	1987		
GREECE	2004	1993	1972
GUINEA-BISSAU	1993		1986K
HAITI	1987		1972K
HONDURAS	1956		1940
HUNGARY	1990		1988
ICELAND	1928		1830
IRELAND	1990		1954
ITALY	1994	1947	1947
KIRIBATI			Ind.
LIECHTENSTEIN	1987		1785
LITHUANIA	1998		1995
LUXEMBOURG	1979		1949
MACEDONIA (former Yug. Rep.)	1991		
MALTA	2000	1971	1943
MARSHALL ISLANDS			Ind.
MAURITIUS	1995		1987
MEXICO	2005		1937
MICRONESIA (Federated States)			Ind. ⁴⁰⁷
MOLDOVA	1995		
MONACO	1962		1847
MONTENEGRO	2002		
MOZAMBIQUE	1990		1986
NAMIBIA	1990		1988K

⁴⁰⁷

Independent 1986

NEPAL	1997	1990	1979
NETHERLANDS	1982	1870	1952
NEW ZEALAND	1989	1961	1957
NICARAGUA	1979		1930
NIUE			Ind. ⁴⁰⁸
NORWAY	1979	1905	1948
PALAU			Ind. ⁴⁰⁹
PANAMA	1922		1903K
PARAGUAY	1992		1928
PHILIPPINES	2006 (1987)		2000
POLAND	1997		1988
PORTUGAL	1976	1867	1849K
ROMANIA	1989		1989
RWANDA	2007		1998
SAMOA	2004		Ind.
SAN MARINO	1865	1848	1468K
SAO TOME AND PRINCIPE	1990		Ind.
SENEGAL	2004		1967
SERBIA	2002		1992
SEYCHELLES	1993		Ind.
SLOVAK REPUBLIC	1990		
SLOVENIA	1989		
SOLOMON ISLANDS		1966	Ind.
SOUTH AFRICA	1997	1995	1991
SPAIN	1995	1978	1975
SWEDEN	1972	1921	1910
SWITZERLAND	1992	1942	1944
TIMOR-LESTE	1999		
TURKEY	2004	2002	1984
TURKMENISTAN	1999		
TUVALU			Ind. ⁴¹⁰

⁴⁰⁸ Niue is self-governing in free association with New Zealand. Self-governing independence 1974

⁴⁰⁹ Independent 1994

⁴¹⁰ Independent 1978

UKRAINE	1999		
UNITED KINGDOM	1998	1973	1964
URUGUAY	1907		
UZBEKISTAN	2008		2005
VANUATU			Ind. ⁴¹¹
VATICAN CITY STATE	1969		
VENEZUELA	1863		

Death penalty: Countries abolitionist for ordinary crimes only

Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances, such as wartime crimes.

Abbreviations: **Date (AO)** = date of abolition for ordinary crimes; **Date (last ex.)** = date of last execution; **K** = date of last known execution; **Ind.** = no executions since independence

Country	Date (AO)	Date (last ex.)
BOLIVIA	1997	1974
BRAZIL	1979	1855
EL SALVADOR	1983	1973K
FIJI	1979	1964
ISRAEL	1954	1962
KAZAKHSTAN	2007	
KYRGYZSTAN	2007	
LATVIA	1999	1996
PERU	1979	1979

⁴¹¹ Independent 1980

Death penalty: Countries abolitionist in practice

Countries that retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions. The list also includes countries which have made an international commitment not to use the death penalty.

Abbreviations: **Date (last ex.)** = date of last execution; **K** = date of last known execution; **Ind.** = no executions since independence

The Russian Federation introduced an moratorium on executions in August 1996. However, executions were carried out between 1996 and 1999 in the Chechen Republic.

Country	Date (last ex.)
ALGERIA	1993
BENIN	1987
BRUNEI DARUSSALAM	1957K
BURKINA FASO	1988
CENTRAL AFRICAN REPUBLIC	1981
CONGO (Republic)	1982
ERITREA	1989
GABON	1981
GAMBIA	1981
GHANA	1993
GRENADA	1978
KENYA	1987
KOREA (SOUTH)	1997
LAOS	1989
MADAGASCAR	1958K
MALAWI	1992
LIBERIA	2005
MALDIVES	1952K
MALI	1980
MAURITANIA	1987
MOROCCO	1993
MYANMAR	1980s
NAURU	Ind.
NIGER	1976K

PAPUA NEW GUINEA	1950
RUSSIAN FEDERATION	1999
SRI LANKA	1976
SURINAME	1982
SWAZILAND	1983
TAJIKISTAN	2004
TANZANIA	1995
TOGO	1978
TONGO	1982
TUNISIA	1991
ZAMBIA	1997

Countries and territories that retain the death penalty for ordinary crimes

Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Burundi, Cameroon, Chad, China, Comoros, Congo (Democratic Republic), Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Korea (North), Kuwait, Lebanon, Lesotho, Libya, Malaysia, Mongolia, Nigeria, Oman, Pakistan, Palestinian Authority, Qatar, Saint Christopher & Nevis, Saint Lucia, Saint Vincent & Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, Sudan, Syria, Taiwan, Thailand, Trinidad And Tobago, Uganda, United Arab Emirates, United States Of America, Viet Nam, Yemen, Zimbabwe

Abolitionist for all crimes*

Australia (1985)
 Bhutan (2004)
 Cambodia (1989)
 Cook Islands (2007)
 Hong Kong (1993)
 Kiribati (Ind.) **
 Marshall Islands (Ind.)
 Micronesia (Federated States) (Ind.)
 Nepal (1997)
 New Zealand (1989)
 Philippines (2006 and 1987)
 Samoa (2004) Ind.
 Solomon Islands (1966)
 Timor-Leste (1999)
 Tuvalu (Ind.)
 Vanuatu (Ind.)

* dates refer to date of abolition for all crimes

**Ind. = no executions since independence

Abolitionist for ordinary crimes

Fiji (1979)

De Facto abolitionist*

Korea (South) 1997
 Laos 1989
 Maldives (1952)K
 Myanmar (1980s)
 Papua New Guinea (1950)
 Sri Lanka (1976)

*dates refer to date of last execution

Retentionist

Countries and territories that retain the death penalty for ordinary crimes:

Bangladesh, China, India, Indonesia, Japan, Korea (North), Malaysia, Mongolia, Pakistan
 Singapore, Taiwan, Thailand, Viet Nam.

State parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

Australia, Nepal, New Zealand, Philippines and Timor-Leste

Status of countries viz a viz the ratification of international human rights treaties

	ICERD	ICCPR	ICESCR	CEDAW	CAT	CRC
Afghanistan	R	R	R	N	R	R
Albania	R	R	R	R	R	R
Algeria	R	R	R	N	R	R
Andorra	R	R	N	R	R	R
Angola	N	R	R	R	N	R
Antigua	R	R	N	R	R	R
Argentina	R	R	R	R	R	R
Armenia	R	R	R	R	R	R
Australia	R	R	R	N	R	R
Austria	R	R	R	R	R	R
Azerbaijan	R	R	R	R	R	R
Bahamas	R	N	N	N	N	R
Bahrain	R	R	R	N	R	R
Bangladesh	R	R	R	R	R	R
Barbados	R	R	R	N	N	R
Belarus	R	R	R	R	R	R
Belgium	R	R	R	R	R	R
Belize	R	R	S	R	R	R
Benin	R	R	R	S	R	R
Bhutan	S	N	N	N	N	R
Bolivia	R	R	R	R	R	R
Bosnia	R	R	R	R	R	R
Botswana	R	R	N	R	R	R
Brazil	R	R	R	R	R	R
Brunei	N	N	N	N	N	R

Bulgaria	R	R	R	R	R	R	R
Burkina	R	R	R	R	R	R	R
Burundi	R	R	R	S	R	R	R
Cambodia	R	R	R	S	R	R	R
Cameroon	R	R	R	R	R	R	R
Canada	R	R	R	R	R	R	R
Cape Verde	R	R	R	N	R	R	R
C.A.R	R	R	R	N	N	R	R
Chad	R	R	R	N	R	R	R
Chile	R	R	R	S	R	R	R
China	R	S	R	N	R	R	R
Colombia	R	R	R	R	R	R	R
Comoros	R	S	S	N	S	R	R
Congo	R	R	R	S	R	R	R
Cook Island	N	N	N	R	N	R	R
Costa Rica	R	R	R	R	R	R	R
Cote d'Ivoire	R	R	R	N	R	R	R
Croatia	R	R	R	R	R	R	R
Cuba	R	S	S	S	R	R	R
Cyprus	R	R	R	R	R	R	R
Czech	R	R	R	R	R	R	R
DPR Korea	N	R	R	N	N	R	R
DR Congo	R	R	R	N	R	R	R
Denmark	R	R	R	R	R	R	R
Djibouti	S	R	R	N	R	R	R
Dominica	N	R	R	N	N	R	R
Dom Rep	R	R	R	R	S	R	R
Ecuador	R	R	R	R	R	R	R
Egypt	R	R	R	N	R	R	R
El Salvador	R	R	R	S	R	R	R
Eq. Guinea	R	R	R	N	R	R	R
Eritrea	R	R	R	N	N	R	R
Estonia	R	R	R	N	R	R	R
Ethiopia	R	R	R	N	R	R	R
Fiji	R	N	N	N	N	R	R
Finland	R	R	R	R	R	R	R
France	R	R	R	R	R	R	R
Gabon	R	R	R	R	R	R	R
Gambia	R	R	R	N	S	R	R
Georgia	R	R	R	R	R	R	R
Germany	R	R	R	R	R	R	R
Ghana	R	R	R	S	R	R	R
Greece	R	R	R	R	R	R	R
Grenada	S	R	R	N	N	R	R
Guatemala	R	R	R	R	R	R	R
Guinea	R	R	R	N	R	R	R
Guinea b	S	S	R	S	S	R	R
Guyana	R	R	R	N	R	R	R
Haiti	R	R	N	N	N	R	R
Honduras	R	R	R	N	R	R	R
Hungary	R	R	R	R	R	R	R

Iceland	R	R	R	R	R	R	R
India	R	R	R	N	S	R	R
Indonesia	R	R	R	S	R	R	R
Iran	R	R	R	N	N	R	R
Iraq	R	R	R	N	N	R	R
Ireland	R	R	R	R	R	R	R
Israel	R	R	R	N	R	R	R
Italy	R	R	R	R	R	R	R
Jamaica	R	R	R	N	N	R	R
Japan	R	R	R	N	R	R	R
Jordan	R	R	R	N	R	R	R
Kazakhstan	R	R	R	R	R	R	R
Kenya	R	R	R	N	R	R	R
Kiribati	N	N	N	N	N	R	R
Kuwait	R	R	R	N	R	R	R
Kyrgyzstan	R	R	R	R	R	R	R
Laos	R	S	R	N	N	R	R
Latvia	R	R	R	N	R	R	R
Lebanon	R	R	R	N	R	R	R
Lesotho	R	R	R	R	R	R	R
Liberia	R	R	R	S	R	R	R
Libya	R	R	R	R	R	R	R
Liechtenstein	R	R	R	R	R	R	R
Lithuania	R	R	R	R	R	R	R
Luxembourg	R	R	R	R	R	R	R
Madagascar	R	R	R	S	R	R	R
Malawi	R	R	R	S	R	R	R
Malaysia	N	N	N	N	N	R	R
Maldives	R	R	R	R	R	R	R
Mali	R	R	R	R	R	R	R
Malta	R	R	R	N	R	R	R
Marshall Is.	N	N	N	N	N	R	R
Mauritania	R	R	R	N	R	R	R
Mauritius	R	R	R	R	R	R	R
Mexico	R	R	R	R	R	R	R
Micronesia	N	N	N	N	N	R	R
Moldova	R	R	R	R	R	R	R
Monaco	R	R	R	N	R	R	R
Mongolia	R	R	R	R	R	R	R
Montenegro	R	R	R	R	R	R	R
Morocco	R	R	R	N	R	R	R
Mozambique	R	R	N	R	R	R	R
Myanmar	N	N	N	N	N	R	R
Namibia	R	R	R	R	R	R	R
Nauru	S	S	N	N	S	R	R
Nepal	R	R	R	R	R	R	R
Netherlands	R	R	R	R	R	R	R
New Zealand	R	R	R	R	R	R	R
Nicaragua	R	R	N	N	R	R	R
Niger	R	R	R	R	R	R	R
Nigeria	R	R	R	R	R	R	R

Niue	N	N	N	N	N	R
Norway	R	R	R	R	R	R
Oman	R	N	N	N	N	R
Pakistan	R	S	R	N	S	R
Palau	N	N	N	N	N	R
Panama	R	R	R	R	R	R
Papua N.G	R	R	R	N	N	R
Paraguay	R	R	R	R	R	R
Peru	R	R	R	R	R	R
Philippines	R	R	R	R	R	R
Poland	R	R	R	R	R	R
Portugal	R	R	R	R	R	R
Qatar	R	N	N	N	R	R
Rep. Korea	R	R	R	R	R	R
Romania	R	R	R	R	R	R
Russia	R	R	R	R	R	R
Rwanda	R	R	R	N	N	R
St Kitts	R	N	N	R	N	R
St Lucia	R	N	N	N	N	R
St Vincent	R	R	R	N	R	R
Samoa	N	R	N	N	N	R
San Marino	R	R	R	R	R	R
Sao Tome	S	S	S	S	S	R
Saudi Arabia	R	N	N	N	R	R
Senegal	R	R	R	R	R	R
Serbia	R	R	R	R	R	R
Seychelles	R	R	R	S	R	R
Sierra Leone	R	R	R	S	R	R
Singapore	N	N	N	N	N	R
Slovakia	R	R	R	R	R	R
Slovenia	R	R	R	R	R	R
Solomon Is.	R	N	R	R	N	R
Somalia	R	R	R	N	R	S
South Africa	R	R	S	R	R	R
Spain	R	R	R	R	R	R
Sri Lanka	R	R	R	R	R	R
Sudan	R	R	R	N	S	R
Suriname	R	R	R	N	N	R
Swaziland	R	R	R	N	R	R
Sweden	R	R	R	R	R	R
Switzerland	R	R	R	R	R	R
Syria	R	R	R	N	R	R
Tajikistan	R	R	R	S	R	R
Thailand	R	R	R	R	R	R
Yugoslav	R	R	R	R	R	R
Timor-Leste	R	R	R	R	R	R
Togo	R	R	R	N	R	R
Tonga	R	N	N	N	N	R
Trinidad	R	R	R	N	N	R
Tunisia	R	R	R	R	R	R
Turkey	R	R	R	R	R	R

Turkmenistan	R	R	R	N	R	R
Tuvalu	N	N	N	N	N	R
Uganda	R	R	R	N	R	R
Ukraine	R	R	N	R	R	R
UAE	R	N	N	N	N	R
UK	R	R	R	R	R	R
UR Tanzania	R	R	R	R	N	R
USA	R	R	S	N	R	S
Uruguay	R	R	R	R	R	R
Uzbekistan	R	R	R	N	R	R
Vanuatu	N	S	N	R	N	R
Venezuela	R	R	R	R	R	R
Vietnam	R	R	R	N	N	R
Yemen	R	R	R	N	R	R
Zambia	R	R	R	S	R	R
Zimbabwe	R	R	R	N	N	R

N = not signed

S = signed

R = ratified

APPENDIX TWO

Comments of national and international celebrities on capital punishment

Mahfound Smati, member of Algeria's Supreme Islamic Council

"The utmost effort must be made to avoid issuing the death penalty, because the human soul is given by God and He alone has the right to take it back",

Representative, Movement of Society for Peace (Algerian Islamic party)

"Islam encourages forgiveness, grace and settlement without the death of a person. God is the only master who can give life to man"

Rally for Culture and Democracy (RCD)

"the repeal of capital punishment is not contrary to Islam, since for this religion the sovereignty of life is the rule."

Brian Spilg, a lawyer from Botswana: "Whether crime increases or not had nothing to do with the presence or absence of the death penalty"⁴¹²

Kenneth Kuanda, Former President of Zambia, who signed scores of death warrants in his country during wartime.

"It has pained me to sign the death warrants during my tenure; I did so with the utmost reluctance"

Zimrights former Director David Chimhini:

"The Death sentence is viewed as the most primitive way of meting out justice...the legendary eye for an eye concept is outdated, inhumane, immoral and evil"⁴¹³

The highly respected former **Chief Justice Dumbutshena of Zimbabwe** was a noted advocate of abolition: On the South African Constitutional Court Judges:

"...the constitutional judges have done wonderful work in putting right the injustices of the past by purposefully interpreting the provisions of the constitution. They have declared the death penalty unconstitutional. They have outlawed juvenile whipping as a judicial punishment...The courts are using judicial activism in order to achieve social or distributive justice. This is important because our people were and still are disadvantaged."⁴¹⁴

Father Agostini in his book 'May the State kill?'⁴¹⁵

"Making a case for the abolition of the death penalty does not in any manner attempt to underestimate the difficulty associated with healing victims of violent crimes such as rape, murder and other unbelievable and outrageous crimes"

In abolishing the death penalty in 1993, the former **Gambian president, Sir Dawda Jawara**, stated that the government had taken the decision with the firm conviction

⁴¹² Southern African News Features 'A New Millennium Free From Death Penalty in Southern Africa?' 30 September 1999, <http://www.sardc.net/editorial/sanf/1999/09/30-09-1999-nf2.htm>

⁴¹³ Ibid

⁴¹⁴ SAIRR, Frontiers of Freedom, 3rd Quarter 1997, 'Off with their wigs and up with their sleeves' <http://www.sairr.org.za/publications/pub/fof/1997q3/wigs.htm>

⁴¹⁵ Fr. Tarcisio Agostoni (LPh, LTh) 'May the State Kill? A Challenge to the Death Penalty' 2000, Paulines Publications Africa,

that: “The death penalty has no value, no useful purpose in relation to crime prevention or control”⁴¹⁶

Before he left office in 1985, **Julius Nyerere, President of Tanzania**, was reported to have told prison officers that he found it very difficult to order the hanging of convicted murderers because: “You will be killing two people instead of one”⁴¹⁷

In the **High Court of Tanzania**, **Justice James L. Mwalusanya** ruled in a murder case in 1991 that the death penalty violated the Constitution as it was: “a cruel, inhuman and degrading punishment and or treatment and also that it offends the right to dignity of man in the process of execution of the sentence”⁴¹⁸

The Catholic Centre for Justice, Development and Peace (CCJPD) acting director Sam Mulafufu: “Our security as citizens of Zambia does not lie in continuing to have the threat of death on our statutes but on the performance of our security wings and the judiciary in protecting the lives and property of citizens.”⁴¹⁹

Justice Chaskalson in State v. Makwanyane: (on public opinion)

“...the issue of constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. Those who are entitled to claim the protection [of the democratic process], include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and weakest amongst us, that all of us can be secure that our own rights will be protected.”⁴²⁰

The Rt. Hon Edward Heath, MP [Former British Prime Minister] during a House of Commons debate on restoring the death penalty in 1983

‘We must recognise that if we really are to tackle the penal problems of the country we must turn our attention to that, instead of automatically saying that the answer is hanging and flogging’.

Albert Pierrepoint; Official executioner in Britain until 1956

‘I do not believe that any one of the hundreds of executions I carried out has in any way acted as a deterrent against future murder. Capital punishment, in my view, achieved nothing except revenge.’

Excerpt from ‘Ballad of Reading Gaol’, Oscar Wilde 1886

‘They hanged him as a beast is hanged:

They did not even toll

A requiem that might have brought rest to his startled soul,

But hurriedly they took him out, and hid him in a hole.

They stripped him of his canvas clothes, and gave him to the flies:

⁴¹⁶ Apolo Kakaire, ‘Death Penalty: Total or Partial Abolition? The case for total abolition’ ‘Your Rights Magazine’ Vol. VI No. 1 May 2003, Uganda Human Rights Commission

⁴¹⁷ Ibid

⁴¹⁸ *Republic v. Mbushuu alias Dominic Mnyaroge and Kalai Sangula*, Criminal Sessions Case No. 44 of 1991, [1994] *Tanzanian Law Reports* 146-173 at 173

⁴¹⁹ ‘Catholics Call for the Abolition of the Death Penalty’, 22 January 2004, Death Penalty News and Updates, <http://people.smu.edu/rhalperi/>

⁴²⁰ Constitutional Court of the Republic of South Africa, 1995 Case No.CCT/3/94, [1995] 1 LRC 269, Judgement of Justice Chaskalson, paragraph 88

They mocked the swollen purple throat,
And the stark and staring eyes:
And with laughter loud they heaped the shroud
In which their convict lies’.

George Orwell: ‘A hanging’, Adelphi, 1931

‘It is curious, but till that moment I had never realised what it means to destroy a healthy conscious man. When I saw the prisoner step aside to avoid a puddle I saw the mastery, the unspeakable wrongness, of cutting a life short when it is in full tide. This man was not dying – bowels digesting food, skin renewing itself, nails growing, tissues forming – all toiling away in solemn foolery. His nails would still be growing when he stood on the drop, when he was falling through the air with a tenth of a second to live.

His eyes saw the yellow gravel and the grey walls, and his brain still remembered, foresaw, reasoned, even about puddles. He and we were a party of men walking together, seeing, hearing, feeling, understanding the same world; and in two minutes, with a sudden snap, one of us would be gone – one mindless, one world less’.

Arthur Koestler, ‘Promise and fulfilment’.

‘In April [1947], four terrorists were hanged....The executions were followed by a new wave of assassinations, bomb throwing and mine laying, which caused further deaths within the next few days; on the scene of each attack the terrorists left a hangman’s noose as their signature’.

