THE DEATH PENALTY IN INTERNATIONAL LAW: TOOLS FOR ABOLITION

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I. INTRODUCTION

In 1978, when Amnesty International first started campaigning against the death penalty, only 16 countries had abolished it. In 2004, the figure for de jure abolitionist countries is 79, and there are a total of 117 states where no executions have taken place for the last 10 years. However, in 2003, according to figures obtained by AI, a total of 1,146 executions were carried out in 28 countries.1

In Africa only a few countries have formally abolished the death penalty, including Mozambique and Namibia (in 1990), Angola (1992), South Africa (1997) and Cote d’Ivoire (2000). Executions were carried out in 2003 in Botswana, Chad, Congo DR, Somalia, Sudan, Uganda and Zimbabwe.2

There are also countries which are de facto abolitionist and which do not actively use the death penalty. In West Africa, 10 countries have either abolished or carried out no executions in the 10 years. In South Africa, 5 countries have abolished the death penalty. In Kenya the government has commuted huge amounts of death penalties. In Zambia, President Mwanawasa has commuted 60 death sentences in 2004 alone. In Malawi, President Muluzi has said that the will not sign any death warrants. President Obusanjo of Nigeria has also said that he is against the death penalty.3 It is clear that there is an inexorable trend towards a cessation in the active use of the death penalty as a method of seeking to control crime.

It has long been the position that international law accepts the continued existence of the death penalty, whilst suggesting that abolition is the natural forward development. International law provides for clear controls on the use of the death penalty, and in some regions has moved towards outright abolition. In 1995 the South African Constitutional Court in a thorough review of international standards declared the death penalty to be against the post-apartheid constitution and a violation of the prohibition against cruel and inhuman punishments.4 The Council of Europe has outlawed the death penalty in all 45 countries that are a member of the organisation, and the European Court of Human Rights held in the case of Öcalan that the death penalty had ‘no place in a civilized society’.

At this stage it is not clear whether countries in Africa will join the trend towards abolition or whether they will stand against it.

This paper will cover the different international standards that are applicable in death penalty cases, together with regional standards in Europe and the Americas that can be considered comparatively. It will also look at the relevance of common law standards and identify some of the key issues. Finally, it will consider the importance of developing a strategy for abolition.

II. INTERNATIONAL STANDARDS

1. Declarations and Treaties

Article 3 of the Universal Declaration of Human Rights states that ‘Everyone has the right to life, liberty and security of person’. When the UDHR was drafted there was much discussion amongst the State Parties as to whether or not there should be a formal statement that they should move towards outright abolition. In 1995 the South African Constitutional Court in a thorough review of international standards declared the death penalty to be against the post-apartheid constitution and a violation of the prohibition against cruel and inhuman punishments.4 The Council of Europe has outlawed the death penalty in all 45 countries that are a member of the organisation, and the European Court of Human Rights held in the case of Öcalan that the death penalty had ‘no place in a civilized society’.

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abolition were likely to be controversial. The compromise was to remain entirely silent on the issue, and leave the lawyers to argue about the ambiguity.

The International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations General Assembly in 1966 and came into force on 23rd March 1976. It has been signed by virtually every country in the world. Article 6 of the ICCPR states that

(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.

The fact that the right is described as ‘inherent’ arose out of attempts by abolitionist South American countries to push for a statement of total abolition, suggesting that life is not something that is in the gift of governments. The fact that the right is ‘protected by law’ incorporates a requirement of ‘legality’, i.e. that any interference with the right to life must be strictly in accordance with the law, and also imposing a positive obligation upon the state to ensure that life is protected. The prohibition on ‘arbitrary’ deprivation of life is another area which allows the law to intervene to prevent executions that do not fulfil this requirement, as it has been broadly interpreted to include notions of inappropriateness, injustice and lack of predictability.5

Most significantly, Article 6(2) limits the use of the death penalty to the ‘most serious crimes’. The ICCPR also sets up a monitoring body in the form of the Human Rights Committee which has issued a number of “general comments” on the interpretation of the Covenant, including the right to life. In interpreting the provision of Article 6, the Committee has stated that

(1) The right to life enunciated in Article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation…It is a right which should not be interpreted narrowly… …

(6) While it follows from Article 6(2) to (6) that States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the “most serious crimes”. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the “most serious crimes”.

(7) The Committee is of the opinion that the expression ”most serious crimes” must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant.6

This last clause means that Article 14 ICCPR, the right to a fair trial, is an inherent part of any procedure leading to a death sentence, rendering unlawful any attempt to execute following an unfair trial, including in circumstances where there was no lawyer, no impartial tribunal, no right to an appeal, or an unreasonable delay prior to trial. This view was upheld by the Human Rights Committee sitting in a judicial capacity under the procedure for individual complaints pursuant to the First Optional Protocol to the ICCPR. In Reid v Jamaica7 the Committee stated that ‘in capital cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in Art.14 of the

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6 General Comment 6(16), UN Doc CCPR/C/21/Add.1, UN Doc A/37/40, Annex V, UN Doc CCPR/3/Add.1.
Covenant is even more imperative’ (at paragraph 11.5). In Mbenge v Zaire, the defendant had been tried in absentia after having been given only three days notice of the trial, and sentenced to death. The Committee found that there was a breach of the right to a fair trial protected in Article 14 and consequently a breach of the right to life.

The nexus that has been created between Article 14 and Article 6 has the effect of controlling the ability of governments to enter into reservations suspending the operation of fair trial rights, as they will always be required to apply them in respect of capital trials in order to protect the right to life, for which reservations are not allowed. For a detailed discussion of fair trial rights, see the paper presented by Lilian Chenwi, Capital trials in Africa in the light of international and regional fair trial standards.

The Second Optional Protocol to the ICCPR was adopted by the UN General Assembly in 1989 and came into force in 1991 for those countries that had ratified it. The Protocol abolishes the death penalty, and prevents any reservations to that abolition, save for a reservation allowing for capital punishment in time of war. At the end of 2003, 52 countries had signed the protocol, including six in Africa.

B. International Humanitarian law

There can be no doubt that genocide, crimes against humanity and war crimes are the most serious crimes known to criminal justice. The death penalty has been used in the past as a punishment for those convicted of such serious offences, most notably at the Nuremburg and Tokyo international military tribunals which followed the Second World War, and also in the trials that occurred in local courts in Germany and the Far East in the same period.

The Geneva Conventions require there to be fair trials, and declare that the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court ‘affording all the judicial guarantees which are recognized as indispensable by civilized peoples’ would amount to a war crime. There are also protections for vulnerable groups, such as the prohibition in Art. 68(4) of the Fourth Geneva Convention of 1949 of the imposition of the death sentence on anyone who was under 18 years of age at the time of the offence.

The International Criminal Tribunal for Rwanda has jurisdiction to prosecute individuals deemed responsible for the 1994 genocide. The maximum punishment that can be imposed is life imprisonment, which has been the sentence for a number of defendants convicted of genocide. The Special Court for Sierra Leone was set up in 2002 by a treaty between the United Nations and the Government of Sierra Leone with the mandate to try ‘those who bear the greatest responsibility’ for the atrocities committed during the 10 year civil war. Again, the death penalty may not be imposed. For one defendant currently before the Special Court, this has meant that following a decision to prosecute him he was removed from the domestic prison in Freetown where he was facing the death penalty for treason and transferred to the Special Court where he is now immune from the death penalty.

Approximately 35 countries in Africa have signed the Rome Statute for the International Criminal Court which again sets up a body that has no power to impose the death penalty, despite the heinousness of the offences for which it is required to bring people to account. This discrepancy between domestic and international standards causes a fundamental problem in the imposition of the death sentence for ordinary murders where capital punishment can only be imposed for the most serious offences.

C. Minimum guidelines and interpretation

In 1984, the United Nations Economic and Social Council (“ECOSOC”) adopted nine Safeguards with regard to the implementation of the death penalty. These arose out of a series of resolutions from the 1960’s to 1980. These were subsequently adopted by the UN General Assembly.

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9 Available at <http://www.biicl.org>
10 Art 3(1) (d) common to the Geneva Conventions.
Safeguards are subject to interpretation by the Committee on Crime Prevention and Control and a five-yearly report on behalf of the UN Secretary-General. The Safeguards reiterate what is stated in Article 6 ICCPR in that the death penalty should be imposed only for the most serious crimes which have lethal effect, i.e. murder, or a violent robbery with lethal firearms (Safeguard 1). The Safeguards state that a death sentence should only be imposed where the conviction was based on ‘clear and convincing evidence’ where there is no room for an alternative explanation of the facts (Safeguard 4). They ensure that there must be a right to appeal, and a right to apply for clemency (Safeguards 6 and 7). The death penalty must be imposed in a way which leads to minimal suffering (Safeguard 9) and may not be carried out whilst an appeal is pending (Safeguard 8).

The Committee on Crime Prevention and Control has provided further guidance. In 1988 they suggested that the protection offered in Safeguard 5 makes it clear that there must be a standard of proof that goes above and beyond the protection afforded in non-capital cases. They recommended that there should be a maximum age for the imposition of the death penalty, and also that ‘persons suffering from mental retardation or extremely limited mental competence’ should not be subjected to the death penalty.

III. REGIONAL STANDARDS

A. Europe

The most progressive of the regional bodies that has had a dramatic effect on reducing the use of the death penalty is the Council of Europe, which now covers all 45 countries of the continent of Europe and sets the standards for the 800 million people residing there.

The Parliamentary Assembly of the Council of Europe, which is made up of parliamentary representatives from each of the different legislatures of the member states, has long expressed its opposition to the use of capital punishment. In 1999 they stated their ‘firm conviction that capital punishment has no place in civilised, democratic societies governed by the rule of law’. The Secretary-General of the organisation stated in March 2000 that

The Council of Europe’s position with regard to the death penalty is very clear: capital punishment is incompatible with accepted standards of human rights and human dignity. Our objections are based on the fact that it is arbitrary, discriminatory and irreversible and on the brutalisation of society which results from state institutions killing their citizens in the name of justice. It is also ineffective in terms of deterrence, one of its alleged prime purposes. Simply put, the death penalty has no place in a civilised society.

The European Court of Human Rights, the judicial organ of the Council of Europe, found against the operation of the death penalty in the United States in the case of Soering v United Kingdom. The State of Virginia sought the extradition of Mr Soering from the United Kingdom so that he could be charged with the capital offence of the murder of his girlfriend. The UK government was prepared to extradite him. The Court was told that if convicted and sentenced to death he was likely to spend at least 7 years on ‘death row’ in Virginia, and they heard evidence as to the conditions of detention on death row. The Court found that given the fact that he was only 18 years old, and that there were mental health issues, it would be a violation of the prohibition on torture or inhuman or degrading treatment in Article 3 were he to be subjected to such conditions, and consequently the UK government could not extradite him without firm guarantees that he would not be subject to the death penalty.

The Council of Europe introduced further standards to control the death penalty in the form of Protocol 6 to the European Convention on Human Rights, which prohibits the use of the death penalty in peacetime. This entered into force in 1985, and is now signed by every member of the Council of Europe. On 30th July 2003, Protocol No. 13 entered into force abolishing the death penalty in all circumstances. The last execution on the continent of Europe took place in 1997.

12 Resolution 11877 (1999).
The European Court of Human Rights has further developed the law in the case of Öcalan v Turkey.\(^{15}\) The Court found a violation of the right to liberty due to the excessive detention prior to charge, a violation of the right to an independent and impartial tribunal in the use of military judges and fair trial violations due to limits on contact with lawyers and limited access to prosecution evidence.

They further held that ‘it can be said that capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment which is no longer permissible under Article 2 [the right to life].’\(^{16}\) They go on to reaffirm the importance of the right to a fair trial and state that ‘the implementation of the death penalty in respect of a person who has not had a fair trial would not be permissible’\(^{17}\). Imposing a death sentence after an unfair trial would clearly subject the defendant to anguish, and consequently such treatment would be inhuman, leading to a violation of Article 3 of the Convention.

The European Union (EU) has also developed Guidelines on the use of the death penalty which are based on the UN Safeguards. These insist upon limiting the use of the death penalty to the most serious, intentional crimes, and that it must not be imposed upon vulnerable individuals. They require full procedural safeguards, such as guilt established on clear and convincing evidence, a right of appeal and a right to apply for clemency. Where there is a breach of the guidelines, the EU will intervene and issue a demarche, or diplomatic complaint. In 2002-2003, the EU issued demarches in 20 countries, including Democratic Republic of Congo, Nigeria, Sudan and Uganda. They are also prepared to intervene in court cases directly, and have done so in the United States Supreme Court on the issue of juvenile executions.\(^{18}\)

The importance of European standards in Africa, particularly those based on the provisions of the European Court of Human Rights, is that the ECHR is the model for many of the post-colonial constitutional fair trial guarantees in the Commonwealth. When the civil servants in Westminster in the de-colonial period were required suddenly to introduce democracy to colonies where only imperial rule had previously held sway, they set about the task of writing constitutions. When it came to the description of the ‘fundamental rights and freedoms’ that should be respected, they found it very simple to look to the recently developed European Convention on Human Rights. At that stage, the Convention was not directly applicable in the UK and individuals could not even take individual cases to the Strasbourg court. Consequently, it was not regarded as anything to be feared. Subsequently, the Court has become the pre-eminent human rights legal body in the world, and the Judgements of the Court can be of great assistance in assisting a judge in a Commonwealth country to decide how he should interpret the identical wording of a domestic constitution.

\textbf{B. Americas}

Many Latin American countries were the first in the world to abolish the death penalty, many years before anywhere else,\(^{19}\) although the hemisphere also contains the United States and various countries in the Caribbean who are keen to use the death penalty.

The Organisation of American States was created in 1948 and is tasked inter alia with protecting and promoting Human Rights in the Americas. The American Declaration on the Rights and Duties of Man is considered to have mandatory application on states parties, and has a right of individual petition to the Inter-American Commission of Human Rights. In 1978, the American Convention on Human Rights was approved, which outlines the powers of the Commission and creates a Court of Human Rights.

The Commission has considered several death penalty cases sitting in its judicial capacity. In the case of Edwards v Bahamas\(^{20}\) they stated that death penalty cases should be subject to a ‘heightened level

\(^{15}\) Judgment of 12 March 2003.
\(^{16}\) para.196
\(^{17}\) para.204
\(^{19}\) Countries abolished the death penalty on the following dates: Colombia (1910), Uruguay (1907), Ecuador (1906), Panama (1903), Brazil (1882), Costa Rica (1878), Venezuela (1963).
of scrutiny’ and that ‘death is qualitatively different’. Whilst the Declaration actually remains silent on the use or otherwise of the death penalty, the Commission concluded that despite the omission of the original paragraph 2 in the final draft of the Declaration [which allowed for the death penalty], the Commission is of the opinion that the founding fathers of the Declaration intended that the states in issuing legislation in respect of capital punishment uphold the sanctity of life as being sacrosanct with all the due process guarantees found in other Articles of the Declaration before the imposition and implementation of capital punishment.

Thus, the Commission has imposed the same requirement found elsewhere that fair trial guarantees be observed before the death penalty can be lawfully imposed.

In 1983 the Court was asked by the Commission to deliver an advisory opinion on the death penalty, particularly on the point of whether a country can increase the scope of crimes to which the death penalty applies, once they have ratified the Convention. The decision details the fact that the death penalty may only be imposed for the most serious crimes, and is explicitly prohibited for political crimes, as well as prohibiting the execution of certain vulnerable groups (at para. 53). The Court states that

Although in the one case the Convention does not abolish the death penalty, it does forbid extending its application and imposition to crimes for which it did not previously apply. In this manner any expansion of the list of offences subject to the death penalty has been prevented. In the second case, the re-establishment of the death penalty for any type of offence whatsoever is absolute prohibited, with the result that a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, ipso jure, a final and irrevocable decision.

They conclude that ‘the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance’.

In 1990 the General Assembly of the Organisation of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty which has to date been ratified by 8 states. It abolishes the death penalty completely, although allows states the option of a reservation allowing for the use of the death penalty for extremely serious crimes of a military nature. Only Brazil has chosen to make such a reservation.

In the case of Garza v US they decided that there was now a ‘demonstrable international trend towards more restrictive interpretation of the death penalty’ and that they would follow the spirit and purpose of the Declaration to move in that direction (at paragraph 94).

The significance of the American human rights system for developing the law on the death penalty in Africa is as a comparison. The OAS has specifically addressed such issues as the use of the death penalty for political offences, which is a problem in Commonwealth Africa. They have also addressed the issue of attempts to extend the use of the death penalty to new offences. The wording and history of the Convention and Declaration and its application in the Commonwealth Caribbean mean that it can be directly persuasive in discussing constitutional issues in other Commonwealth countries with similar legal systems.

C. Africa

Human Rights protections against the use of the death penalty are much weaker in the African continent, as has been eloquently discussed elsewhere at the Entebbe conference. The African

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22 ibid para 56
23 ibid para 57
Charter on Human and People’s Rights (African Charter) specifically allows for the use of the death penalty. The Commission on Human and People’s Rights has failed to intervene or to find against the death penalty. The Court of Human Rights has yet to establish itself as an independent international body. However, the Principles and Guidelines on the Right to a fair trial and legal assistance in Africa, when combined with the international law requirement that there can be no execution after an unfair trial gives plenty of scope for human rights lawyers to challenge the use of the death penalty using regional standards to assist in the argument.

IV. COMMON LAW STANDARDS

A. Privy Council

The Judicial Committee of the Privy Council remains, for the time being, the final court of appeal for some Commonwealth countries, most notably in the Caribbean. They have delivered a number of significant decisions interpreting post-colonial Commonwealth constitutions, some of which have assisted in limiting the use of the death penalty, others which have not.

The most dramatic decision that the Privy Council took was in the case of *Pratt and Morgan v Attorney-General of Jamaica* [1994] 2 A.C. 1 where they held that keeping someone on death row for a period of years in fear for his life amounted to cruel treatment such as to make a subsequent execution unlawful. They decided that any period over five years should automatically result in a commutation of the sentence to life imprisonment. In a number of subsequent cases the Privy Council clarified such issues as whether it mattered who was responsible for the delay, and whether delays caused by an appeal to an international tribunal should be included in the calculation of the period.26

In *Lewis and others v Attorney-General of Jamaica* [2001] 2 A.C. 50, the Privy Council was considering the standards that should apply when a prisoner was asking for mercy. They held that the process of recommending mercy is not beyond scrutiny and that if it arbitrary, perverse or unreasonable then the courts will interfere. Therefore, fair trial guarantees should apply, and the accused should be entitled to make full representations and be given adequate notice. The mercy committee should also consider the recommendations of international tribunals, unless there is a good reason not to do so.

B. Other jurisdictions

Other common law jurisdictions have contributed significant judgements to the development of death penalty jurisprudence. In the landmark decision of the South African Constitutional Court in *Makwanyane*27, the Court decided that the death penalty was contrary to the Constitution of South Africa, that it had no place in African society, that it was not a deterrent, that it was cruel and inhuman punishment and that the irreversible nature of the penalty means that it must be presumed to be contrary to developed standards of human rights. The decision makes substantial use of comparative standards, although the Court stated that ‘we can derive assistance from public international law and foreign case law, but we are in no way bound to follow it’28 The decision is significant because the entrenched nature of the judgement, finding against the use of the death penalty on a whole variety of reasons, makes it extremely difficult to re-introduce capital punishment without having to bluntly accept that it is in breach of human rights standards.

The Canadian Supreme Court has often been called upon to deal with death penalty cases, even though Canada has abolished the death penalty, due to the fact that there are often extradition requests for their citizens to be sent for trial in the United States on capital charges. After a number of

25 See the paper by Lilian Chenwi, *Capital Trials in Africa in the light of International and Regional Fair Trial Standards*.
27 *Makwanyane* n 6
28 ibid para 39
different decisions, the Supreme Court of Canada in the case of USA v. Burns\(^ {29}\) decided that it was unconstitutional to send a Canadian citizen to face the death penalty. They concluded that ‘in the Canadian view of fundamental justice, capital punishment is unjust and it should be stopped’.

In the case of Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General\(^ {30}\) the Supreme Court of Zimbabwe decided that the death penalty was unconstitutional, relying inter alia on the conditions of detention. However, parliament shortly after the decision amended the Constitution, preventing that line of appeal from being relied upon.

C. Arguing comparative standards in common law courts

It is often suggested that the common law prohibits the use of international standards being argued in domestic courts, whereas other countries are more prepared to accept the direct applicability of treaty law. The common law is generally regarded as imposing a ‘dualist’ system, whereby domestic law is entirely separate from international law, until such time as the latter is directly incorporated into domestic law by Act of Parliament. ‘Monist’ systems under the civil code system of laws, suggest that international treaties once ratified are instantly part of the law of the land that can be argued in any court, as another element of the law.

In the United Kingdom, the dualist attitude prevailed with regard to the European Convention of Human Rights prior to its incorporation into domestic law by Parliament in the Human Rights Act 1998. Since the UK signed the Convention in the 1950’s, British citizens had to make the trip to Strasbourg if they wished to complain about a violation of their rights. However, there were ways in which the law of the European Convention could be argued in domestic courts prior to the Human Rights Act, by controlling any discretion exercised either by a public authority or by a judge, and in creating a legitimate expectation that such people would not act in breach of fundamental rights.

What this means is that where a judge is being invited to exercise either his judgement or his discretion in making a decision, the judge must be presumed to make that decision in accordance with internationally accepted human rights standards. It may be that the judge would benefit by having the assistance of case law in similar cases that will be able to explain the interpretation of those human rights standards. Likewise, when a judge is considering whether or not the behaviour of a public decision making body was reasonable, he can look at whether the decision was made in conformity with human rights norms. Again, case law may well be useful to assist in that process.

In the case of Re K.D. (a Minor) (Ward: Termination of Access)\(^ {31}\), the committee was considering an argument based on articles 6 and 8 of the ECHR and authorities from the European Court of Human Rights. Lord Oliver of Aylmerton approved the argument that although this is not binding on your Lordships, the United Kingdom is, of course, a party to the Convention for the Protection of Human Rights and Fundamental Freedoms and it is urged that it is at least desirable that the domestic law of the United Kingdom should accord with the decisions of the European Court of Human Rights under the Convention\(^ {32}\).

In South Africa, the Courts have been keen to use international standards to assist in their decision making process, and not only treaty standards, but also information from the bodies that interpret those treaties. In S v Williams and Others, 1995 (3) SA 632 (CC) the Supreme Court used the General Comments of the Human Rights Committee as direct assistance in deciding whether or not corporal punishment was a violation of the prohibition of cruel, inhuman or degrading treatment. In Residents of Bon Vista Mansions v Southern Metropolitan Local Council\(^ {33}\), Bundler AJ relied on identical provisions in international treaties in order to assist in the interpretation of the South African Bill of Rights in circumstances ‘where the Constitution uses language similar to that which has been used in international instruments’\(^ {34}\).

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\(^{29}\) [2001] 1 SCR 283


\(^{31}\) 1988] A.C. 806 HL

\(^{32}\) ibid p 823

\(^{33}\) 2002 (6) BCLR 625 (W)

\(^{34}\) ibid para 15
In Australia, courts have also been prepared to use international standards. In *Mabo v State of Queensland*\(^{35}\), a case involving land rights for native peoples, Justice Brennan stated

> The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform to international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.\(^{36}\)

### D. Bangalore principles

At a meeting organised in Bangalore by the Commonwealth Secretariat in 1988 a colloquium of high level judges from a number of Commonwealth countries discussed the use of international standards to assist in the interpretation of the common law. At the conclusion of the meeting Justice Bhagwati issued a communiqué summarising into key principles the discussions that had occurred. The Bangalore Principles state that fundamental rights exist in all constitutions, and that international bodies can help to interpret them. The body of available jurisprudence is of practical relevance and value to judges, and they are of value even where not directly incorporated, particularly where domestic law is uncertain or incomplete. Where there is ambiguity in national law, it should be resolved in accordance with international human rights standards.\(^{37}\) The principles have since been applied in a number of cases in common law countries.\(^{38}\)

### V. KEY ISSUES

#### A. Mandatory Death Penalty

The first of the ECOSOC Safeguards states that:

> In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

Where the death penalty is mandatory, the judge is not able to consider the circumstances of the accused and his personal mitigation in considering sentence. The requirement that the death penalty not be ‘arbitrary’ means that there must be some discretion for a judge to decide whether each individual case can truly be considered to be one of the ‘most serious crimes’.

The issue was considered by the UN Human Rights Committee in the case of *Lubuto v Zambia*. In Zambia the situation is very similar to Kenya, in that the death penalty is the mandatory punishment for armed aggravated robbery, that is, a robbery where the defendant was in possession of a firearm. The Committee found Zambia in violation of the ICCPR in 1995, stating that:

> Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that

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\(^{35}\) [No.2] (1992) 175 CLR 1

\(^{36}\) ibid para 42


the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2, of the ICCPR.\textsuperscript{39}

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has reported on the proper standards required by international law in death penalty cases. Included in those recommendations is the requirement that ‘all mitigating factors must be taken into account’\textsuperscript{40} which would appear to exclude the possibility of sentence passed without consideration of the individual circumstances of the defendant.

Other common law jurisdictions also prohibit the mandatory death penalty. In India, the Supreme Court has given guidelines to judges to assist them in deciding which cases are appropriate for the use of the death penalty and which are not. These include a presumption in favour of life imprisonment and imposing the death penalty only where there are ‘special reasons’ for doing so. These would include the offence being especially depraved or heinous or the offender being a source of grave danger to society at large.\textsuperscript{41}

Even in the United States of America, the use of a mandatory death penalty is prohibited in law. The concern was that such a sentence was arbitrary, in that it did not allow for the individual circumstances of the offender to be considered, and was therefore unconstitutional.\textsuperscript{42}

In April 2001, the Eastern Caribbean Court of Appeal held that the mandatory nature of the death penalty was an arbitrary deprivation of the right to life, not allowing any rational connection between the offender and the offence, and not allowing any consideration of individual mitigation.\textsuperscript{43} Similarly, the Inter American Court of Human Rights in \textit{Hilaire, Constantine et al v. Trinidad & Tobago}, found that the mandatory imposition of death sentences was arbitrary as it could not take into account the mitigating circumstances of the individual, requiring the same punishment to be imposed despite the possibility of conduct that can be vastly different.\textsuperscript{44}

\textbf{B. Detention on Death Row}

Many people are detained on death row for many years. The problem of delay on death row has concerned many international courts. It has long been considered that to hold someone in peril of execution for a long period of time is inherently cruel. In Common Law countries, executions always used to follow swiftly after sentence. In England, this normally occurred within 4 weeks, allowing only 6 if there was an appeal. Historically, delays of years were not known. As Justice Stevens noted in the case of \textit{Lackey v. Texas}, 514 U.S. 1045 (1995), where there was a delay of 17 years, ‘[s]uch a delay, if it ever occurred, certainly would have been rare in 1789’.

In the case of \textit{Pratt and Morgan} the Judicial Committee of the Privy Council held that keeping someone on death row for 14 years amounted to inhuman or degrading punishment in violation of Section 17(1) of the Constitution of Jamaica. The Privy Council\textsuperscript{45} stated that:

\begin{quote}
In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not
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\textsuperscript{43} \textit{Spence and Hughes v The Queen}, ECCA, 2 April 2001.
\textsuperscript{45} Para 53
The Privy Council concluded that ‘in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute ‘inhuman or degrading punishment or other treatment’\(^{47}\). Other common law jurisdictions have decided that delays measured in years are not acceptable. The Supreme Court of Zimbabwe held that being held for between four and six years under sentence of death constituted ‘inhuman or degrading punishment’.\(^{48}\) In India, two years delay has been held to be unconstitutional.\(^{49}\) The Constitutional Court of South Africa found in \textit{Makwanyane}\(^{50}\) that the death penalty was unconstitutional, and that the ‘death row phenomenon’ was part of the problem which caused them to come to that decision. In the \textit{Soering} case the European Court of Human Rights decided that waiting 7-8 years on death row was treatment in violation of the prohibition of cruel and degrading punishment in Article 3 of the European Convention of Human Rights.

\textbf{C. Cruel Treatment}

The prohibition in Article 7 ICCPR against inhuman or degrading treatment allows for challenges to the operation of the death penalty.

The Human Rights Committee in General Comment 20(44) of 1992 stated that ‘When the death penalty is applied by a State party for the most serious crimes, it must not only be limited in accordance with Art.6, but must be carried out in such a way as to cause the least possible physical and mental suffering’\(^{51}\). In the case of \textit{Ng v Canada} the Committee was considering the circumstances whereby Mr Ng was due to be extradited to California, where he would face execution by form of asphyxiation by gas. The Committee read evidence that death may take over 10 minutes, and found that such a method of execution would violate Article 7, reiterating their previous guidance in the General Comment.\(^{52}\) In other cases they found no violation for lethal injection as a method of execution,\(^{53}\) although in at least one case the Committee declined to hear expert evidence on the subject before making their decision.\(^{54}\)

\textbf{D. Developing a Strategy for Abolition}

The examples of challenges to the death penalty outlined above make clear the need to develop a strategy in each individual country, and also regionally, to challenge the operation of the death penalty. In the case of the Commonwealth Caribbean, a clear legal strategy has been adopted in the last 15 years in order to bring the right cases at the right time, in order to chip away at the death penalty, utilising lawyers employed full time to work on death penalty cases and also the pro bono involvement of international commercial firms to provide litigation support and legal advice.

In many commonwealth countries in Africa the position is that capital punishment is rarely used by the government, particularly for common crimes, but that they like to keep it on the statute book for various political reasons. This may be that they want to appear ‘tough on crime’, due to a high crime rate. It may be for technical reasons such as the lack of parliamentary time or will to formally abolish. It may be that they do not want to ignite the debate which might be firmly in favour of re-introducing active executions, but that they prefer to tuck the problem under the carpet and forget about it.

\(^{46}\) ibid para 73  
\(^{47}\) ibid para 85  
\(^{50}\) ibid para 3  
\(^{51}\) UN Doc CCPR/C/21/Add.3 (7 April 1992)  
All of these considerations mean that it is essential to place any legal strategy to abolish the death penalty in a context of a political and popular campaign. This means ensuring that the government concerned is fully briefed on alternatives to the death penalty, that they realise the expense of the death penalty as opposed to prison sentences. There are various international organisations that have great expertise in advising governments on such issues.

Also, if a legal strategy is placed in the context of a campaign at a grassroots level, that can assist with the sensitisation programme that is essential to ensure that the country is receptive to the abolitionist ideas that are being promoted. Civil society has a very organised presence in many countries, and through specific organisations it may well be possible to design a campaign that will lead to an understanding of the key issues that will arise in that country.

VI. CONCLUSION

If International Law has in the past said ‘not yet’ when dealing with the issue of the abolition of the death penalty, it is clear that in certain regions of the world human rights law is saying ‘now’. In many countries in Africa where the death penalty is not actively used, the situation is to some extent the same, with many governments keen to abolish but frightened that public opinion will not be with them. By the development of legal and other strategies, it should be possible to assist in pushing Commonwealth Africa towards the same inevitable conclusion.