CONFRONTING CAPITAL PUNISHMENT IN ASIA

Human Rights, Politics, and Public Opinion

EDITED BY
ROGER HOOD AND SURYA DEVA

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This book is the outcome of a conference entitled 'Capital Punishment in Asia: Progress and Prospects for Law Reform' held on 4–5 November 2011 at City University of Hong Kong, under the auspices of its Law School. At that time Roger Hood was visiting Adjunct Professor responsible for teaching a short intensive seminar on 'The Death Penalty in International Perspective'. It was Surya Deva, Associate Professor in the Law School, who suggested that they should join hands to organize such an event and his suggestion received warm support and financial assistance from the Law School as well as City University. The conference was organized in collaboration with the Office of the European Union in Hong Kong and Macau, and the Jindal Global Law School, India.

The conference attracted a significant number of scholars, legal practitioners, and civil society representatives from all over the world. More than 20 papers were presented, which brought together both international and Asian perspectives on the death penalty. The editors had a difficult, albeit pleasant, dilemma in selecting papers for this volume. At the conference we had some very helpful additional papers relating to India, Japan, Malaysia, South Korea, and Taiwan to provide a wider context, but regrettably there was not space for us to be able to include them here.

We are very grateful for the support we received from many people in organizing the conference and when editing this book. In particular, we thank the City University Law School for providing the much needed funds that allowed us to invite leading scholars to the conference. We would also like to thank Professor C Raj Kumar, the Vice Chancellor of the OP Jindal Global University, and Maria Castillo Fernandez and Asad Beg from the Office of the European Union to Hong Kong and Macau for showing enthusiasm in co-hosting the conference and making useful financial contributions. Emily Chow and her team members at the Law School are to be congratulated for their organization skills in ensuring that it was a smooth and pleasant experience.

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Roger Hood and Surya Deva
Oxford and Hong Kong
30 April 2013

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II. THE PROGRESS SO FAR

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Introduction

Roger Hood and *Surya Deva*

Asia remains central to the quest to abolish capital punishment worldwide. There are several reasons for this. China and India, both of which retain this cruel, degrading, and inhumane punishment, although use it on a very different scale, between them account for 37 per cent of the world's population. Indeed, the 13 countries that remain actively retentionist in the region account for half of the world's population.[1] But can one really talk about 'Asia' as a uniform entity? Is Asia different from the rest of the world when it comes to the factors that determine retention or abolition of the death penalty? Will Asian countries continue to resist the international movement towards its abolition?[2] What are the prospects of Asian retentionist countries abolishing capital punishment in the near future? How could/should these countries move in this direction? This book tries to grapple with these questions by shedding light on the evolving human rights discourse, politics, public opinion, and judicial practices *vis-à-vis* the death penalty in Asia through in-depth analyses of the situation in China, India, Japan, and Singapore. Progress towards abolition of the death penalty in these four countries—which represent diverse political and judicial systems, levels of economic development, social structures, and civil society movements—is likely to make the biggest impact on developments in the region as a whole.

The chapters are substantially revised versions of papers presented at a conference on 'Capital Punishment in Asia' held at City University of Hong Kong in November 2011. In the time that has passed since the conference, the essays have been developed further and brought as much up-to-date as was possible before the manuscript went to press at the end of April 2013.

In their insightful and comprehensive scholarly survey of the death penalty in Asia, published in 2009, David Johnson and Franklin Zimring referred to the region as *The Next Frontier* in the international campaign to abolish capital punishment.[3] In contrast to Africa south of the Sahara on the one hand (where many countries since the end of the 1980s had abolished the death penalty or instituted a moratorium on judicial executions) or the Islam dominated nations of the

[1] These countries, which have all carried out executions within the past 10 years, are: Afghanistan, Bangladesh, China, India, Indonesia, Japan, North Korea, Malaysia, Pakistan, Singapore, Taiwan, Thailand, and Vietnam. For further information about them, see Roger Hood, *Enhancing EU Action on the Death Penalty in Asia*, Briefing Paper for the European Parliament, Directorate General for External Policies, EXPO/B/DROI/2011/22 (2012).

[2] As at 31 December 2012, 140 nations were abolitionist in law (105) or in practice (35), whereas 58 retained the death penalty for ordinary crimes. Amnesty International, *Death Sentences and Executions in 2012* (London, Amnesty International 2013) Annex II, 50, AI Index: ACT 50/001/2013.

[3] David T Johnson and Franklin E Zimring, *The Next Frontier. National Development, Political Change, and the Death Penalty in Asia* (New York, Oxford University Press 2009).

middle-east on the other hand (where most had resolutely opposed abolition), several Asian countries within the past decade have, as Professor Zimring relates in his contribution to this book, shown a greater awareness of the issue and become possibly more susceptible to the case for moderating and eventually eliminating recourse to this cruel, degrading, de-humanizing, and irreversible punishment.

Professor Zimring begins by reminding us that it is not particularly helpful to talk about Asia as if it is a unified region in respect of death penalty policies. Indeed, he points to the variety of such policies and practices within the region. Excluding Australasia and the small islands of the Pacific (which he includes in his analysis), only two Asian states had successfully abolished capital punishment prior to the end of the 1990s and maintained abolition since then—Cambodia in 1989 after the fall of Pol Pot's murderous regime and as part of the United Nations settlement and Nepal in 1997. They were joined by Bhutan in 2004 after 40 years without an execution and by the Philippines which, having abolished it in 1987 following the overthrow of President Marcos, re-introduced it in 1994, but only carried out seven executions before abolishing it again in 2006. In 2013, these four abolitionist nations will almost certainly be joined by Mongolia which, after ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), with effect from 13 June 2012, is now preparing to eliminate it from its domestic law.

Six other Asian countries have retained the death penalty in law but not enforced it through executions for at least 10 years: the last executions took place in the Maldives in 1953, in Brunei Darussalam in 1957, in Sri Lanka in 1976, in both Burma and Laos in 1989, and in South Korea in 1997. These are regarded by the United Nations as 'abolitionist de facto' and by Amnesty International as 'abolitionist in practice', although it has to be recognized that all of them have continued to impose death sentences, even if only occasionally. Among the other Asian countries, executions have become more sporadic even if not rare events. Notably, Pakistan, which had executed 34 people in 2008 has since then adopted a policy not to carry out executions (although one did occur under military jurisdiction in November 2012). There have been no executions in Thailand since 2009, none in Malaysia between 2010 and 2013, and none in Indonesia from 2008 until 2013. In fact, only three Asian countries carried out an execution in 2012 and every one of the previous 10 years (China, Bangladesh, and North Korea) and as Zimring points out, only one of them (China) has what he calls an 'operational' death penalty policy aimed at crime repression. Even though Liu Renwen in his chapter tells us that the estimated 'number of executions has been reduced by at least a half, even two-thirds, since the withdrawal of the approval power from the Provincial High Courts and its return to the Supreme People's Court' in 2007, this means that the number may still be as high as 3,000 to 4,000. The continuing insistence of the authorities to keep the number shrouded by its secrecy law remains a large blot on the Chinese government's claims that it is proceeding gradually towards abolition and building a society based on the rule of law.

There have been a few set-backs to this general trend to ameliorate the full potential impact of capital punishment. In Taiwan, an 'unofficial', but Ministry

of Justice-backed, moratorium on executions which began in 2006 was ended in 2010 when executions resumed. In Japan, the victory of the democratic Liberal Party (LPJ) in 2010 brought with it the appointment of a prominent abolitionist as Minister of Justice but after a short pause executions resumed. India, where the authorities had shown a great reluctance to move from death sentences to executions since the late 1990s, with the consequence that it has a substantial 'death row' of over 400 persons, suddenly broke an eight-year period of abstention since 2004 when in November 2012 it executed the lone remaining perpetrator of the 2008 'Mumbai massacre', Mohammad Ajmal Kasab. Three months later, another politically motivated offender, Afzal Guru, who had been implicated in the attack on the Indian Parliament in 2001, was executed and since then the President of India has rejected clemency pleas for murderers convicted of non-political murders. More recently, in April 2013, the Indian Supreme Court held that the delay in disposal of a mercy petition by the President cannot be a ground to commute the death penalty into life imprisonment.[4]

As will be seen from the table of contents, the book begins by exploring the ways in which and the reasons why Asia is different from other parts of the world, in particular Europe, as regards the speed at which the international movement to abolish capital punishment in all countries, first promulgated by the UN General Assembly in 1971, has been embraced. Zimring rightly, in our view, dismisses the hypothesis that the difference lies in the so-called 'Asian values', culture or in public opinion, which appears not to be so different than that canvassed in Europe prior to abolition. Instead, he stresses the importance of political and economic development and authoritarian rather than democratic 'political and governmental structures'.

This theme is taken up in other parts of the book, in particular in relation to China. In her chapter, Susan Trevaskes writes:

> Party-state policy, the product of politics on the nation's politico-legal landscape, continues to heavily inform judicial interpretation of criminal law for capital case sentencing in China's march towards modernization. This makes death penalty decision-making vulnerable to political vicissitudes at both the central and provincial level…We can therefore be sure that policy and politics will continue to firmly shape legal practice as the place of capital punishment in China's national reform continues to evolve.

Børge Bakken, in his revealing comparative analysis of the lower level of support for capital punishment among the 'masses' than among the 'elite' in China, is equally insistent that this 'is a political, not a cultural issue'.

David Johnson's authoritative essay also points to the highly variable resort to executions that have followed Ministerial changes in Japan. This is echoed in Michael Hor's conclusion that the dramatic change in the execution rate in Singapore ('from a rate of seven executions per million pre-2004…to 1.2 per million post-2004') was not brought about by the courts but by the government after the election of 2011. As Hor puts it, the changes 'are not apparently

[4] *Devender Pal Singh Bhullar v State of NCT of Delhi*, WP (Crl) D No 16039/2011 (judgment dated 12 April 2013).

fully explicable on grounds other than an unannounced change of official policy towards the necessity of executions . . . Large and profound shifts are taking place in the political culture of Singapore—so much so that the newly elected president Tony Tan blessed this phenomenon with the phrase "the New Normal" '. It should be noted too that the great decline in the number of executions has not been accompanied by a rise in the murder rate which has remained stable. Indeed, the number of murders recorded in 2012 was the lowest for 20 years.[5]

Another important theme covered in this volume is the influence of, and reaction to, the development of international norms both in relation to the pressures to abolish capital punishment altogether and to protect the rights of those facing the death penalty where it is still enforced. The European Union has been at the forefront in engaging with Asian countries, especially China, to impress upon them that the death penalty inevitably, howsoever administered, contravenes the rights embodied in the Universal Declaration of Human Rights and the ICCPR, namely, the right not to be arbitrarily deprived of life and the right not to be 'subjected to torture or to cruel, inhuman or degrading treatment or punishment'. It is significant that Professor Liu Renwen, one of the leading and most influential advocates for abolition in China, in his analysis of the factors that have spurred China within the past 10 years to change its death penalty policy—so as to lower the number of executions, reduce the number of capital crimes, and to improve procedures to protect the rights of the accused to a fair trial—places first the fact that the Chinese government has been made aware that 'abolition of the death penalty has become an international trend' and that 'in those countries without executions or even few executions, there is no evidence to show that the situation of public safety deteriorated'. Such information, he believes, 'has had a marked impact on thinking in China'.

Similarly, Michelle Miao, in her revealing chapter on China's response to the global campaign against the death penalty, notes that

> collecting statistics about the worldwide administration of capital punishment has been a crucial device because it induced changes in states still actively practising capital punishment by informing them about the position of other countries on capital punishment policies and by forcing them to accept their status as 'rogue states' in the international community. . . . [This] has forced China to re-consider whether it should insist on its excessive capital punishment policies and whether such policies comport with China's self-perceived identity as a 'civilised nation' and a 'responsible member of the global community'.

Her chapter provides two striking examples—the execution of the British citizen Akmal Shaikh in 2009 for drug trafficking, and the hurdles faced by the central government in trying to extinguish completely 'shaming parades' prior to

[5] 'The number of murder cases registered a 20 year low, dropping from 16 cases in 2011 to 11 cases in 2012', Singapore Police Force, 'Annual Crime Brief 2012', <http://www.spf.gov.sg/stats/stats2012_details.htm> (accessed 20 April 2013). For a fascinating comparison of the murder rates of Singapore and Hong Kong (which has no capital punishment), see Franklin E Zimring, Jeffrey Fagan, and David T Johnson, 'Executions, Deterrence and Homicide: A Tale of Two Cities' (2010) 7 *Journal of Empirical Legal Studies* 1–29.

execution—of the tensions that still exist between its 'reputational interest' in seeking to conform to international human rights standards and China's 'political interest' in putting security of the party and the state as its top priority. Nevertheless, as she shows, there is growing acceptance among the judicial and political elite that China needs to adhere to international human rights norms. As Professor Zhao Bingzhi, of Beijing Normal University, the leading figure in the death penalty reform movement, stated in 2009: 'The international standard of the death penalty is new. In the past, whether the death penalty was applied in a country fell into the scope of domestic affairs, but now it has become an international obligation . . . abolition is an inevitable international tide and trend as well as a signal showing the broad-mindedness of civilized countries . . . [abolition] is now an international obligation . . . '.[6]

Professor Murthy looks at the influence of human rights values emanating from various countries as regards their impact on the death penalty debate, most notably the extent to which National Human Rights Institutions (NHRIs) have played a part (or rather little part as in the case of India) in extending the human rights case against capital punishment. To buttress this point, Murthy quotes the current Chair of the Indian National Human Rights Commission (NHRC), Justice KG Balakrishnan, who has said: 'It is not proper for the NHRC to give an opinion on the death sentence. But if you ask me, I personally feel that the death penalty should continue. It has got a very great deterrent effect on society'. As Murthy notes, the NHRIs in the Asia Pacific region could play a more active role in abolishing capital punishment through conducting research, submitting shadow reports to the UN Treaty bodies, intervening in 'test cases', bringing forward legislative reform proposals, and supporting advocacy campaigns.

Another aspect that must be considered is discussed in Sam Garkawe's chapter. By referring to the relevant extradition laws and policies and the 'Bali Nine' case, he analyses the role that the Australian government can play in influencing the policies of retentionist Asian states and the dilemmas that the Australian government faces in relation to extradition and pleas for assistance in criminal matters where a death sentence could be a possible outcome. This has arisen both when responding to the threat of execution of its citizens for capital offences committed abroad and to threats to execute those who have killed Australians abroad, most notably in the Bali bombing. Ironically it is the Indonesian government that is now complaining about threats to execute its own citizens convicted of capital offences while working in the Middle East, Malaysia, and China: hence the significance of pressures that can be mounted on retentionist states to refrain from the use of capital punishment, what Professor William Schabas has called a form of 'indirect abolition'.[7]

[6] Zhao Bingzhi and Wang Shuiming, 'Development Trend in Death Penalty in Contemporary Era and its Inspiration for China', Guangzhou China, June 2009, 37.

[7] William Schabas, 'Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice' (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 581.

Saul Lehrfreund brings to bear his profound experience of litigation in the international sphere by considering the extent to which the countries in Asia live up to their obligations entered into by acceding to the ICCPR and the Safeguards Guaranteeing the Protection of Rights of those Facing the Death Penalty (Safeguards), first adopted by the UN, without dissent in 1984. China signed the ICCPR in 1998 but has not yet ratified it, whereas Singapore (and Malaysia) has yet to sign or ratify the ICCPR. Nevertheless, the norms established by the ICCPR and the Safeguards have had a clear influence on recent developments directed at limiting the scope and number of crimes subject to the death penalty to the 'most serious crimes' under Article 6(2) of the ICCPR, which has been interpreted by paragraph 1 of the Safeguards to mean only 'intentional crimes with lethal or other extremely grave consequences'.

Several contributors to this book reveal that the retentionist countries under consideration have a long way to go to reach these international minimum standards. Liu Renwen remarks that although it 'is obvious that China has made great progress in the reform of its death penalty system when seen in the Chinese context', the fact 'that 55 offences are still punishable by capital punishment is certainly unacceptable and it is difficult for China to provide a convincing explanation' for this position because more than half these 55 offences are non-violent crimes. Among the vital reforms he highlights is the need for China to have an effective system for considering and granting clemency independent of the Supreme People's Court. David Johnson brings his expert knowledge of Japan's criminal justice system to bear critically on the relatively new 'lay judge' system, which appears to have weakened safeguards for those facing the death penalty, and shows that in Japan death is not, as it is in the United States, regarded as 'different'. He contrasts the United States and Japan with respect to 12 safeguards available under the US 'super due process' system (though without claiming that these have proved a satisfactory means of making the death penalty acceptable in the United States). On this basis he demonstrates how weak the protections are for those facing the death penalty in Japan, a country which has ratified and therefore should conform to the standards set out in the ICCPR. In particular he draws attention to the vagueness of the Japanese guideline limiting the circumstances when the death penalty can be imposed, namely, to when 'it is unavoidable' and 'cannot be helped'.

Another theme running through several chapters in this book is the role of public opinion. In China and Japan and no doubt in India one of the most prevalent arguments is that public opinion demands the death penalty. In China and Japan this appears to be taken for granted and even when evidence is brought forward to challenge this assumption, it is largely ignored, not only by the media but also by academics and administrators. As Michelle Miao notes: 'It is commonly asserted that the general public has a blind faith in capital punishment in China. The Chinese authorities insist that resorting to the death penalty is necessary to appease growing public anger in highly publicised cases involving murder and other grave crimes'. Susan Trevaskes in her contribution gives two telling examples in which an outcry over suspended death sentences regarded as too lenient by 'netizens' influenced the Courts to change the sentence to immediate execution,

despite findings being available from a scientifically sound public opinion survey which demonstrated the generally low level of concern among members of the public about the use of the death penalty.

Børge Bakken, in contrast, argues cogently, on the basis of the evidence of the first major and sophisticated public opinion survey carried out in China in 2007 and 2008,[8] that it is the intellectual, legal and administrative elites that are holding back the pace of reform in China, not the masses. This survey found that when asked whether they favoured or opposed the death penalty, 58 per cent of almost 4,500 respondents were *definitely* in favour—by no means a very high proportion when compared with the experience of European countries when they abolished capital punishment. While only 14 per cent said they opposed capital punishment, as many as 28 per cent were recorded as being 'unsure'. When asked whether China should speed up the process to abolish the death penalty, only 53 per cent were opposed to doing so and a further 33 per cent were 'unsure'. This can hardly be said to indicate a fervent desire for capital punishment of a kind that would make abolition politically impossible to achieve. Yet he cites a debate between three leading death penalty scholars in 2010 in the publication *Faxue* (*Legal Studies*) in which all appear to have ignored the evidence from this survey when claiming that the strength of Chinese public opinion in favour of capital punishment is a barrier to abolition. 'Thus', he concludes, 'even liberally minded reductionist intellectuals tend to blame "penal populism" for the slow pace of capital punishment reform'.

Mai Sato's original quantitative and qualitative research and her imaginative deconstruction of the Japanese government's claims about the strength of public opinion in favour of the death penalty, on which they base their own support for the death penalty, turns the question round from 'Do the public approve of or support the death penalty?' (the Japanese government states that 86 per cent do) to 'Is support so strong for the death penalty among the public that to abolish it would undermine their trust in government?' In other words, would abolition erode the legitimacy of political and judicial institutions and lead to 'non-compliance with the law, lack of co-operation with the criminal justice system, and in the worst scenario, vigilantism where victims' families take justice into their own hands'? After examining closely the government survey, she found that if those who said they supported the death penalty at present but could contemplate abolition in the future were excluded from the total percentage of people favouring the death penalty, the percentage that would *resolutely* be in support of capital punishment—'pure retentionists'—would be not 86 but 56 per cent. More importantly, her own surveys of over 20,000 Japanese citizens showed that the majority did not hold strong opinions on the issue, and that only 44 per cent endorsed the view that the death penalty 'should definitely be kept'. She calls on the Japanese government to take the lead in better informing the public about the realities of capital

[8] Dietrich Oberwittler and Shenghui Qi, *Public Opinion on the Death Penalty: Results from a General Population Survey Conducted in Three Provinces in 2007/08* (Freiburg, Max Planck Institute 2009) 1–30, <http://www.mpicc.de/shared/data/pdf/forschung_aktuell_41.pdf> (accessed 20 April 2013).

punishment and to provide public education on the subject rather than to 'wait passively until a change occurs in public opinion'.

In democratic India the death penalty is to be imposed in only the 'rarest of rare' cases, as per the principle laid down by the Supreme Court in *Bachan Singh v State of Punjab* in 1980, and further developed in *Macchi Singh v State of Punjab* in 1983. Because of the 'special reasons' requirement stipulated by section 354(3) of the Code of Criminal Procedure 1973 and its judicial interpretation, life imprisonment is to be the 'normal' penalty for murder. Although the Indian Penal Code and other criminal statutes provide the death penalty for offences other than murder (such as kidnapping under threat of death and mandatorily for drug-trafficking on a second conviction for specified offences), it is doubtful whether executions would now ever be carried out other than for aggravated forms of murder or for a murder coupled with other crimes. However, the 'rarest of the rare' principle (which in reality means 'the worst of the worse') gives discretion to the Supreme Court to define what classes of killings should fall within this category. For example, the court ruled in 2009 that 'dowry deaths' and 'bride burning' should be subject to the death penalty, while in 2011 it added 'honour killings' to the list.

The enlightening analysis of death penalty cases dealt with on final appeal by the Indian Supreme Court between January 2000 and October 2011 carried out by Surya Deva shows the extent to which a device aimed at restricting the use of capital punishment has produced another objectionable outcome, namely, arbitrariness in the administration of capital punishment. This arbitrariness, Deva argues, violates the right to equality under Article 14 of the Constitution. Furthermore, as Amit Bindal and Raj Kumar demonstrate conclusively in their chapter, this arbitrary administration of the death penalty by the Supreme Court is certainly not 'fair, just and reasonable' as required by Indian law. Since it is unlikely that this judicial arbitrariness could be remedied, Deva argues that the Indian parliament should abolish the death penalty for all 'ordinary' crimes which do not threaten the national unity and integrity. Bindal and Kumar advance an additional argument for abolishing the death penalty. Applying Joseph Raz's theory that human rights require that individuals must be allowed to attain their ultimate potential as part of their personal autonomy, they argue that sentencing persons to death is a violation of this individual right, as there is no way of determining that an individual is beyond hope of redemption.

As long as the death penalty remains in force in India, a major concern will be the length of time that prisoners have been held on death row, subsequent to exhausting their right to file appeals, waiting for a response to their clemency petitions to the Governor of the State in which they have been convicted and finally to the President of India. Bikramjeet Batra has provided a comprehensive analysis, in the light of decisions of international human rights bodies, of the Supreme Court's jurisprudence on the question of delay and the 'death row syndrome' and the varying extent to which, in the past, Indian courts took into account the suffering and mental deterioration of prisoners who had been left for long periods

of time under terrible conditions on death row. However, Batra informs us that the recent 'Indian jurisprudence on this issue has been limited to delay alone' and the Supreme Court 'only starts the clock after it has disposed of the appeal and a mercy petition has been sent to the executive'. Batra also shows how the April 2013 judgment of the Indian Supreme Court in *Bhullar* has turned the clock back on an evolving progressive jurisprudence which had castigated inordinate delay on the part of the executive in disposing of mercy petitions. The politics relating to disposal of mercy petitions—keeping petitions pending indefinitely or disposing them at a given point of time to serve political purposes—is also a matter of great concern.

To conclude our brief introduction, the essays in this volume highlight the challenges that the countries discussed, as well as other retentionist states in Asia, face if the goal of universal total abolition of the death penalty is to be reached within the foreseeable future.

First, even if it is impossible for various political reasons to remove the death penalty from the statute book overnight for all crimes, concrete steps must be taken immediately to reduce substantially the imposition of the death penalty and the recourse to executions. The nature of these steps may vary in different countries—from limiting the death penalty only to crimes that affect the national unity and integrity of the state (as European nations did originally); to making greater use of rigorous judicial and clemency review aimed at reducing the number of executions to the minimum; to imposing a moratorium on executions. It is critical, however, that even during this transitional phase, retentionist states in Asian remain wedded to achieving the ultimate goal of total abolition as soon as possible.

Secondly, retentionist countries in Asia should make greater use of clemency procedures. The award of 'suspended' death sentence by the courts in China and grant of clemency by the executive in India are cases in point. It should be possible to develop guidelines to make use of such measures swiftly, consistently, and in a greater number of cases.

Thirdly, retentionist states must display higher transparency and procedural fairness in conformity with international human rights standards at all stages of administering capital punishment. Any secrecy in state-based institutionalized killing not only infringes international human rights law but also runs counter to globally accepted good governance aspirations. Countries should make available to the public, in conformity with Resolution 1989/64 of the UN Economic and Social Council, regular statistical information, if possible on an annual basis, providing the number of death sentences imposed and the number of executions carried out for each category of offence, the number of persons under sentence of death, the number reversed or commuted on appeal, and the number of instances in which clemency has been granted.

Fourthly, a significant organizational and political difference between Europe and Asia that Franklin Zimring has highlighted should be noted and acted upon. There is a lack of robust regional organizations, whether governmental or civil

society, in Asia that can put pressure on states to develop a regional policy towards abolition of capital punishment. This, for instance, made a profound difference in Europe, as first the Council of Europe and then the European Union made complete abolition a key element of its human rights agenda. Professor Zimring's case for an institutional structure that would support abolition across the Asian countries is one that the conference from which this book has evolved hoped to provide a platform.

PART I

SITUATING ASIA IN AN INTERNATIONAL HUMAN RIGHTS CONTEXT

1

State Execution: Is Asia Different and Why?

Franklin E Zimring

This chapter reports a mixture of theory and practical suggestions, drawing on the findings of the book that David Johnson and I wrote and on Roger Hood's original research. The central theoretical issue I address is whether and to what extent Asia is different from other areas of the world where the struggle over state killing as judicial punishment has played out.

The basic issue is whether places like the People's Republic of China, South Korea, Japan, and Thailand are an entirely different cultural and political context for the evolution of death penalty policy or simply a region behind Europe in political and social development that will behave in much the same way that was observed in Western Europe at the appropriate stages of national and regional development.

My analysis will focus on first describing the variety of death penalty policies found in Asia early in the twenty-first century and then on a variety of possible reasons why policies are different in many Asian nations than in Europe or elsewhere. A brief concluding section will suggest two modest changes that may improve the prospects for progress towards abolition of capital punishment in Asia.

1. Patterns of Death Penalty Policy in Asia

The first stop in any profile of the death penalty is a survey of whether a nation's criminal code provides execution as a policy for any offences. Figure 1 distributes the policies in effect in 2011 in 29 Asian jurisdictions using three categories of policy reported by Amnesty International—abolition, retention, and what the United Nations calls *de facto* abolition, where the penalty remains a legal possibility but no executions have been conducted for at least ten years.

The 29 jurisdictions reported in Figure 1 include two sub-national 'Special Administrative Regions' of the PRC (Hong Kong and Macao) which have autonomy in death penalty policy. A plurality of Asian jurisdictions—12 out of 29—retain a death penalty on their statute books and have conducted at least one

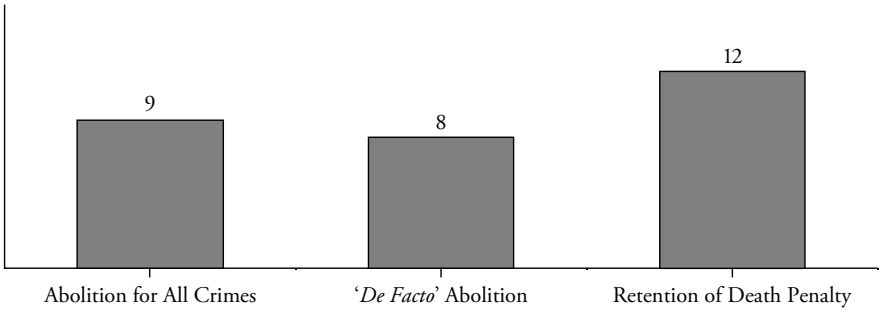

Figure 1: Status of the Death Penalty in 29 Asian Jurisdictions as of December 2011

Note: The jurisdictions are as follows. *Abolition for all crimes*: Hong Kong (1993), Macao (1995), Australia (1985), New Zealand (1989), Bhutan (2004), Cambodia (1989), East Timor (1999), Nepal (1997), and the Philippines (2006). *'De facto' abolition*: Brunei Darussalam (last execution in 1957), Laos (1989), Maldives (1952), Mongolia (2008), Myanmar (1989), Papua New Guinea (1950), South Korea (1997), and Sri Lanka (1976). *Retention*: China, Japan, North Korea, Taiwan, Bangladesh, Pakistan, Indonesia, Malaysia, Singapore, Thailand, Vietnam, and India. Note, too, that the 'Special Administrative Regions' of Hong Kong and Macao do not have capital punishment, but offenders can be executed in China through the process of 'rendition'.

Source: *Johnson and Zimring* (2009).

execution in the decade prior to 2012.[1] Nine of the 29 jurisdictions have formally abolished capital punishment and eight other places have been moved from 'retentionist' to '*de facto* abolition' because of protracted non-execution or, as in the case of Mongolia, announcing a permanent moratorium.[2] In compiling this distribution we give credence to Myanmar's claim to '*de facto* abolition' status but reject a 'no execution' claim from North Korea.[3]

The almost 50-50 split in the census taken by Figure 1 does not reflect the actual balance of death penalty policy in Asia because all of the major population centres in Asia are in the retentionist category. So about 95 per cent of the persons who reside in Asia are found in nations that retain the death penalty.

But the impression of uniformity of policy that is produced by showing that 95 per cent of the population resides in 'retentionist' governments is also misleading. The two largest 'retentionist' nations in Asia are India and the People's Republic of China (PRC). India executed a total of one person in the 14 years between 1998 and 2011 and thus compiled the lowest execution risk ever in the Amnesty 'retentionist' category—an annual rate per population smaller than one in ten billion. The PRC during the same period executed more than 50,000 persons and accounted for more than 95 per cent of the world's executions. Any meaningful assessment of the actual content of death penalty policy in retentionist nations should try to estimate the actual rate of execution. This is the aim of Table 1 taken from the Johnson and Zimring survey[4] and updated from 2007 to 2011.

[1] David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change and the Death Penalty in Asia* (New York, Oxford University Press 2009) 15–18.
[2] Johnson and Zimring (2009) 15–18.
[3] Johnson and Zimring (2009) 15.
[4] Johnson and Zimring (2009) 35.

Table 1: Varieties of execution policy among retentionist nations in Asia by execution rate in 2011 (excluding North Korea)

Operational	Exceptional	Nominal	Symbolic	
More than 1 execution per 1,000,000 population	*More than 1 execution per 10,000,000 population*	*More than 1 execution per 25,000,000 population*	*Less than 1 execution per 25,000,000 population*	*No executions*
China: estimate 5 per million, execution range is 3,000–8,000; 1,337,000,000 population	*Singapore: 0.63 per million*, 3 executions, 4,700,000 population	*Bangladesh: estimate 0.133 per million*, estimated execution range is 5–35, 150,500,000 population		*India:* 1,189,000,000 population
	Vietnam: 0.4 per million, 25 executions, execution range is 10–60; 90,550,000 population			*Indonesia:* 246,000,000 population
	Taiwan: 0.21 per million, 5 executions, 23,072,000 population			*Pakistan:* 173,000,000 population
				Japan: 126,500,000 population
				Thailand: 66,7000,000 population
				Malaysia: 28,7000,000 population

Editors' Note: Such are the annual variations in execution policy in recent years that it should be noted that the numbers reported for 2012 (which Amnesty International published in April 2013) were: none in Singapore, none in Vietnam, one in Bangladesh, one in India, one in Pakistan (military court), and seven in Japan. Six were executed in Taiwan.

Eleven of the 12 'retentionist' nations in Asia are divided into four categories (there are no good estimates for North Korea). Only China has an 'operational' level of executions with more than one execution per million population per year. Six of the 12 retentionist states executed nobody in 2011, but this included Japan which in typical years does execute.

There are three notable features of this pattern of executions in retentionist Asia. First, most Asian nations with death penalties still in force cluster at the very lowest category of usage, and this cluster includes very large nations such as India and

Indonesia. Secondly, very few Asian states use the executioner with any regularity. The PRC is alone in making execution a more than one-in-a-million proposition, with a rate per million population of executions more than five times the magnitude of any other Asian nation. Most Asian nations with a death penalty are clustered closer to the pattern of India than to the PRC.

But the third obvious interpretation of the regional distribution is that huge variations within the region rather than any consistent regional pattern are the status quo in Asia and very wide variation persists when examining smaller regions within Asia. East Asia has *de facto* abolition and *de jure* abolition jurisdictions in close proximity to a country with the world's highest execution rate. Southeast Asia runs the gamut from abolition to high rates of execution [until very recently] in Vietnam and Singapore.

2. Explaining Asian Differences

The extraordinary variation to be found across Asia in death penalty policy is a possible complication that will undermine most attempts to seek out any simple 'Asian difference' in death penalty policy. With such a substantial variation within the region, why is an assumption of an overarching regional difference plausible?

The search for an 'Asian difference' is probably based on one of two assumptions. The first is that the natural basis for comparison to Asia is Europe which is uniformly non-capital punishment in practice (except for Belarus). Once Europe is the standard for comparison, it is Asia's variation in capital punishment practice that must be explained, and be measured against a zero execution European norm. The second possible explanation for trying to find an 'Asian difference' is the assumption that Chinese policy in recent years reflects some broader regional pattern. The notion that China's recent execution policies are typical for the region does not survive the data on Asian execution policy presented in Figure 1 and Table 1. Far from being typical of Asian policy, the PRC was what statisticians call an 'outlier' in 2011, with a rate of executions many times higher than any other with data available.

The more complicated question is what separates the diversity of current execution policy in Asia from the uniform absence of state killing in Europe? That is the topic discussed in this section.

So the contrast at the heart of this analysis is between the wide range of policies found in contemporary Asian nations and the uniform commitment to non-execution in Europe. As a matter of strict logic, this comparison could just as easily be called the search for a 'European difference' instead of 'Asian differences'. Except that most of us assume that the current conditions in Europe are the end point of an historical progression which is also a permanent and desirable outcome. If *that* is assumed, the question behind the 'differences' inquiry is whether

Asia is on its way towards a similar evolution or whether the varieties of policy now observed are likely to persist.

Table 2 approaches this question by positing four features of culture and government that might be different in contemporary Europe and Asia—cultural values that favour execution as a criminal sanction, authoritarian governments which use state execution, public opinion on the narrow question of capital punishment, and single-nation parochialism. Table 2 creates a 4×3 matrix where each of the four issues can be judged as no different in Europe and Asia ('No Real Difference'), or different in Europe and Asia because some Asian nations are earlier along a developmental continuum than the nations of Western Europe ('Developmental Difference'), or policy differences between some Asian nations and European nations that are not explained by developmental lags and can be expected to persist over long periods of time ('Substantive Differences' in Table 2). The remainder of this section will explain my own preferred explanations for each of the four issues highlighted in the table, but I also believe that the table itself should be used by readers as an invitation to fill in their own answers to the questions. In that sense, I would propose an unfilled version of Table 2 as a heuristic device to facilitate a structured discussion of the sources of differences in policy in Europe and Asia.

The first heading in the table concerns 'cultural values' and is based on Lee Kuan Yew's argument, 'The basic difference in our approach [to capital punishment] springs from our traditional Asian value system which places the interests of the community over and above that of the individual'.[5] This 'Asian values' argument can be distinguished from national political structures because he is arguing for cultural and moral values among citizens and it can be distinguished from public opinion on the death penalty itself, which is narrower and specific. The Lee Kuan Yew version posits a preference for community interests rather than individual interests—a far larger theme. There is little in the way of specific empirical evidence of this Asian vs. European difference in the Lee Kuan Yew analysis. There have been a number of collectively oriented political ideologies popular in twentieth-century Europe as well as in Asia. Moreover, there is no firm logical

Table 2: What accounts for differences between Asia and Europe on capital punishment?

	Substantive difference	Developmental difference	No real difference
Cultural values that support the death penalty			✓
Political and governmental structure	?	✓	
Public opinion		✓	
Single-nation parochialism	?	✓	

[5] Johnson and Zimring (2009) 407.

connection between community vs. individual interests and support for the death penalty. In the United States, the interests of individual victims are a dominant theme in recent pro-death penalty rhetoric[6] and the negative impact of state killings on collective community welfare has also been a major theme in European and American abolitionist arguments.[7] Limitations on extreme governmental power can be regarded as a distinctive community benefit as well as a guarantee of individual dignity.

The second problem with 'Asian values' as an explanation of firm tendencies towards Asian state execution is that there is no area-wide pattern of state executions in Asia to explain. Less than a quarter of the jurisdictions reported in Figure 1 and Table 1 executed anyone in 2011 and the non-executing states included one of the world's two largest nations. With no consistent pattern of execution in Asia, was there at least popular discontent associated with the lack of state killings in most Asian nations? Many of the non-executing states in Asia in 2011 were also popular democracies with hotly contested political campaigns on the horizon, places like South Korea and Thailand. Yet a political campaign for executions was nowhere an important element in national politics in the region, an issue I examine briefly when discussing public opinion about the death penalty.

A final reason that the Lee Kuan Yew version of 'Asian cultural values' does not explain or predict the distribution of executions is the stable association of Asian cultural values with wildly different execution policies. Is Hong Kong (abolitionist since 1993) less 'Asian' in its cultural values than the PRC (many thousands of executions)? Is South Korea (no executions since 1997) less Asian in its culture than North Korea? That similar cultural systems produce very different death penalty policies suggest that other variables must account for the range of death penalty policy in modern Asia.

And the second explanation listed in Table 2, what I call 'Political and Governmental Structure', does an almost perfect job of predicting which states execute often in modern Asia. The nations in Asia that have had high execution rates are all authoritarian governments with very few limits on state power, communist governments such as the PRC, Vietnam, and probably North Korea, together with the right-wing authoritarian regime in Singapore. When formerly authoritarian regimes liberalize into plural democracies, their governments transition from high levels of execution to no executions (South Korea) or very few (Taiwan) (Johnson and Zimring 2009, Chapters 5 and 6).[8] There are only two exceptions to a perfect fit between authoritarian government and state execution. Myanmar has not pushed its contested but highly authoritarian regime into execution activity, and Japan, a one-party but functioning developed democracy, has continued a small but steady execution policy.

While it is clear that the number and power of authoritarian governments is the major reason for a persistent number of executing states in Asia, what accounts for

[6] Franklin E Zimring, *The Contradictions of American Capital Punishment* (New York, Oxford University Press 2003) Ch 3.

[7] Zimring (2003) Chs 7 and 8.

[8] *Johnson and Zimring* (2009) Chs 5 and 6.

the continuing number of hard-line authoritarian states in a region where rapid economic development is widespread? The two potential explanations in Table 2 are, first, that this is a 'developmental difference' evident because a number of Asian nations are not yet far enough along in the pattern of stable political and economic development seen in Europe. After all, this argument goes, it was the middle of the twentieth century before Europe decisively shifted out of Nazi and fascist governmental patterns. Asia, too, is on this path.

The alternative theory is one of what Table 2 calls Asian 'substantive difference'—a prediction that authoritarian government and its tendencies towards state execution can persist even if Asia's nations become fully economically developed and its citizenry becomes well-educated. At both the left and right extremes of East Asian politics, in Beijing and in Singapore, the hope of those in power is that an authoritarian state can be a permanent fixture of fully developed economies with large middle-class populations. But the 1990s produced two rather striking demonstrations of the vulnerability of authoritarian governments to the combination of economic development and an educated middle class. Both South Korea and Taiwan had persisted in right-wing authoritarian government during periods of rapid economic development and social change. Whatever hopes the regimes of the 1980s held out for continuity in authoritarian governance came crashing down by the late 1990s. And the economic and social vectors in both South Korea and Taiwan were almost a generation ahead of the PRC because their dramatic growth started in 1960. Singapore in 2012 is the only remnant of the hyper-growth triumvirate of hard-line states on the right that persisted until the 1980s. So we can be sure that developmental differences are one major reason why Asia contains hard-line high execution states. What remains to be seen is whether there are substantive differences that will enable hard-line regimes in Asia to persist in the face of full development. To the extent that democracy is produced by development, the recent histories of Taiwan and South Korea suggest that state execution will be under threat in the PRC and Singapore as well.

Public opinion

The term 'public opinion' about the death penalty is a much narrower concept than the cultural values implicated in my earlier discussion of 'Asian values'. Table 3 shows the percentage of adults supporting the death penalty for murder or as a general proposition in seven Asian settings between 1986 and 2010.

Two numbers are provided for the PRC because the survey I use has higher support for one question (murder) than for another (general support).[9] A majority of citizens favour the death penalty in all the surveys and there is no close link between national policy and the extent of public support—with no discernible

[9] Dietrich Oberwittler and Shenghui Qi, *Public Opinion on the Death Penalty: Results from a General Population Survey Conducted in Three Provinces in 2007/08* (Freiburg, Germany, Max Planck Institute 2009) 25, <http://www.mpicc.de/shared/data/pdf/forschung_aktuell_41.pdf> (accessed 11 February 2013).

Table 3: Levels of public support for the death penalty in east and southeast Asia

	Percentage supporting
China (2007–08)	58–78%
South Korea (1999)	66%
Hong Kong (1986)	68%
Philippines (1999)	80%
Taiwan (2001)	80%
Thailand (2005)	84%
Japan (2010)	86%

Source: *Johnson and Zimring* (2009), Table 8.1, p 302; updated for the PRC by Oberwittler and Qi (2009), 25.

Table 4: Interest in the death penalty, Chinese adults, 2007–08

	Percentage interested
Very interested	3%
Interested	23%
Not very interested	37%
Not interested at all or don't know	37%

Source: *Oberwittler and Qi* (2009), Table 3.1.1, p 10.

difference in public support in zero execution Hong Kong and South Korea as opposed to the then 7,000 execution PRC. Indeed, five of the seven countries surveyed in Table 3 reported no executions in 2011. Yet there is no sustained public pressure for executions in these places despite the widespread public support for a death penalty. Why is this?

The best evidence on why the public is not importantly involved in state execution policy comes from a recent survey of Chinese adults done by Oberwittler and Qi, and reported in Table 4.

The important lesson of Table 4 is that most people in China do not regard the death penalty as a matter of personal importance—fully 74 per cent of respondents are not very interested, not interested at all, or do not know. Because the death penalty appears not to be important to citizens, governments are free to choose their death penalty policy even in the democratic states like Taiwan, South Korea, and the Philippines.

But is the pattern of widespread but shallow support for capital punishment in Table 3 an 'Asian difference', and if so what might be the most likely explanation? The support for the death penalty observed in recent surveys in Asia is much higher than we would find if we measured public support for the death penalty in twenty-first-century Western Europe. But there is substantial evidence that public opinion in favour of capital punishment was quite strong in Europe all during the period when the death penalty was being abolished. When Germany eliminated

the death penalty in 1949, 74 per cent of the public supported capital punishment and majority support continued for more than two decades[10] and 82 per cent of persons in Great Britain supported the death penalty in 1975, more than a decade after it had been ended.[11] So the existing research on public opinion in Western nations suggests that the levels of public support now found in Asia are what Table 2 calls 'developmental differences'. As Zimring and Hawkins concluded in a Western context a quarter century ago:[12]

> The symbolic character of death penalty legislation probably explains the strong support for the punishment after abolition, which diminishes until, after several years, opposition dominates public opinion.

In this analysis, the support for capital punishment should begin to fade soon in Hong Kong but may persist for a decade or more in South Korea and the Philippines. If this is the pattern, it will simply repeat the history in the West—it is in that sense the opposite of an 'Asian difference'.

Single nation parochialism

A final aspect of the current situation of capital punishment in Asia is what Table 2 calls 'single-nation parochialism'. When South Korea debates the death penalty, nobody from Taiwan is listening. There are very few regional human rights or political organizations. In part, this pattern is typical of what happened in Europe in the 1950s and 1960s, so I have marked this as at least in part developmental. Why should Taiwan have better peripheral vision in 2013 than did France in 1980? But the answer to this is because it is 2013! If the rest of the world is paying attention to the PRC and Singapore, shouldn't the rest of the region?

The lack of regional and indigenous organizations to focus on issues like the death penalty and other concerns relating to human rights limitations on state power in Asia is peculiar but not hard to understand. There are important Asian branches of worldwide organizations such as Amnesty International and there are single-country entities that are small in scale but very important. Amnesty's Anti-Death Penalty Asia Network (ADPAN), established in 2006, has become the modest but critical beginning of an organization about Asia that is based in the region.[13] The major obstacle for intergovernmental collaboration on human rights issues is the large number of governments unwilling to subject themselves to transnational standards. What is needed is an organization that collects data on punishments, on legal proceedings, and human rights problems in Asian nations and that also examines the extent to which there are similarities and differences in policies and trends within the region.

[10] Franklin E Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (New York, Cambridge University Press 1987) 13–14.

[11] Zimring and Hawkins (1987) 12.

[12] Zimring and Hawkins (1987) 14.

[13] See Anti-Death Penalty Asia Network <http://adpan.net/> (accessed 23 June 2013).

Explaining this persistent single-nation parochialism that has characterized the categories of Table 2 leaves at least one box open to question. No doubt much of the lack of regional organization is simply a by-product of the developmental differences between Europe and Asia. But to the extent that the very wide range of governmental systems persists in the twenty-first century, the problems of scrutiny across such political boundaries will limit the effectiveness of regional organizations for some time to come. This may be a genuinely substantive 'Asian difference'.

3. Two Modest Proposals

The special historical and current circumstances of the death penalty in Asia suggest two modest shifts from a general abolitionist agenda that would help in the region, a non-governmental organization (NGO) that is both indigenous to and focused on the region and a special emphasis on the early prohibition of state killing as an instrument of political conflict.

A regional death penalty NGO should become a place to collect and evaluate data, a meeting place for national level death penalty NGO staff and a centre for comparative empirical study. In addition to the standard problems of funding and staffing, choice of the best place to locate such a centre is not obvious. The region's political diversity would make authoritarian governments inhospitable to this type of centre, and Japan's spotty record on executions probably would make Tokyo a poor place to locate a regional centre. Seoul in South Korea and Hong Kong are two attractive possibilities. And one way to minimize cost and provide continuity and support would be to locate in a university or larger criminology institute.

A second important special emphasis for death penalty efforts in Asia should be to push for broad commitments by states across the full political spectrum of the region to prohibit the execution of political prisoners. The greatest attraction of state killing to authoritarian governments is as a weapon against political threats. Putting a political opponent in jail does not remove him as a threat to the regime. Killing him does. Substantial use of killing as a state political tool is part of the non-distant history of at least three East Asian states: the PRC, Taiwan, and North Korea, and several other modern nations in the region have problematic pasts (South Korea, Cambodia, and Vietnam). But every nation in the region now rejects capital punishment as a political tool. It might be strategically important to try to mobilize this stated opposition into an international ban on the execution of political prisoners in those Asian nations that retain executions as a criminal sanction. This specific prohibition would be one important start towards meaningful international standards in the region. And once the option of use in political conflict was removed, the appeal of executions to those hard-line governments that use it most might be substantially diminished.

2

The Impact and Importance of International Human Rights Standards: Asia in World Perspective

Saul Lehrfreund

1. Introduction

There is a natural correlation and synergy between the development of international human rights standards that have gradually restricted the scope and use of the death penalty pending abolition and the astonishing progress that has been made towards global abolition of the death penalty for all crimes and in all circumstances over the last quarter of a century. International standards and norms have provided a legal platform and a human rights context for states to move towards abolition. The pace and extent to which so many countries have done so has given force and meaning to the human rights principles and has directly impacted on the evolution of the law. It is no longer credible to maintain that *killing* convicted prisoners as a punishment (on whatever grounds) is a matter purely of national concern. Those states that continue to claim that the death penalty can be retained on grounds that it is a criminal justice issue, subject solely to national law, form an ever-shrinking minority of countries. On the contrary, the majority of nation states regard capital punishment as a fundamental human rights issue shaped by universal concepts of human dignity, in particular, the right to life and the prohibition on cruel, inhuman, and degrading punishment. International law dictates that pending the ultimate goal of abolition, capital punishment should always be subject to contemporary human rights norms. There must be limits to any form of excessive or extreme punishment that inevitably involves the infliction of physical and psychological suffering. International norms and standards have thus been developed to provide a code of irreducible standards that are applicable to all states pending total abolition of capital punishment.

2. Does International Law Prohibit the Death Penalty?

In the recent decision of the Inter-American Court of Human Rights in the case of *DaCosta Cadogan v Barbados*, Judge Sergio Garcia Ramirez, in his separate concurring opinion noted that, 'The day must come when universal consensus—which for now does not appear to be near—establishes the prohibition of capital punishment within the framework of *jus cogens*, as in the case of torture'.[1]

It is still the case that the retention of the death penalty for a very limited number of offences may not amount to a violation of international law *per se*, but there are aspects of international human rights law that have been intentionally designed in order to *prohibit* capital punishment. Many states have now accepted international legal obligations that prohibit the use of capital punishment, and four international treaties providing for the abolition of the death penalty have been adopted by the international community.[2] One is of worldwide scope; the other three are regional and whilst these treaties are not universally accepted, more than 80 states are now bound, as a question of international law and as a result of their adhesion to these treaties not to impose the death penalty. In addition, recent case law of the United Nations Human Rights Committee (UNHRC)[3] implies that a state party to the International Covenant on Civil and Political Rights (ICCPR)[4] that has abolished the death penalty cannot reinstate it, further enlarging the list of states that are abolitionist as a matter of international law.

As custom rapidly changes towards a position in favour of worldwide abolition as reflected in international norms and the changing attitudes of member states to the United Nations, leading academics have suggested that the prohibition on capital punishment under customary international law is a probable development at some point in the foreseeable future.[5]

[1] Judgment of 24 September 2009 (Inter-American Court of Human Rights), Separate Opinion of Judge Sergio García Ramírez, para 5, Series C No 203.

[2] Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, ETS 114 (1982); Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty, GA Res 44/128, Annex (1989); Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, OASTS 73 (1990); 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, ETS 183 (2002). The American Convention on Human Rights, (1978) 1144 UNTS 123, OASTS 36, Article 4(4), prohibits the death penalty in States that have previously abolished it.

[3] *Judge v Canada* (Communication No 829/1998), UN Doc CCPR/C/78/D/829/1998. See also, *Ng v Canada* (Communication No 469/1991), UN Doc A/49/40, Vol II, 189, (1994) 15 *Human Rights Law Journal* 149 (per Francisco José Aguilar Urbina and Fausto Pocar).

[4] International Covenant on Civil and Political Rights (ICCPR) (1976) 999 UNTS 171.

[5] See William A Schabas, *The Role of International Law in the Reform and Abolition of the Death Penalty*, paper presented at launch seminar of Sino-EU project on Moving the Debate Forward of Death Penalty in China, 20 June 2007; and William A Schabas, *The Abolition of the Death Penalty in International Law* 3rd edn (Cambridge, Cambridge University Press 2002).

3. The Development of International Norms and the Worldwide Trend Towards Abolition of the Death Penalty—A Dynamic Relationship

Over the last 20 years the number of abolitionist countries has almost doubled to 105, with the latest additions being Burundi and Togo in 2009, and Gabon in 2010. Also, Mongolia, by ratifying the Second Optional Protocol to the ICCPR[6] in 2012, is preparing to remove the death penalty from its domestic law. The figures so well documented by Professor Roger Hood in his global survey on the death penalty reveal that capital punishment all over the world is in ever rapid retreat.[7] This was recently confirmed by the Eighth Quinquennial Report of the United Nations Secretary-General on the Status of Capital Punishment (2010) which noted the measurable international trend towards abolition of capital punishment for at least three decades and its acceleration in recent years.[8] The trend, although perhaps not the pace of change that has occurred, was foreseen by international bodies such as the United Nations General Assembly which, in 1971, confirmed the view that international law aspires towards the gradual diminution and eventual abolition of the death penalty.

On 18 December 2007, the United Nations General Assembly passed Resolution No 62/149 calling for a worldwide moratorium on executions. The resolution was adopted by an overwhelming majority of 104 United Nations member states in favour to 54 countries against, with 29 abstentions. Five years later, in December 2012, the United Nations General Assembly adopted its fourth resolution calling for a moratorium on the use of the death penalty. On this occasion 111 countries voted in favour of the resolution and only 41 voted against with 34 countries abstaining. The growing support for the resolution at the UN General Assembly again provides incontrovertible evidence of a dynamic towards the universal abolition of the death penalty.

The international tribunals set up to deal with crimes against humanity have all rejected capital punishment as a sanction for the gravest of crimes. The death penalty is simply not available as a penalty for genocide, other crimes against humanity and war crimes under the International Criminal Tribunals set up to deal with atrocities in former Yugoslavia in 1993 or Rwanda in 1994, nor is it an available sanction in the Statute of the International Criminal Court established in 1998.

If the death penalty is not available for the most atrocious crimes against humanity, how can it still be justified for lesser crimes? On the understanding that the

[6] Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty, GA Res 44/128.

[7] See Roger Hood, 'Towards Global Abolition of the Death Penalty: Progress and Prospects' in Luis Arroyo, Paloma Bigling, and William A Schabas (eds), *Towards Universal Abolition of the Death Penalty* (Valencia, Tirant lo Blanch 2010), 419–41. See also Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* 4th edn (Oxford, Oxford University Press 2008).

[8] 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, Report of the Secretary-General', UN Doc E/2010/10.

underlying intention of the ICCPR and other regional treaties is to gradually phase the death penalty out of existence, it is anticipated that this discrepancy in international law will be resolved at some point in the future.

Article 6(2) of the ICCPR states:

> 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 offence and not contrary to the present Covenant . . . This penalty can only be carried out pursuant to a final judgment rendered by a competent court. (emphasis added)

Although an exception to the right to life (although Article 6(1) states that 'No one shall be arbirtrarily deprived of his life'), Article 6 of the ICCPR lists various safeguards in the application and implementation of the death penalty. It may only be imposed for the *most serious crimes*, it cannot be pronounced unless *rigorous procedural rules* are respected and it may not be imposed on pregnant women or to individuals for crimes committed under the age of 18.

Article 6(6) goes on to place the death penalty in its real context and assumes its eventual elimination, stating that 'Nothing in this article shall be invoked to *delay or to prevent the abolition* of capital punishment by any State Party to the present Covenant'.

The worldwide movement towards abolition of the death penalty reveals that the majority of United Nations member states have accepted their obligations under Article 6 of the ICCPR to make abolition of the death penalty not only a goal, but also a reality. Compliance with Article 6(6) has taken place on a grand scale as more and more countries have rejected capital punishment as an acceptable penal sanction. The evidence of a worldwide shift away from the death penalty drastically weakens justification for retention of the death penalty on culturally specific or socio-political grounds as there are no discernible geographical or cultural barriers to abolition.

Professor William A Schabas has noted that these 'important references to abolition' were added to the draft text of the ICCPR when it was under consideration at the Third Committee of the UN General Assembly.[9] He goes on to explain that the reference in Article 6(2) 'indicated not only the existence of abolitionist countries but also the direction which the evolution of criminal law should take', while the reference in Article 6(6):[10]

> . . . set a goal for parties to the covenant. The *travaux préparatoires* indicate that these changes were the direct result of efforts to include a fully abolitionist stance in the covenant. They represented an intention . . . to express a desire to abolish the death penalty, and an undertaking by States to develop domestic criminal law progressively towards abolition of the death penalty.

Roger Hood, has also characterized the exception to the right to life in Article 6(2) of the ICCPR as a creature of its time and in no way a permanent justification

[9] The Third Committee of the United Nations General Assembly held 12 meetings between 13 November and 26 November 1957.

[10] Schabas (n 5 2002) 70.

for the retention of the death penalty when read alongside Article 6(6), which makes abolition the ultimate goal. With the drafting taking place as early as 1957, when there were still only a very small minority of abolitionist states, Article 6 was a compromise. In order to achieve agreement, an exception had to be made in Article 6(2) allowing for the death penalty for those countries that had not yet abolished it.

This analysis of the ICCPR with regard to capital punishment became clear in 1971, when the United Nations General Assembly endorsed an approach of progressive restriction of the death penalty with a view to its eventual abolition. In their General Comment on Article 6 of the ICCPR, the UNHRC stated that Article 6 'refers generally to abolition [of the death penalty] in terms which strongly suggest… that abolition is desirable. The Committee concluded that all measures of abolition should be considered as progress in the enjoyment of the right to life…'.[11]

The restrictions on capital punishment set out in Article 6 of the ICCPR are reflected and further developed in the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty (hereinafter 'the Safeguards'), which 'constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment'.[12]

The Safeguards were adopted in 1984 by the United Nations Economic and Social Council Resolution No 1984/50.[13] In 1989, these standards were further developed by the Council which recommended *inter alia* that there should be a maximum age beyond which a person could not be sentenced to death or executed and that persons suffering from mental retardation should be added to the list of those who should be protected from capital punishment.[14] The Council in its Resolution 1996/15, called upon member states in which the death penalty had not been abolished 'to effectively apply the safeguards guaranteeing the rights of those facing the death penalty'.[15] The significance of the Safeguards has subsequently been reaffirmed by the Commission on Human Rights in 2005[16] and the General Assembly in its Resolution Nos 62/149 and 63/168.

All countries in Asia are bound by the international standards set out in the Safeguards which should be considered as the general law applicable to the death penalty.[17]

Article 4 of the American Convention on Human Rights,[18] adopted in 1969, contains extensive provisions concerning the death penalty. It is very similar to

[11] General Comment 6 on Art 6 of the ICCPR, adopted on 27 July 1982, para 6.

[12] United Nations Economic and Social Council, 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', ESC Res 1984/50, UN Doc E/1984/84 (endorsed by GA Res 39/118).

[13] See Report of the Secretary-General (n 8) 33–4, para 58.

[14] United Nations Economic and Social Council, 'Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', ESC Res 1989/64, para 1(d).

[15] United Nations Economic and Social Council, ESC Res 1996/15, adopted on 23 July 1996, para 2.

[16] United Nations Commission on Human Rights Resolution 2005/59, adopted on 20 April 2005.

[17] See Report of the Secretary-General (n 8) 55.

[18] American Convention on Human Rights (1978) 1144 UNTS 331.

the wording of Article 6 of the ICCPR but specifically prohibits the extension or re-introduction of the death penalty. The prohibition of execution of juveniles and pregnant women appears in both the Convention and the ICCPR, but the Convention adds to this group of protected persons anyone over the age of 70.

The Inter-American Court of Human Rights observed in their Advisory Opinion entitled 'Restrictions to the Death Penalty' that:[19]

> On this entire subject, the Convention adopts an approach that is clearly incremental in character. That is, without going as far as to abolish the death penalty, 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.

Accordingly, both the Commission and the Court have taken a restrictive approach towards the use of the death penalty consistent with human rights obligations, whilst recognizing that the penalty is not a violation *per se* in those states that are not parties to the Protocol abolishing it. In the recent judgment of the Inter-American Court of Human Rights in the case of *DaCosta Cadogan v Barbados*, Judge Sergio Garcia Ramirez, in his separate concurring opinion explained that:[20]

> [A]bolition is not included in the provisions of the American Convention on Human Rights, which tends towards this, but does not eliminate the punishment; it merely reduces, minimizes, and conditions it. The penalty is limited, as much as it was possible to do so at the 1969 Conference of San José, through different kinds of restrictions: (a) substantive, regarding the offenses to which it applies (the point at which the issue of the obligatory or compulsory death penalty appears); (b) procedural, regarding the characteristics of the proceedings and the means of objection, appeal or substitution that should be observed therein; (c) subjective, regarding persons—groups or categories of persons—to which this punishment cannot be applied or who cannot be executed even if it has been imposed on them; and (d) for reasons of progressive development, inasmuch as the death penalty may not be re-introduced once it has been abolished.

It is now the position that all members of the Council of Europe (save for Russia), have either *de facto* or *de jure*, abolished the death penalty for all crimes and in all circumstances, and all but two members have signed or ratified Protocol No 13 (2002) (concerning the abolition of the death penalty).[21] Furthermore, it has been the policy of the Council of Europe since 1994, and of the European Union since 1998, that new member states must undertake to abolish capital punishment as a condition of their admission into the organizations.

In the case of *Al-Saadoon and Mufdhi v United Kingdom*[22] the European Court of Human Rights went beyond its previous decision in *Ocalan v Turkey*[23] to declare the death penalty contrary to the European Convention on Human Rights,

[19] Restrictions to the Death Penalty (Arts 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83 1983, 4 HRLJ 352, para 57.

[20] See *DaCosta Cadogan* (n 1).

[21] Armenia, Latvia, and Poland have signed but not ratified Protocol No 13 (2002), and Azerbaijan and Russia have neither signed nor ratified.

[22] Council of Europe, European Court of Human Rights, Application No 61498/08, 2 March 2010.

[23] (2003) 37 EHRR 10.

despite the express terms of Article 2(1) which contemplate capital punishment as an exception to the right to life. In *Ocalan*, the Court held that the death penalty in peacetime had come to be regarded in Europe as an unacceptable form of punishment which was no longer permissible by Article 2. However, no firm conclusion was reached in respect of whether Convention states had established a practice of considering the death penalty as inhuman and degrading treatment contrary to Article 3. In any event, the Court found that it would be contrary to the Convention, even if Article 2 were to be interpreted as still permitting the death penalty, to carry out a death sentence after an unfair trial.

In *Al-Saadoon and Mufhdi*, the Court went further. The Court emphasized that since the Convention was drafted 60 years ago, there had been a subsequent evolution towards the complete abolition of the death penalty, in law and practice, within all 47 Council of Europe member states, evidenced by the fact that all but two Convention states had signed Protocol No 13. The Court found that this transformation in state practice demonstrated that Article 2 had been (impliedly) amended so as to prohibit the death penalty in all circumstances. Consequently, the Court in adopting a dynamic view of the Convention, indicated that the death penalty could be considered cruel, inhuman, and degrading and as such contrary to Article 3 of the Convention.

4. The Applicable International Human Rights Standards

Where capital punishment remains in force, international norms and standards impose strict limitations on the application of the death penalty. These derive not only from Article 6 of the Covenant, but also from other relevant human rights treaties and international standards such as the Safeguards. The interpretation and application of many of these standards has been addressed by international human rights bodies in a series of death penalty cases (many concerning Caribbean defendants) and the resultant case law of the UNHRC and of other international bodies such as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights provides a contemporary understanding of the applicable safeguards and necessary limitations on capital punishment according to human rights law and practice.

Some of the following norms are particularly relevant to the application and imposition of the death penalty in Asia.

Transparency and the need for data

International law obligates all countries to collate and disclose the details of their application of the death penalty. The United Nations Economic and Social Council has called for the publication of such information and the United Nations Special Rapporteur, on extrajudicial, summary, or arbitrary executions has stigmatized the

failure of states to do so as a violation of human rights standards. The UN Special Rapporteur has stated that 'Transparency is essential wherever the death penalty is applied. Secrecy as to those executed violates human rights standards. Full and accurate reporting of all executions should be published'.[24]

In Resolution No 1989/64, adopted on 24 May 1989, the United Nations Economic and Social Council urged UN member states:

> [T]o publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law…

The UNHRC has called on states parties to the ICCPR to provide information on the use of the death penalty including the number of death sentences imposed over the past 10 years, the types of offence for which the death penalty has been imposed, the grounds for the sentences imposed, the number of executions carried out, the manner of execution, and the identity of the prisoners executed.[25]

In Resolution No 2005/59, adopted on 20 April 2005, the United Nations Commission on Human Rights called upon all states that still maintain the death penalty 'to make available to the public information with regard to the imposition of the death penalty and to any scheduled execution'.

As long as official figures remain under a cloud of state secrecy, as they are most notoriously in China, not only will it be impossible to verify the pace of change in the use of the death penalty in any given country, but any meaningful national debate on capital punishment will be stifled by a lack of available statistical data.

The scope of the death penalty

Article 6(2) of the ICCPR restricts the imposition of the death penalty to the 'most serious crimes'. The first of the Safeguards emphasizes that the death penalty may only be imposed for 'intentional crimes with lethal or other extremely grave consequences'.

According to the recent case law of the UNHRC the definition of the 'most serious crimes' should be interpreted as narrowly as possible. There is a strong argument that capital punishment should (pending abolition) only be imposed for the most serious offences of intentional homicide, but it may not be mandatory for such crimes. The Committee has said that the death penalty should not be enforced for crimes that do not result in the loss of human life, such as drug-related

[24] 'Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Philip Alston', UN Doc E/CN.4/2005/7, para 87.

[25] 'Concluding Observations of the Human Rights Committee: Libyan Arab Jamahiriya', UN Doc CCPR/C/79/Add.101, 6 November 1998, para 8; 'Concluding Observations of the Human Rights Committee: Syrian Arab Republic', UN Doc CCPR/CO/71/SYR, 24 April 2001, para 8.

or economic crimes, which is contrary to the ICCPR. In order to clarify the vaguely defined term 'the most serious crimes' and to give effect to its contemporary meaning, Professor Roger Hood has suggested that the first of the Safeguards should be re-written to limit the death penalty 'to intentional murder, but only of the gravest kind, and ensure that it is never mandatorily enforced'.[26]

The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions has stated that 'the death penalty should be eliminated for crimes such as economic crimes and drug-related offences'.[27] The Special Rapporteur has also stated that the restrictions set out in the first Safeguard exclude the possibility of imposing death sentences for economic and other so-called victimless offences, or activities of a religious or political nature—including acts of treason, espionage, and other vaguely defined acts usually described as 'crimes against the State' or 'disloyalty' and that 'Similarly, this principle would exclude actions primarily related to prevailing moral values, such as adultery and prostitution, as well as matters of sexual orientation'.[28]

The position that drug-related offences do not fall into the category of the most serious crimes is shared by the UNHRC,[29] and the United Nations Office on Drugs and Crime.[30] Furthermore, in 2009, the United Nations High Commissioner for Human Rights noted that the application of the death penalty for those convicted solely of drug-related offences raised serious human rights concerns as they did not meet the threshold of 'most serious crimes'.[31]

Throughout Asia, all countries that retain the death penalty have capital punishment in law for some crimes other than intentional homicide/murder in breach of Article 6(2) of the ICCPR as interpreted by the first Safeguard.[32]

There are at least 55 capital offences in China, 28 in Pakistan, 57 in Taiwan and 21 in Vietnam. In Japan as of 2012, there are 19 crimes which are still eligible for capital punishment, including seven crimes for which a death sentence is possible, even if it does not result in the loss of life.[33] It is clear that little progress has been

[26] See Roger Hood, 'Towards World-wide Abolition of the Death Penalty: A Statement Delivered to the International Commission Against the Death Penalty', 7 October 2010, Madrid, <http://www.icomdp.org/cms/wp-content/uploads/2011/02/Discurso-Roger-Hood.pdf> (accessed 19 April 2013).

[27] 'Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur Bacre Waly Ndiaye', UN Doc E/CN.4/1997/60, para 91.

[28] 'Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur Asma Jahangir', UN Doc E/CN.4/1999/39, para 63.

[29] 'Concluding Observations of the United Nations Human Rights Committee: Thailand', UN Doc CCPR/CO/84/THA, 8 July 2005, para 14; 'Concluding Observations of the United Nations Human Rights Committee: Sudan', UN Doc CCPR/C/SDN/CO/3, 29 August 2007, para 19.

[30] United Nations Commission on Narcotic Drugs, Drug Control, Crime Prevention and Criminal Justice: A Human Rights Perspective. Note by the Executive Director, UN Doc E/CN.7/2010/CRP.6*-E/CN.15/2010/CRP.1.

[31] See Report of the Secretary-General (n 8) 36–7, para 67; Rick Lines, 'A "Most Serious Crime"? The Death Penalty for Drugs Offences and International Human Rights Law' (2010) 21 *Amicus Journal* 21; and Harm Reduction International, 'The Death Penalty for Drug Offences, *Global Overview 2011*, 9–10.

[32] See Roger Hood, 'Enhancing EU Action on the Death Penalty in Asia', Report to the European Parliament, October 2012, 12–14, EXPO/B/DROI/2011/22.

[33] See The Death Penalty Project, *The Death Penalty in Japan: A Report on Japan's Legal Obligations under the International Covenant on Civil and Political Rights and an Assessment of Public Attitudes*

made in countries in Asia that retain the death penalty in law to progressively restrict the number of offences for which the death penalty might be imposed, by abolishing it for all crimes except intentional murder, pending complete abolition.

Minimum fair trial guarantees

The comprehensive provisions of Article 14 of the ICCPR set out in detail the minimum guarantees for a fair trial. These provisions *must* be respected in capital cases.

The UNHRC has consistently held that if Article 14 (fair trial) of the ICCPR is violated during a capital trial, then Article 6 (right to life) of the Covenant is also breached. In *Carlton Reid v Jamaica* the UNHRC held that:[34]

> [T]he imposition of a sentence of death upon the conclusion of a trial in which the Provisions of the Covenant have not been respected constitutes . . . a violation of Article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the present Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal', the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.

The Committee went on to add that in death penalty cases, 'the duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant is even more imperative'.

The UNHRC has found violations of Article 14 and consequently Article 6 in scores of capital cases, in particular from Jamaica and Trinidad and Tobago. In so doing, the Committee has declared that defendants in a capital trial have the absolute right to *effective* counsel and must have *adequate time* and *facilities* for the preparation of the defence. The Inter-American Commission and Court have adopted a similar approach to due process in capital cases.

Article 14(3)(b) of the ICCPR states that a person shall be entitled 'to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing'.

Before a trial starts, the central aspect of the right to a fair trial is the right to have adequate time and facilities to prepare a defence. This is the springboard for other fair trial rights such as legal representation and discovery.

The time needed to prepare a defence inevitably depends on the nature of the proceedings and the factual circumstances of each case. Relevant factors include the complexity of the case, the accused's access to evidence and to his lawyer.

Adjourning a murder trial and giving a newly appointed attorney (who replaced previous counsel) four hours to confer with the accused and prepare the case was deemed by the UNHRC in *Smith v Jamaica* to be inadequate time to prepare the

to Capital Punishment (The Death Penalty Project 2013) 7–8, <http://www.deathpenaltyproject.org/legal-resources/research-publications/the-death-penalty-in-japan/> (accessed 19 April 2013).

[34] Communication No 250/1987, UN Doc CCPR/C/39/D/250/1987 (1990) para 11.5.

case. The Committee stated that 'the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms . . . '.[35]

In *Aston Little v Jamaica* the UNHRC once again found that the requirements of Article 14(3)(b) of the ICCPR had been breached in a capital case from the Caribbean. The Committee held that:[36]

> In cases in which capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for trial; this requirement applies to all stages of the judicial proceedings . . . In the instant case it is uncontested that the author did not have more than half an hour for consultation with counsel prior to the trial and approximately the same amount of time for consultation during the trial.

In that case, the Committee also concluded that Article 14(3)(e) of the Covenant had been violated as the lack of sufficient time for the adequate preparation of the defence had clearly affected counsel's ability to trace or call defence witnesses to trial. The defendant was therefore unable to obtain the testimony of a witness on his behalf under the same conditions as testimony of witnesses against him.

The right to adequate facilities to prepare a defence includes the right of the accused to obtain the opinion of *independent experts* in the course of preparing and presenting a defence. Article 8(2)(f) of the ACHR guarantees the right of the defence 'to examine witnesses present in the court and to obtain the appearance . . . of experts or other persons who might throw light on the facts'.

In relation to medical experts, and in particular, the responsibility of the state to provide psychiatric assessments in capital trials, the Inter-American Court of Human Rights recently addressed this point for the first time in its judgment in the case of *DaCosta Cadogan v Barbados*. The Court re-emphasized that in capital cases the procedural requirements for a fair trial must be strictly observed and in this regard were specifically asked to consider whether the accused person's right to a fair trial was violated in light of the fact that that no detailed evaluation of his mental health was made during his criminal trial:[37]

> [E]very judge has the obligation to ensure that proceedings are carried out in a manner that guarantees and respects those due process rights necessary to ensure a fair trial in each case. Accordingly, Article 8(2) of the Convention specifies which of these constitute 'minimum guarantees' to which all persons have an equal right during proceedings. Specifically, Article 8(2)(c) of the Convention requires that individuals are able to adequately defend themselves against any act of the State that may affect their rights. Additionally, Article 8(2)(f) recognizes the right of defendants to examine witnesses against them and those testifying on their behalf, under the same conditions as the State, with the purpose of defending themselves.
>
> [T]he Court observes that the supposed mental illnesses that the representatives alleged Mr. DaCosta Cadogan suffered or suffers are alcohol dependence and anti-social personality

[35] Communication No 282/1988, UN Doc CCPR/C/47/D/282/1988 (1993) para 10.4.
[36] Communication No 283/l988, UN Doc CCPR/C/43/D/283/1998 (1991) para 8.3.
[37] See *DaCosta Cadogan* (n 1) paras 84–6.

disorder, which could have allowed Mr. DaCosta Cadogan to raise a defense of diminished responsibility… Consequently, Mr. DaCosta Cadogan's mental health at the time of the offense was never fully evaluated by a mental health professional for the purpose of preparing his defense in a case where the death penalty was the only possible sentence…

The Court held that taking into account the strict procedural requirements that the state is obliged to observe in all capital cases, the judge had a duty to adopt a more active role in ensuring that all necessary measures were carried out in order to guarantee a fair trial. The failure by the judge to ensure that the accused's mental health was fully evaluated was held to constitute a violation of the right to a fair trial. As a measure of reparation and in order to guarantee that events such as those analysed in the case are not repeated, the Court ordered the state to ensure that all persons accused of a crime whose sanction is the (mandatory) death penalty are duly informed, at the initiation of the criminal proceedings against them, of the right to obtain a psychiatric evaluation carried out by a state-employed psychiatrist recognized under domestic law.

In 2009, Japan's lay judge system started and the courts have become more restrictive about what evidence can be introduced at trial. The change is largely motivated by the desire to minimize the 'burden' felt by citizens who serve as lay judges and the courts have become more likely to demand that expert testimony be presented in extremely abbreviated forms. As a result the defendant's psychological conditions and developmental problems are seldom considered by the lay judge tribunals as carefully as they should be.[38]

More generally, death is not deemed a *different* form of punishment in Japan. As a result, there are few special procedural protections accorded to suspects and defendants in potentially capital cases.[39] Three consequences follow from the assumption in Japan that death is not different.

First, Japanese prosecutors make no advance announcement as to whether they will seek a sentence of death; the disclosure is only made on the penultimate day of trial, after all the evidence has been presented and immediately before the defence makes its closing argument. This non-disclosure policy makes it difficult for Japanese bar associations to provide institutional support of the kinds that American capital defenders take for granted. The non-disclosure policy also means that while Japan has a system of capital punishment, it does not have anything that can be called a 'capital trial' because nobody except the prosecutor knows until the trial ends whether the defendant's life is at stake. This significantly handicaps the defence attorney's ability to prepare a decent defence.

Secondly, capital trials in Japan are not bifurcated into separate guilt and sentencing phases, even when the defendant denies guilt. Hence, when a defendant denies the charges against him or her, the court often hears little mitigating evidence, for such presentations by the defence might undermine its arguments for

[38] See The Death Penalty Project (n 33) 21–2.

[39] David T Johnson, 'Capital Punishment Without Capital Trials in Japan's Lay Judge System' (2010) 8(52) *Asia Pacific Journal* 1–8, <http://www.japanfocus.org/-David_T_-Johnson/3461> (accessed 19 April 2013). See also Ch 9.

acquittal. In this way, protestations of innocence in Japan may increase the probability of receiving a sentence of death.

Thirdly, in Japan there is no requirement that all judges and lay judges agree that a death sentence is deserved, nor is there even a requirement that a 'super-majority' of six or seven or eight of the nine people on a panel agree before the ultimate penalty can be imposed. In Japan, a bare 'mixed majority'—five votes, with at least one from a professional judge—is enough to condemn a person to death. It is difficult to square Japan's mixed majority rule with the claim often made by Japanese officials that the country is extremely 'cautious' (*shincho*) about capital punishment.[40]

Article 14(3)(d) of the ICCPR states that a person shall be entitled 'to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing… and to have legal assistance assigned to him where the interests of justice so require…'.

In *Frank Robinson v Jamaica* the UNHRC considered whether a state party is under an obligation itself to make provision for effective representation by counsel in a capital case, should the counsel selected by the defendant decline to appear. The Committee held that 'it is axiomatic that legal assistance be made available in capital cases'[41] and that Jamaica was in breach of Article 14(3)(b) of the ICCPR as the applicant had faced a capital trial without legal representation.

There are concerns in many retentionist countries in Asia that prisoners facing the death penalty have little or no access to a lawyer following arrest and when preparing for trial or the appeal process. According to a recent report on the death penalty in Asia:[42]

> Many of those sentenced to death in Afghanistan do not have proper legal representation at the time of their trial. In fact, defence lawyers in Afghanistan are normally not even present in the trial court but must submit a written rebuttal of the charges against their client to the court. In Indonesia even though the Criminal Procedure Code guarantees the right to be assisted by a lawyer, in practice there are documented cases of defendants who do not have access to a lawyer. In China, the authorities may block or make it very difficult for defence lawyers to meet with their clients, gather evidence and access case documents. Lawyers defending clients involved in politically sensitive cases have been subjected to intimidation and excluded from proceedings. Others have had charges filed against them for advising their clients to withdraw forced confessions or for trying to introduce evidence that challenges the prosecution's case.

In Japan, there are no legal provisions requiring the effective assistance of defence counsel. Indeed, Japanese courts tend not to find problems even when defence counsel's assistance is clearly ineffective and inappropriate.[43] In capital cases, there

[40] See Ch 9.

[41] Communication No 223/1987, UN Doc CCPR/C/35/D/223/1987, paras 10.3 and 10.4.

[42] Anti-Death Penalty Asia Network (ADPAN), Amnesty International in Asia and the Pacific, 'When Justice Fails, Thousands Executed in Asia After Unfair Trials', ASA/01/023/2011, 24 <http://www.amnesty.nl/sites/default/files/public/asa010232011en_1.pdf> (accessed 19 April 2013). See also Amnesty International, 'Against the Law: Crackdown on China's Human Rights Lawyers Deepens', 30 June 2011, <http://www.amnesty.org.au/china/comments/26080/> (accessed 19 April 2013).

[43] See The Death Penalty Project (n 33) 23–4.

are some cases where death sentences have been imposed and finalized despite insufficient assistance from a defence lawyer, but there have been no cases in which a death sentence has been overturned because of the ineffective assistance of counsel. This raises serious concerns that Article 14(3)(d) of the ICCPR is not being respected in all capital cases.

A minimum fair trial guarantee that needs to be respected in all capital cases is the right of appeal. Any person sentenced to death must have an effective right to appeal with effective access to each stage of the appellate process, and this must include the provision of legal assistance (in public hearings) at all stages.

The right of appeal is guaranteed under Article 14(5) of the ICCPR, which states that 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'.

Safeguard six adopted by the UN Economic and Social Council in 1984, states that 'Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory'.

The importance of a *mandatory* right of appeal was confirmed by the United Nations Economic and Social Council in its Resolution No 1989/64.[44] Furthermore, in Resolution No 2005/59, the United Nations Commission on Human Rights urged all states that still maintain the death penalty '[t]o ensure that all legal proceedings, including those before special tribunals or jurisdictions, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in Article 14 of the ICCPR'.[45]

Commendably, China now provides for more than one appeal as part of the appellate process, but there are concerns that the review process before the Supreme People's Court does not meet the minimum requirements of Article 14, because the present procedures are insufficient to meet developing human rights standards. All appeals must be governed by the principles and safeguards of Article 14 of the ICCPR, and in order to ensure an effective right of appeal, the convicted person should be granted effective access to the review process with adequate legal representation in an open, public hearing.

In Japan there is no system of mandatory appeal. Appeal to a higher court against a death sentence is not automatic despite repeated recommendations by the Committee against Torture[46] and the UNHRC.[47] The government of Japan insists that a mandatory appeal system is unnecessary because most defendants do exercise their right to appeal. But the numbers are troubling. Of the first 15 death sentences imposed by lay judge panels in Japan, three (20 per cent) became finalized after defendants withdrew their appeals. Moreover, persons sentenced to

[44] See Implementation of the Safeguards (n 14) para 1(b).

[45] See also *Nicholas Henry v Jamaica*, CCPR/C/64/D/610/1995, 21 October 1998, para 8.4.

[46] Committee Against Torture, 'Conclusions and Recommendations of the Committee Against Torture: Japan', CAT/C/JPN/CO/1, 3 August 2007, para 20.

[47] UNHRC, 'Concluding Observations of the Human Rights Committee: Japan', CCPR/C/JPN/CO/5, 30 October 2008, para 17.

death in Japan who withdraw their appeals tend to be executed more quickly than non-volunteers (these inmates seldom file requests for retrial or pardon either).

In South Korea and parts of Pakistan, there is no mandatory requirement for appeal to a higher court in death penalty cases and in North Korea there is no possibility of appeal at all.[48]

For China, ratification of the ICCPR (which it signed in 1998) is partly dependent on completing further reforms of criminal procedures to ensure fair trials and the highest standard of proof in death penalty cases. Some progress has been made with the introduction in 2006 of open trials in the courts of second instance (appeals at the High Court) and significantly in 2007, when the power to review all death sentences was returned to the Supreme People's Court in an effort to constrain and regulate the imposition of the death penalty. Nevertheless, further reform is required to meet all the safeguards to ensure a fair trial contained in Article 14 of the ICCPR. Some areas that need to be considered for reform relate to ensuring protection of the rights of the accused during police investigation, in particular the practice of obtaining confessions, and the collection of evidence. Provision needs to be made for adequately funded defence counsel in all capital cases and the defence must be protected and able to challenge all aspects of the prosecution's case. Further all persons sentenced to death must have effective mandatory right to appeal.

5. The Impact of International Human Rights Obligations on the Domestic Law—The Role of the Judiciary in Harmonizing Standards

In a number of commonwealth countries where governments have remained inactive and have failed to reform outdated death penalty laws,[49] the judiciary has been increasingly prepared to interpret the domestic laws in accordance with international principles of justice and human rights. This has in turn produced a rich source of jurisprudence on capital punishment in an evolving human rights context on a range of issues relating to the scope of the death penalty; minimum pre-trial guarantees and procedural safeguards in capital trials; delay; the right to seek pardon or commutation; prison conditions; and the method of execution.

The body of persuasive non-binding jurisprudence that has been created at an international level in recent years has been increasingly made available to national constitutional courts who have in many cases adopted international human rights norms in domestic constitutional jurisprudence. Domestic laws that do not comply with international human rights norms on the death penalty have been

[48] See Anti-Death Penalty Asia Network (ADPAN), Amnesty International in Asia and the Pacific, (n 42), 31.

[49] See Roger Hood, 'Capital Punishment: The Commonwealth in World Perspective' (2008) 17(3) *The Commonwealth Lawyer*, for an excellent analysis on where the Commonwealth stands on the death penalty.

invalidated, and as a result, criminal justice regimes are operating in closer conformity with international human rights norms—a process that has been described as 'the harmonization of death penalty regimes across borders'.[50]

Some of the best examples derive from the Caribbean and Africa where the domestic courts (in cases concerning the continued imposition of the mandatory death penalty and the *fairness* of mercy procedures) have sought to interpret constitutional human rights provisions consistently with international human rights standards, thereby integrating contemporary international norms into the domestic legal systems.

The mandatory death penalty

To impose an automatic death sentence without a proper sentence hearing has consistently been found to violate the ICCPR and other regional human rights treaties as it is deemed to be both arbitrary and cruel. The domestic courts in the vast majority of Caribbean states, and more recently countries in common law Africa, have adopted a construction of their respective constitutions consistent with international human rights obligations in declaring that the laws prescribing the mandatory death penalty are unconstitutional on a number of grounds.

It is now clearly and firmly established in the UNHRC's jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6(1) of the ICCPR, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence. In *Thompson v Saint Vincent and the Grenadines* it was observed that:[51]

> The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation or article 6, paragraph 1, of the Covenant.

This decision has since been followed in many subsequent cases determined by the Committee[52] and accords with regional and constitutional human rights jurisprudence on the right to life.

[50] See Andrew Novak, 'The Abolition of the Mandatory Death Penalty in Africa: A Comparative Constitutional Analysis' (submitted to publication review in April 2011); Andrew Novak, 'Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya' (2011) 45 *Suffolk University Law Review* 285; Andrew Novak, 'The Decline of the Mandatory Death Penalty in Common Law Africa: Constitutional Challenges and Comparative Jurisprudence in Malawi and Uganda' (2009) 11 *Loyola New Orleans Journal of Public Interest Law* 19.

[51] Communication No 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000) para 82.

[52] See eg *Kennedy v Trinidad and Tobago*, Communication No 845/1998, UN Doc CCPR/C/74/D/845/1998 (2002); *Carpo v The Philippines*, Communication No 1077/2002, UN Doc

In April 2000, the Inter-American Commission on Human Rights found the mandatory death penalty regimes then operating in Jamaica and Grenada to be in breach of the American Convention on Human Rights, and in June 2002, the Inter-American Court of Human Rights addressed the mandatory death penalty for the first time. In the Court's judgment in *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*,[53] it was held that the mandatory imposition of the death penalty for all offences of murder violated Article 4(1) of the American Convention on Human Rights. That provision enshrines the right to life in very similar terms to Article 6(1) of the ICCPR. The Court held:[54]

> [T]he Offences Against the Person Act of 1925 of Trinidad and Tobago automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness. Consequently, this Act prevents the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different. In light of Article 4 of the American Convention, this is exceptionally grave, as it puts at risk the most cherished possession, namely, human life, and is arbitrary according to the terms of Article 4(1) of the Convention.

In 2007, this decision was followed by the court in the case of *Boyce et al v Barbados*[55] and in September 2009, in the case of *Cadogan v Barbados*.[56]

This approach to the right to life was also adopted in the Ugandan case of *Kigula v Attorney-General*.[57] In this case, the Constitutional Court of Uganda held that the various provisions of the law prescribing the mandatory death penalty were incompatible with the Constitution. It reached that conclusion on a number of grounds, including that such sentence violates the right to life protected under Article 22(1) of the Constitution of Uganda. The Court's conclusions were subsequently affirmed by the Supreme Court of Uganda in *Attorney-General v Kigula*.[58]

There is also now a broad consensus that the mandatory death penalty violates the prohibition on inhuman and degrading treatment and punishment. In *Reyes v Queen*,[59] the Judicial Committee of the Privy Council held that the imposition of a mandatory death sentence on all those convicted of murder was 'disproportionate' and 'inappropriate' and thus inhuman and degrading. As Lord Bingham observed:[60]

CCPR/C/77/D/1077/2002 (2002); *Lubuto v Zambia*, Communication No 390/1990, UN Doc CCPR/C/55/D/390/1990/Rev.1 (1995); *Chisanga v Zambia*, Communication No 1132/2002, UN Doc CCPR/C/85/D/1132/2002 (2005); *Mwamba v Zambia*, Communication No 1520/2006, UN Doc CCPR/C/98/D/1520/2006 (2010).

[53] Inter-American Court of Human Rights, Judgment of 21 June 2002.

[54] Inter-American Court of Human Rights, Judgment of 21 June 2002, para 103.

[55] Inter-American Court of Human Rights, Judgment of 20 November 2007.

[56] See *DaCosta Cadogan* (n 1).

[57] Constitutional Petition No 6 of 2003 (2005).

[58] [2008] UGSC 15.

[59] [2002] 2 AC 235. See also *R v Hughes* [2002] 2 AC 259; *Fox v R* [2002] 2 AC 284; *Boyce and Joseph v The Queen* [2005] 1 AC 400; *Matthew v The State* [2005] 1 AC 433; and *Bowe and Davis v The Queen* [2006] UKPC 10.

[60] [2002] 2 AC 235 at para 43.

To deny the offender the opportunity, before sentence has been passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core right of which section 7 exists to protect.

In so doing, the Judicial Committee of the Privy Council construed the domestic law to conform closely with international human rights norms:[61]

This does not mean that in interpreting the Constitution of Belize effect need be given to treaties not incorporated into the domestic law of Belize or non-binding recommendations or opinions made or given by foreign courts or human rights bodies. It is open to the people of any country to lay down rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does.

In recent years the highest courts in three African jurisdictions have concluded that imposing the death penalty with no discretion to impose a lesser sentence in appropriate cases violates the constitutional prohibition of inhuman or degrading treatment or punishment. This conclusion was reached by the Constitutional Court of Uganda, in *Kigula v Attorney-General*[62] later affirmed by the Supreme Court of Uganda;[63] the Court of Appeal of Malawi, in *Twoboy Jacob v The Republic*,[64] and most recently, the Court of Appeal of Kenya, in *Mutiso v The Republic*.[65]

The same conclusion was reached in 2010, in the case of *Bangladesh Legal Aid and Services Trust v Bangladesh (Shukur Ali)*,[66] where the High Court of Bangladesh declared unconstitutional section 6(2) of the Women and Children Repression Prevention (Special) Act which provided for the mandatory death sentence for those convicted of killing a woman or child after rape. The High Court adopted the reasoning of the Judicial Committee of the Privy Council in *Reyes* and noted Bangladesh's obligations under the ICCPR in reaching its conclusion.

In *Mutiso*, the Court of Appeal of Kenya also observed and encouraged an approach to constitutional interpretation which accords with international jurisprudence:[67]

The common thread running through the authorities cited before us is that the provisions of the law invoked by the appellant herein are in *pari materia* with those considered in other jurisdictions and were largely influenced by, and in some cases lifted word for word, from international instruments which Kenya has ratified. We are satisfied that those decisions are persuasive in our jurisdiction and we make no apology for applying them.

There is also case law to the effect that the mandatory death penalty violates not only the right to life and/or the prohibition of inhuman or degrading treatment

[61] [2002] 2 AC 235 at para 28.
[62] See Constitutional Petition No 6 of 2003 (2005) (n 57) 62.
[63] *Kigula* [2008] UGSC 15 (n 58).
[64] Criminal Appeal Case No 18 of 2006, Judgment of 19 July 2007.
[65] Criminal Appeal No 17 of 2008, Judgment of 30 July 2010, 35–7.
[66] (2010) 30 BLD 194 (High Court Division of the Supreme Court of Bangladesh).
[67] Criminal Appeal No 17 of 2008, Judgment of 30 July 2010 (n 65) 32.

or punishment, but also the convicted person's right to a fair trial. This much was implicit in the conclusions of the Inter-American Commission on Human Rights in *Edwards v The Bahamas*:[68]

> [B]y reason of its compulsory and automatic application, a mandatory sentence cannot be the subject of an effective review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of a crime for which the sentence was mandated.

In *Twoboy Jacob v The Republic*[69] the Court of Appeal of Malawi followed this line of reasoning. The Court held that the right to a fair trial includes sentencing, and that the mandatory death penalty for murder violates the right to a fair trial under the Constitution of Malawi. This is because the mandatory death sentence prevents the offender from adducing evidence in mitigation and precludes the court from judicial examination and determination of sentence.

As noted above, in Bangladesh the High Court recently declared the mandatory imposition of the death penalty for murder and rape to be unconstitutional. However, in four of the countries that have carried out executions in the last 10 years, it remains the mandatory penalty. In Pakistan and Afghanistan for murder; in Singapore for murder and certain drug trafficking offences; and in Malaysia for murder, non-fatal wounding, drug trafficking, robbery, burglary and kidnapping not involving death, and certain firearm offences. The death penalty is also mandatory for some offences in Japan, Brunei, Laos, and Sri Lanka.[70]

There have been a number of recent challenges to the mandatory death penalty for trafficking in drugs in Asia with mixed results. In 2011, there was a breakthrough in India with a successful challenge to the mandatory death penalty for certain drugs offences. In *Indian Harm Reduction Network v The Union of India*[71] the Bombay High Court found that:[72]

> '[T]he use of wise and beneficent discretion by the Court in a matter of life and death after reckoning the circumstances in which the offence was committed and that of the offender is indispensable and divesting the court of the use of such discretion and scrutiny before pronouncing the preordained death sentence cannot but be regarded as harsh, unjust and unfair.

In 2010, an unsuccessful challenge was made to the mandatory death penalty in Singapore. In *Yong Vui Kong v Public Prosecutor*[73] the Court of Appeal disregarded the massive body of international, regional, and national jurisprudence summarized above in upholding the mandatory death penalty. They distinguished the many cases on the basis of Singapore's different constitutional structure, specifically because the Singapore Constitution does not contain an express prohibition

[68] Case 12.086, Report No 48/01, 4 April 2001 (Inter-American Commission on Human Rights), para 137.
[69] Criminal Appeal Case No 18 of 2006, 7.
[70] See Hood, 'Enhancing EU Action on the Death Penalty in Asia' (n 32) 48.
[71] Criminal Writ Petition No. 1784 of 2010.
[72] See Hood (n 32) para 57.
[73] [2010] SGCA 20.

against inhuman punishment. The judgment has been criticized as representing 'an unwillingness to engage with international law on a domestic level, and an "eyes shut" approach to the sheer futility of the harshest punishment in deterring drug traffickers…'.[74] Even though the legal challenge did not succeed, this litigation had still played a role in bringing the issue of the mandatory death penalty to the fore, leading to proposed legal reforms in Singapore.

In July 2012, the Government of Singapore announced in Parliament that new laws would be drafted to abolish the mandatory imposition of the death penalty for certain categories of drug trafficking offences and some homicide offences. The draft bills were read in Parliament in October 2012, and passed in November 2012. Under the new law, judges will have a discretion to impose life imprisonment in lieu of the death penalty in cases of non-intentional murders and certain drug trafficking offences. The introduction of the new legislation will provide an opportunity for all accused people—and those presently under sentence of death who meet the necessary requirements—to seek a review of their sentences, potentially saving their lives. The government also announced a moratorium on executions until the legislative process has been completed.[75]

In Malaysia the courts have also upheld the constitutionality of the mandatory death penalty for drug trafficking.[76] However, following the announcement in Singapore in 2012, the Attorney General of Malaysia stated that similar proposals were also being considered to give judges the discretion for not imposing the death sentences on drug couriers.[77]

Pardons and petitions of mercy

Article 6(4) of the ICCPR states that 'Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.'

The seventh Safeguard reinforces this norm and recognizes the right to seek pardon in identical terms.

International law thus provides for a 'right' to seek pardon or commutation of sentence, and in order for this to be meaningful, states are under an obligation to provide *effective* measures for the proper consideration of clemency in all cases. No person may be executed while a petition for mercy or pardon is pending. This principle derives from the eighth Safeguard which states that 'Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceedings relating to pardon or commutation of the sentence'. Filing an appeal or a petition for mercy should always provide a basis to suspend execution.

In *Reyes v The Queen*, the Judicial Committee of the Privy Council attached great importance to the role of the executive in the mercy process and contrasted

[74] Yvonne McDermott, '*Yong Vui Kong v. Public Prosecutor* and the Mandatory Death Penalty for Drug Offences in Singapore: A Dead End for Constitutional Challenge?' (2010) 1 *International Journal on Human Rights and Drugs Policy* 35.

[75] See Ch 8. [76] *PP v Lau Kee Hoo* [1983] MLJ 157. [77] See Hood (n 32) 49.

mercy with the sentencing function carried out by an independent and impartial tribunal:[78]

> Mercy . . . means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted.

On the other hand, the right to seek pardon cannot be employed to deny the right of a full judicial review of sentence on appeal. The UNHRC made this clear in *Thompson v Saint Vincent and the Grenadines*:[79]

> The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of article 6, paragraph 1, of the Covenant.

In recent years, the right to seek clemency, amnesty, or pardon has been carefully examined in the Caribbean context both by the domestic courts and regional human rights tribunals.

Article 4(6) of the American Convention on Human Rights is in very similar terms to Article 6(4) of the ICCPR. It states that 'Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases'.

The Inter-American Commission on Human Rights has considered the effect of Article 4(6) of the American Convention in a number of Caribbean death penalty cases. In *Desmond McKenzie et al v Jamaica*, the Commission held that procedures for granting mercy or pardon must guarantee condemned prisoners with an effective and adequate opportunity to participate in the process:[80]

> In the Commission's view, the right to apply for amnesty, pardon or commutation of sentence . . . encompasses certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections include the right on the part of condemned prisoners . . . to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel . . . and to receive a decision from the authority within a reasonable period of time prior to his or her execution.

In the landmark decision of *Neville Lewis and others v Attorney General of Jamaica*,[81] the Privy Council ruled that fairness was a fundamental requirement of the

[78] See (n 59) para 44 (emphasis added). [79] See (n 51).

[80] Inter-American Commission on Human Rights, Case 12.023, Report No 41/00, 13 April 2000, para 228.

[81] [2001] 2 AC 50.

proceedings before the Jamaican Mercy Committee, the body which ultimately decides who should be executed and who should be granted mercy or a pardon. The Council adopted an approach to constitutional interpretation which was consistent with Jamaica's international human rights obligations:[82]

> Jamaica ratified the American Convention on Human Rights . . . and it is now well established that domestic legislation should as far as possible be interpreted so as to conform to the state's obligations under such a treaty.

Bearing in mind the obligations of Jamaica under Article 4(6) of the American Convention on Human Rights, the Council held that:[83]

> [I]t seems . . . that the State's obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subjected to judicial review.

The decision in *Neville Lewis* clearly establishes and applies the principle that public authorities who make such important decisions as whether or not a person sentenced to death should be executed must observe basic rules of fairness. There is no reason to suggest that the applicable standards under Article 6(4) of the ICCPR are any different and therefore, signatories to the ICCPR in Asian countries that retain the death penalty should take steps to ensure that condemned prisoners are provided with adequate and *effective* mercy procedures.

Article 80 of the Chinese Constitution confers power on the President to order special pardons, but a mere *paper right* is not enough to meet the requirements of international human rights law and the standards under the ICCPR.[84] The decision is one of life or death and, as such, the domestic law is required to make provision for a proper functioning, transparent, and fair system that allows for the proper consideration of clemency in all cases.

Article 73 of Japan's Constitution states that the Cabinet shall 'Decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights'. In addition, Japan's Pardon Act states that 'special pardons, commutations of sentence with respect to a specific person, and remissions of execution of a sentence or restoration of rights with respect to a specific person shall be granted to persons subject to a recommendation from the National Offenders Rehabilitation Commission'. Moreover, the Ordinance for Enforcement of the Pardon Act has established procedures which require that when a person incarcerated in a penal institution requests special pardon, commutation of sentence, or remission of execution of sentence, the warden of the penal institution shall petition to the National Offenders Rehabilitation Commission (NORC) and include his or her opinion about the inmate's request. Thus, incarcerated persons in Japan cannot apply directly to the NORC for amnesty or pardon—they must do so through an intermediary.

The last death sentence to have been commuted in Japan was in June 1975 (more than 37 years ago), since then no other inmate has been granted clemency.

[82] [2001] 2 AC 50 at para 78F. [83] [2001] 2 AC 50 at para 79B. [84] See Ch 6.

As a consequence, many death row inmates live for years under continuous threat of execution. As of January 2013, when Japan had 133 inmates on death row under a finalized sentence of death, four had lived in those circumstances for more than 30 years.[85]

In contrast to China and Japan, many death row prisoners in India have been granted clemency. During Pratibha Patil's period of office as President of India, 35 prisoners under sentence of death were granted clemency and had their death sentences reduced to terms of life imprisonment. Nevertheless, prisoners who had committed politically motivated crimes have not been granted clemency and the death sentence imposed on Mohammed Ajmal Kasab, who was involved in the 2008 Mumbai attacks, was carried out on 21 November 2012.[86]

6. Concluding Remarks

Evolving international and domestic jurisprudence on the death penalty has increasingly limited the circumstances in which the death penalty can be imposed or carried out on those charged with, and convicted of a capital offence. It is clear that legislative reforms to the criminal and constitutional laws that regulate the death penalty in many Asian countries are required in order to achieve greater conformity with contemporary international norms and the obligations of state parties to the ICCPR. The scope of the death penalty will need to be reduced, the mandatory death sentence will need to be abolished, procedural guarantees in the trial and appeal process will need strengthening, and access to a fair and functioning mercy process will need to be permitted.

The judiciary will also have a critical role to ensure that the domestic law is interpreted and construed consistently with human rights norms restricting the death penalty pending abolition. The wave of recent case law from national courts finding the mandatory death penalty to be unlawful and mercy procedures to be judicially reviewable reveals an increasing interdependence between different legal systems. It also reveals a willingness by the judiciary to invalidate laws that do not comply with contemporary international norms on the death penalty.

In the case of *Spence and Hughes v The Queen*, Justice Saunders of the Eastern Caribbean Court of Appeal endorsed an approach to the interpretation of fundamental rights which takes account of international and comparative law:[87]

> [A] court must confront the question as to what criteria should be used to evaluate punishment or treatment that is inhuman or degrading. In my view we would be embarking upon a perilous path if we began to regard the circumstances of each territory as being so peculiar, so unique as to warrant a reluctance to take into account the standards adopted by humankind in other jurisdictions. The collective experience and wisdom of courts and tribunals the world over ought fully to be considered.

[85] See Death Penalty Project (n 33) 10. [86] See Hood (n 32) 49. See also Ch 14.

[87] Criminal Appeal Nos 20/1998 and 14/1997, Judgment of 2 April 2001 (Eastern Caribbean Court of Appeal) (unreported).

3

Examining China's Responses to the Global Campaign Against the Death Penalty

*Michelle Miao**

1. Introduction

For a long time, China's aggressive capital punishment policies stood in pronounced opposition to the UN goal of restricting the scope of the death penalty with a view to its eventual abolition in all countries.[1] Yet the last decade has seen a surprising turn of policy: the issue of capital punishment in China has taken on a new set of features. This chapter, which draws in part on interviews undertaken in 2010 with Chinese legal professionals, charts the recent transformation of China's attitudes towards international human rights forces in the field of capital punishment. It reveals that these forces have had a significant but still limited impact on the reform of death penalty laws in China. Although China has made several laudable adjustments to its capital punishment regime since 2006, it is widely recognized that it has yet to fully respect existing international standards on the use of the death penalty. This article suggests that China's domestic reliance on capital punishment and its resistance to rapid change derives from a complex web of multifaceted political and social conditions.

In essence, this contribution examines the interaction between China and the international community as it gradually moves towards embracing international human rights norms, both with regard to its conditional acceptance of such norms and values and its resistance to international pressure. It explores first the extent to which the socializing forces of the global anti-death penalty community, acting through persuasion and acculturation, have been effective in compelling and inducing changes in China's beliefs and behaviour as regards the use of the death penalty. In particular, the change in the procedures and methods of executing capital offenders in China suggests that the Chinese government has been sensitive to

* The author would like to thank Professor Roger Hood and Professor Carolyn Hoyle for their valuable comments and suggestions on this chapter.

[1] By United Nations Resolution 2857 (XXVI) entitled 'Capital punishment', issued 20 December 20 1971, the General Assembly affirmed that 'the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries'.

external denunciation while the difficulties facing the Chinese central government in banning the practice of shaming parades prior to execution provides proof of the resistance at the local level. The second part sheds light on the drivers behind China's recent curtailing of the use of capital punishment as well as the causes of resistance to abolitionist forces on the international level.

2. Chinese Discourse and Practices on the Death Penalty: Changes and Resistance

According to Professor Roger Hood, a renowned scholar on the global process of capital punishment abolition, discourses on capital punishment between China and the Europe-led worldwide campaign against the death penalty started around the end of the 1990s.[2] From that time the EU has been engaged with China in regular wide-ranging dialogues, seminars, and projects[3] to create, develop, and then transform discourses leading to restriction and eventual abolition of the death penalty.[4] China's attitudes towards human rights rationales that underpin the anti-capital punishment activisms have undergone a change from considering these subjects as alien topics against the grain of Chinese orthodox ideology and culture, to conditionally accepting them into mainstream penal discourse. China's official policy on capital punishment has also shifted from a strike-hard style infliction of the death penalty without restraint to a commitment to 'kill fewer, kill carefully' and 'tempering justice with mercy'.[5] It is significant that China signed the International Covenant on Civil and Political Rights (ICCPR) in 1998,[6] and although it has yet to ratify this treaty it has, at various times, claimed—although not in a way to convince its critics—that its policy is in conformity with the demands of that treaty as regards the use of the death penalty.

[2] Roger Hood, 'Abolition of the Death Penalty: China in World Perspective' (2009) 1(1) *City University of Hong Kong Law Review* 7.

[3] Specific recommendations generated from these meetings included recommending China to limit its use of the death penalty, lifting the secrecy on death penalty statistics, narrowing the scope of capital offences, improving judicial procedure for capital cases, granting of clemency and amnesty to condemned prisoners, etc.

[4] See Hood (n 2) 1–5; Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 248.

[5] In February 2010, the Supreme People's Court (SPC) issued 'Several Opinions on Implementing the Penal Policy of Tempering Justice with Mercy', in which the SPC pronounced and stressed that the use of the death penalty must be restricted and cautiously applied, instructing lower courts to limit its use to a small number of 'extremely serious' cases. See 'China's Supreme Court stresses "mercy" in death penalty' *The Telegraph* (10 February 2010), <http://www.telegraph.co.uk/news/worldnews/asia/china/7204197/Chinas-Supreme-Court-stresses-mercy-in-death-penalty.html> (accessed 14 May 2011); Sui-Lee Wee and Sabrina Mao, 'China Scraps Death Penalty for 13 Non-Violent Crimes' *Reuters* (Beijing, 25 February 2011), <http://uk.reuters.com/article/2011/02/25/uk-china-deathpenalty-idUKTRE71O1X820110225> (accessed 28 March 2011).

[6] International Covenant on Civil and Political Rights, GA Res 2200A (XXI), UN Doc A/6316 (1966) 999 UNTS 171, adopted on 16 December 1966 and entered into force on 23 March 1976.

Today, the debate between China and the global community against the death penalty has come to centre on *how*, not *whether*, to restrict the death penalty with the final goal of abolition. Attitudinal changes among elites have subsequently been institutionalized by a series of reform initiatives. Along with a domestic impetus, the author argues that the government's position on capital punishment has been motivated by external drivers, mainly pressures and criticisms appealing for China to restrain and then abolish its use of capital punishment. The European Union (EU), international organizations (IOs) such as the United Nations, and non-governmental organizations (NGOs) such as Amnesty International, Hands Off Cain, and the Great Britain-China Centre, among others, have played a leading role in first initiating and then stimulating anti-capital-punishment discourses and sentiments in China.

An overview of attitudinal, normative, and institutional transformations regarding capital punishment in China

Over the course of China's contemporary criminal justice history, capital punishment norms, policies, and attitudes have gone through fundamental changes. Under the rule of Mao Zedong, the machinery of capital punishment in China during the chaotic era of political campaigns—fraught with errors and uncertainties—was particularly appalling. A report issued in 1980 by the Supreme People's Court (SPC) admitted that miscarriages of justice were so prevalent during China's decade-long Cultural Revolution (1966–76) that an estimated 17.5 to 39 per cent of capital convictions were found to be wrongful in various provinces across China.[7] Significant progress in the post-Mao era has been made, along with the socio-economic developments launched towards the end of the 1970s. The Criminal Law of 1979, the first criminal code in China's penal history, eliminated 'counter-revolutionary' offences from the list of capital offences in criminal law. Apart from this depoliticization of criminal conduct, vulnerable groups including juveniles were no longer punishable by immediate execution under the 1979 statute, but still eligible for a suspended death penalty.[8]

[7] The Supreme People's Court, 'The Report on Some Opinions for Reviewing and Correcting Wrongfully Convicted Capital Cases during the Culture Revolution' (1980). Scholars claimed that this bloodstained era of the 1950s witnessed a death toll of approximately 710,000 in the Campaign to Supress Counter-Revolutionary Elements and over 20,000,000 deaths during the Cultural Revolution from 1966 to 1976. In the Second Plenary Session of the Eighth Central Committee of the Communist Party of China (1956), Chairman Mao Zedong once commented, in response to the fact that during Stalin's reign at least one million people were executed, 'we have killed at least 790,000 counter-revolutionaries during the few years after the establishment of the PRC, imprisoned more than a million, and put over a million on parole'. In the 1957 Moscow Conference of Representatives of Communist and Workers Parties, he even spoke of the possibility of sacrificing 300 million lives for 'the cause of global revolution'. See Qi Shi, 'Marx, Engels, Lenin, Stalin-Mao?' (1999) 3 *Bainianchao*, <http://www.xiexingcun.com/bainianchao/banc1999/banc19990302.html> (accessed 10 June 2011); Radio Free Europe/Munich, 'Herta Kuusinen on the 1957 Conference', 14 August 1963, Box-Folder-Report No 133-1-120, <http://www.osaarchivum.org/greenfield/repository/osa:2fb34ceb-4158-4105-b067-56a015caef5d> (accessed 9 March 2013); Guo Daohui, 'To Prevent the Tragedy from Happening in the Future', *China Review* (21 May 2011), <http://www.china-review.com/LiShiPinDaoA.asp?id=27871> (accessed 10 June 2011).

[8] There are two forms of capital punishment under Chinese criminal law—immediate execution and the death sentence with a two-year suspension of execution. The latter allows for the commutation

Despite the rapid growth of capital offences in law via promulgation of judicial interpretations and special ordinances, and the gradual delegation of the SPC's review power to Provincial High Courts[9] throughout the 1980s and 1990s, the 1997 Criminal Law—the second and present existing penal code—stipulated that the power to review death sentences belonged only to the SPC and it excluded pregnant women and juvenile offenders from both suspended death sentences and immediate execution. The greater protection afforded to vulnerable groups and insistence on procedural due process in the 1997 Criminal Law, at a time when Strike Hard Campaigns were still dominating the Chinese penal regime, shows the positive influences of scholars and legislators in promoting China's march towards the rule of law and human rights.

China's institutional adjustment of its capital punishment law and practices began to gain momentum in 2004, following the second Five-Year Reform Plan of the People's Courts (2004–08) which prioritized reform in the field of capital punishment. Since then, the SPC regained the review power over capital cases from Provincial High Courts in 2007; appellant trials have been held in open courts instead of in secret from 2006; China's state legislature removed 13 capital offences from the Criminal Law in 2010 and the aged (above the age of 75) were no longer punishable by death save in exceptional circumstances; lethal injection has generally replaced shooting as the main execution method; and China amended its criminal procedure law in March 2012 to require the recording of interrogations, mandatory appellate hearings, and more rigorous review processes in capital cases. These reforms, which have institutionalized the transformation of the discourse on capital punishment since the turn of the century at a remarkable pace, are the outcome of sustained efforts by legal elites to contain the expansion of capital punishment in Chinese penal law which can be traced back to the late 1970s.

There have been two visible trends in these recent transitions in capital punishment law and practices. The first involves qualitative changes in the administration of capital punishment towards more civilized and humane practices in various ways. The ongoing shift from bullets to needles and the strong attempts to eliminate shaming parades from the local practices are cases in point. The second is a quantitative change in the recourse to death sentences and executions. Although no official statistical proof has been forthcoming, as these figures remain cloaked by state secrecy law, it has been claimed that since the review power was recalled by the SPC in 2007, half of the defendants who would previously have been executed instead received a death sentence with a two-year reprieve, of which 99 per cent

of the sentence when the condemned prisoner does not deliberately commit further crimes during the two-year suspension period. The term 'death sentence' in the context of Chinese criminal law in this chapter refers to the former type of death penalty—immediate execution—unless it is specifically stated as 'suspended death'.

[9] According to the Organic Law of the People's Courts of the People's Republic of China, the Provincial High Courts are responsible for issues at the provincial level. They are also referred to as High People's Courts of China or Higher People's Courts of China.

would never be executed.[10] This quantitative reduction in the use of capital punishment is perhaps the most significant development in the moderation of capital punishment machinery in China.

Whatever the actual numbers, the UN Secretary-General's Eighth Quinquennial Report accepted that there has been a decline in the total number of death sentences and executions since 2007 and attributed the decline to the attitudinal transformation in China.[11] It is not difficult to discern the attitudinal changes by examining the speeches of various Chinese spokespersons in the United Nations over time. The United Nations serves as an important platform for the international community to monitor and exert pressures on countries still actively inflicting the death penalty around the world, including China. In November 1994, when Mr Li Baodong spoke before the Third Committee of the 49th session of the United Nations General Assembly, he said that 'the abolition of capital punishment was an internal matter to be decided by states; it was therefore unrealistic to request all countries to abolish it'.[12] This emphasis on territorial sovereignty over the matter of capital punishment and refusal to envisage the possibility of abolishing the use of capital punishment in China changed fundamentally 13 years later. In March 2007, during a high-level segment of the UN Human Rights Council, the head of the Chinese delegation stated, 'we are seeking to limit the application of the death penalty in China. I am confident that with the development and the progress in my country, the application of the death penalty will be further reduced and it will be finally abolished.'[13] This announcement has been extensively cited by activists and scholars not only as a signal of the Chinese government's willingness to moderate considerably its previous active use of the death penalty, but to embrace eventually the goal of the abolitionist movement.

Furthermore, at the General Assembly of the United Nations, resolutions were carried in 2007, 2008, 2010, and 2012 by a majority of voting member states calling for a Moratorium on the Use of the Death Penalty.[14] Although not legally binding, these resolutions carry significant moral and political weight. China voted

[10] This information is from an interview given by Liu Hainian, a researcher at the Chinese Academy of Social Sciences. See Wu Jing, 'Chinese Experts on Human Rights Refuted Reports from Amnesty International' *Xinhua News Agency* (Beijing, 29 April 2009), <http://www.humanrights.cn/cn/zt/qita/rqxz/zhangxiaoling/2/t20090429_445558.htm> (accessed 10 June 2011).

[11] UN Secretary-General, 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty', E/2010/10, 18 December 2009, 23, <http://www.unodc.org/documents/commissions/CCPCJ_session19/E2010_10eV0989256.pdf> (accessed 1 May 2011).

[12] United Nations General Assembly 49th Session, Third Committee, 36th Meeting, UN Doc A/C.3/49/SR.36, 21 November 1994, para 44.

[13] Human Rights Committee, 'Human Rights Council Opens Fourth Session', Press Release, HRC/07/3, 12 March 2007, 9.

[14] See United Nations General Assembly Resolutions 62/149 (2007), 63/168 (2008), 65/206 (2010). On 19 November 2012, the United Nations Third Committee—the Social, Humanitarian and Cultural Affairs Committee—voted in favour of a resolution for a moratorium on capital punishment by a majority of 110 for, with 39 against, and 36 abstaining. See 'Ban Welcomes General Assembly Committee's Record Vote on Death Penalty Moratorium', UN News Centre, 21 November 2012, <http://www.un.org/apps/news/story.asp?NewsID=43568&Cr=death+penalty&Cr1#.UR3oQ6XWi-U> (accessed 3 January 2013).

against all these resolutions and in doing so questioned this periodical ritual of the UN, but it was nevertheless drawn into debates, discussions, and deliberation on the suspension of capital punishment. For instance, in 2007, China objected to the pressures from abolitionists but indicated its preference to discuss the use of capital punishment with other parties via bilateral or multilateral dialogues.[15] While casting a negative vote on the most recent draft resolution calling on states to establish a moratorium on executions—A/C.3/67/L.44/Rev.1—China nevertheless admitted that it is crucial 'to exercise the strictest caution in the practice of the death penalty'.[16]

Europe's self-perceived identity as a normative promoter of human rights values has found a profound expression in its international pursuit of abolition of the death penalty.[17] Indeed, the worldwide anti-death penalty campaign led by the Council of Europe, the European Union, member states of Europe, and European-based NGOs, has become a central part of European foreign policy.[18] Based on its cosmopolitan view that the death penalty is a fundamental violation of basic human rights, specifically the right to life and the right to be free from cruel, inhumane, and degrading punishment or treatment,[19] Europe's campaigns against the death penalty have extended beyond its continental border to all retentionist nations, including Asia, the 'next frontier'[20] of the capital punishment abolition movement.[21]

Europe has sought to promote changes in China mainly through mechanisms of persuasion and dialogue. EU-level institutions have endorsed high-level bilateral ministerial activities between the European representatives and the Chinese Ministry of Foreign Affairs,[22] as well as coordinated academic projects and

[15] 'General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty (Adopts 54 Resolutions, 12 Decisions Recommended by Third Committee)', Sixty-second General Assembly Plenary, 18 December 2007, <http://www.un.org/News/Press/docs/2007/ga10678.doc.htm> (accessed 12 September 2011).

[16] This draft resolution was approved by the Third Committee of the General Assembly. See Department of Public Information (News and Media Division, New York), 'General Assembly Will Call for Moratorium on Executions, with View to Abolishing Death Penalty, Under Terms of Resolution Approved by Third Committee', GA/SHC/4058, <http://www.un.org/News/Press/docs/2012/gashc4058.doc.htm> (accessed 1 January 2013). China went further than voting against these resolutions by signing the NOTE VERBALE of dissent to the resolutions of 2007, 2008, 2010, and 2012.

[17] See Manners (n 4) 235–58.

[18] Evi Girling, 'European Identity and the Mission Against the Death Penalty in the United States', in Austin Sarat and Christian Boulanger (eds), *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford, California, Stanford University Press 2005) 112–28.

[19] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* 4th edn (Oxford, Oxford University Press 2008) 6–8 and 18–20; Hood (n 2) 7; Manners (n 4) 246.

[20] David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (New York, Oxford University Press 2009).

[21] Roger Hood, 'Enhancing EU Action on the Death Penalty in Asia', Briefing Paper, Directorate-General for External Policies of the Union, Directorate B, Policy Department, <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=78258> (accessed 7 January 2013).

[22] British Embassy in Beijing, 'Human Rights', <http://ukinchina.fco.gov.uk/en/about-us/working-with-china/HumanRights/> (accessed 12 August 2011).

programmes between European and Chinese partners.[23] Political elites, academics, judicial elites, legislators, and law-enforcement officials from both sides have been actively involved in these activities. The Council of Europe, the European Union and its member states also appeal for China to stop imposing the death penalty on and executing defendants who are European nationals on a case-to-case basis. The highly publicized execution of Akmal Shaikh, a British citizen, is a case in point which will be discussed later in this chapter.

Apart from the efforts made by institutions in Europe and the United Nations, scholars, Amnesty International, and other NGOs have done remarkable work in keeping a close eye on various aspects of the administration of capital punishment in China. Collecting statistics about the worldwide administration of capital punishment has been a crucial device because it induced changes in states still actively practising capital punishment by informing them about the positions of other countries on capital punishment policies and by forcing them to accept their status as 'rogue states' in the international community. For example, compiling data on the widespread and growing acceptance by most nations that Article 6(2) of the ICCPR (which states that capital punishment can only be imposed, pending abolition, for 'the most serious crimes'), should be interpreted in a very restrictive way to encompass only crimes that intentionally result in lethal or other extremely grave consequences, provided China with a strong incentive to remove non-violent crimes from its list of capital crimes. Exposure of China's practice in the field of capital punishment in the global media discourse has forced China to re-consider whether it should insist on its excessive capital punishment policies and whether such policies comport with China's self-perceived identity as a 'civilized nation' and a 'responsible member of the global community'.

Resistance to justifications for, and setbacks to, the capital punishment reforms in China

Although it is fair to say that there has been a visible shift in China's attitudes and practice regarding capital punishment and human rights, the Chinese authorities still consider capital punishment as an essential instrument of domestic criminal justice. To date, there remains widespread support for the death penalty among political and legal elites, as well as among the general public, especially for murder and possibly for corruption.[24] Furthermore, there are still considerable gaps

[23] For example, the Great Britain-China Centre has worked with Chinese partners since 2003 on projects on capital punishment such as 'Strengthening Defence in Death Penalty Cases' (2003–06), 'Moving the Debate Forward: China's Use of the Death Penalty' (2007–09), 'The Power of Evidence' (2011), 'Promoting Judicial Discretion in the Reduction and Restriction of the Application of the Death Penalty' (2009–11).

[24] A public opinion survey was conducted in 2007-2008 by the Max Planck Institute for Foreign and International Criminal Law in collaboration with the Research Center for Contemporary China (RCCC) of Peking University. The author notices that the findings of this most recent survey of public opinion did not suggest that there is high public support for the death penalty for corrupt officials. See Dietrich Oberwittler and Shenghui Qi, *Public Opinion on the Death Penalty in China* (Freiburg, Max-Planck Institute for Foreign and International Criminal Law 2009).

between the Chinese practice and international standards as set out in the ICCPR and the United Nations Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty.[25] The three most commonly used counter-arguments against abolitionist movements, which are repeatedly used by the mainstream media and government representatives in China to justify China's existing capital punishment institutions and policies, are as follows.

The first rationale is to deny that international human rights standards and norms concerning capital punishment are universally applicable to all countries, despite the fact that China has signed the ICCPR. The Chinese government has argued that China has its special national circumstances and therefore should not be subject to international human rights norms and standards that are rooted in the culture and social structures of Western countries. Various spokespersons of the Chinese government have labelled the arguments and initiatives launched by countries promoting worldwide campaign against the death penalty as political interference in China's capital punishment policies and practices under the cloak of promoting universal values of human rights.

A second, related, justification for retaining the death penalty is based on the argument that capital punishment is, in any case, a matter within the domain of domestic criminal justice policy. Thus, requiring sovereign states to abolish capital punishment represents an outright invasion of their sovereignty and internal affairs. This nationalist argument has been supported by pro-death-penalty scholars[26] as well as government officials. For example, Zhang Dan, Counselor of the Chinese Mission at the UN General Assembly, stated that attempts to achieve a universal moratorium on capital punishment at the UN General Assembly was an intrusion into the internal affairs of a sovereign state.[27] Further, this position insists that the issue of the death penalty is a matter of domestic administration of criminal justice, rather than an issue of human rights. This argument, reinforced by mainstream media and other propaganda tools in China, has become a justification widely accepted by the general public.

Thirdly, it has also been frequently maintained by Chinese government officials that there is no consensus worldwide that capital punishment is in breach of universal human rights, in part because Article 6(2) of the ICCPR still allows its limited use, but mainly because quite a few countries and some regions have not abolished the death penalty, including democratic states such as the United States and Japan. Given that these societies that highly value democracy and the rule of law have retained the death penalty, it seems unreasonable to criticize China's retention of capital punishment, especially as it has now set on the path to reform

[25] 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', ESC Res 1984/50, Annex, 1984 UN ESCOR Supp (No 1), 33, UN Doc E/1984/84 (1984).

[26] Liang Genlin, 'Public Identification, Political Choice and the Control of the Death Penalty' (2004) 4 *Legal Research* (in Chinese) 15–27; Tian He, 'On the Conditions for Abolishing or Retaining the Death Penalty' (2005) 2 *Legal Research* (in Chinese) 66–74; Chen Xingliang, 'An Examination of the Death Penalty in China' (2005) 36(3) *Contemporary Chinese Thought* 35–52.

[27] Summary Record of the 45th Meeting: 3rd Committee, Held at Headquarters, New York, 11 November 2010, General Assembly, 65th Session, A/C.3/65/SR.45, 12 January 2011.

its death penalty administration in order to use capital punishment in a strict and cautious manner.

Other justifications include the claim that the death penalty is a greater deterrent than other forms of punishment in China (the most severe form of these lesser penalties being a suspended death sentence). It is widely said in China that 'killing one can deter one hundred', ie punishing a few of the most outrageous wrong-doers with death can most effectively prevent others from committing crimes. In addition, it is also believed that executing a handful of heinous criminals is actually respectful of the 'human rights' of the majority of the people, including victims and the families of victims.[28] Last but not least, it is commonly asserted that the general public has a blind faith in capital punishment in China. The Chinese authorities insist that resorting to the death penalty is necessary to appease growing public anger in highly publicized cases involving murder and other grave crimes.

This mindset that insists on retaining the status quo, has led occasionally to backlashes against progressive reforms. Despite the movement towards greater leniency and restraint in China's capital punishment policy, just at a time when China observers believed the notorious 'Strike Hard' Campaign had faded into Chinese criminal justice history, this practice found its way back. The most recent 'Strike Hard' Campaign in 2010 was a setback for China's movement towards the reduced use of harsh punishment and indicates the complexity and difficulty of promoting changes towards penal moderation in a country where punitive policies and mentalities continue to dominate political and legal circles.

Domestic and international critics expressed great concerns over possible wrongful convictions and abuses of criminal procedure during this new round of a national campaign.[29] Statistics show that during the 'Fight against Evil Forces' in 2010, a specific theme under the general Strike Hard Campaign, 1,802 (45 per cent) of the 3,989 offenders convicted of involvement in organized crime were sentenced to fixed-term imprisonment above five years, life imprisonment, suspended death and death, although the specific number of death sentences and executions remains unknown. The media nationwide were once again flooded with news and photographs of sentencing rallies and parades in various provinces[30] aimed to shame offenders during the high tide of this Strike Hard Campaign.[31]

[28] Xu Xuejiang, 'The Death Penalty Should be Reinforced Rather than Being Abolished' (*Xinhuanet*, 20 January 2005), <http://news.xinhuanet.com/comments/2005-01/20/content_2481578.htm> (accessed 19 June 2011).

[29] Congressional-Executive Commission on China, 'Ministry of Public Security Launches Seven-Month Nationwide "Strike Hard" Campaign', 11 August 2010, <http://cecc.gov/pages/virtualAcad/index.phpd?showsingle=143701>, accessed 11 April 2011.

[30] Because the Chinese authorities will not reveal the total number of executions, the lump-sum term of 'fixed-term imprisonment above five years' has been frequently used by the SPC to refer to harsh punishment, including capital punishment, meted by the courts. See the Supreme People's Court, 'The Annual Work Report of the People's Courts' (in Chinese), <http://www.dffy.com/sitedata/resource/files/201105/20110524222431802k.doc> (accessed 12 June 2011). According to online news report, various cities and counties of at least nine provinces, including but not limited to Hunan, Yunan, Hubei, Jiangsu, Guangdong, Shangxi, Guizhou, Guangxi, and Sichuan, held such publicized sentencing rallies in 2010.

[31] Jin Zhu, '"Strike Hard" Campaign Targets Violent Crimes' (*China Daily*, 15 June 2010), <http://www.chinadaily.com.cn/china/2010-06/15/content_9977822.htm> (accessed 12 August 2011).

Nevertheless, this latest Strike Hard Campaign was milder and narrower in scope than the previous three rounds in 1983, 1996, and 2001. The old practices of convicting and executing a prisoner within only a few days of arrest[32] has gradually disappeared during the recent capital punishment reform era, particularly due to fundamentally changed institutional arrangements and practices in the field of capital punishment. Moreover, even during the climax of this new round of Strike Hard Campaign, authorities sent down guidelines for 'tempering justice with mercy'. In addition, in the same year (2010), the first draft of the Eighth Amendment to the Criminal Law (Eighth Amendment)—which proposed to abolish 13 capital offences—was submitted to the National People's Congress and finally approved in 2011.

3. Evaluating the Impact of International Pressures on Chinese Capital Punishment Practices: Case Studies and Empirical Evidence

This part of the chapter discusses the impact of international influences based on two case scenarios—the drawn-out process of prohibiting the local-level practices of shaming parades in China; the failed efforts of anti-death penalty activists abroad to save Akmal Shaikh from execution; and some empirical evidence obtained from semi-structured interviews with 36 members of the legal elite in China which the author conducted in autumn 2010. The aim is to evaluate further the impact of the worldwide campaign against the death penalty on the capital punishment practices in China, as well as to explore the influences of domestic political manoeuvres on the processes of policy developments relating to capital punishment.

Banning the ritual of pre-execution shaming parades

Public shaming has long been regarded as instrumental for the administration of capital punishment in China at the local level due to three reasons. First, culture comes into the play because, in China, the concept of face (*mianzi*) is a highly-valued cultural symbol associated with authority, personality, status, dignity, honour, and prestige of a person. Losing one's face will substantially affect the functioning of the person's social life.[33] Therefore, shaming the prisoner in front of the public was meant to convey a powerful warning message of retribution and

[32] Amnesty International reported a case that began with three men allegedly stealing a car filled with banknotes on 21 May of a particular year. On 24 May, they were arrested; on 27 May they were sentenced to death; on 28 May their appeal was rejected; on 31 May they were executed. In another case a man was executed for murder six days after he committed the crime. See 'Facts and Details: Executions, Organ Harvesting and the Death Penalty in China', <http://factsanddetails.com/china.php?itemid=298&catid=8&subcatid=50> (accessed 15 April 2011).

[33] David Yau-fai Ho, 'On the Concept of Face' (January 1976) 81(4) *American Journal of Sociology* 867–884; Kwang-kuo Hwang, 'Face and Favour: The Chinese Power Game' (January 1987) 92(4) *American Journal of Sociology* 960–2.

moral blameworthiness to the public. It was also regarded as a powerful deterrent signal to members of the society of the consequent loss of 'face' if they dared to commit wrongdoings. Secondly, public shaming was of symbolic significance to demonstrate the government's power to maintain tight social-control and spread ideological propaganda. At public shaming parades the strength of political power, the harshness of criminal punishment, and the power of public indignation were merged together to create a theatre of justice 'drama'.[34] During these occasions, members of the public were regularly mobilized to side with the government and made to believe that harsh punishments inflicted on the rule-breakers were in their best interest. They—rather than the authorities—were the guardians of the government-made rules. In essence, the public administration of capital punishment is a populist ritual that not only confirmed, but also reinforced the political legitimacy of the local government.

Nevertheless, in the years 1984,[35] 1986,[36] 1988,[37] 1990,[38] 2007, and 2010 various Chinese political-legal authorities at the national level jointly issued a series of directives to local law enforcement departments and judicial authorities, banning the parading of convicted prisoners in public. The directives issued in the 1980s and 1990s were mainly responses to foreign media coverage of these practices. They would normally state in the opening paragraph that foreign media had made false accusations about China's administration of justice and suggest that, as a coping strategy against foreign criticisms, local authorities must prevent disclosure of any relevant information. Unlike announcements by the Chinese government meant for an international audience, these 'internal' directives, issued by the central authorities to instruct local authorities on issues concerning capital punishment, reflect the genuine intentions and concerns of the Chinese government.

These directives indicate that over the past three decades, concerns over loss of China's reputation and damage to China's image were of primary concern to the government, along with domestic motivators. These legal documents proved that in contrast to the tendency of US political and legal authorities to turn a deaf ear to international criticism of its use of capital punishment,[39] the Chinese

[34] Dr Susan Trevaskes has provided an excellent account of the symbolic meanings conveyed in these sentencing rallies. See Susan Trevaskes, 'Public Sentencing Rallies in China: The Symbolizing of Punishment and Justice in a Socialist State' (2003) 39 *Crime, Law and Social Change* 359–82.

[35] The Propaganda Bureau of the Central Committee, the Supreme People's Court, the Ministry of Public Security, and the Ministry of Justice, 'Notice on Preventing Hostile Media Reports Uttering Slanderous Statements on Our Executions of Condemned Prisoners', 21 November 1984.

[36] The Supreme People's Court, the Supreme People's Procuratorates, the Ministry of Public Security, and the Ministry of Justice, 'A Notice on Prohibition of Parading the Prisoners through Streets in Front of the Public', 24 July 1986.

[37] The Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security, 'The Notice on Firmly Restraining Parading Convicted and Unconvicted Prisoners through Streets in Front of the Public', 1 June 1988.

[38] In 1990, the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security issued the 'Notice on Strictly Control Interviewing and Taking Photos at Execution Sites'.

[39] This tendency has been characterized as the 'American exceptionalism'. See Harold Hongju Koh, 'On American Exceptionalism' (2003) 55(5) *Stanford Law Review* 1482; Michael Ignatieff (ed),

government has been sensitive, or even vulnerable, to international influences. Yet the fact that the instructions demanded local authorities in China to cover up information and spectacles of capital punishment administration, serves as proof to show that besides fostering positive changes towards embracing human rights, strong external pressure could also force the state to fold in secrecy those practices that were targets of the shaming strategy.

As a matter of fact, as the pressure generated by international criticisms grew over the years, the Chinese government created a thicker veil of secrecy over its practices. For example, by 1990, central authorities instructed in the directive that all domestic media reports on executions must be approved by the Higher People's Courts (HPCs)[40] so that those materials would not fall into the hands of the public and anyone outside of mainland China.[41] This secrecy about the way China implements capital punishment and the number of people annually executed has become a huge impediment for further reforms today.

On the other hand, over the years, the reasons why central government has sought to ban public sentencing rallies and shaming parades have changed. For instance, the 1988 Notice, for the first time, mentioned 'domestic' concerns as one of the rationales against shaming parades. This was a sign that domestic objection to this practice may have emerged. Later on, concern for the dignity of the defendant was also included. A 2007 Notice said that 'parading [the condemned prisoners] through streets in front of the public is forbidden because such practices *humiliate* those who are about to be executed'.[42] And a more recent (2010) Notice forbade parading prostitutes through streets in public[43] because such practices *humiliate* women.[44]

American Exceptionalism and Human Rights (Princeton, New Jersey, Princeton University Press 2005); David Garland, 'Capital Punishment and American Culture' (2005) 7 *Punishment and Society* 347; Carol S Steiker, 'Capital Punishment and American Exceptionalism' (2002) 81 *Oregon Law Review* 97–125.

[40] This term refers to the people's courts at the provincial level.

[41] The Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security, 'The Notice on Strictly Control Interviewing and Taking Photos at Execution Sites', 16 July 1990.

[42] Article 48, Notice of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice on Issuing the 'Opinions on Strengthening Handling Cases in Strict Accordance with Law and Guaranteeing the Quality of Handling Death Penalty Cases', 9 March 2007, <http://news.xinhuanet.com/legal/2007-03/12/content_5833204.htm> (in Chinese) (accessed 8 September 2011).

[43] Andrew Jacobs, 'China Pushes to End Public Shaming' (*The New York Times*, 27 July 2010), <http://www.nytimes.com/2010/07/28/world/asia/28china.html> (accessed 20 August 2011); the Ministry of Public Security, the Ministry of Human Resources and Social Security, the Ministry of Health, and the All-China Women's Federation have jointly issued a 'Notice on Enhancing Education and Saving Prostitutes During the Crackdown on Illegal Criminal Activities of Prostitution'; 'the Ministry of Public Security: Prohibiting Parading Prostitutes through Streets or Exposing Them in Front of the Public' (*China Legal Daily*, 12 December 2010), <http://www.chinanews.com/fz/2010/12-12/2716060.shtml> (in Chinese) (accessed 1 September 2011).

[44] After an outcry from some members of the public on the internet expressing sympathy for the prostitutes and resistance to the use of shaming by the police, in July 2010, the Ministry of Public Security called on local departments to enforce laws in a 'rational, calm and civilized manner' and end the humiliating 'shame parades'. See 'China Bans Shame Parades of Prostitutes' (*China Daily*, 28

The fact that shaming parades and sentencing rallies have been gradually fading out of the criminal justice theatre in China was not the only indicator of change in the rituals and culture of executions. Apart from the largely successful attempts to abolish public shaming parades before executions, the capital punishment culture today in China has been transformed into a situation whereby more than half of the provinces have adopted lethal injection and abandoned the practice of execution by shooting.[45] China's administration of state-sponsored killings changed from public or semi-public practices to procedures protected from the public gaze; from cruel displays of taking lives to a relatively civilized approach; and from a propaganda instrument carried out in front of mobilized, enraged, emotionally-charged masses to a judicial procedure administered by rational, professional, impartial physicians. The pressure of international influences undoubtedly has contributed to these changes.

To sum up: despite the national-level authorities' obvious sensitivity to foreign criticisms, the actual process of removing shaming parades in various local regions across China has been a long and difficult process. The fact that the state-level authorities had to issue directives every few years to remind local authorities to restrain from practising shaming parades indicates not only a collective psychological inertia in old values and institutions but also the tension between the central and local authorities in China. Indeed, this case study shows that the two-level political dynamics of domestic decision-making[46] has profound implications in criminal justice administration in general and capital punishment practices in particular. In essence, central-level decision-makers and local-level decision-makers have divergent interests vested in the penal processes discussed above. China's central authorities clearly care about both its international face and also its domestic gains, and have been struggling to deliver a package to satisfy both its international audience and its domestic bureaucracy. The local authorities, however, do not share such a need to change existing practices. Although it is expected that the local authorities are susceptible to control and surveillance from the top authorities under the current top-down and centralized fashion of Chinese governance, the rise of localism after the launch of economic reforms in the late 1970s has made implementation of directives from central governance which do not meet the needs of local governments a daunting task.

July 2010), <http://www.chinadaily.com.cn/china/2010-07/28/content_11058479.htm> (accessed 3 September 2011).

[45] In February 2009, the Supreme People's Court of China required courts nationwide to use lethal injection save in exceptional circumstances.

[46] Various scholars have noticed the dynamics of the two-level nature of a state's international relations and domestic politics. See Robert D Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (Summer, 1988) 42(3) *International Organization* 427–460; Daniel Druckman, 'Boundary Role Conflict: Negotiation as Dual Responsiveness', in I William Zartman (ed), *The Negotiation Process: Theories and Applications* (London, Sage 1978) 100–1, 109; Richard E Walton and Robert B McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (New York, McGraw-Hill 1965); Robert Axelrod, 'The Gamma Paradigm for Studying the Domestic Influence on Foreign Policy', prepared for delivery at the 1987 Annual Meeting of the International Studies Association.

Despite local authorities clinging to the practices of shaming parades, the recent public outcry against shaming prostitutes mentioned above suggests that public awareness concerning the rights and dignity of prisoners has gradually built up sufficient pressure to push local authorities to abandon this uncivilized practice. With this new combination of domestic and international forces, there is hope that shaming parades and sentencing rallies will finally disappear in the near future. This holds out hope that progress towards further restriction and final abolition of the death penalty will gain momentum once the abolitionist attitudes and anti-death penalty sensibilities get accepted by the general public.

The failed political intervention to save Akmal Shaikh from execution

Akmal Shaikh, a British citizen, was caught smuggling approximately four kilograms of heroin into China in 2007 and was charged with smuggling drugs—the maximum discretionary punishment for which under Chinese criminal law is the death penalty. He was sentenced to death. Repeated appeals for clemency were made on his behalf to the Chinese authorities[47] by, among others, his family, a British human rights charity called Reprieve, the then British Prime Minister Gordon Brown, the then Foreign Secretary David Miliband, and the Foreign and Commonwealth Office (FCO). The main argument, apart from the objection to capital punishment in principle, and especially for a drug offence, was the pragmatic one that Shaikh should be exempted from the death sentence because he was said to have a bipolar disorder and a delusional personality.[48] After Shaikh was sentenced to death in October 2008 by the first instance court, the appeals against his sentence by the British stayed at the quiet diplomatic level and only became public before Shaikh faced the appellant trial on 26 May 2009.[49] However, these attempts to 'go public' to persuade the Chinese authorities fell on deaf ears. Shaikh's

[47] This group of Chinese authorities and individuals included the then President Hu Jintao, the National People's Congress, and a judge in the intermediate court of Urumqi. See David Eimer, 'Condemned Briton's "Heartbroken" Family Beg for Compassion from China' (*The Telegraph*, 28 December 2009), <http://www.telegraph.co.uk/news/worldnews/asia/china/6901478/Condemned-Britons-heartbroken-family-beg-for-compassion-from-China.html> (accessed 20 August 2011); Ross McGuinness, 'Gordon Brown Joins Fight to Save China Death Row Briton Akmal Shaikh' (*Metro*, 23 December 2009), available at <http://www.metro.co.uk/news/807030-brown-joins-fight-to-save-china-death-row-briton#ixzz1XB3vmabz> (accessed 20 August 2011); 'UK Prime Minister Gordon Brown Condemns China's Execution of British Father Akmal Shaikh' (*Herald Sun*, 29 December 2009), <http://www.heraldsun.com.au/news/world/china-executes-british-father-of-three/story-e6frf7lo-1225814460183> (accessed 20 August 2011).

[48] Reprieve alleged that Shaikh thought he was going to China to record a song about a Little Rabbit which would inspire world peace. Britain made 27 ministerial pleas for clemency. Katherine O'Shea, 'Listen to Come Little Rabbit, Written and Sung by British Bipolar Sufferer Akmal Shaikh, Now Facing Execution in China', <http://www.reprieve.org.uk/video/songforpeace> (accessed 12 September 2011); Helen Pidd, 'Akmal Shaikh's Harebrained Business Schemes and Dreams of Pop Stardom' (*Guardian*, 28 December 2009), <http://www.guardian.co.uk/uk/2009/dec/28/akmal-shaikh-execution-china-mental-illness/print> (accessed 10 September 2011).

[49] 'Briton to Appeal Death Sentence' (*BBC News*, 26 May 2009), <http://newsvote.bbc.co.uk/1/hi/uk/8068773.stm> (accessed 15 August 2011); Jack Lefley, 'Gordon Brown Urged to Intervene

death sentence was confirmed at the appeal (second trial) and finally upheld by the Supreme People's Court on 21 December 2009. Shaikh was executed on 29 December 2009, which sparked a strong international reaction.

The Chinese government responded to the high tide of foreign criticism by hitting back. Jiang Yu, a Chinese Foreign Ministry Spokeswoman, stressed that

> nobody has the right to speak ill of China's judicial sovereignty . . . it is the common wish of people around the world to strike against the crime of drug trafficking . . . we urge the British to correct their mistakes in order to avoid harming China-UK relations . . . [and that China expressed its] . . . strong dissatisfaction and resolute opposition over the groundless British accusations.[50]

Shaikh's case was a no-win game. Britain could not save its citizen from execution. China suffered reputational loss, despite the efforts it had made to establish a shining image before British and global media over the years. Britain was furious at China's stubbornness over its 27 unsuccessful appeals on Shaikh's behalf[51] and in particular at China's refusal to allow a full mental health examination of the defendant by a foreign expert. China criticized Britain for requiring the Chinese judiciary to offer supernational treatment to a British national, claiming that neither Shaikh himself nor his legal representative proffered sufficient proof to show that he was mentally ill.[52] The Chinese believed the British side was interfering with China's internal affairs and its administration of justice.

The Chinese and the British have different priorities in a scenario like this. For Britain, protecting the right to life of its citizen was the top concern; for the Chinese, cracking down and deterring drug crimes was the priority. The Chinese and the British have widely different value systems and cultures and they barely understood the concerns of each other when dealing with Shaikh's case. It is surprising that—according to information available in media archives—no real

in Death Row Briton Case' (*Evening Standard*, 26 May 2009), <http://www.standard.co.uk/news/gordon-brown-urged-to-intervene-in-death-row-briton-case-6774190.html> (accessed 15 August 2011); Reprieve, 'Akmal Shaikh, Mentally Ill British National Who Has Been Sentenced to Death in China, Will Today Plead for His Life in Court', <http://www.reprieve.org.uk/press/2009_05_26akmalshaikhmentallyillBritishnationalwho/> (accessed 15 August 2011).

[50] 'China Execution: International Reaction' (*BBC News*, 29 December 2009), <http://news.bbc.co.uk/1/hi/8433300.stm> (accessed 19 August 2011); 'China Executes Akmal Shaikh: Was the Execution Justified?' (*The Telegraph*, 29 December 2009), <http://www.telegraph.co.uk/news/newstopics/debates/6905283/China-executes-Akmal-Shaikh-was-the-execution-justified.html> (accessed 20 August 2011); David Eimer, 'Execution of Briton Akmal Shaikh: China Defiant in the Face of Criticism' (*The Telegraph*, 29 December 2009), <http://www.telegraph.co.uk/news/worldnews/asia/china/6904175/Execution-of-Briton-Akmal-Shaikh-China-defiant-in-the-face-of-criticism.html> (accessed 20 August 2011).

[51] Will Woodward, 'Akmal Shaikh Relatives Say Britain Abandoned Him to Execution' (*The Guardian*, 30 December 2009), <http://www.guardian.co.uk/world/2009/dec/30/akmal-shaikh-execution-relatives-letter> (accessed 12 August 2011).

[52] The Chinese Embassy in London stated that 'there apparently has been no previous medical record', and that 'China has its own definition of mental illness and by that he is deemed to be mentally sound': 'China Execution: International Reaction' (*BBC News*, 29 December 2009), <http://news.bbc.co.uk/1/hi/8433300.stm> (accessed 19 August 2011); 'Diplomacy Cannot Undo Law of the Land (Comments)' (*Global Times*, 24 December 2009), <http://www.globaltimes.cn/opinion/editorial/2009-12/494027.html> (accessed 12 September 2011).

dialogue or compromise was made between China and the UK on this matter. It is particularly surprising given that China and the UK, despite their diplomatic disagreements on the status of Hong Kong, managed to compromise and have continued to enjoy a friendly and cooperative relationship since Hong Kong returned to China.

Furthermore, there remain some gaps between the Chinese practices in the field of criminal justice with what is generally recognized and accepted as minimal international human rights standards, to which Britain subscribes. What passes for 'normal' practices in Chinese domestic practices may be viewed as a violation of due process and human rights safeguards. In fact, although Chinese criminal law and criminal procedure law provide that the mentally ill are not subject to criminal punishment including the death penalty, it entrusts multiple legal authorities, not the defendant, with the power to initiate the psychiatric appraisal procedure. Therefore because none of the multiple authorities—the police, the procuracy, and the courts—decided in this case to conduct a psychiatric appraisal of the defendant due to their belief that the materials provided by him were insufficient to prove that he was mentally ill at the time of conducting his criminal activities, the defendant had to be considered criminally liable.[53] What happened to Shaikh was thus not a rare case in the domestic judicial practice in China.

More importantly, the outcome of the Shaikh case may have something to do with both the high-profile approach adopted by Britain to negotiate with China in the later stage of the case. The UK may have had good reasons to use extensive media coverage on the Shaikh case during the second instance trial and the final review procedure, and to encourage the participation of various branches of the British government, NGOs, and public figures in the processes of negotiation with the Chinese government before the execution of Shaikh. However, given China's preference for soft, discreet, and low-profile approaches when communicating with foreign countries and the rich experience of British and European institutions of engaging with China on human rights matters, forcing China to yield by widely politicizing a politically-sensitive capital case was a risky strategy. Contrary to the expectation of the British side, historical and cultural factors turned out to play an important role in the decision-making and public-opinion forming processes in this case.

Factors of the case which were highlighted in the Chinese media include Shaikh's British citizenship, China's sovereignty, Shaikh's criminal conduct of trafficking a large quantity of heroin, such that it fell within the guidelines of the Chinese courts for the infliction of the death penalty, and the British media's attack on China's judicial system. Discussions of the Shaikh case in China drew heavily on history, namely Britain's nineteenth-century opium trade, despite the ban against such illegal activities by the Qing Empire and the futile imposition of the death

[53] Chai Huiqun, 'The Mentally Ill has been Convicted and Imprisoned: The Psychiatric Appraisement Procedure that cannot be Initiated' (*Southern Weekend*, 16 September 2011), <http://www.infzm.com/content/63162> (accessed 1 January 2013); Zhang Aiyan, 'Research on How to Properly Initiate the Psychiatric Appraisement Procedure' (2010) 9 *Criminal Science* 70–7.

penalty for drug trafficking by the Qing.[54] The failures of both the Qing judicial authorities to punish British drug offenders and the Qing military to fight against the British have been perceived as the beginning of China's 'century of humiliation'. Shaikh's drug trafficking reminded Chinese people of the history of the Opium Wars (the First and the Second Opium War)[55] forced on China by the UK, the unequal treaties, and the notorious extraterritorial jurisdictions[56] imposed upon China as a result of China's defeat in the war.

Shaikh was portrayed by the Chinese state-run media, and then perceived by most Chinese, as an unpardonably wicked British drug trafficker. The nationalist sentiments[57] were further fuelled by a *Telegraph* blogpost message threatening to use Britain's 'gunboat' diplomacy to stop the execution of Shaikh.[58] Public frenzy

[54] See generally, Julia Lovell, *The Opium War: Drugs, Dreams and the Making of China* (London, Picador 2011).

[55] The Opium Wars, also known as the Anglo-Chinese Wars, divided into the First Opium War from 1839 to 1842 and the Second Opium War from 1856 to 1860, were the climax of disputes over trade and diplomatic relations between China under the Qing Dynasty and the British Empire. The first Opium war resulted in the Treaty of Nanking, which granted extraterritorial rights to foreigners in China, among other privileges. The Second Opium War culminated in 1860 with the looting and burning of Beijing by British and French troops and led to the Treaty of Tientsin. These military invasions of China and the unequal treaties between China and Western Powers were deemed as the start of China's 'Century of humiliation'. See Lovell (n 54); J Kossoff, 'The Opium Wars Still Define Relations between the UK and China: Pity the Hapless Mr Cameron' (*The Telegraph Blog*, 10 November 2010), <http://blogs.telegraph.co.uk/news/juliankossoff/100063040/david-cameron-in-china-dont-mention-the-opium-wars> (accessed 12 September 2011).

[56] Extraterritorial jurisdiction was imposed upon China by Western Powers following the First Opium War. Under extraterritoriality, foreign nationals of treaty powers were tried by consular courts, not subject to Chinese law. This was deemed as a violation of China's judicial sovereignty and judicial independence by Chinese people. There is also a wide-spread belief in China that foreigners who committed crimes against Chinese citizens were exempted from being punished under extraterritoriality. See Wang Jianlang, *The Process of China's Abolition of Unequal Treaties (Zhong Guo Fei Chu Bu Ping Deng Tiao Yue de Li Cheng)* (Nanchang, Jiang Xi People's Press 2000); N Wing Mah, 'Foreign Jurisdiction in China' (1924) 18(4) *The American Journal of International Law* 678; Suzanne Ogden, 'Sovereignty and International Law: The Perspective of the People's Republic of China' (1974) 7 *New York University Journal of International Law and Politics* 1, 3–8.

[57] Banyan, 'Akmal Shaikh and China's Smile Diplomacy' (*The Economist*, 30 December 2009), <http://www.economist.com/blogs/banyan/2009/12/post_1> (accessed 15 August 2011). Before Shaikh was executed, a cybercitizen commented in *Tianya Forum* (one of the most popular internet forums in China) that 'the British government has made a scene there, and yet they expect things will be calmed down?!' Another one observed that 'whether Shaikh dies or not is already decided. Look at the public opinion in China!' There has been a heavy reference to extraterritoriality, for example, someone commented that 'Let's see how today's Qing Emperor provides extraterritoriality (to this British citizen)'. There were references to Opium Wars, such as 'Don't say you are aggrieved, asking your people to wage the third Opium War could work better!', 'Are the British going to wage a Heroin War against China now?', and 'Let's not forget the Opium War!' Some said the government should ignore his mental condition 'If (our government) releases a "mental person", there will be hundreds and thousands of "mentally ill" crowded into China'. There was reference to drug trafficking: 'China had so much pain (in the past) relating to drugs. We cannot set such a precedent!' Some comments said the Chinese government has no option but execute him, 'China will die if this person does not die' (all posts were in Chinese). See 'Akmal Was Executed in China and has Caused Strong "Earthquake" in the UK', <http://www.tianya.cn/publicforum/content/worldlook/1/235516.shtml> (accessed 10 September 2011). Similar posts and comments were all over major internet forums in China such as bbc.163.com, qq.com, sohu.com, etc.

[58] In his *Telegraph* blogpost, George Pitcher proposed that UK and EU should employ gunboat diplomacy and trade sanctions to China. See George Pitcher, 'Akmal Shaikh: China Has Failed to Live

flooded blogs, online discussion forums, and the comment sections of newspapers. On a webpage of Sohu.com, 2,702 cybercitizens participated in a single-question public opinion survey which asked them to share their thoughts on Shaikh's death sentence being confirmed by the SPC. The result was that 2,227 (82 per cent of the respondents) agreed with the statement 'whoever violates Chinese laws should be punished, regardless of his or her nationality. This is the only way to show the authority of the law of our nation'.[59]

The fact that the general public saw Shaikh as a common enemy of the Chinese people made it impossible for the judicial authorities to grant him clemency in China's unique domestic political landscape.[60] Faced with flames of public indignation, the Chinese government would have faced high political risks by disregarding public opinion on such a politically sensitive matter. The political drama[61] surrounding the Shaikh case provided an opportunity for the government to display its political power and authority in front of the domestic audience. This partly explains why the Chinese authorities were determined to execute Shaikh—the first European national whom China has put to death over the past 50 years—and why China's refusal to show mercy in this case stands in stark contrast with its willingness to grant mercy to foreigners and even prisoners of war in the early years of the Party state.[62]

Akmal Shaikh's case suggests that the Chinese government might well cherish its global image, but reputational loss is not always its paramount concern if it is in conflict with the government's political interest.[63] Indeed, avoiding losing face before the international community is a major driver of changes in China's practice, as shown in the earlier case of public shaming. However, the last thing the Chinese government would like to risk losing is public trust and support.

Up to its Civilised Aspirations' (*The Telegraph*, 28 December 2009), <http://blogs.telegraph.co.uk/news/georgepitcher/100020842/china-must-spare-akmal-shaikh-or-face-serious-consequences> (accessed 20 August 2011). *Global Times*, a newspaper affiliated with the *People's Daily*, translated Pitcher's claims into Chinese and sparked a storm of criticisms and anger among the general public in China about the British media and British government. As of 14 September 2011, 20,900 results could be generated by keying in search terms such as '炮舰外交' (gunboat diplomacy) and '阿克毛' (Akmal Shaikh) in google.com.

[59] 'Topic: Share Your Thoughts About Shaikh's Execution', <http://comment2.news.sohu.com/n269278716.html> (accessed 12 August 2011).

[60] The alleged mental ill-health of Shaikh was left out of public discussions in China. See Analysis by BBC correspondent Chris Hogg from Beijing in a *BBC News* report: 'British Anger at China Execution' (*BBC News*, 29 December 2009), <http://news.bbc.co.uk/1/hi/8433704.stm> (accessed 13 August 2011).

[61] Poppy Sebag-Montefiore, 'China's Rough Injustice' (*Prospect*, 8 January 2010), <http://www.prospectmagazine.co.uk/2010/01/chinas-rough-injustice> (accessed 12 September 2011).

[62] China repatriated most of the Japanese detainees during the Second World War and released the majority of the leading Kuomintang prisoners in six batches from 1959 to 1966. And a final amnesty in 1975 gave pardon to the remaining 293 Kuomintang prisoners. See JA Fyfield, *Re-educating Chinese Anti-Communists* (London, Croom Helm 1982).

[63] Goldsmith and Posner seem to agree, stating '[o]ne might conclude that all things equal, nations will strive to have a reputation for compliance with international law, but a reputation for compliance will not always be of paramount concern because all things are not equal'. Jack L Goldsmith and Eric A Posner, 'A Theory of Customary International Law' (1999) 66 *University of Chicago Law Review* 1113, 1136.

Therefore, no matter how irrational, ill-informed and unfounded the public opinion on penal matters may be, the government will side with 'domestic' public opinion regardless of 'international' reputation loss.

Varying degrees of distrust among Chinese legal elites towards international human rights forces

Eighteen of the 36 elite respondents who were interviewed by the author in 2010 were from China's national-level judicial and legislative authorities, ie the Legislative Affairs Commission of the NPC Standing Committee, the Supreme People's Court, and the Supreme People's Procuratorate. Of these 18 respondents, five were scholars who had been legal practitioners or in positions closely related to the administration of justice on capital punishment and the other 13 were judges, prosecutors, and legislators. The other 18 respondents came from Higher People's Courts and Higher People's Procuratorates in four provinces across China: namely, Shanghai, Guangdong, Henan, and Hubei.

These interviews further confirmed the susceptibility of Chinese authorities to foreign criticisms and pressures. Judges, prosecutors, and legislators were explicit about the fact that, like other countries, China does care about foreign discourses on matters concerning its administration of capital punishment. In fact, concerns for China's global image and reputation are indispensable to the decisions of Chinese authorities to reform its capital punishment law and policies. When talking about the impact of international human rights forces, quite a number of respondents stated that they believed a most significant motivation for China's willingness to embrace international standards on the administration of capital punishment was to improve China's global image. One of my respondents, a judge of the SPC, commented:

> Domestic drivers are less crucial compared to international drivers. After all, we have wide and strong support for capital punishment at home. China's involvement in the international community, the high-level talks among political leaders, the criticisms and pressures, the possible damage to our national image, are the decisive promoting factors.

A state's identity, reputation, and image play an important part not only in influencing the way it communicates and interacts with other state actors in the international community, but also in the making of key domestic policies. Foreign criticisms and denunciation of China's failure to adhere to civilized standards in its practice of capital punishment has resulted in China's national reputational loss. Desperate to shed the stigmatized identity of human rights violator and to neutralize the impact of its negative image, China found reforming China's capital punishment norms and practices to be an excellent opportunity to show its willingness to move towards compliance with the minimum international standards on the use of capital punishment and therefore change the perceptions of other international actors. Commenting on the removal of 13 capital offences from the Criminal Law, a legislator said that 'now that we have signed the ICCPR, we need to show something to the international community . . . the amendment (to the Criminal Law)

is a gesture that could repair China's damaged reputation of heavy reliance on capital punishment'. However, as the case of Akmal Shaikh shows, these concerns about China's global reputation are subject to the paramount interests of the ruling Party-state—that is, the domestic political stability.

Meanwhile, the case of Akmal Shaikh exemplified how in reality the judicial decision-making process in capital cases can be complicated by domestic political dynamics in China. An SPC judge explained that as a high-profile capital case moves up the judicial hierarchy from local Intermediate People's Courts (first instance courts) to the HPCs (second instance courts) and then to the SPC (final review court), the final decision of the case is determined not only on the decisions of judges but also on the balance of power among various parties, including the victims' supporters, the general public, the ruling Party and government, and the courts, seeking either the death penalty or a lesser sentence. The judicial decision-making process in high-profile capital cases is thus not purely a matter of legal fact-finding, reasoning, and deliberation. It is essentially the outcome of collective political and legal manoeuvres.

For trials of capital cases which are relatively low-profile and the making of capital punishment policies in general, the attitudes of politicians and legal elites are important forces shaping these decision-making processes. The empirical evidence from my interviews confirmed that although in general sensitive to external pressures, Chinese elites nevertheless share varying degrees of reservation and suspicion towards foreign criticism and persuasion. Even respondents who in general acknowledged the impact of international human rights often disagreed about when and how to push forward the reform of China's current capital punishment machinery and to what degree China should comply with international human rights standards on the use of capital punishment. Some of them believed that international human rights forces had only a limited impact in China and/or that China should conform to international norms only when it is 'suitable' to do so. This attitude of conditional acceptance was based either on a time-contingent argument that it will be pragmatic for China to abide by the full set of international standards only in the distant future (but not at present), or a selective approach under which the Chinese government should only pick and choose those international norms which are 'compatible with China's reality'.

Analysis of the linguistic content of the responses of the interviewees suggests that varying degrees of cognitive discomfort were shown in most interview responses when I raised the term 'human rights'. Traces of psychological tension can be identified from the respondents' preference in word usage. Seven of the 36 respondents deliberately or sub-consciously replaced the term 'human rights' in my questions with 'humanism' or 'the livelihood of the people' (*min sheng*) in their responses. And a few said that they are bold enough to talk openly about 'human rights' matters not because they believed in human rights values but only because the taboo on this concept was lifted when it was written into the Chinese Constitution in 2004.

A considerable number of respondents used adjectives conveying negative feelings when they talked about international human rights norms. Scepticism

frequently emerged in their discussions about the role of international human rights: for example,

'it is [*unrealistic*, *impossible*, *harmful*, *utopian*] and so on, for China to conform to international human rights standards at the current stage' or that 'international human rights forces have played a [*negative*, *limited* or *minimal*] role in inspiring changes in China'.

Reluctance was also shown in discourses on China's conformity to international standards. For instance: 'we must be *cautious* towards international human rights influences', or 'it is *inconvenient* (for me to comment on) the influences of international human rights forces'. An SPC judge commented, 'Why should we care about the so-called "human rights" of the defendants? We need to be concerned about the *majority* of our people'.

The fact that my respondents had agreed to be interviewed on a politically sensitive topic indicated that they were among the Chinese elites who are open to the concepts and values of human rights, or at least who were not afraid of talking about such a subject. Yet, given their reservations, it may be fair to say that the Chinese authorities have continued to maintain close control of the power of discourse on human rights and capital punishment.

In addition, the respondents tended to distinguish their own personal opinions from the official position of the government or various authorities. Quite a few said that while *personally* they were abolitionists and supportive of the anti-death penalty movement worldwide, they believed that the Chinese government and legal authorities should not abolish capital punishment or adopt a radical reform approach because 'it is unwise and unpragmatic for the authorities to fully and immediately accept international standards, given China's special national conditions. An incremental, selective approach fits China's singular social situation better'. This commonly shared cautiousness among policy-makers, jurists, and legislators illustrates the political sensitivity of the issue of capital punishment policy in the context of international abolitionist influences.

4. Conclusion

China's active use of the death penalty has long sparked international discomfort; however, the past decade reveals a nascent trend towards openness, due process, and awareness of humanity. This attitudinal change may have provided the foundation for stronger protection of the rights of accused and condemned prisoners and a growing tendency to align Chinese law and practice with minimum international human rights standards. Under both domestic and international pressures, China has sent out messages to its international audience of its conditional willingness to embrace international human rights values in the field of capital punishment. Anxiety over injury to China's global image may be one of the major concerns promoting China to adopt new reforms. It is hard to predict whether international human rights forces will have less influence on China's death penalty

policies and legislation as China's influence in international affairs grows ever stronger, or whether international human rights forces will have a greater influence in reshaping China's practices as it needs to prove to the outside world that it is a responsible power.

The use of pressure and criticism to try to influence Chinese practices is a double-edged sword. While this approach has created positive changes in the past decade, external pressures could also have enhanced the sense of distrust and latent hostility shared by elites in China and induce the Chinese government to adopt defensive measures such as creating even more secrecy around the implementation of capital punishment. Conducting research on how to generate equal and sincere dialogues between China and the international community and to foster greater understanding across China's domestic political and legal landscape is a necessity.

There is no reason to be excessively pessimistic about the outlook of capital punishment administration in China. But as long as the death penalty remains a dominant social control method and a powerful symbol of government authority, substantial changes will only be promoted by building on the genuine efforts so far made by human rights promoters to engage in dialogues with the Chinese government in a flexible and culturally-sensitive manner and by successful endeavours by the government of China to promote among its citizens an understanding of why the death penalty inevitably in practice violates the human right not to be subject to a cruel, inhuman, and degrading punishment.

4

The Role of National Human Rights Institutions in Abolishing Capital Punishment: A Critical Evaluation

*YSR Murthy**

1. Introduction

National Human Rights Institutions (NHRIs) have emerged as key entities in the task of protecting and promoting human rights. They complement the efforts of various United Nations Charter and Treaty bodies, special procedures mandate holders under the international human rights system, and regional systems for the protection of human rights in Europe, the Americas, and Africa. NHRIs constitute a crucial component of the national human rights protection systems that seek to uphold the rule of law, good governance, and human rights.

This chapter reviews the potential as well as the performance of NHRIs in law reform efforts aimed at the abolition of the death penalty in the Asia-Pacific region. NHRIs perform a wide range of responsibilities such as monitoring and encouraging compliance with human rights law, promoting awareness, providing training, and fostering respect for human rights.[1] Since capital punishment is widely recognized as an inhumane and uncivilized form of punishment, it can be argued that NHRIs are under an obligation to lead the movement against its abolition. However, it is paradoxical that while the Asia-Pacific region has witnessed an impressive growth in the establishment of NHRIs in the past two decades to protect and promote human rights, it still accounts for the highest number of executions in the world.[2] Several questions therefore arise. What, if any, has been the contribution of NHRIs in seeking to secure abolition of the death penalty? Are

* The author is grateful to Mr Ravi Shankar Shukla and Ms Raadhika Gupta for their suggestions on an earlier draft of this chapter.

[1] Their mandate is generally very broad but their true scope is dependent upon the enabling or constituting legislation which differs from country to country and hence from NHRI to NHRI.

[2] Amnesty International, *Death Sentences and Executions 2010* (London, Amnesty International 2011), ACT 50/001/2011, 19.

they protectors or pretenders?[3] Are they catalysts for good and humane governance or are they passive bystanders? This chapter seeks to investigate these and related aspects.

Although many countries in the Asia-Pacific region have retained the death penalty and a few carried out a significant number of executions in 2012,[4] this chapter is confined to those countries which have established an NHRI in conformity with the Paris Principles.[5]

2. Role, Relevance, and Significance of NHRIs

The Declaration and Programme of Action adopted at the World Conference on Human Rights held in Vienna in 1993 not only recognized the unique role of NHRIs but gave a big impetus to their establishment.[6] In addition to asserting that human rights are universal, indivisible, interconnected, and interrelated, the Vienna Declaration emphasized the need for assisting states in the task of building and strengthening national institutions and legal systems in the field of human rights.[7] The establishment of NHRIs should be seen in this context. At this point of time, NHRIs exist in over 100 countries of the world. They undertake a range of functions including proposing law and policy reform and reviewing international conventions and making recommendations thereon.

The mandate of a given NHRI is either based on a constitution or legislation. The 1991 Paris Principles outlined the basic international standards for NHRIs. They were adopted by a group of NHRIs at an international workshop and were endorsed in 1993 by the former United Nations Commission on Human Rights, and the United Nations General Assembly. These Principles have been widely accepted as a yardstick to evaluate NHRIs' legitimacy and credibility.[8]

All NHRIs are expected to conform to the Paris Principles for the purpose of accreditation by peer institutions within the United Nations system. These Principles require NHRIs to protect human rights in a number of ways, such as by receiving, investigating and resolving complaints, mediating conflicts, and monitoring activities. In addition, they have a responsibility to promote human rights

[3] The title of a report published by Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001).

[4] According to Amnesty International, of the reported executions in 2012, China accounted for 1,000s, Afghanistan 14+, Iran 314+, Iraq 127+, Japan seven, Saudi Arabia 79+, North Korea six+, Taiwan six, Bangladesh one, India one, Pakistan one, and Yemen 28+. See Amnesty International, *Death Sentences and Executions in 2012*, AI Index: ACT 50/001/2013 (London, Amnesty International 2013), 48.

[5] Principles Relating to the Status of National Institutions (Paris Principles), UN GA Res 48/134 of 20 December 1993.

[6] See Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna (25 June 1993), para 100, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (accessed 20 June 2013).

[7] Vienna Declaration (n 6), para 100.

[8] Paris Principles (n 5).

through education, outreach, media, publications, training and capacity-building activities, as well as by advising and assisting governments.[9]

An NHRI which complies with the Paris Principles is eligible to be accredited by the Sub-Committee of the International Coordinating Committee (ICC).[10] As of May 2012, 69 NHRIs are accredited as 'A' category for being fully compliant with the Paris Principles.[11] On the other hand, a 'B' category status is conferred on those NHRIs which are not *fully* in compliance with the Paris Principles. Such NHRIs have no voting rights, but only an observer status in the meetings of the ICC of NHRIs. The 'C' category status is given to those NHRIs which are not compliant with the Paris Principles.

When fully in compliance with the Paris Principles, NHRIs are regarded as cornerstones of national human rights promotion and protection systems. Described as 'relay mechanisms' between international human rights norms and the national level, NHRIs seek to translate universal human rights norms into reality at the national level where it matters the most.[12] NHRIs are often regarded as the bridge between the government and the civil society and they are expected to take steps commensurate with this status. The Human Rights Council's Resolution 5/1 on Institution Building has entrusted NHRIs with greater responsibilities, among others, in the areas of grievance redressal as well as Universal Periodic Review.[13]

In the Asia-Pacific Forum (APF) of NHRIs, 15 NHRIs enjoy the status of 'full members',[14] while three NHRIs are 'associate members'.[15]

[9] United Nations Development Program-Office of the High Commissioner for Human Rights (UNDP-OHCHR) 'UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions' (December 2010).

[10] The following aspects are considered: a broad mandate based on universal human rights standards; autonomy from other State entities; independence guaranteed by statute or constitution; pluralism including through membership and/or effective cooperation; adequate resources; and adequate powers of investigation.

[11] International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Chart of the Status of National Institutions', <http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NIs%20(30%20May%202012).pdf> (accessed 27 April 2013).

[12] UNDP-OHCHR (n 9).

[13] Human Rights Council, 'Institution Building of the United Nations Human Rights Council', A/HRC/RES/5/1 (7 August 2007).

[14] Full members are national human rights institutions that comply with the international standards set out in the Paris Principles. Each full member is represented on the Forum Council—the Asia-Pacific Forum's (APF) decision-making body—by a voting councillor. Full members also nominate a jurist to sit on the APF's Advisory Council of Jurists. The 'Full Members' include: Afghanistan Independent Human Rights Commission, Australian Human Rights Commission, National Human Rights Commission of India, Indonesian National Commission on Human Rights (Komnasham), Jordan National Centre for Human Rights, Human Rights Commission of Malaysia (Suhakam), National Human Rights Commission of Mongolia, National Human Rights Commission of Nepal, New Zealand Human Rights Commission, the Palestinian Independent Commission for Human Rights, Philippines Commission on Human Rights, National Human Rights Committee of Qatar, National Human Rights Commission of Korea, National Human Rights Commission of Thailand, Timor Leste Office of the Provedor for Human Rights and Justice. See APF Website <http://www.asiapacificforum.net/members/full-members> (accessed 19 March 2011).

[15] Associate members are national human rights institutions which currently do not comply with the Paris Principles. Associate member institutions must, however, possess a broad human rights mandate and only one institution will be admitted per member state of the United Nations. Associate members are entitled to participate in APF programmes and activities, however, they are not entitled

3. Positive Developments

Among the 15 full members of the Asia-Pacific Forum of NHRIs, Australia, Nepal, New Zealand, Philippines, and Timor-Leste have signed the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[16] Mongolia has instituted a moratorium on executions since January 2010 and has ratified the Second Optional Protocol with effect from 13 June 2012.[17] In other words, the law and practice relating to the death penalty as well as the role played by the NHRIs towards its abolition in India, Thailand, Indonesia, Malaysia, and Afghanistan require deeper examination.[18] The roles played by the NHRIs in Bangladesh, Maldives, and Sri Lanka—which are associate members in the APF—also require a critical examination.

As discussed below, the National Human Rights Commission (NHRC) of India has made attempts to restrict the use of the death penalty through interventions and recommendations made to the state Governors to commute death sentences to life imprisonment.[19] The Malaysian NHRI (Suhakam) has recommended in its annual report that the death penalty should be abolished and is consistently making efforts in this direction.[20] The Human Rights Commission of Thailand has also agreed to consider the issue.[21] In Afghanistan, human rights organizations have been putting pressure on its Human Rights Commission to take concrete steps in order to abolish the death penalty.[22] The former Special Rapporteur on extrajudicial, summary, or arbitrary executions, Asma Jahangir, also raised this issue in her report to the Commission on Human Rights in relation to Afghanistan.[23] In

to vote on Forum Council decisions or nominate a jurist to the Jurists. The Associate Members of APF include: Human Rights Commission of the Maldives, Human Rights Commission of Sri Lanka, and National Human Rights Commission of Bangladesh.

[16] See Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty, GA Res 44/128, Annex.

[17] Amnesty International, 'Mongolia Takes "Vital Step Forward" in Abolishing the Death Penalty', (5 January 2012), <http://www.amnesty.org/en/news/mongolia-takes-vital-step-forward-abolishing-death-penalty-2012-01-05> (accessed 27 April 2013).

[18] Jordan, Qatar, and the Palestine Authority are not discussed here because they are in the Middle East.

[19] Human Rights Law Network (HRLN), 'Supreme Court Acts to Prevent Travesty of Justice!', <http://www.hrln.org/hrln/child-rights/pils-a-cases/693-supreme-court-acts-to-prevent-travesty-of-justice.html> (accessed 25 April 2013).

[20] Suhakam Annual Report for 2009, 51, <http://www.suhakam.org.my/documents/1168820/1252644/annual+report2009.pdf> (accessed 25 April 2013).

[21] 'Statement of the Chairperson, NHRC of Thailand, at the 19th Session of the Human Rights Council', <http://nhri.ohchr.org/EN/IHRS/HumanRightsCouncil/19/Adoption%20of%20UPR%20reports%2014%20%2016%20March/Statement%20of%20the%20Chairperson%20of%20the%20NHRC%20of%20Thailand.pdf> (accessed 25 April 2013).

[22] Amnesty International, 'Afghanistan: Amnesty International Submission to the UN Universal Periodic Review', Fifth Session of the Universal Periodic Review Working Group of the Human Rights Council (May 2009), <http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/AF/AI_AFG_UPR_S5_2009_AmnestyInternational.pdf> (accessed 25 April 2013).

[23] 'UN Rapporteur Demands Moratorium on Death Penalty in Afghanistan', *e-Ariana* (30 October 2012), <http://e-ariana.com/ariana/eariana.nsf/allDocs/6C36D34D1739F0CA87256C6200518BA0?OpenDocument> (accessed 25 April 2013).

Bangladesh, executive decisions and judicial reviews have evolved as potential tools to contain the number of death sentences.[24] In Sri Lanka a moratorium on the death penalty has been in place for more than 35 years.[25]

4. Areas of Concern and the Scope for Greater Engagement

India

India is the world's largest democracy and second most populous nation. The NHRC was established under the Protection of Human Rights Act 1993. The Preamble of the Act asserts that the aim of this law is the 'better' protection of human rights. Under section 2(d) of the Act, the term 'human rights' has been defined as the rights relating to life, liberty, equality, and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India. 'International Covenants' has been further defined as the ICCPR and the International Covenant on Economic, Social and Cultural Rights and such other covenant or convention adopted by the General Assembly of the United Nations as the central government may, by notification, specify.[26]

The NHRC has the statutory responsibility to 'review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation'.[27] It can also review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures.[28]

The NHRC is also mandated to study treaties and other international instruments on human rights and make recommendations for their effective implementation.[29] It has the power to intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court.[30] In pursuance of these statutory responsibilities, the NHRC of India has reviewed over 35 domestic laws and a dozen international human rights conventions and made significant recommendations to the government thereon.[31]

[24] See 'Report of the Working Group on the Universal Periodic Review: Bangladesh, Addendum' UN Doc A/HRC/11/18/Add.1, 9 June 2009.

[25] See Death Penalty Worldwide, 'Sri Lanka', <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Sri+Lanka> (accessed 26 April 2013).

[26] This explanation was added by an amendment in 2006. On the one hand the use of the expression 'such other Covenant or Convention' makes the definition flexible by not identifying them specifically, but on the other, it provides the government with an opportunity to pick and choose.

[27] Protection of Human Rights Act 1993, section 12(d).

[28] Protection of Human Rights Act 1993, section 12(e).

[29] Protection of Human Rights Act 1993, section 12(f).

[30] Protection of Human Rights Act 1993, section 12(b).

[31] See 'NHRC India Brochure', <http://nhrc.nic.in/Documents/Publications/NHRCbrochure.pdf> (accessed 25 April 2013).

There is no clear indication either on the NHRC's website or in its various annual reports submitted to the parliament in the last 20 years about its stand on the abolition of the death penalty. A number of international delegations have, therefore, raised this issue with the NHRC. In response to the Swedish Parliamentary delegation, a member of the NHRC, Justice GP Mathur, explained that in India the death penalty is part of statute law and is only enforced in the 'rarest of rare' cases.[32] The view of Justice Mathur was based on the belief that since the constitutionality of the death penalty has been upheld by the Supreme Court of India, any dispute regarding validity of the death penalty has been put to rest.[33] But this is hardly a reason why the law should not be challenged. For instance, although the Supreme Court had upheld the constitutionality of the Terrorist and Disruptive Activities Prevention Act 1987, it did not deter the Indian NHRC from leading a movement for the repeal of this draconian law. It is precisely the role of the NHRC to examine existing legislation or draft legislation through the human rights lens and to make recommendations for law reform rather than hide behind non-tenable reasons aimed at maintaining the status quo.

When Justice S Rajendra Babu was the Chairperson of the NHRC of India, he accepted the need to examine the validity of the death penalty in the changing contours of human rights and observed: 'Even though the government has not sought any suggestions from the NHRC so far, the panel has undertaken research with respect to the UN General Assembly's resolution against capital punishment, in the Indian context'.[34] He further noted that the 'NHRC is studying the issue on its own and will give suggestions to the government if asked for'.[35] The current Chairperson of the NHRC of India, Justice KG Balakrishnan, has favoured continuance of the death penalty provision by observing that it has a 'deterrent effect' in a country where various types of crimes are on the rise. He is reported to have said that punishment was awarded in the 'rarest of rare' cases and there were adequate safeguards in the law.[36] Although expressing only his 'personal opinion' and not the view of the NHRC, he said the country had not reached the stage where death punishment could be abolished. In an interview to the Press Trust of India, Justice Balakrishnan opined: '*It is not proper for the NHRC to give an opinion on the death sentence. But, if you ask me, I personally feel that the death penalty should continue. It has got a very great deterrent effect on society*.'[37]

[32] 'Foreign Delegations Visit NHRC: The First Month of the New Year Saw Several Visits of Foreign Delegations to NHRC', NHRC press release dated 1 February 2009.

[33] See *Jagmohan Singh v State of Uttar Pradesh* AIR 1973 SC 947; *Rajendra Prasad v State of Uttar Pradesh* AIR 1979 SC 916; *Bachan Singh v State of Punjab* AIR 1980 SC 898.

[34] Ritu Sharma, 'We Are Studying the Death Penalty: NHRC Chief', *TwoCircles.net* (22 May 2008), <http://twocircles.net/2008may21/we_are_studying_death_penalty_nhrc_chief.html> (accessed 26 April 2013).

[35] Sharma (n 34).

[36] 'Death Penalty has Deterrent Effect: NHRC Chairperson', *The Hindu* (2 August 2010), <http://www.thehindu.com/news/national/death-penalty-has-deterrent-effect-nhrc-chairperson/article546402.ece> (accessed 26 April 2013).

[37] 'Death Penalty has Deterrent Effect: NHRC Chairperson', *The Hindu* (2 August 2010) (emphasis added).

However, it must be noted that in terms of jurisdictional competence there is no such restriction upon the Indian NHRC.[38] It is not difficult to guess the effect of the 'personal opinion' of the Chairperson of the NHRC on the stand of the Commission itself. Terming Justice Balakrishnan's defence of the death penalty as bewildering, an editorial of *The Hindu*, a prominent national English-language daily newspaper, noted that 'His "deterrent effect" argument is starkly at odds with the near universal understanding that the fundamental right to life implies, among others, the abolition of the death sentence'. The editorial went to observe that:[39]

> It should be fairly obvious to Justice Balakrishnan, more than to others, that his sanguine view on the legal safeguards for the death penalty is not borne out by facts on the ground. The accused in serious offences are often unable to get proper representation during trials; investigative agencies often resort to torture to extract confessions; and the complex web of corruption coupled with the suppression of evidence does not offer the assurance that no innocent person would be convicted. And, appealing to the higher judiciary is beyond the pale of the ordinary citizenry because of the huge cost. The cost-benefit analysis in terms of the 'deterrent value' of capital sentence in the reduction of heinous crimes repudiates the very notion of punishment as a reformative process. *The country's premier body vested with the protection of human rights is expected to take a humane and sympathetic view to soften the law's hard edges, and the right course for it would be to steer the public debate towards abolition*.

Rather than leading or steering a debate on the issue, there is a strange reluctance on the part of the Indian NHRC to even initiate the debate. This is of course true of other NHRIs as well. Apart from these dark sides, there have been some bright moments when the NHRC took some steps to mitigate human sufferings on account of the death penalty. In one case where the accused had been convicted by the District Court and the conviction had been upheld by the High Court and the Supreme Court, the NHRC recommended to the Governor of the state of Assam that the death sentence imposed on the defendant Ramdeo Chauhan, who had murdered Bhabani Charan Das and three members of his family on 8 March 1992, should be commuted to life imprisonment.[40] This was done on the grounds that Chauhan should not have been sentenced to death because he was only 16 years old at the time of committing the crime. The state government accordingly commuted the death penalty to life imprisonment.[41]

Aggrieved by the state's action, the family members of the deceased filed a fresh petition in the Supreme Court. The Court in its judgment slammed the NHRC for interfering with its judicial order and said that it had no such powers to intervene.[42] However, Chauhan filed a second review petition stating that he had not been heard by the Supreme Court while it was dealing with the appeal filed by the victim's family. Ultimately, reason and humanity prevailed and the Supreme

[38] See the Protection of Human Rights Act 1993.

[39] Editorial, 'For a More Humane View', *The Hindu* (11 August 2010), <http://www.thehindu.com/opinion/editorial/for-a-more-humane-view/article562946.ece> (accessed 27 April 2013) (emphasis added).

[40] HRLN (n 19).

[41] HRLN (n 19).

[42] *Ramdeo Chauhan v Bani Kant Das* (2010) 14 SCC 209.

Court set aside its earlier judgment and commuted to life imprisonment the death penalty awarded to Ramdeo Chauhan.[43] A Bench of Justice Aftab Alam and Justice Asok Kumar Ganguly set aside the earlier judgment that the NHRC had no power to recommend to the Governor commutation of the death sentence to life imprisonment after the death penalty had already been upheld by the Supreme Court.[44] Upholding Chauhan's plea, the Court noted: 'if we look at Section 12(j) of the 1993 [Protection of Human Rights] Act, we find that it confers on NHRC such other functions as it may consider necessary for the promotion of human rights'.[45] Justice Ganguly rightly observed that:[46]

> One must accept that human rights are not like edicts inscribed on a rock. They are made and unmade on the crucible of experience and through irreversible process of human struggle for freedom. They admit of a certain degree of fluidity. Categories of human rights, being of infinite variety, are never really closed.

Commending India for its ratification of the ICCPR and the Convention on the Rights of the Child, the Advisory Council of Jurists (ACJ) to the APF has recommended that India move towards ratification of the Second Optional Protocol to the ICCPR and the Convention against Torture.[47] The Council expressed concern about the stated intention of the government to increase the list of offences which are punishable by death and drew particular attention to its comments regarding the criteria for what constitute 'most serious crimes' in Article 6(2) of the ICCPR. The Council endorsed the comments of the Human Rights Committee in relation to India's obligation to ensure that its Penal Code does not permit the execution of a person who commits a crime while under the age of 18. The ACJ recommended that India 'take progressive steps towards de facto abolition of the death penalty and ultimately its de jure abolition'.[48]

Going by the contents available on the website of the NHRC of India, there is no indication of any worthwhile follow-up action to these recommendations having been taken so far. It is clear that the Commission has failed to take any public stand on the abolition of the death penalty in India. This is totally contrary to its statutory responsibilities. It appears to have taken a 'minimalist' view of human rights as opposed to a 'maximalist' one and has not fulfilled several statutory responsibilities assigned to it, including review of international conventions, law and policy reform; intervention in pending court proceedings; spreading

[43] *Ramdeo Chauhan v Bani Kant Das* (2010) 14 SCC 209.
[44] *Ramdeo Chauhan v Bani Kant Das* (2010) 14 SCC 209.
[45] *Ramdeo Chauhan v Bani Kant Das* (2010) 14 SCC 209, para 52.
[46] *Ramdeo Chauhan v Bani Kant Das* (2010) 14 SCC 209, para 52.
[47] It is pertinent to mention here that the government of India had introduced the Prevention of Torture Bill 2010 in the Lok Sabha (the Lower House of the Parliament) on 26 April 2010 to allow India to ratify the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Bill was passed by the Lok Sabha on 6 May 2010. It was presented before the Rajya Sabha (the Upper House of the Parliament) which referred the Bill to a Select Committee for examination as concerns were raised over the inability of the Bill to prevent torture and its narrow definitions. The Select Committee submitted its report to the Rajya Sabha on 6 December 2010.
[48] APF of NHRIs, 'Towards Abolition of the Death Penalty: Role of NHRIs', December 2000.

human rights literacy and awareness; and undertaking and promoting research in relation to the abolition of death penalty. Although the former Chairperson of the NHRC, Justice Rajendra Babu, referred to the research being done by the Commission on the death penalty, the Commission has not placed the findings of that research in the public domain nor taken legislative or media advocacy action based on that research. It appears that Justice Babu's progressive and ambitious agenda has not been carried forward by the Indian NHRC after his retirement from the Commission.

The Commission has attracted criticism, and rightly so, for its vacillation over protests against death penalty. It is high time that the Chairperson of the NHRC stops viewing this issue through judicial lenses which strictly interpret criminal law. A more humanistic and holistic approach is required from the highest echelons in the Commission which may provide a vent for the huddled masses yearning to break free. A shadow report published by 340 non-governmental organizations (NGOs) as part of the All India Network of NGOs and Individuals (ANNI) has severely criticized the NHRC for its accommodative approach towards the death penalty.[49] The Asian Centre for Human Rights (ACHR) has also criticized the government of India for procrastinating over the abolition of the death penalty and its half-hearted approaches in this regard. It has called for more sincere and substantial efforts to be made by the government when it is examined by the United Nations Human Rights Council under the Universal Periodic Review in May 2012.[50]

Maldives

The Maldives has not executed anyone for 60 years, but has not abolished the death penalty. The United Nations Human Rights Committee has asked it to 'consider abolishing the death penalty and ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights'.[51] It has also asked the government to remove mandatory death penalties from its statutes.[52] In response to growing incidents of crime, there has been a clamour among some quarters including the Majlis (parliament) to do away with the power of the President to grant clemency in cases where the Supreme Court has upheld a death sentence. In December 2012, the Maldives drafted a Death Penalty Bill which provides for execution by lethal injection. The Bill, which has been opened for public discussion,

[49] All India Network of NGOs and Individuals working with NHRIs (ANNI), 'An NGO Report on the Compliance with the Paris Principles by the National Human Rights Commission of India', April 2011.

[50] See ACHR, 'India's Draft Universal Periodic Report-II: A Case of Forced Marriage?', <http://www.achrweb.org/UN/HRC/UPRIndia2.pdf> (accessed 10 February 2012).

[51] Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations', UN Doc CCPR/C/MDV/CO/1, 31 August 2012.

[52] UN Doc CCPR/C/MDV/CO/1 (n 51) para 13.

was posted on the website of the Attorney General's office.[53] According to the Bill:[54]

> [T]he death penalty process would include a superior court with the jurisdiction of entertaining murder cases with a three Judge bench. The second stage would be the High Court with a five Judge bench, while the Supreme Court's seven Judge bench would necessitate the presence of at least one Judge proficient in Islamic Shariah. The verdicts throughout the entire process must be unanimous.

Insofar as rights of the inmates on death row are concerned, the Bill provides that:[55]

> [A] convict of ill health cannot be executed. While a pregnant woman can only be executed two years after baby is delivered. Once the last court delivers the death sentence, the sentence can only be enforced after determining whether the victim's family grants pardon. If the convict is below the age of 18, the sentence must be put off until he reaches 18. In addition, statement of an underage heir can only be taken after he turns 18.

Despite an 'unofficial' moratorium on the death penalty, the criminal statutes of the Maldives still provide for capital punishment. Therefore, there is a clear need to enact legislation to abolish the death penalty. The Human Rights Commission of the Maldives, which was established as an independent statutory body on 10 December 2003, has a catalytic role to play in this regard. The Human Rights Commission Act specifies various responsibilities of the Commission. These include, among others, investigating complaints of human rights violations; reviewing existing laws, regulations or administrative rules against human rights standards and, where necessary, providing advice and recommendations to the government; advising the government in relation to the ratification of regional and international human rights instruments; conducting research and carrying out relevant surveys on human rights; and delivering training, education, and awareness raising activities to develop a culture of respect for human rights among all groups of people in the Maldives.[56]

These functions are clearly relevant to the abolition of the death penalty in the Maldives, because during the Universal Periodic Review process, the Maldives government stated that 'it did not have any current plans to accede to the Second Optional Protocol' to the ICCPR, despite observing a long-standing moratorium on the death penalty since 1952.[57] The Committee on the Rights of the Child

[53] 'AG Drafts Bill Outlining Executing Death Sentence, Favours Lethal Injection', *Minivan News* (20 December 2012), <http://minivannews.com/society/ag-drafts-bill-outlining-executing-death-sentence-favours-lethal-injection-49351> (accessed 25 April 2013). As of April 2013, the Bill has not yet been sent to the Parliament.

[54] Ali Yoosuf, 'Maldives Drafts Death Penalty Bill with Execution by Lethal Injection', *Haveeru Online* (20 December 2012), <http://www.haveeru.com.mv/news/46341> (accessed 25 April 2013).

[55] Yoosuf (n 54).

[56] Human Rights Commission Act No 6/2006, <http://www.asiapacificforum.net/members/associate-members/republic-of-the-maldives/downloads/legal-framework/HRCMAct2006.pdf> (accessed 16 April 2013).

[57] Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Maldives', UN Doc A/HRC/16/7, 4 January 2011, paras 27, 76.

also recommended that the Maldives abolish the death penalty related to Hudud offences (offences created by the Quran) perpetrated by persons under the age of 18 years.[58]

To the credit of the Human Rights Commission of the Maldives, in June 2012 it submitted a shadow report on the ICCPR in response to the initial state report submitted by the Maldives government. While outlining various legal provisions, the report noted that 'Neither the Penal Code encompasses provisions on penalties for offences committed by minors nor does the Juvenile Justice Bill explicitly proscribe death penalty'.[59] With regard to international obligations, the shadow report further noted the following:[60]

> Maldives has affirmed the UN Resolution of Moratorium on death penalty on December 18, 2007, which emphasizes all States that still provision capital punishment to 'progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed'. This resolution still needs to be endorsed by the Parliament. In addition, one of the recommendations of the Universal Periodic Review (UPR) that is being considered by the State includes the ratification of the 2nd Optional Protocol to ICCPR.

The shadow report also noted that 'abolition of death penalty may not be possible unless article 115(s) of the Constitution is amended'.[61] The report finally concludes with the following recommendation:[62]

> State should facilitate the establishment of an independent forensic institution. It is imperative that State revise the current Penal Code to reflect the spirit of the new Constitution that was ratified in August 2008 and in par with its international obligations, and also enact Criminal Procedure Code, Evidence Bill and Witness Protection Bill. It is important that State take prompt measures to ratify the Second Optional Protocol to the Covenant on the abolition of death penalty as this is one of the recommendations being considered by the State during the UPR process.

It has been observed in the past that the Human Rights Commission of the Maldives has not been as proactive as it should have been and that it should work towards abolition of the death penalty from the penal code.[63] It seems that the

[58] Human Rights Council, 'Compilation Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1: Maldives', UN Doc A/HRC/WG.6/9/MDV/2/Rev.1, 10 November 2010, para 19.

[59] Human Rights Commission of the Maldives, *Shadow Report on the International Covenant on Civil and Political Rights: In Response to the Maldives Initial State Report* (June 2012), para 35, <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HRCM_Maldives105.pdf> (accessed 16 April 2013).

[60] *Shadow Report on the International Covenant on Civil and Political Rights: In Response to the Maldives Initial State Report* (n 59), para 40.

[61] *Shadow Report on the International Covenant on Civil and Political Rights: In Response to the Maldives Initial State Report* (n 59), para 41. Article 115 of the Constitution of Maldives states that the President is entrusted pursuant of the Constitution to carry out the duties to grant pardons or reductions of sentence as provided by law, to persons convicted of a criminal offence who have no further opportunity to appeal.

[62] *Shadow Report on the International Covenant on Civil and Political Rights: In Response to the Maldives Initial State Report* (n 59), para 42.

[63] See ANNI, *Report on the Performance and Establishment of National Human Rights Institutions in Asia* (Asian Forum for Human Rights and Development 2010), 135–6, <http://forum-asia.org/2010/ANNI2010_TEXTONLY.pdf> (accessed 28 April 2013).

Commission has adopted a more active role recently as reflected by the shadow report. In future, the Commission would have to perform an onerous task in shaping the law and society towards accepting the redundancy of the death penalty in a civilized and humane world order.

Thailand

The status of the death penalty in Thailand is also akin to that in India with some differences in modalities. A person below the age of 18 years or suffering from mental illness and pregnant women are not subjected to the death penalty.[64] Similar to the Indian President, the King of Thailand can commute a death sentence to life imprisonment or grant a pardon.

In 2005, the United Nations Human Rights Committee had noted with concern that the death penalty was not restricted to the 'most serious crimes' and recommended that Thailand review the imposition of the death penalty for offences related to drug trafficking.[65] Joint Submission 12 to the Human Rights Council indicated that as of October 2011 there were 708 persons on death row with, according to Joint Submission No 1, 339 of them for drug-related offences, 68 of whom were women. Joint Submission 12 recommended that the 'Government immediately take steps towards the abolition of the death penalty as promised in the national human rights action plan'.[66]

The NHRC of Thailand was constituted in July 2001, under the Human Rights Protection Act 1999.[67] Initially it was criticized for lack of capacity and autonomy and serious questions were raised about its efficacy and credibility. With the passage of time, the Commission has shown signs of independence[68] and the Second

[64] See Death Penalty Worldwide 'Thailand', <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Thailand> (accessed 25 April 2013).

[65] Human Rights Council, Working Group on the Universal Periodic Review, 'Compilation Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1: Thailand', UN Doc A/HRC/WG.6/12/THA/2, 25 July 2011, para 19.

[66] Joint Submission 12 by the International Federation for Human Rights and Union for Civil Liberty, October 2011, para 6, <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TH/JS12-JointSubmission12-eng.pdf> (accessed 28 April 2013). See also Human Rights Council, Working Group on the Universal Periodic Review, 'Summary Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 15 (c) of the Annex to Human Rights Council Resolution 5/1 for Thailand', UN Doc A/HRC/WG.6/12/THA/3, 25 July 2011, para 22.

[67] The NHRC was constituted as a response to domestic criticism of the May 1992 military crackdown on massive pro-democracy demonstrations in the capital, Bangkok, under Arts 199 and 200 of the new Constitution adopted by the government in October 1997.

[68] 'Thailand's "Anti-national" Human Rights Commission', *Human Rights Features* (14–20 April 2003), <http://www.hrdc.net/sahrdc/hrfchr59/Issue5/pdf.pdf> (accessed 26 April 2013). Section 15(2) of the National Human Rights Commission Act empowers the NHRC 'to examine and report the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties relating to human rights to which Thailand is a party, and propose appropriate remedial measures to the person or agency committing or omitting such acts for taking action'.

National Human Rights Action Plan (2009–13) has recommended in Section 3.1 that the death penalty should be replaced by life imprisonment.[69]

The government of Thailand in its National Report under the Universal Periodic Review has asserted that it 'attaches importance to the process of national consultation on the death penalty'.[70] A country-wide discussion on the possibility of abolishing the death penalty is underway and expected to be concluded soon. It should be noted that Thailand abstained in the December 2012 vote on General Assembly Resolution 67/176 on a moratorium on the death penalty, whereas India voted against the Resolution.

In July 2012, Thailand officially withdrew its interpretive declaration of Article 6(5) of the ICCPR, which stipulates that 'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women'.[71] Thailand enforced the death penalty on two convicted death traffickers in 2009. These executions marked the end of a *de facto* six-year-long moratorium in Thailand.[72] According to Amnesty International's 2011 Annual Report, the Thailand Minister of Interior announced a campaign to extend the death penalty for drug offences under three existing laws.[73] These developments contradict Thailand's Second National Human Rights Action Plan (2009–13), published by the NHRC, which included the intention to abolish the death penalty.[74] The Commission should not only monitor the implementation of National Human Rights Action Plan but also catalyse action by various state agencies towards the objectives mentioned in a given Plan. Going by the outcome, the NHRC of Thailand has failed to ensure the creation of a conducive environment for abolishing the death penalty. It should go beyond rhetoric and promote law and policy reform as well as public education towards the abolition.

Afghanistan

Under Afghan law and the traditional justice system, the death penalty is an option for severe crimes such as murder and armed rebellion as well as for ordinary crimes.[75] Although Afghanistan does have the death penalty, it has been used

[69] See Anti-Death Penalty Asia Network (ADPAN), 'When Justice Fails: Thousands Executed in Asia After Unfair Trials', ASA 01/023/2011, <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/ASA0102311?CMD=VEROBJ&MLKOB=30222190000> (accessed 10 February 2012).

[70] Human Rights Council, 'National Report Submitted by Thailand under the Universal Periodic Review', UN Doc A/HRC/WG.6/12/THA/1, 19 July 2011, para 33.

[71] Delegation of the European Union to Thailand, 'The European Union and Death Penalty in Thailand', <http://eeas.europa.eu/delegations/thailand/eu_thailand/political_relations/the_european_union_and_death_penalty_in_thailand/index_en.htm> (accessed 16 April 2013).

[72] International Federation for Human Rights, 'Executions in Thailand: FIDH Calls for an Immediate Moratorium', 28 July 2009, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4b47619c45> (accessed 16 April 2013).

[73] Amnesty International, *Annual Report 2011: The State of the World's Human Rights—Thailand* (Amnesty International 2011), <http://www.amnesty.org/en/region/thailand/report-2011> (accessed 25 April 2013).

[74] Amnesty International, *The State of the World's Human Rights—Thailand* (n 73).

[75] See Death Penalty Worldwide, 'Afghanistan', <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Afghanistan> (accessed 25 April 2013).

sporadically. Since the fall of the Taliban in 2001, who regularly executed people in public, the Afghan government has carried out the punishment only every few years. The president must personally sign an order to carry out executions.[76]

In 2004, Afghanistan President Hamid Karzai declared a moratorium on executions, after his government carried out the first death sentence in the country since the fall of the Taliban regime in 2001. However, the President has continued to approve death sentences. This has been criticized as a move to gain popularity in the country because many Afghans support the death penalty.[77] At least 250 prisoners were on death row in Afghanistan at the end of 2012.[78] In November 2008, nine individuals convicted of rape, murder, and kidnapping were hanged in Kabul.[79] In November 2012, 14 prisoners on death row were executed within two days for a variety of crimes (including murder, kidnapping, rape, and terrorism) due to political pressure from the government.[80]

The administration of the death penalty in Afghanistan is a serious issue because of the poor justice delivery system. The judicial system of Afghanistan is allegedly one of the most corrupt in the world.[81] Moreover, the justice system relies a lot on confessions, some of which are extracted through torture.[82]

The NHRI of Afghanistan, named as Afghanistan Independent Human Rights Commission, was established in pursuance of the Bonn agreement.[83] Although the Commission is performing its activities in the areas of promotion, protection, and monitoring of human rights and has been doing a significant job despite the on-going conflicts, there is no indication on its website about its stand on the abolition of the death penalty. It has submitted a number of annual reports and several thematic reports on other issues,[84] but not on the death penalty and it appears that no moratorium on executions has yet been imposed on account that the government believes that the death penalty is needed to fight serious crimes including terrorism.[85] The fact

[76] Waslat Hasrat-Nazimi, '14 Hanged in Two Days: The Death Penalty in Afghanistan', *DW* (23 November 2012), <http://www.dw.de/14-hanged-in-two-days-the-death-penalty-in-afghanistan/a-16400788> (accessed 16 April 2013).

[77] 'Afghan Death Penalty Raises Concerns', *Los Angeles Times* (20 December 2007), <http://articles.latimes.com/2007/dec/20/world/fg-execute20> (accessed 16 April 2013).

[78] See Amnesty International, *Death Sentences and Executions in 2012* (n 4), 18.

[79] 'Afghanistan: Unofficial Moratorium on Death Penalty', *IRIN* (Kabul, 5 April 2010), <http://www.irinnews.org/Report/88687/AFGHANISTAN-Unofficial-moratorium-on-capital-punishment> (accessed 16 April 2013).

[80] See 'Afghanistan Hangs "Terrorists"', *iafrica.com* (21 November 2012), <http://news.iafrica.com/worldnews/828701.html> (accessed 24 April 2013).

[81] Heather Barr, an Afghanistan researcher for the Asia section of Human Rights Watch, noted this. Hasrat-Nazimi (n 76).

[82] Hasrat-Nazimi (n 76).

[83] In accordance with the Resolution 134/48 of United Nations General Assembly in 1993 and on the basis of Art 58 of the Constitution of Islamic Republic of Afghanistan.

[84] See, eg, Afghanistan Independent Human Rights Commission, *Evaluation Report on General Situation of Women in Afghanistan* (2006), <http://www.refworld.org/docid/47fdfad5d.html> (accessed 28 April 2013).

[85] 'Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, Ms Asma Jahangir Submitted Pursuant to Commission on Human Rights Resolution 1998/68', UN Doc E/CN.4/1999/39/Add.1, para 257. Also see Nick Schifrin, 'How the Taliban Turned a Child Into a

that the Afghanistan Commission has lacked the courage to challenge the prevailing notions of a legal system based on clan and tribal customs and religious diktats raises doubts regarding its independence.[86] Nevertheless, it has to be accepted that ethnic diversity, internal hierarchy along tribal, regional, and class lines within Afghanistan have been a hindrance in developing the normative arguments necessary to build a consensus on the basic and common denominators of human rights,[87] let alone the abolition of the death penalty.

It appears that the legal landscape in Afghanistan is characterized by the need to deter serious crimes from occurring during the on-going conflict. The Independent Human Rights Commission of Afghanistan has a critical role to play in evaluating and countering these policy rationales.

In 2013, the Commission noted that the killing of 16 soldiers of the Afghan national army after being arrested by anti-government militants is a clear violation of International Humanitarian Laws.[88] The Afghanistan Commission urged the opposition forces that those who are not involved in war or captured in any way should not be subjected to death without a fair trial.[89] The Commission also criticized the increasing number of civilian deaths and mentioned the need to proceed against the persons accountable.[90] With respect to the executions in November 2012, the Commission raised concerns about due process: its investigators noted that the death penalty is an irreversible punishment and that because they had not had full access to the cases they could not yet say if there had been a fair trial.[91]

Although the Commission criticized the act of killing persons without a fair trial, it did not condemn awarding the death penalty itself. In the light of existing international human rights law provisions, the Afghanistan Independent Human Rights Commission has a critical role in recommending harmonization of domestic law with the international human rights law and in particular abolition of the death penalty. It might need to make more sustained efforts with regard to law reform as well as public advocacy.

Suicide Bomber', *ABC News* (21 June 2011), <http://abcnews.go.com/Blotter/taliban-killer-zar-ajam-duped-terror-attack/story?id=13894578&singlePage=true> (accessed 12 October 2011).

[86] The persistence of distinct sectors of ethnic dominance within Afghanistan, such as the ethnic Pashtuns in the south bordering Iran and Pakistan; ethnic Tajik, Uzbek, and Hazara control of the northern region; Turkmen tribes along the north-west; Baluchs in the south-west and division between Shia and Sunni makes Afghanistan an ethnically volatile state.

[87] 'Afghanistan' (2001) 41(338) *The Adelphi Papers* 63, 65.

[88] Afghanistan Independent Human Rights Commission, 'Press Release about Killing of 16 Arrested Soldiers', <http://www.aihrc.org.af/en/press-release/1424/press-release-about-killing-of-16-arrested-soldiers-.html> (accessed 16 April 2013).

[89] Afghanistan Independent Human Rights Commission, 'Press Release about Killing of 16 Arrested Soldiers'.

[90] Afghanistan Independent Human Rights Commission, 'Press Release on Parties to Afghan Conflict must Escalate Protection of Civilians', <http://www.aihrc.org.af/en/press-release/305/english-press-releases-2011.html> (accessed 16 April 2013).

[91] Human Rights Watch, 'Kabul Execution Spree Bodes Ill for Human Rights' (17 December 2012), <http://www.hrw.org/news/2012/12/17/kabul-execution-spree-bodes-ill-human-rights> (accessed 16 April 2013).

Bangladesh

The 1860 Penal Code of Bangladesh has several provisions that allow for capital punishment.[92] In addition, there are several other laws in Bangladesh that also provide for the death penalty.[93] The Asian Human Rights Commission pointed out that the death penalty is awarded for crimes that do not meet Bangladesh's obligations under Article 6(2) of the ICCPR which requires that death sentences 'may be imposed only for the most serious crimes'. Contrary to popular belief, the death penalty has not deterred the incidence of serious crimes which have been rising each year. For example, there were 3,592 murders during 2005 and 4,219 murders in 2009.[94] Referring to manifold problems in the Bangladesh criminal justice system, the Asian Human Rights Commission observed:[95]

> No legal system in the world functions well enough to guarantee that errors in awarding the death penalty can be totally avoided, and in countries with deeply flawed criminal justice systems such as Bangladesh and most others in the Asian region, the use of the death penalty gives rise to serious travesties of justice and arbitrary, unjust and irrevocable violations for the right to life.

Referring to certain recent incidents, Souhayr Belhassen, the President of the International Federation of Human Rights (FIDH), also raised similar concerns:[96]

> Evidence of government's interference, combined with verdicts which are clearly politically-motivated and recent amendments of ICT [International Crimes Tribunal, Bangladesh] rules, allowing in particular for a person to be tried or punished again for an offense for which he/she has already been acquitted, are aggravating factors which require an immediate stay on death sentences. The truth and justice-seeking process for the heinous

[92] Section 121 of the Penal Code of Bangladesh: waging war against Bangladesh; section 132: abetment of mutiny, if mutiny is committed; section 194: giving or fabricating false evidence with intent to procure conviction of capital offence; section 302: murder; section 305: abetment of suicide of child or insane person; section 307: attempted murder by life-convicts; and section 396: robbery with murder. See Asian Human Rights Commission, 'Bangladesh: Death Penalty Continues Despite a Flawed Criminal Justice System', 23 August 2010, ALRC-CWS-15-02-2010, <http://www.humanrights.asia/countries/bangladesh/news/alrc-news/human-rights-council/hrc15/ALRC-CWS-15-02-2010> (accessed 16 April 2013).

[93] The Special Powers Act 1974, provides the death penalty for the offences of sabotage under section 15; counterfeiting currency notes and government stamps under section 25A; smuggling under section 25B; and adulteration of, or sale of adulterated food, drink, drugs, or cosmetics under section 25C. See Asian Human Rights Commission (n 92). The *Nari o' Shishu Nirjaton Daman Ain*-2000 [Women and Children Repression (Prevention) Act 2000] further provides for the death penalty to be awarded as punishment for offences or attacks committed using corrosive, combustible, or poisonous substances that cause burns or physical damage leading to the death of the victim, under section 4; for trafficking of women and children, as per sections 5 and 6 respectively; for ransom, according to section 8; for sexual assaults resulting in the death of any woman or child who dies consequently, as per section 9(2); causing death for dowry, in section 11; and maiming or mutilation of children for begging, under section 12. Section 5 (KA) of the Acid Crime Control Act 2002 also includes the death penalty for acid attacks on women if the victim's eyes, ears, face, chest or sexual organs are fully or partially damaged.

[94] Asian Human Rights Commission (n 92) para 6.

[95] Asian Human Rights Commission (n 92) para 7.

[96] International Federation for Human Rights, *Bangladesh: Stop Violence, Stop Death Sentences!* (7 March 2013), <http://www.refworld.org/docid/513dd18119.html> (accessed 17 April 2013).

crimes committed during the war of independence in 1971 in Bangladesh should respect the guarantees of a fair trial and victims' rights to truth, justice and reparation.

In 2003, the Committee on the Rights of the Child, while acknowledging the efforts made by the government of Bangladesh to improve the juvenile justice system, expressed concern, among other things, at the use of the death penalty for children under the age of 16 years and the absence of juvenile courts and judges in some parts of Bangladesh.[97] When Bangladesh was reviewed by the Human Rights Council under the Universal Periodic Review in 2009, a strong recommendation was made for the abolition of the death penalty.[98] In response, the government of Bangladesh said:[99]

> The provision of death penalty is maintained in Bangladesh only as an exemplary punishment for heinous crimes such as throwing of acid, acts of terrorism, planned murder, trafficking of drugs, rape, abduction of women and children. Both the judiciary and administration deal with these cases of capital punishment with extreme caution and compassion, and such punishment is extended only in ultimate cases that relates to gross violation of human rights of the victims. Bangladesh has an extremely low rate of implementation of such death penalties.

The National Human Rights Commission started functioning in Bangladesh in December 2008 under the Ordinance of 2007. The Commission was reconstituted in 2009 as a national advocacy institution for human rights promotion and protection under the National Human Rights Commission Act 2009. What has the National Human Rights Commission of Bangladesh done in relation to the abolition of capital punishment? It appears that the Commission has come to terms with the above-stated position of the Bangladeshi government. Despite the recommendation made by the Human Rights Council, no apparent follow-up action seems to have been initiated by the Commission of Bangladesh. While some may suggest that this matter lies within the realm of the executive or that the Commission is still only a few years old, it cannot escape from its catalytic role or even its monitoring role with regard to such a serious human rights issue. The Commission has not been effective in preventing recent high profile death

[97] 'Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1', UN Doc A/HRC/WG.6/4/BGD/2, 12 December 2008.

[98] See Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Bangladesh', UN Doc A/HRC/11/18, 5 October 2009. Paragraph 94(19) concludes as follows: 'Strongly encouraged to abolish the death penalty, and while awaiting such decision, to adopt a moratorium on executions' (France); recalling General Assembly resolution 62/149, establish a moratorium on executions with a view to abolishing the death penalty (Brazil); Adopt a moratorium on the death penalty, as a primary step towards its abolition (Chile); As a first step, consider amending their legislation on the death penalty in order to restrict its scope and adjust it to the international minimum standards on the death penalty, and, in the light of the increasing awareness of the international community on the matter, as reflected in General Assembly resolutions approved in 2007 and 2008, consider the establishment of a moratorium on the use of the death penalty with a view to abolishing capital punishment in the national legislation (Italy)'.

[99] Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Bangladesh, Addendum', UN Doc A/HRC/11/18/Add.1, 9 June 2009, 4, Recommendation 19.

sentences against those involved in heinous crimes committed during the war of independence in 1971 or in ensuring guarantees of fair trial.[100] Its record in seeking law reform or securing Bangladesh's obligations under international human rights law has been disappointing.

Indonesia

Capital punishment is prescribed in Indonesia for murder, terrorism, betrayal of the military in cases of war, and drug trafficking.[101] Executions take place by firing squad. Amnesty International has expressed concerns over the fact that the death penalty is provided for in Indonesian law for a very large number of criminal offences and that two recently adopted laws—the Law on Human Rights Courts 2000 and the Law on Combating Criminal Acts of Terrorism 2003—contain provisions for the death penalty and fall short of international standards for fair trials.[102] This trend towards greater use of the death penalty has also been confirmed by a recent ruling by the Indonesian Constitutional Court to uphold the death penalty for drug offences. Amnesty urged the Indonesian government to remove from domestic legislation all provisions allowing for the death penalty and immediately declare a moratorium on all executions and review the Law on Combating Criminal Acts of Terrorism to ensure that it conforms to international human rights standards.[103]

Indonesia's record with regard to the abolition of the death penalty came under careful scrutiny by several UN Special Rapporteurs and the secrecy with which executions are handled in Indonesia has been a source of disquietude.[104] The ACJ of the APF of NHRIs recommended the ratification of the ICCPR and the Second Optional Protocol to the ICCPR. Indonesia was asked to limit the number of crimes for which the death penalty may be imposed and also move towards the *de facto* and ultimately *de jure* abolition of the death penalty. The Asia Pacific Human Rights Network pointed out that so far nothing has been done about the recommendations of the ACJ.[105]

The NHRC of Indonesia (Komnas-HAM) was established in 1993 with a view to ensure protection of human rights. Although Komnas-HAM made an attempt to restrict the use of the death penalty, it did not prove to be successful.[106] It has

[100] For details see Ana Lehmann, 'Do Not Kill Bangladesh's War Criminals', *DW* (21 February 2013), <http://www.dw.de/do-not-kill-bangladeshs-war-criminals-ai/a-16616362> (accessed 25 April 2013).

[101] See Death Penalty Worldwide, 'Indonesia', <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Indonesia> (accessed 25 April 2013).

[102] Amensty International, 'Indonesia: A Briefing on the Death Penalty', October 2004, 7, <http://www.upr-info.org/IMG/pdf/AI_IND_add3.pdf> (accessed 25 April 2013).

[103] Amensty International, 'Indonesia: A Briefing on the Death Penalty', October 2004, 7.

[104] Human Rights Council, Working Group on the Universal Periodic Review, 'Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1: Indonesia', UN Doc A/HRC/WG.6/1/IDN/2, 31 March 2008.

[105] UN Doc A/HRC/WG.6/1/IDN/2 (n 104).

[106] 'The Indonesian Human Rights Commission has questioned the morality and professionalism of the Indonesian judicial system, arguing that the pro-death penalty statements issued by a corrupt

been alleged that Komnas-HAM works under political influence and that it functions in a clandestine manner.[107] Lack of adequate performance and institutional design has greatly hampered its potential as a crusader against the death penalty.[108] This criticism is substantiated to an extent by the fact that no evidence exists as to any serious effort on the part of the Commission to lead a movement for abolition of the death penalty. This failure is glaring in light of government apathy in response to calls for abolition of the death penalty.[109]

In this milieu, the NHRC of Indonesia appears to be lagging behind in its duty to lead the movement against capital punishment as new and more repressive legislation providing for the death penalty has been introduced by the Indonesian government. The procrastination of the Indonesian Commission matches that of its counterpart in India with the exception that the Indian NHRC has made a few positive interventions which its Indonesian counterpart has yet to emulate.

Malaysia

In Malaysia capital punishment is mandatory for murder, possession of drugs, drug dealing and well as for several other offences, while discretionary capital punishment is prescribed for some other offences.[110] Nevertheless, there have been very few executions since 2002 and this has led to a situation with over 900 prisoners on death row.[111]

There is growing support among the legal elite for abolition of the mandatory death penalty and of the death penalty altogether. The NHRC of Malaysia (SUHAKAM), which was established by the Human Rights Commission of Malaysia Act 1999, has played a significant role in this movement. It first urged Pardons Boards to review all cases of persons sentenced to death with a view to granting clemency and the substitution of life imprisonment, and in 2010 in its Annual Report called for the complete abolition of the death penalty.[112] It is also

judiciary can be very dangerous.' See Pacific Human Rights Network, 'Towards Abolition of the Death Penalty: Progress Paper on the Role of NHRIs', Asia, February 2004, <http://www.asiapacificforum.net/about/annual-meetings/8th-nepal-2004/downloads/ngo-statements/ngo_deathpenalty.pdf> (accessed 17 April 2013).

[107] Human Rights Features, 'Komnas HAM—The Indonesian Human Rights Commission: A Long Way to Go', HRF 28/00, 6 December 2000, <http://www.hrdc.net/sahrdc/hrfeatures/HRF28.htm> (accessed 26 December 2011).

[108] Human Rights Features, 'Komnas HAM—The Indonesian Human Rights Commission: A Long Way to Go', HRF 28/00, 6 December 2000.

[109] It is worth noting that Indonesia abstained at the United Nations General Assembly on 20 December 2012, on Resolution 67/176 for a moratorium. See Amnesty International, *Death Sentences and Executions in 2012*, Annex IV.

[110] See Death Penalty Worldwide, 'Malaysia', <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malaysia> (accessed 25 April 2013).

[111] By September 2012 it appears that there were 924 people under sentence of death on 'death row' in Malaysia, 648 of whom had been sentenced for drug trafficking. See *The Death Penalty for Drug Offences: Global Overview 2012* (London, Harm Reduction International 2012), 30.

[112] Human Rights Commission of Malaysia, *Suhakam Annual Report 2010*, 2, <http://www.suhakam.org.my/c/document_library/get_file?p_l_id=24205&folderId=39678&name=DLFE-10502.pdf> (accessed 25 April 2013).

moulding the public opinion in this regard. Professor Datuk Dr Khaw Lake Tee, the vice chairman of SUHAKAM, has personally taken the initiative to lead the movement for the abolition of capital punishment by giving a broad interpretation to Article 5(1) of the Federal Constitution which safeguards the right to life.[113]

The Bar Council Human Rights Committee, Delegation of the EU to Malaysia and SUHAKAM have collaboratively started the Anti-Death Penalty Campaign. As part of the campaign, they organized a public seminar on 'The Abolition of the Death Penalty in Malaysia' in October 2011.[114] In October 2012, SUKAHAM called on the Malaysian government to review the relevance and effectiveness of capital punishment, and to join other UN member states to completely abolish the death penalty.[115] The Minister in the Prime Minister's Department, Datuk Seri Nazri Aziz, recently stated that Malaysia is considering withdrawal of the mandatory death sentence for drug offences and replacing it with jail terms.[116]

Despite efforts on the part of SUHAKAM and others to abolish the death penalty in Malaysia, public support for the mandatory death penalty for murder appears still to be strong, which hinders the abolition efforts.[117]

Sri Lanka

Despite its failure to abolish the death penalty, no executions have taken place in Sri Lanka since 1976. In 2007 and 2008, the Sri Lankan government voted in favour of United Nations Resolutions calling for moratorium on the death penalty.[118] However, in 2012, Sri Lanka abstained in the United Nations General Assembly vote on moratorium on the death penalty.[119] Despite the long *de facto* moratorium, the Sri Lankan government seems to be pushing to reinstate the death penalty, as

[113] See Zoe Daniel, 'Three Sentenced to Death for Heroin Smuggling in Malaysia', *ABC Radio Australia* (26 September 2011), <http://www.radioaustralia.net.au/international/2011-09-26/three-sentenced-to-death-for-heroin-smuggling-in-malaysia/204776> (accessed 28 April 2013).

[114] 'Public Seminar on the Abolition of the Death Penalty in Malaysia', 13 October 2011, <http://www.suhakam.org.my/c/document_library/get_file?p_l_id=35723&folderId=740993&name=DLFE-13209.pdf> (accessed 17 April 2013).

[115] Malaysians Against Death Penalty and Torture, 'The Death Penalty: Why, and How to Abolish it? UN Deputy High Commissioner for Human Rights, Ms Kyung-wha Kang', 25 February 2013, <http://madpet06.blogspot.in/> (accessed 17 April 2013).

[116] Edmund Ngo, 'Death Penalty May Be Scrapped for Drug Offences', *thestaronline* (21 October 2012), <http://thestar.com.my/news/story.asp?file=/2012/10/21/nation/12204175&sec=nation> (accessed 17 April 2013).

[117] Churchill Edward, 'Abolition of Death Penalty in Malaysia?', *Borneo Post Online* (30 October 2011), <http://www.theborneopost.com/2011/10/30/abolition-of-death-penalty-in-malaysia/> (accessed 17 April 2013).

[118] Amnesty International, 'UN General Assembly Resolution 62/149: Country Votes', <http://www.amnesty.org/en/death-penalty/international-law/moratorium/voting-records> (accessed 28 April 2013); Amnesty International, 'Draft Resolution A/C.3/63/L.19/Rev.1 on Moratorium on Executions', ACT 50/020/2008, 20 November 2008, 3, <http://www.amnesty.org/en/library/asset/ACT50/020/2008/en/68c2f332-bfb7-11dd-9f1c-69adff6d2171/act500202008en.pdf> (accessed 28 April 2013).

[119] Amnesty International, 'UN: Support for a Moratorium on the Death Penalty Grows', Press Release, 19 November 2012, <http://www.amnesty.org/en/for-media/press-releases/un-support-moratorium-death-penalty-grows-2012-11-19> (accessed 17 April 2013).

a number of ministers have publicly campaigned for the death penalty in recent times.[120]

The NHRC of Sri Lanka was established in 1996 by an Act of parliament[121] to give effect to the obligations of Sri Lanka as a member of the 'United Nations in protecting human rights, and to perform the duties and obligations imposed on Sri Lanka by various international treaties at international level; as well as to maintain the standards set out under the Paris Principles'.[122]

The Commission has established regional offices and entertains individual complaints. However, it has been alleged that its functions are limited in the light of the presence of an authoritarian regime and the Commission has been called a 'ghost commission'.[123] In fact, in 2007, the ICC of NHRIs downgraded the Sri Lankan Commission to a 'B' status due to, among other reasons, its lack of independence, political impartiality and no regular rapport with civil society.[124] Nevertheless, it is praiseworthy that in 2012 the Commission recommended the abolition of the death penalty in Sri Lanka.[125]

5. Conclusion

Although the above analysis of various NHRIs in the Asia-Pacific region is not exhaustive, this analysis and other available indicators clearly point in one direction: the practices of NHRIs in this region, though promising at times, have been generally marred by restrictive mandates and lack of initiatives in the direction of harmonizing national legislation with international human rights instruments. There is no doubt that it is the prerogative of each state to choose the mechanism for the establishment of an NHRI, but they should not sacrifice the autonomy and ingenuity of NHRIs, especially when the matter of concern pertains to life as well as human rights and fundamental freedoms. Uniform and consistent measures instead of ad-hoc reactions should be evident in the practices of NHRIs. The Paris Principles are nothing more than the lowest common denominator and should not

[120] Sanjaya Jayasekera, 'Sri Lankan Government Moves to Revive the Death Penalty', *World Socialist Web Site* (1 October 2012), <https://www.wsws.org/en/articles/2012/10/sril-o01.html> (accessed 17 April 2013).

[121] Human Rights Commission of Sri Lanka Act No 21 of 1996.

[122] See Human Rights Commission of Sri Lanka, 'About Us', <http://hrcsl.lk/english/?page_id=11> (accessed 10 February 2012). The Commission succeeded two previous bodies which had been established under emergency regulations. These institutions were: the Human Rights Task Force (HRTF), to prevent illegal arrest and detention, and the Commission for Eliminating Discrimination and Monitoring of Human Rights (CEDMHR) to prevent discrimination.

[123] Vanessa Spencer, 'Sri Lanka and Fiji: Ghost Human Rights Commissions', *Sri Lanka Guardian* (New Delhi, 20 September 2011), <http://www.srilankaguardian.org/2011/09/sri-lanka-and-fiji-ghost-human-rights.html> (accessed 10 February 2012).

[124] Message of the High Commissioner for Human Rights, Navi Pillay at the Human Rights Commission Special Session on the Human Rights Situation in Sri Lanka, 26 May 2009, para 14.

[125] 'Human Rights Commission Recommend at UN to Abolish Death Penalty', *Online Uthayan* (2 October 2012), <http://onlineuthayan.com/english-news/uthayannews/y27433l1h1h1r2> (accessed 17 April 2013).

be assumed to be the highest benchmarks for NHRIs. The right to life has suffered the most due to this lacklustre attitude of NHRIs and the continued existence of capital punishment is its glaring result.

Despite recommendations from the ACJ to the APF of NHRIs way back in 2000, there exists a considerable gap between the potential and performance of NHRIs in relation to the abolition of the death penalty. It is also significant to note that all countries have been reviewed under Universal Periodic Review and that one cycle has been successfully completed. The detailed recommendations of the Human Rights Council are available, including specific ones relating to abolition of the death penalty. But it is a matter of grave concern that follow up action on these recommendations has been lacking.

An independent watchdog like an NHRI must truly fulfil its role. NHRIs should identify serious human rights issues, sensitize all stakeholders, and make concrete recommendations for law and policy reform. They can also conduct empirical research on various aspects of the death penalty including testing the validity of 'deterrence', 'public opinion', and other arguments put forth by pro-retentionists. They can also submit shadow reports to United Nations treaty bodies and the Human Rights Council and intervene in important death penalty 'test cases' pursued before the courts. Moreover, NHRIs can conduct inquiries in appropriate cases, document evidence, and publish reports to share findings. In short, NHRIs have a range of tools open to them which should be used effectively and imaginatively to mount advocacy and policy reform in support of the abolition of the death penalty, otherwise they might go down in history as 'pretenders' rather than 'protectors' of human rights.

5

The Role of Abolitionist Nations in Stopping the Use of the Death Penalty in Asia: The Case of Australia

Sam Garkawe

1. Introduction

What role might abolitionist nations play in helping to end the use of the death penalty as the ultimate criminal sanction in retentionist Asian nations? There are some who might argue there is little such nations can do. However, the primary contention of this chapter is that abolitionist nations can and do have an ongoing important role to play in convincing all nations of the world to move away from the use of the death penalty. This contribution will analyse the laws and policies of Australia in relation to the death penalty in order to illustrate the potential role an abolitionist nation may play in stopping capital punishment in Asia.

Abolitionist nations can assist in encouraging Asian retentionist nations to end their use of the death penalty in a number of ways. The most obvious role is that they contribute to the growing numbers of nations moving away from the death penalty, preferably in both practice and law, but at least in practice.[1] The weight of the number of nations no longer having the death penalty surely contributes to the arguments against the death penalty, and this also clearly contributes to the moral arguments against the death penalty. This use of numbers alone in arguments against the death penalty requires no analysis, with a nation such as Australia playing exactly the same role as every other abolitionist nation, such as those found in the European Union (EU).

The second manner by which an abolitionist nation can influence Asian retentionist nations is in examining its internal laws and policies with respect to the death penalty: to what extent is the abolition of the death penalty irreversible and part of a consistent policy? An abolitionist nation cannot have moral authority in Asia if

[1] As at 31 December 2012, 140 nations were abolitionist in law (105) or in practice (35), and 58 retained the death penalty for ordinary crimes. Out of the 140 abolitionist nations, the great majority (97) were abolitionist for all crimes. See Amnesty International, *Death Sentences and Executions in 2012* (Amnesty International 2013), Annex II, 50, AI Index: ACT 50/001/2013.

its internal laws and its international outlook are not consistent with an abolitionist stance. This is directly related to another important role of an abolitionist nation—the stance it takes internationally on the death penalty. The more clear, consistent, and unequivocal this stance is, the more impact it will have on retentionist nations. Part 3 of this chapter will examine Australia's internal laws and policies and its related stance internationally on the death penalty in order to ascertain the extent to which Australia is consistently and unequivocally an abolitionist nation.

The third manner by which an abolitionist nation can influence Asian retentionist nations is in their *formal* laws and policies in relation to cooperation with Asian retentionist nations in criminal matters. There are two areas where an abolitionist nation's formal laws and policies may have a direct influence on retentionist nations. One is the question of whether extradition laws of an abolition nation allow it to extradite someone to a retentionist nation who might face the death penalty in that nation. If the answer is clearly 'no', this means that retentionist nations will find it very difficult to extradite defendants from these nations, contributing to what William Schabas refers to as the 'indirect abolition' of the death penalty.[2] The other area of an abolitionist nation's formal laws and policies that have a direct influence on retentionist nations are those governing mutual assistance in criminal matters. If the abolitionist nation's laws do not generally allow it to accede to such requests from a country that is liable to impose the death penalty if a person is convicted on the basis of the assistance given, it will be harder for retentionist nations to achieve convictions in death penalty cases. Both these issues will be discussed in Part 4 of this chapter.

The fourth and final way in which an abolitionist nation can influence Asian retentionist nations is through its *informal* laws and policies in relation to cooperation with Asian nations in criminal matters. Without the need for any formal request, it is possible for Asian criminal justice and security agencies to ask for assistance from their counterparts around the world in relation to existing or potential future criminal matters. Will agencies in abolitionist nations be restrained in their cooperation with an Asian agency in a retentionist nation where the death penalty may be the ultimate result of this cooperation? This is a far more difficult area to navigate. Generally, such informal requests for help or information are made at a much earlier stage of investigations than formal requests, and thus it may be very difficult to predict whether the requested assistance will have any bearing ultimately on whether or not the death penalty is imposed. There is also the issue of whether some sort of promise that the result will *not* be the death penalty can actually be given by the agency concerned in the retentionist nation.[3] Furthermore, the

[2] William Schabas, 'Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice' (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 581.

[3] For example, Italy sent back to India two Italian marines for trial only after getting assurance from the Indian government that they will not face the death penalty. 'India Fashions Great Escape for "Killer" Italian Marines, Says No to Death Sentence', *Indian Express* (22 March 2013), <http://expressindia.indianexpress.com/latest-news/India-fashions-great-escape-for-killer-Italian-marines-says-no-to-death-sentence/1091862/> (accessed 8 April 2013).

need to maintain cooperation between criminal justice and security agencies amongst nations may be an important and legitimate policy objective.

The case of the 'Bali Nine', discussed in Part 5, has highlighted some criticisms from human rights advocates in respect of Australian laws on this issue.[4] An analysis of whether Australian law is appropriate and consistent with Australia's opposition to the death penalty, given the other possible considerations that need to be taken into account in such circumstances, will be undertaken in this part.

2. Australia's Relationship with Asia

It is argued that because of Australia's physical proximity with Asia, it can play an influential role in relation to the abolition of the death penalty in Asia over and above that played by other abolitionist nations, such as those of the EU. Australia sits on the fringes of Asia, and although it shares a British heritage (and thus a similar common law legal system) with some Asian nations such as Singapore, Malaysia, India, and Sri Lanka, its overall relationship with Asia has been fraught with ambiguities and difficulties. Many Asian nations are deeply suspicious of Australia, given its history and continued close ties with Britain, its close defence relationship with the United States, its status as a relatively rich and developed nation, and it generally being seen as part of the Western world. Furthermore, Australia at times has been seen to be insensitive to Asian ideas, culture, and methods of government. A good example of such suspicion is the comment of Indonesia's Attorney-General, Abdul Rahman Saleh, who personally acted as the government's lawyer in Indonesia's Constitutional Court during a 2007 hearing on a constitutional challenge by the lawyers for the 'Bali Nine' to the legislation that imposes the death penalty on certain drug-trafficking crimes. In refusing to cross-examine Professor Philip Alston, a prominent human rights academic who gave expert evidence at the hearing, Saleh stated that: 'people come from rich countries and know nothing about our situation'.[5]

Despite a number of Asian nations harbouring these types of suspicions concerning Australia, it is submitted that Australia's close proximity in an ever increasingly globalized world means that it does have an influence on Asian nations. Links between Australia and Asia are increasing.[6] There is clearly greater trade between the

[4] According to Civil Liberties Australia: 'All Australian civil liberties and human rights groups have been campaigning for… [police] instructions' that would prevent exchanges of information between police of another country where this would expose an Australian citizen to the death penalty. Civil Liberties Australia, 'CLA's proposals adopted by Parliamentary Joint Committee: No More "Bali 9" Cases', Report by CLA President, Dr Kristine Klugman, <http://www.cla.asn.au/0805/index.php/subs/2008/no-more-bali-9-cases-and-extraditions-to?zoom_highlight=death+penalty> (accessed 20 September 2011).

[5] See Mark Forbes, 'Executions Break Treaty, Court Told', *Sydney Morning Herald* (19 April 2007) 7.

[6] In its November 2009 submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade's *Inquiry into Australia's Trade and Investment Relations with Asia, the Pacific and the Americas*, the Department of Foreign Affairs and Trade described Australia's trade and investment relationship as 'massive and fast growing with North and Southeast Asia'. See Submission 40, p 2,

two continents and the amount of natural resources China continues to buy from Australia is considered by many to be the main reason why Australia has been able to escape the worst effects of recent global financial problems. Most importantly, however, are the increasing number of people that travel between Australia and Asia for various purposes such as trade, tourism, immigration, education, and even sport. In short, this proximity has a direct bearing on issues connected with the death penalty in Asia as Australians accused of committing a capital offence (such as drug-trafficking) whilst in Asia will be exposed to the possibility of being sentenced to death.

Asian governments are likely to request information and intelligence sharing from Australia where they are investigating a person under suspicion in such circumstances, and this then raises the issue of whether Australia will accede to such a formal request under mutual assistance in criminal matters legislation. If an Australian accused of or committing a crime that carries the death penalty has been able to travel back to Australia, then Australian extradition law will be relevant to whether Australia will be prepared to extradite that person to the relevant Asian nation. A similar question arises if an Asian national accused of such a crime happens to be found in Australia. These issues will be discussed at greater length in Parts 4 and 5 of this chapter.

3. Australian Internal Laws and Policies and its International Stance on the Death Penalty

This part will briefly examine the state of the law and policy in Australia with respect to the death penalty. Its purpose is to analyse not only the extent to which Australia has in fact become an abolitionist nation, but also the degree to which it has become an international advocate for abolitionism. During the initial years of colonization of Australia, the Australian criminal justice system to a large extent replicated the British criminal justice system.[7] Under this system, capital punishment was prescribed for a wide variety of crimes.[8] There was also a perception held by the government authorities that capital punishment was needed to maintain law and order in a penal colony[9] and that it was a handy weapon to use against the Aboriginal people who were seen as a threat to the colony.[10] In conformity with changes to the British criminal justice system, over time the range of crimes which could attract the death penalty was reduced. Despite this, it took nearly 200 years of European settlement to totally abolish the death penalty in Australia. With nine criminal jurisdictions in Australia and no coordinated federal approach to

<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/apla/subs.htm> (accessed 13 February 2012).

[7] See Alex Castles, *An Australian Legal History* (Sydney, Law Book Co 1982) 55.

[8] At the beginning of the nineteenth century, there were over 200 crimes in England for which an offender could be sentenced to death. See Castles (n 7) 56.

[9] See L Whitefeld, *Founders of the Law in Australia* (Sydney, Butterworths 1971) 6.

[10] See Susanne Davies, 'Aborigines, Murder and the Criminal Law in Early Port Phillip' (1987) 22 *Historical Studies* 313.

the issue, this turned out to be a slow process. The state of Queensland was the first jurisdiction to abolish the death penalty in 1922.[11] It was finally removed from the statute books in Australia in 1985, with New South Wales (NSW) being the last jurisdiction to do so.[12] In practice, there was also a significant gap between total abolition and actual utilization of the death penalty. For example, no one had been executed in NSW since 1939 and the last person put to death by any government in Australia was Ronald Ryan in Victoria in 1967.

Despite these laws and practices, until recently there was still nothing preventing a particular state in Australia, or one of the two main self-governing Territories (the Australian Capital Territory and the Northern Territory), from re-instating the death penalty should one of these governments choose to do so. In practical reality, this is highly unlikely though, as incidents such as the Port Arthur massacre, the Bali bombings, or the 'war on terror' has not led to any serious discussion in Australia of the reinstatement of the death penalty,[13] and with the passage of time this is becoming an even more unlikely possibility. In order to fully entrench the abolition of the death penalty in Australian law, a constitutional referendum would be required. However, as this is not a significant issue any more in Australian politics and given the difficulty of making changes to the constitution[14] and the cost of doing so, it is submitted that it is both unrealistic and unnecessary for Australia to take such a step.[15] In my opinion, Australia will almost certainly be an abolitionist nation forever.

[11] Criminal Code Amendment Act 1922 (Queensland).

[12] Criminal Code Act 1968 (Tasmania); Death Penalty Abolition Act 1973 (Commonwealth); Criminal Law Consolidation Ordinance 1973 (Northern Territory); Crimes (Capital Offences) Act 1975 (Victoria); Statutes Amendment (Capital Punishment Abolition) Act 1976 (South Australia); Crimes (Amendment) Ordinance 1983 (Australian Capital Territory); and Acts Amendment (Abolition of Capital Punishment) Act 1984 (Western Australia).While it had been abolished for all crimes except for treason and piracy by the Crimes (Amendment) Act 1955 (NSW), it was finally abolished for treason and piracy by the Crimes (Death Penalty Abolition) Amendment Act 1985 (NSW) and the Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985 (NSW).

[13] Although note that Greg Carne is of the opinion that recent threats of terrorist crimes has led to some being more 'open' to a reintroduction of the death penalty: '…law and order debates demand increasingly draconian legislative responses and penalties…particularly so after…September 11 2001. Terrorist crimes have been a modern animator of populist debate about reintroduction of the death penalty'. Greg Carne, 'Abolitionist or Relativist? Australia's Legislative and International Responses to its International Human Rights Death Penalty Abolition Obligations' (2011) 15 *University of Western Sydney Law Review* 31, 46.

[14] Since 1901, out of 44 proposals for constitutional change, only eight have succeeded. See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* 5th edn (Sydney, Federation Press 2010) 1340.

[15] It is true that there has been at times very occasional discussion by some conservative politicians in various jurisdictions of the desirability of a referendum on the death penalty. However, even this possibility has now been prevented with the enactment by the Federal government in 2010 of the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act (Commonwealth) (Abolition Act). The Abolition Act would make any purported enactment of the death penalty by a state government invalid (the imposition of the death penalty by the Federal and Territory governments was already outlawed by the Death Penalty Abolition Act 1973 (Commonwealth)) as such legislation would be directly inconsistent with the Abolition Act, thus rendering it void due to the supremacy clause of the Australian Constitution (section 109). For an analysis of the Abolition Act, see Carne (n 13). Despite this, however, it must be stated that as the Abolition Act is not entrenched in any way (ie it is not part of the Constitution), it is theoretically possible (but highly unlikely) for a future Federal government to repeal it, thus leaving it open for the Federal government, or any State or Territory government to reinstate the death penalty.

Australia's international stance also indicates that it has been an advocate for abolition. The most important evidence of this is the ratification in October 1990 of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR),[16] aiming at the abolition of the death penalty. Australia ratified this Protocol unconditionally, thus promising that it would not under any circumstances reinstate the death penalty, even in times of war for the 'most serious crime of a military nature'.[17] Furthermore, Australia has consistently voted in favour of General Assembly resolutions that call for a moratorium on the use of the death penalty, including the most recent 2012 General Assembly Resolution.[18]

In cases where the death penalty is imposed upon an Australian national, the general policy of the Australian government seems to be to wait until all legal appeal avenues have been exhausted and then seek clemency. In the small number of cases where this policy has not been successful, the Federal government has protested against the imposition of the death penalty. One area where some outside governments and human rights advocates have criticized Australia's stance on the death penalty is where it has not protested about the execution in an Asian nation of a non-Australian citizen.[19] The best example of this is the execution of three of the 'Bali bombers'. During the 2007 election campaign, both the then Prime Minister and Leader of the Opposition stated they would not diplomatically intervene in the execution process, and in fact the Australian government said very little when these executions were carried out. The former Foreign Affairs Minister, Stephen Smith, clarified Australia's position as follows: 'When it comes to non-Australian citizens, we make a judgment on a case by case basis as to whether Australia will make representations on their behalf'.[20] This is quite clearly a contentious issue, with some commentators arguing that Australia's failure to protest in many such situations undermines its opposition to the death penalty and that this policy is

[16] International Covenant on Civil and Political Rights (ICCPR) (1976) 999 UNTS 171; Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty, GA Res 44/128.

[17] See Article 2(1) of the Second Optional Protocol to the ICCPR which allows such a derogation to be made, but only at the time of ratification.

[18] Resolution 67/176 adopted on 21 December 2012. See also GA Res 62/149 adopted on 18 December 2007 and GA Res 63/168 adopted on 18 December 2008. One other step Australia could take is to invoke Article 41 of the ICCPR and make an interstate complaint against an Asian nation that purports to carry out the death penalty. Of course, due to reciprocity requirements, this can only be done where the relevant Asian nation has likewise made a Declaration under Article 41. However, this international mechanism has *never* been used in the history of the United Nations (probably due to diplomatic sensibilities). Since only a few retentionist states have made such an Article 41 Declaration, it would be extraordinary for Australia to invoke this mechanism. See Carne (n 13) 59. It would also be very unlikely for another possibility Carne mentions to eventuate (a state bringing an action against Australia in the International Court of Justice).

[19] For example, see Ben Saul, 'The Rudd Government's Human Rights Record: One Year On', address to NSW Young Lawyers on 29 October 2008, Sydney Centre for International Law, 3–4. See also Carne (n 13) 51–3.

[20] Stephen Smith, Minister for Foreign Affairs and Trade, 'Joint Media Conference with Indonesian Foreign Minister Wirajuda' (Jakarta, 11 August 2008), <http://foreignminister.gov.au/transcripts/2008/080811_pc.html> (accessed 27 February 2013). The Minister gave an example of an Iranian child who was to be executed as a situation when Australia would protest the execution of a non-Australian.

even racist when the decision to protest or not appears to depend on the nationality of the prisoner.[21]

While this argument has some validity, there are several countervailing factors to consider. First, given that thousands of executions are carried out each year in China,[22] it would be impractical to protest against every threatened known execution, or even actual execution. Conversely, if Australia does not protest every single known case and limits its protests, for example, to those involving Australian offenders or victims, it would then be accused of inconsistency and/or discrimination. Secondly, given the sometimes negative perceptions of Australia in Asia, the government will not wish to be seen as overly judgmental about the legal and penal systems of Asian nations. This is particularly the case in situations where the relevant Asian nation has not violated any of the international restrictions on and safeguards protecting the rights of those facing the death penalty.[23] Thirdly, it is doubtful whether such protests would have much impact; in fact, they may even be counter-productive. Fourthly, as suggested in the conclusion of this chapter, there might be better ways for a nation such as Australia to make the case for abolitionism in Asia, primarily by the use of 'quiet' diplomacy and cooperation.

4. Australian *Formal* Laws and Policies in Relation to Cooperation with Asian Retentionist Nations in Criminal Matters

This part will examine two aspects of Australia's *formal* laws and policies in relation to cooperation in criminal matters that have an impact on death penalty issues. The first is Australia's extradition laws. There is clearly a growing international consensus amongst abolitionist nations that 'extradition treaties . . . require requesting states to give assurances that they will not impose the death penalty'.[24] Under section 22(3)(c) of the Extradition Act 1988 (Commonwealth), the Attorney-General may authorize the extradition of a person to a foreign country to face trial for an offence punishable by death only if that country has provided an undertaking that the person will not be tried for that offence, or that the death penalty will not be imposed, or that the death penalty (even if imposed) will not be carried out.

[21] See Carne (n 13) 52–3.

[22] The 2012 figures for the Asia-Pacific can be found in Amnesty International (n 1) 18–26. Although this reports that there were 'at least' 679 known new death sentences and 38 executions in this region, China is suspected of imposing thousands of death sentences and several thousand executions.

[23] Article 6 of the ICCPR does not outlaw the death penalty but only restricts it in various ways, as do the Safeguards Guaranteeing the Protection of the Rights of those facing the Death Penalty, first adopted by the United Nations in 1984.

[24] Schabas (n 2) 583. See eg 'Australia's Extradition Laws Stopping Death Penalty', *ABC News* (29 June 2010), <http://www.abc.net.au/news/2010-06-29/australias-extradition-laws-stopping-death-penalty/886762> (accessed 30 December 2011): 'Alabama's attorney-general has blamed Australia's extradition laws for his inability to seek the death penalty for a man jailed in Queensland over his wife's death'.

This legal position is strengthened by specific extradition agreements Australia has entered into with other nations such as Indonesia.[25]

The only real issue here is whether the Extradition Act needs to be amended to provide for a higher standard as to the strength and nature of the required undertaking. For example, the Law Council of Australia, in a submission to the Federal parliament relating to the proposed Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011, mooted the proposal that: '. . . only formal undertakings, which are provided by an official appropriately authorised to offer a guarantee that the death penalty will not be imposed, should be regarded as sufficient to bring a request within this exception'.[26] The Council, along with others,[27] also suggested that whether these undertakings have in fact been complied with by receiving states should be monitored.[28] While I am not opposed to such improvements to the present legislation, the fact is that, to the writer's knowledge, such an undertaking has never been breached in a death penalty case. Thus, the present legislation does seem to be sufficient to ensure that nobody who is extradited from Australia is subjected to the death penalty.

Apart from extradition law, the second area where an abolitionist nation's formal laws can help to reduce executions in other jurisdictions is mutual assistance in criminal matters laws. When a formal request is received by an abolitionist nation for assistance in a criminal matter under consideration by a retentionist nation, if it were made clear that such request would not be granted unless there was an undertaking that the death penalty would not be imposed if a conviction for a capital offence were to be the outcome, this would serve to undermine the retentionist nation's use of the death penalty. It would strengthen Schabas's contention that 'capital punishment is incompatible with effective international cooperation in criminal law matters'.[29]

While there is room for improvement in Australian law in this area (as pointed out below), it is submitted that the current law reasonably conforms to the above understanding of what mutual assistance legislation should contain, and thus does contribute to the undermining of the death penalty internationally. Australian law distinguishes between requests for assistance when someone has already been arrested, detained, charged, or convicted of a criminal offence that might result in the death penalty being imposed, and all other situations. In relation to the former situation, section 8(1A) of the Mutual Assistance in Criminal Matters Act 1987 (Commonwealth) (Mutual Assistance Act) states that 'such a request *must* be refused . . . unless the Attorney-General is of the opinion, having regard

[25] See section 7 of the Extradition Treaty between Australia and the Republic of Indonesia.

[26] Law Council of Australia, Submission No 2 on the proposed Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 to the House Standing Committee on Social Policy and Legal Affairs (1 August 2011) 15, para 69.

[27] For example, see Submission to the Extradition Review by Monash University's Castan Centre for Human Rights Law, <http://www.law.monash.edu.au/castancentre/publications/submissions.html> (accessed 29 December 2011) under the heading: 'Refugees, Asylum Seekers and "Illegal" Immigrants'.

[28] Law Council of Australia, Submission No 2 (n 26) 16, para 72.

[29] Schabas (n 2) 582.

to the special circumstances of the case, that such assistance requested should be granted'.[30]

This provision has already been significantly improved by the 2012 amendment extending its application even to situations where a person has been arrested or detained,[31] unlike the position under the unamended legislation where a person should have already been charged with, or convicted of, such an offence. The old legal position was particularly problematic as it is common in many Asian criminal justice systems for there to be a lengthy period of time between arrest/detention and a suspect being charged. The Federal government's recent amendment to extend this back to the period from when a suspect has been arrested or otherwise detained is thus particularly welcome. One continuing concern is that despite its apparent mandatory language, section 8(1A) still allows the Attorney-General to exercise discretion. However, the nature of the assistance may be the handing over of evidence that will help to exculpate the suspect, or the requesting state has already provided an assurance that the death penalty will not be sought or carried out. In these circumstances it would be advantageous to be able to exercise the discretion provided in the statutory provision. In fact, these are precisely the situations where the Attorney-General has exercised her discretion to provide the assistance requested, and this has been acknowledged by the government.[32]

Section 8(1B) of the Mutual Assistance Act, which covers all other situations that are not covered in section 8(1A), provides far more leeway to the Attorney-General. Under this provision, the Attorney-General *may* refuse a request for assistance if he or she 'believes that the provision of the assistance may result in the death penalty being imposed on the person', and 'after taking into consideration the interests of international criminal cooperation, is of the opinion that in the circumstances of the case the request should not be granted'. It should be noted that while the discretion here is far broader than that found in section 8(1A), the provision still makes it clear that the possible imposition of the death penalty is a major factor to be considered by the Attorney-General. It certainly cannot be seen as a *carte blanche* to provide assistance in all situations. It must also be acknowledged that often cooperation on criminal matters is a very important policy consideration and thus particularly at the early stage of the criminal process, it may be appropriate for discretion to be granted to the government.

Furthermore, the recent amendments to section 8(1A), extending that provision to situations where a suspect has been arrested or detained, and not just charged, will considerably limit the use of section 8(1B). Despite this, I do agree with the position advocated by some organizations that it would be better for the approach of section 8(1A) to apply in *all* circumstances of formal requests for assistance by

[30] Emphasis added.

[31] See Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012 (Commonwealth) (No 7, 2012).

[32] See Australian Government Attorney-General's Department, 'How does Mutual Assistance Work in Death Penalty Matters?', <http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~Fact+Sheet+3+-+How+does+mutual+assistance+work+in+.pdf/$file/Fact+Sheet+3+-+How+does+mutual+assistance+work+in+.pdf> (accessed 29 December 2011).

retentionist nations.[33] While the legislation could be improved in the manner suggested, it still makes it reasonably clear that formal requests for assistance by retentionist nations should generally not be granted in cases where the death penalty could be imposed. As stated above, this then does contribute to the international community's push to limit, and preferably abolish, the death penalty by making it harder for retentionist nations to obtain international assistance required from abolitionist nations such as Australia in cases where the death penalty might be imposed.

5. *Informal* Australian Policies: Australian-Asian Agency to Agency Cooperation when the Asian Agency is Located in a State that Maintains the Death Penalty

This part examines Australian law in relation to *informal* cooperation between criminal justice agencies in Australia and those in Asia in the investigation of potential criminal offences. These agencies are primarily the police, particularly in cases of drug-trafficking, but could also be various arms of the security service, especially in cases involving anti-terrorism intelligence sharing. It is here that human rights advocates and others argue that Australian law is not strong enough to prevent accused persons in retentionist nations from being subject to the death penalty where their arrest and conviction can be attributable to Australian-Asian agency cooperation. This, it is argued, undermines Australia's commitment to oppose the death penalty.

While some other examples are available and could have been chosen,[34] this chapter will now analyse the circumstances of the 'Bali Nine' which have highlighted this very issue and proven to be very controversial. The facts of the 'Bali Nine' were as follows:[35] the Australian Federal Police (AFP) had informed the Indonesian National Police (INP) that there was a plan by a number of Australian nationals to smuggle heroin into Australia. This information led to the INP arresting five Australians at Bali international airport on their way to Sydney on 17 April 2005. Four out of these five arrested people were found with heroin in their possession. The one not found with heroin was the alleged ringleader of the group. A further four Australian nationals were then arrested at their hotel in Bali on the same day in connection with this plot and heroin was found in a suitcase in their room.[36] Each of the 'Bali Nine' was charged

[33] For example, see Law Council of Australia, Submission No 2 (n 26) 19–20, para 90.

[34] See Connie Lovett, 'AFP Assists in Capital Cases', *Sydney Morning Herald* (13 October 2008) 2. The most prominent of the other cases was that of Van Nguyen, an Australian who was hanged in Singapore on 2 December 2005 for a drug-trafficking offence. See Mirko Bagaric, 'Lessons to be Learned from the Execution of Van Nguyen' (2005) 1 *International Journal of Punishment and Sentencing* 111.

[35] See Lorraine Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia' (2011) 33 *Sydney Law Review* 95.

[36] It was suggested that the AFP should have waited to arrest the 'Bali Nine' until after they entered Australia, and thus they would have been tried under the Australian criminal justice system where there is no possibility of the death penalty being imposed. However, there were clear practical problems with this suggestion: it assumes that the four suspects arrested in their hotel room in Bali would in fact have travelled to Australia (they may have been 'tipped off' by the arrest of the others), and even

with trafficking heroin, an offence that carries a potential death sentence in Indonesia. The various criminal trials saw all of the nine being convicted, and the various appeals and legal proceedings regarding their sentences have resulted in three of the offenders being sentenced to death by a firing squad, five to life imprisonment, and one to 20 years' imprisonment.[37] Whereas Scott Rush's death sentence was reduced on appeal to life imprisonment,[38] the other two Australians sentenced to death, Andrew Chan and Myuran Sukumaran, are now reliant on a resort to Presidential Clemency as their legal avenues of appeal have been exhausted.[39]

This case—which was not an isolated instance of the AFP helping an overseas police force in a potential death penalty case[40]—sparked considerable controversy in Australia, as some people argued that the AFP, by 'tipping off' the INP in this case, directly led to the possibility of these Australians being subjected to the death penalty and that because of this Australia's opposition to the death penalty has been severely undermined. A number of commentators such as Professor Simon Bronnitt,[41] Rohn Safaris,[42] and Greg Carne[43] have taken the view that agency-to-agency cooperation where a retentionist nation is involved should be curtailed where investigations could possibly ultimately lead to the death penalty being imposed. The Law Council of Australia has argued that 'Australia's leadership and credibility in this area has been undermined in recent years by an inconsistent and equivocal approach to the provision of agency to agency assistance in death penalty cases'.[44]

However, there are some strong contrary arguments that should be considered. In asserting that 'Australia's current approach strikes an appropriate and practical balance between competing public policy interests, namely Australia's opposition to the death penalty and broader law enforcement objectives',[45] Lorraine Finlay makes some very cogent practical and political arguments against curtailing

more importantly, there may not have been sufficient evidence for a conviction against the ringleader who did not personally carry any heroin.

[37] See Finlay (n 35) 96–8.

[38] This was a decision of the Indonesian Supreme Court on 10 May 2011. See Peter Alford, 'Scott Rush Spared Death for a Life in Bali Jail', *The Australian* (12 May 2011), <http://www.theaustralian.com.au/news/features/scott-rush-spared-death-for-a-life-in-bali-jail/story-e6frg6z6-1226054237002> (accessed 24 April 2013).

[39] See 'Bali Nine Ringleader Andrew Chan Loses Final Appeal', *The Australian* (17 June 2011), <http://www.theaustralian.com.au/news/world/bali-nine-ringleader-andrew-chan-loses-final-appeal/story-e6frg6so-1226077276750> (accessed 24 April 2013) and 'Bali Nine Ringleader Myuran Sukumaran "Calm" After Death Appeal Loss', *The Australian* (7 July 2011), available at <http://www.theaustralian.com.au/news/nation/bali-nine-ringleader-myuran-sukumaran-loses-his-appeal-against-the-death-sentence/story-e6frg6nf-1226089906318> (accessed 24 April 2013).

[40] See Lovett (n 34).

[41] Simon Bronitt, 'Directing Traffic and the Death Penalty: Policing the Borders of Drug Law Enforcement' (2006) 30 *Criminal Law Journal* 270.

[42] Ronh Sifins, 'Balancing Abolitionism and Cooperation on the World's Scale: The Case of the Bali Nine' (2007) 35 *Federal Law Review* 81.

[43] See Carne (n 13).

[44] Law Council of Australia Letter dated 29 January 2010 to Federal Attorney General and to Minister for Home Affairs: 'AFP Practical Guide on International Police to Police Assistance in Potential Death Penalty Situations', 2.

[45] Finlay (n 35) 96.

international police cooperation in such circumstances. First, a police agency is simply not in a position to provide, early on in an investigation, an assurance that their investigation will not result in the death penalty being imposed. Police agencies often do not have this power, which is often reserved for prosecutors once charges are laid and/or for the sentencing authority during criminal proceedings. One may also question whether it is really necessary to ask for an assurance from an agency at such an early stage of investigations when it is far from certain that any one or more persons will be investigated, let alone arrested, tried, convicted, and sentenced to death. In short, one simply cannot know at such an early stage whether the information provided by the Australian agency involved will actually be the cause of this final result.

Secondly, to either not cooperate with agencies based in retentionist nations or to impose a condition of cooperation that they provide an assurance that the death penalty will not ultimately be imposed would have a chilling effect on international cooperation between Australia and all retentionist Asian nations with respect to many transnational crimes, including anti-terrorism, drug-trafficking, people-trafficking, and very serious commercial crimes.[46] This would ultimately result in at least some of these crimes going unpunished, when cooperation would have led to a different result.

Thirdly, from a broader political perspective, this is also likely to result in cooperation generally between Australia and Asia being downgraded, which will be especially problematic given the types of problems already referred to in Part 2 of this chapter with respect to relations between Australia and Asia.

It is difficult to reconcile the view taken by those commentators who argue that Australia should adopt a consistent approach to opposing the death penalty and thus curtail cooperation with Asian agencies in situations that might eventually lead to the imposition of the death penalty, with the view of those who take a more 'practical' approach and contend that opposition to the death penalty needs to be balanced with the benefits of agency-to-agency international cooperation for the suppression of transnational crimes and law enforcement generally. This debate has some echoes of the long debate in human rights circles between 'idealists' or 'isolationists' who oppose any interaction with repressive regimes[47] and those who believe in 'constructive engagement' with such repressive regimes.[48] In death penalty situations, those who adopt an 'idealist' approach place opposition to the death penalty by abolitionist nations as the highest value in such cases. On the

[46] In China, for example, death is the maximum penalty for certain serious commercial crimes.

[47] This debate was played out many times in relation to how nations should deal with the former State Law and Order Restoration Council (SLORC) of the then Burmese regime. Isolationists argued that 'with a policy of engagement, change is not guaranteed and engagement without political reform will entrench the regime in power'. Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *A Report on Human Rights and the Lack of Progress Towards Democracy in Burma (Myanmar)* (1995) 106, para 6.97.

[48] This was the view often taken by ASEAN: '…engagement through trade and the delivery of aid will bring about structural political change. This is premised on the belief that you have to live with what you cannot change and that economic growth has an automatic liberalising effect'. *A Report on Human Rights and the Lack of Progress Towards Democracy in Burma (Myanmar)* (n 47), 106, para 6.96.

other hand, the 'constructive engagement' advocates would argue that the preservation of cooperation between agencies and others in abolitionist and retentionist states may have a positive effect in convincing retentionist states to abolish the death penalty.

With the criticisms of the role of the AFP in the 'Bali Nine' case in mind, new AFP guidelines were released in December 2009 that govern the conduct of the AFP when it receives a request from an international law enforcement agency in a potential death penalty case.[49] These guidelines require the AFP to consider a list of factors when considering whether it is able to provide assistance in any possible death penalty case.[50] Ministerial approval of assistance is required in cases where the person has been arrested, detained, charged, or convicted of an offence that carries the death penalty.[51] The factors include the purpose of providing the information; the reliability of the information; whether the information is exculpatory in nature; the seriousness of the suspected criminal activity; the potential risks to the person, and other persons, in not providing the information; the degree of risk to the person in providing the information, including the likelihood that the death penalty will be imposed; and Australia's interest in promoting and securing cooperation from overseas agencies in combating crime.[52]

The list of factors indicates that Australia has not adopted the 'idealist' stance, but rather favours the more 'practical' discretionary approach, including consideration of 'Australia's interest in promoting and securing cooperation from overseas agencies in combating crime'. Not surprisingly, writers such as Carne argue that these guidelines: 'remain sufficiently adaptable and porous as to continue to undermine Australia's international abolitionist position'.[53] The important point to note here is that even if an abolitionist government wishes to maintain its discretion to cooperate with criminal justice agencies in retentionist nations, there is important advocacy space for opponents of the death penalty to ensure that any such guidelines are as tight and transparent as possible.[54]

[49] See AFP Media Release dated 18 December 2009, <http://www.afp.gov.au/media-centre/news/afp/2009/december/new-afp-guidelines-released> (accessed 28 February 2013).

[50] See 'AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations', Part 7, <http://www.afp.gov.au/about-the-afp/~/media/afp/pdf/ips-foi-documents/ips/publication-list/NAT12011%20International%20Police-to-police%20Assistance%20in%20Death%20Penalty%20Situations%2014MAY2012.ashx> (accessed 15 April 2013). Note that this Part states that formal approval is only needed when 'there is a reasonable likelihood that the assistance will result in a person being arrested, detained, charged or convicted for a death penalty offence'.

[51] 'AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations' (n 50), Part 7. Note that either the Attorney General or the Minister for Home Affairs and Justice may give this approval.

[52] 'AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations' (n 50), Part 8 under 'Approval process'.

[53] See Carne (n 13) 64. See also the criticisms by the Law Council of Australia, Submission No 2 (n 26) 65, with which Carne expressly agrees.

[54] For example, Carne rightly suggests the guidelines would be better placed in legislation in order to improve accountability. See Carne (n 13) 65.

6. Conclusion

The death penalty is unfortunately utilized all too often on the Asian continent. Long-standing abolitionist countries such as Australia do have a positive role to play in moving retentionist Asian nations towards the eventual abolition to the death penalty. This chapter has shown that there are still debates concerning laws and policies that even long-standing abolitionist nations need to consider in terms of whether they are fully consistent with their abolitionist stance. For example, one area where Australia's commitment to abolition has been called into question is when its government has not protested against death sentences imposed on non-Australians, particularly in cases where Australians have been the victims (such as those of the 'Bali bombers'). However, some cogent arguments against this position were raised in Part 3 of this chapter.

Part 4 of this chapter also indicated that Australian law requires assurances from retentionist states concerning the death penalty in most situations where a *formal* request for either extradition or mutual legal assistance has been submitted to Australian authorities. This brings home to executing countries the negative impact of retaining the death penalty, and thereby assists in what Schabas calls 'indirect abolition' of the death penalty.[55] While in general the law in Australia does discourage the use of the death penalty by retentionist Asian nations, it was noted that some improvements to the law in this area were still needed, again indicating that there is work to be done by abolitionists even in nations such as Australia.

Finally, Part 5 of this chapter examined the law in relation to more *informal* and early-stage requests for inter-agency cooperation between Australia and retentionist states in cases where ultimately the death penalty could be imposed. In particular, it discussed the case of the 'Bali Nine'. It is in relation to this case possibly the greatest criticisms of Australia's position have been made, and the 2009 AFT guidelines, while an improvement on previous policies, have not done enough to stem these criticisms. Whether one takes the 'idealist' position or the more 'practical' position, it is submitted that 'quiet' cooperation and diplomacy is the best and most effective way forward. Keeping up cooperation and the lines of communication between Australian and Asian agencies may prove to be far more effective in the long term and would help ensure that Australia's abolitionist values and legal system are seen as positive examples to retentionist Asian nations. One prominent human rights academic has stated that: 'There is much scope for Australian governments to play a quiet and constructive diplomatic role in encouraging more countries in our region to abolish the death penalty, without preaching'.[56] Getting this balance right is not easy in practice.

Whether opposition to the death penalty should always trump other important policy goals of a nation, such as the need for cooperation with neighbours in

[55] See Schabas (n 2). [56] Saul (n 19) 4.

an ever increasing globalized world, is a matter for debate. Nevertheless, what is important is that human rights advocates in an abolitionist nation should ensure that their nation's internal laws banning the death penalty are unequivocal, that its international stance is resolutely opposed to the death penalty and in favour of its abolition in all countries of the world, and that both its formal and informal laws governing cooperation in criminal matters are as consistent as possible with opposition to the death penalty.

PART II

THE PROGRESS SO FAR

6

Recent Reforms and Prospects in China

Liu Renwen

1. Introduction

The death penalty in China has attracted international attention because of the large but still secret number of executions that take place annually and the wide variety of crimes that remain subject to capital punishment. This chapter reviews the reforms that have been made in the death penalty system in China since the amendment of the Criminal Law of the People's Republic of China (Criminal Law) in 1997. It introduces the general principle to be followed in judicial practice of 'killing less and cautious executions', and analyses two major changes that have resulted from the adoption of this policy. First, on 1 January 2007, the Supreme People's Court (SPC) of the People's Republic of China (PRC) took back from the Provincial High Courts (to which it had been devolved for most types of crime during the 1980s) the power of reviewing and approving, or not approving, death sentences with immediate execution imposed by the People's Intermediate Courts and upheld by the Provincial High Courts. As will be explained below, this was intended to strictly limit the use of the death penalty by the Chinese lower courts. Secondly, on 25 February 2011, the Chinese legislature adopted 'Amendment VIII to the Criminal Law' which abolished the death penalty for 13 non-violent crimes.[1] This was the first time that China had reduced the number of statutory death penalty offences and therefore was of great significance as an indicator of further possible reductions in the number of capital offences. It is fair to say that China has made significant progress in a short period. This chapter will review this

[1] The 13 types of offences include the crimes of smuggling cultural relics, crimes of smuggling precious metals, crimes of smuggling precious wildlife or the product thereof, crimes of smuggling common goods and articles, crimes of conducting swindling activities by means of financial bills, crimes of conducting swindling activities by means of financial receipts, crimes of conducting swindling activities by means of credit cards, crimes of filing falsely made out value-added tax invoices or other kinds of invoices used for obtaining fraudulently tax refunds on exported items or tax deduction, crimes of counterfeiting or selling counterfeited special invoices for value-added tax, crimes of stealing, crimes of passing on means of crime, crimes of excavating and robbing a site of ancient culture or ancient tomb, crimes of excavating and robbing fossils of ancient human beings or ancient vertebrate animals.

recent progress and analyse the methods of reducing and restricting the application of the death penalty in judicial practice and through legislative efforts. In addition, it also puts forward some suggestions for further reforms of the death penalty system in China.

2. Cautious Application of the Death Penalty by the Courts

When China promulgated its amended Criminal Law in 1997, academic researchers generally argued that there were too many types of offences that were still subject to capital punishment, and therefore called for the number to be reduced. Although agreeing that such a viewpoint was worthy of their attention, the Chinese legislature insisted that 'the severe current situation of social safety and economic crimes implies that conditions for the abolition of capital punishment are absent'.[2] Therefore, it made a decision 'neither to increase nor to reduce the death penalty in principle'. Directed by this decision, the new Criminal Law absorbed all existing capital offences laid down in separate criminal laws: the total number amounted to 68. However, the new Criminal Law did make some progress in restricting the application of the death penalty. For example, the maximum sentence that could be applied to a juvenile who had committed a capital offence when under the age of 18 was reduced from the death penalty with a two-year suspension to life imprisonment,[3] and the death penalty for theft was limited to two types of dishonest crimes: stealing from banking institutions when the amount involved was especially huge, and stealing precious cultural relics when the circumstances were serious. That is to say, the Criminal Law (1997) abolished the death penalty for ordinary theft, even though it was quite prevalent at that time.

In 1998, the Chinese government signed the International Covenant on Civil and Political Rights (ICCPR),[4] Article 6(2) of which clearly stipulates that, 'in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes'. According to the interpretation of the United Nations Human Rights bodies, the 'most serious crimes' here should be strictly limited, and the death penalty should be a very exceptional punishment. Now that China is preparing for the ratification of the ICCPR, it needs to meet the requirement to further limit the scope of the death penalty through legislative and judicial channels.[5]

[2] 'Introduction to "Draft Amendment to Criminal Law"', made at the annual session of the National People's Congress NPC by Wang Hanbin, the then Vice-Chairman of Standing Committee of the NPC.

[3] According to the Criminal Law, the death penalty with two years suspension is a kind of death sentence. If no further intentional crimes are committed during the suspension period, the sentence in principle will be commuted to life imprisonment.

[4] International Covenant on Civil and Political Rights, GA Res 2200A (XXI), UN DocA/6316 (1966) 999 UNTS 171, adopted on 16 December 1966 and entered into force on 23 March 1976.

[5] At first, the attitude of Chinese researchers towards provisions on the death penalty in the ICCPR was not completely positive. For example, most researchers thought that it would satisfy ICCPR's requirement by changing the formula in the Criminal Law adopted in 1979 ('the death penalty shall

The trend to strictly restrict the use of capital punishment was clearly evident when on 1 January 2007 the SPC, with the support of the central government, withdrew from the Higher People's Courts (HPC) in the Provinces the power of reviewing and approving, or disapproving, capital sentences.[6] The Criminal Law adopted in 1979 had clearly provided that the SPC shall exercise this power, but since the 1980s in response to the perceived severity of crime in China, the SPC had delegated its authority for most types of crime[7] to the HPCs so that cases could be concluded more speedily.[8] This caused a significantly negative impact on the quality of decisions in capital cases in the Intermediate People's Courts (which have power to impose death sentence at the trial of first instance), and in the HPCs (in which appeals are dealt with at the trial of second instance). After advocacy over a considerable period from the academic community, which called for restriction of the use of the death penalty and uniform application of sentences in capital cases, the SPC eventually withdrew the power to approve capital sentences from the HPCs in early January 2007, and accordingly set up three new criminal divisions to exercise the power of review.[9]

When making preparations for withdrawing the power of approving death sentences, the SPC issued the 'Notification on Further Regulation of the Second Trial of Death Penalty' in December 2005, which ordered HPCs to open all court hearings to the public from 1 January 2006 in cases where appeals had been filed which raised important issues of fact and evidence. Six months later it went further and required that all appeals should be heard in public from 1 July 2006 in order to improve the quality of second instance hearings and the decisions made and thereby laid down a good foundation for the SPC to conduct unified review and approval of decisions in capital cases.[10]

The return of the power to review and approve or reject capital sentences to the SPC, directly or indirectly, led to a decline in the number of persons

only be applied to criminals who have committed a heinous crime with the worst evil mind') to 'the death penalty shall be only applied to criminals who have committed extremely serious crimes' when the new Criminal Law was introduced in 1997. When looking back now, I cannot agree that the idea is scientific. The fact that there were 68 capital offences, including a large number of non-violent ones, shows clearly the big gap between Chinese Criminal Law and the requirement of the ICCPR.

[6] In order to withdraw the power to review and approve death sentences, the SPC recruited hundreds of new judges, and thereby made the SPC the largest Supreme Court in the world.

[7] It is worth noting that the Supreme People's Court only decentralized some of the review and approval power of death penalty to the Provincial High Courts, such as the cases of murder, rape, robbery, explosion and other types of crimes seriously endangering the public security and social order, but not such crimes as embezzlement and bribery. According to the information released by the Supreme People's Court in 1997, the percentage of death penalty cases reviewed and approved by the Provincial High Courts occupied 63.2 per cent of the total death penalty cases. See also Liu Renwen, *Structure and Vision of the Criminal Law (Xingfa De Jiegou Yu Shiye)* (Beijing, Peking University Press 2010) 196–8.

[8] According to the Criminal Procedure Law of the People's Republic of China, the jurisdiction of death penalty cases at first instance is the Intermediate People's Court or above.

[9] Liao Weihua, 'The Supreme People's Court Will Take Back the Power of Reviewing and Approving Cases of Death Penalty and Set up Three Special Tribunals', 7 September 2005, <http://legal.people.com.cn/GB/42735/3673797.html> (accessed 27 January 2013).

[10] Until then, the appeal at the trial of second instance was mainly based on written documents.

executed. In 2008, Xiao Yang, the then president of the SPC, in his report to the annual session of the National People's Congress (NPC), disclosed to representatives that the number of death sentences with a two-year suspension now exceeded for the first time in China the number sentenced to be executed immediately. Furthermore, the number of executions had decreased. Meanwhile, the number of serious reported crimes, such as causing an explosion, homicide, and arson was even lower in 2007 than the year before. Besides, when interpreting the SPC's annual report, Ni Shouming, the then spokesman of the SPC, pointed out that the quality of decisions made at first and second instance trials had also been improved. Even so, the proportion of cases where the SPC disapproved capital sentences in 2007 was still about 15 per cent, due to facts in the original trials being unclear, evidence insufficient, the punishment excessive, or specific proceedings illegal. In fact, the decline in the overall use of the death penalty was far more than 15 per cent. The message conveyed by the SPC to courts at all levels was that the death penalty shall be strictly restricted, and should not be used at the trial of first or second instances if at all possible. In the past, some judges said that the first choice of penalty would be death when serious crimes had been committed, but now they would first consider whether or not there were mitigating factors to avoid the imposition of the death penalty. In addition, information released from the procuratorial organ showed that the number of protests from that body requesting immediate execution has been clearly lower in recent years. This is in sharp contrast with the past when the prosecutorate often protested if it thought that a death sentence with two years' suspension was too lenient punishment. All these changes have been due in large part to the cooperation of the prosecution service and the government in implementing the criminal policy of reducing the application of death penalty. It is estimated that the number of executions have been reduced by at least a half, even two-thirds, since the withdrawal of the approval power from the Provincial High Courts and its return to the SPC.[11]

Judicial control on the use of the death penalty is still in progress, including further improvement in the transparency and fairness of reviewing procedures and in regulating the examination and determination of the evidence relating to the criteria to be satisfied before a death sentence can be imposed. For example, in June 2010 the SPC, the Supreme People's Procuratorate (SPP), and other Ministries jointly issued the Regulations on Review and Judgment of Evidence of Death Penalty Cases and Regulations on Elimination of Illegal Evidence in Criminal Cases, and thereby established higher standards for judicial organs in handling criminal cases and especially death penalty cases, because improper practices in collecting evidence, examining, judging, and excluding illegal evidence were still to be found. In addition, regulations have also been handed down on issues such as how defence lawyers and prosecutors should intervene in cases during the approval

[11] Secrecy about the execution toll in China has been strongly criticized by scholars, including Chinese researchers. See Chen Guangzhong, 'Discussing the Pros and Cons of Releasing Capital Punishment Figures', *Southern Weekend*, 16 December 2009.

process for capital sentences in order to guarantee fairness and prevent corruption in the process of handling cases.[12]

3. Reducing Use of the Death Penalty Through Legislation

It is a qualitative jump from strict restriction on the use of the death penalty in practice to decreasing the number of capital offences in law. The 'Amendment VIII to the Criminal Law (Eighth Amendment)', adopted in early 2011, abolished cautiously the death penalty for 13 types of non-violent crimes, including four types of crimes of smuggling, five types of financial crimes, and two types of crimes against control of cultural relics, in addition to theft and the crime of imparting criminal methods. Furthermore, a new provision was added, stating that 'the Death Penalty shall not be applied to a person who has reached the age of 75 at the time of trial, except cases where death consequence is caused by especially cruel means'.[13]

The reasons why the Chinese legislature made substantial progress in abolishing the death penalty might be summarized as follows:

The first reason, in the background, is that abolition of the death penalty has become an international trend. As Roger Hood has put it:[14]

> At the end of 1988, only 52 (29%) of the then 180 member states of the United Nations had abolished the death penalty for murder and other common crimes, but only 35 of them—less than one fifth of all nations—had eliminated capital punishment altogether from their penal and military codes. But since then [by the end of 2011] the number of abolitionist nations has doubled to 104 of the 196 UN member states and the vast majority, 96 of them, have abolished it for all crimes in all circumstances . . . Among the 92 countries that retain the death penalty in law only 43 have executed *anyone* within the past 10 years and not yet announced a moratorium—less than a quarter of all nations and Amnesty International regards 34 of the remaining 49 as truly 'abolitionist in practice': the other 15 although not having executed anyone for at least 10 years might still be liable to do so. Thus 70 per cent (138/196) of states no longer inflict or intend to inflict the ultimate penalty.

For example, Russia, which retains the death penalty in law, has not executed anyone since 1966 and in November 2009 its Constitutional Court effectively abolished the death penalty by declaring that the moratorium on executions will

[12] The SPP set up an internal working office responsible for reviewing the death sentences in 2007, and now the office has been officially approved. It is expected that more prosecutors will be recruited in the office in order to regulate review and approval of death sentences. Many scholars, including the author, advocate that review of death sentences should be converted from a kind of inside examination to a public hearing with lawyers and prosecutors present.

[13] In the past, there were no such 'preferential' measures for older offenders.

[14] Roger Hood, 'Towards Global Abolition of the Death Penalty: Progress and Prospects', speech delivered at the Jindal Global Law School, Delhi 14 November 2011 (unpublished manuscript). See also Roger Hood, 'Towards Global Abolition of the Death Penalty: Progress and Prospects', in Luis Arroyo, Paloma Bigling, and William A Schabas (eds), *Towards Universal Abolition of the Death Penalty* (Valencia, Tirant lo Blanch 2010) 419–41.

continue until the Russian Parliament ratifies an international treaty abolishing capital punishment.[15]

In those countries without executions or even with few executions, there is no evidence to show that the situation of public safety deteriorated or there was a necessary correlation between abolition of the death penalty and an increase or decrease in the crime rate. This has been acknowledged by more and more state leaders and citizens. Such information has had a marked impact on thinking in China.

The second reason lies in the economic development and enriched experience in the area of economic management and regulation. Economic development will naturally promote the respect for human life. When material conditions are no longer impoverished, human life will be treated as invaluable and matchless. What is more important is that China has established and improved administrative supervision measures in the economic sphere, which were absent at the beginning of 'Reforming and Opening to the World' (Chinese economic reform) in the early 1980s, and these measures are key to the prevention of economic crimes and more effective than retrospective punishment. In fact, the majority of the 13 types of capital offences which were abolished recently had been gradually added to the Criminal Law in the 1980s as a harsh response to the rapid increase in economic crimes due to inefficiency of the old management system and incompleteness of new systems during the period of economic development. At present, effective regulation in these fields and the gradual quenching of the people's great outcry against economic crimes has correspondingly contributed to creating a favourable atmosphere for reducing the scope of the death penalty. According to a survey conducted by the legislative body, the death penalty had seldom or never been applied to these 13 types of crimes in recent years. Therefore, the abolition of the death penalty for these crimes has not only done no harm to society, but also generated no opposition from the public in China.

Thirdly, China's empirical experiences at the legislative and judicial levels have provided support for further reduction of executions. When China abolished the death penalty for ordinary theft in 1997, the public were concerned that ordinary theft, an offence closely related to the masses, would increase in China. However, in recent decades there has been no increase in the occurrence of recorded thefts. This fact shows that crimes and the death penalty are not simply correlated as often imagined due to the complex factors that contribute to the crime rate. In the four years that have passed since the withdrawal of approval power of death sentences from the Provincial High Courts and the resulting considerable decrease in the number of executions, crime rates of some offences have decreased due to improvements in social management. This firmly proves that the state can reduce capital offences with strong confidence that by improving management, social stability can be maintained.

[15] Haley Wojdowski, 'Russia Constitutional Court Extends Moratorium on Death Penalty', *Jurist*, 19 November 2009, <http://jurist.org/paperchase/2009/11/russia-constitutional-court-extends.php> (accessed 27 January 2013).

Fourthly, the state has relieved anxiety among the masses by adjusting the punishment structure. There was a fear that if some serious violent criminals were not sentenced to death, they might take advantage of the loopholes in the law which would enable them to be released and threaten society again. Keeping this concern in mind and in order to create conditions for reduction in the use of the death penalty, Amendment VIII to the Criminal Law, responding to the criminal policy of combining severity with lenience, adjusted the system of long-term imprisonment. For instance, it imposed strict limits on mitigating the term of imprisonment of those not sentenced to death and extended the proportion of the sentence they would actually serve.[16] For example, it provided that, for a recidivist or a person convicted of murder, rape, robbery, abduction, arson, explosion, dissemination of hazardous substances or organized violence who is sentenced to death with a reprieve, the people's court may, in sentencing, decide to put restrictions on the commutation of his sentence in light of the circumstances of the crime committed.

Fifthly, public opinion has been appropriately guided in China. China has already written into the Constitution the line that 'the State has respect for and protects human rights'.[17] The principle of 'people-oriented' being actively advocated in criminal legislation and criminal justice has undoubtedly played an active role in constructing a tolerant and humane social psychology. Under the circumstance of incomplete abolition of the death penalty, reforms of the capital punishment system such as use of lethal injection, the gradual removal of shooting as the execution method, and allowing death sentenced criminals to meet their relatives before the execution, have also helped to reinforce the social psychology of respect for life. In addition, detailed reports and analysis in the mass-media with regard to unjust, false, or wrong charges in the cases of She Xianglin,[18] Zhao Zuohai,[19] and Nie Shubin[20] have robustly confirmed the public understanding of, and support for, the series of measures intended to ensure cautious and less use of the death penalty.

Finally, public concerns have been fully taken into account in deciding what types of capital offences should be the first ones to be abolished. Although there were 13 types of capital offences abolished at one time, there are still 55 capital crimes in the Criminal Law of China. Obviously, this is contrary to Article 6(2) of the ICCPR that 'in countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes…'.

[16] According to Amendment VIII, if a convict has any major meritorious performance, the sentence shall be commuted to imprisonment of 25 years. In contrast, the original article provided that the sentence shall be commuted to imprisonment of more than 15 years but less than 20 years.

[17] Article 33(3) of the Constitution of the People's Republic of China (2004).

[18] For the detailed story, see Liu Li, 'Wrongly Jailed Man Freed after 11 Years', *China Daily*, 14 April 2005, <http://www.chinadaily.com.cn/english/doc/2005-04/14/content_434020.htm> (accessed 30 December 2011).

[19] For the detailed story, see Clifford Coonan, 'Zhao Zuohai: Beaten, Framed and Jailed for a Murder that Never Happened', *The Independent*, 14 May 2010, <http://www. independent.co.uk/news/world/asia/zhao-zuohai-beaten-framed-and-jailed-for-a-murder-that-never-happened-1973042.html> (accessed 23 June 2013).

[20] For the detailed story, see Amnesty International, 'Nie Shubin: Wrongly Executed', 23 March 2008, <http://www.amnesty.org.au/china/comments/11243/> (accessed 30 December 2011).

4. Further Reduced Use of the Death Penalty

China is planning to ratify the ICCPR that it signed in 1998 and this will no doubt be an issue that is discussed when it is required (like all UN member states) to undergo a Periodic Review by the UN Human Rights Council. Judging from the precious work of the Human Rights Council, the fact that 55 offences are still punishable by capital punishment is certainly unacceptable and it is difficult for China to provide a convincing justification. More than half of the 55 offences are non-violent crimes. For instance, corruption and bribery which attract strong public resentment at present and are considered to endanger the foundation of the ruling party have not been put on the abolition agenda in China, despite the fact that they are non-violent in nature and scholars have been insisting that such crimes should also be on the abolition list because there is international consensus that such offences are not to be regarded as among 'the most serious crimes'. The 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty' adopted in 1984 by the United Nations Economic and Social Council laid down that 'their scope should not go beyond intentional crimes with lethal or other extremely grave consequences'.[21] Although 'intentional crimes with other extremely grave consequences' might leave some space for justification in a broader sense, the Secretary-General of the United Nations in his 2010 Report concerning 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty' further pointed out that intentional crimes with lethal or other extremely grave consequences should be those endangering life, that is, that privation of life is very likely to happen.[22] Furthermore, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Professor Philip Alston, called in 2007 for revision of Safeguard 1 so that it would read: 'The death penalty can only be imposed where it can be shown that there was an intention to kill which resulted in the loss of life.'[23]

Therefore, China should continue to make efforts to reduce the scope of the death penalty at the legislative level and this will require the government to create conditions capable of decreasing the occurrence of several types of capital offences. In order to abolish the death penalty for such crimes as corruption and bribery, it is crucial to promote system construction such as strengthening the supervision of news media on public power and introducing a law on property declaration of public officers. Only

[21] United Nations Economic and Social Council, 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', ESC Res 1984/50, UN Doc E/1984/84, adopted on 25 May 1984, Safeguard 1.

[22] United Nations Economic and Social Council, 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', UN Doc E/2010/10, Substantive Session of 2010, New York, 28 June to 23 July 2010, adopted on 18 December 2009, para 63.

[23] Human Rights Council, 'Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Philip Alston', UN Doc A/HRC/4/20, Fifth Session, adopted 29 January 2007, para 65. And in general on the interpretation of the concept of 'most serious crimes', see Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* 4th edn (Oxford, Oxford University Press 2008) 130–2.

when a type of crime rarely happens and its harm to the state and society is not so widespread will the public outcry decrease. Under such circumstances, abolition of the death penalty would probably not confront strong public opposition.[24] In this sense, it requires effort beyond the criminal law to address the death penalty issue in corruption and bribery cases.

In the immediate future, as long as the domestic and international situations stay stable, China will continue to move in the direction of limiting and decreasing the use of the death penalty. As for the death penalty for non-violent crimes, economic crimes such as 'fund-raising scams' can be removed from the death list in the first place, followed by such crimes as corruption and bribery. It would be realistic to put crimes such as 'serious premeditated murder' at the end of the abolition agenda due to the deeply-rooted ideology of 'compensating a life with a life' in Chinese culture.

5. Specific Systems for Reforming the Death Penalty

Prosecutorial supervision in reviewing capital sentences

According to the Chinese Constitution, the prosecutorial organ in China is not only a public prosecution organization but also a supervisory one for law enforcement.[25] Therefore, after the SPC took back the power of reviewing and approving capital sentences in 2007, the SPP set up a special office responsible for supervising cases where the death sentence has been either upheld or not upheld by the SPC. Then, how can the review of capital sentences be supervised in practice? The following are some preliminary suggestions.

First, the major purpose of returning the power of reviewing and approving, or disapproving, capital sentences to the SPC was to implement the policy of killing less and cautiously. Therefore, the legal supervision of the review of death penalty by the prosecutorial organ should contribute to achieving this goal. In cases where a defendant who should not have been sentenced to death was sentenced to death or his death sentence had been approved after appeal to an HPC, the prosecutorial organ should submit a legal supervision advice or file an appeal to the HPC

[24] Although whether to abolish the death penalty is more a matter of principle than one of public opinion, no politician will ignore public opinion when making a decision. According to the *Fight for the Abolition of the Death Penalty* by Robert Badinter, as early as in President D'Estaing's presidency, the President himself had agreed that the death penalty should be abolished. However, he never publicly expressed his support for abolition due to the fact that the majority of voters in France were then against it. When Mitterrand was elected President, although supporters of the death penalty still accounted for more than a half, the support rate had dropped. It is under such a condition that it was possible for him to successfully facilitate the abolition of the death penalty in France according to his belief. It should also be noted that when capital punishment for murder was abolished in Britain in 1965, a large majority of the public were in favour of retaining it. See Hood and Hoyle (n 23) 352–3.

[25] Articles 129 and 131 of the Constitution of the People's Republic of China (2004).

or SPC in a timely manner, so as to facilitate the SPC to revoke an inappropriate death sentence.

Secondly, as the supervisor in the review procedure, the SPP bears the responsibility of safeguarding justice and the common interest of society. Where judges disapprove death sentences in cases of taking bribes, abusing the law for private interest, or failing to handle the cases strictly in accordance with legal requirements, or the disapproval is not based on legal facts and objective circumstances or is obviously unfair, the SPP should protest against court decisions, and place judges involved on file for investigation and prosecution, so as to guarantee fairness in reviewing death sentences.

Thirdly, while reviewing death sentences, whether or not the hearing is open, the SPC should not only listen to the views of the defendant and his or her attorney, but also to those of the prosecutorial organ. This is necessary to ensure that the final decision is based on all related facts and prevent it from being partial. The best choice might be to make the procedure of reviewing the death sentence a trial procedure of third instance, or at least as a public hearing with three parties being present. It would be best if this could be put into the draft amendment of the Criminal Procedure Law.

Making the method of execution uniform

Safeguard 9 of the 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty' states that 'where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering'.[26] In the recent past, shooting was the only means of execution in China.[27] The Criminal Procedure Law amended in 1996 added lethal injection as an execution means based on such considerations as injection could reduce suffering and preserve the corpse better than shooting and avoid cruel scenes. Since the first injection execution was carried out in Kunming, the capital city of Yunnan Province, in 1997, it has now become a common method in some provinces. This reflects a humanistic advancement in the means of execution in China. However, shooting was still retained, especially in rural areas as it takes time to develop drugs, build execution sites, and train personnel.

After a ten-year trial period, I think it is time to completely replace shooting with lethal injection. Currently the reasons why some persons are executed by

[26] United Nations Economic and Social Council, 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', Safeguard 9.

[27] Execution methods in history might generally be divided into two categories, one intended to deprive persons of life, and the other to cause great sufferings while depriving persons of life. In China, the latter category included cutting in bits (*lingchi*), decapitation (*xiaoshou*), posthumous execution (*lushi*), etc. When Shen Jiaben (1840–1913) was in charge of amending laws in the late Qing dynasty, he firmly insisted that execution means should be uniform and the above means intended to causing pain to those to be executed should be abolished, and his advice was approved by the Qing government. Needless to say, the current means of execution in China should not be compared with those in feudalism in terms of cruelty. However, Shen Jiaben's proposal for a uniform method of execution is still a valuable reference point for contemporary China.

lethal injection and others by shooting is poorly understood by the general public. They ask why so many corrupt officials have been executed by injection, and this has harmed people's faith that all citizens are equal before the law. Some courts determine execution means according to public anxiety about a case. This is also not in accord with the original intention of legislation to make the execution means more humane. Shooting should be just a transitional measure until the conditions for completely adopting injection are mature. Even if current conditions make it impossible to completely abolish the death penalty in China, it does not mean that China should choose an execution method that may cause unnecessary pain to those put to death.

This problem should be resolved strategically by the state. Furthermore, judicial policemen and full-time forensic doctors responsible for carrying out injection execution should be allocated uniformly throughout the national court system and receive the necessary training. I suggest that the SPC issue documents specifying the practical requirements and medical procedures to be followed in carrying out lethal injections as soon as possible, so as to ensure that this more humane method of execution can be used in every case. Meanwhile, it is necessary to monitor all lethal injections so as to ensure that the kind of mistakes that have led to 'ugly performance' and probably great suffering by some offenders executed by lethal injection in the United States do not occur in China.

Separating the decision makers

To separate the organization responsible for ordering and carrying out the execution from the one responsible for making the decision to sentence the person to death is of great significance in the current context of strictly controlling the death penalty. In fact, the decision to sentence to death and the decision to enforce the punishment are inherently different, as the former should belong to the judicial authority while the latter belongs to an administrative body. Thus, fixed-term imprisonment and life imprisonment sentences imposed by the judicial organ are carried out specifically by the executive organ—the prison administration—after the judgments are pronounced. However, as regards the death penalty, the Chinese have been used to the system under which the death penalty is both pronounced and executed by order of the court itself. According to Articles 210–213 of the Criminal Procedure Law, when the death penalty with immediate execution is pronounced or approved by the SPC, the President of the court shall issue an order for the execution to take place. After receiving this order from the SPC to execute a death sentence, the People's Court at the lower level shall cause the person to be executed within seven days.

Such practice is significantly different from that in other countries that retain the death penalty where a death sentence is declared by a court but would not be carried out until the Minister of Justice signs and issues an execution order. This is the reason that we often read reports showing how many people have been sentenced to death and how many people were actually executed in a country, and the number of the latter is far less than that of the former.

For example, although the death penalty has not been abolished in Japan, the fact that there have been often only one or two executions in a year has made the most serious penalty almost a symbolic punishment there. An important reason is that the authority to approve execution in Japan belongs to the Minister of Justice. Now, there are about 130 inmates who were sentenced to death but have still not been executed. There are a number of reasons for this that can be summarized as follows.

First, according to the Japanese law, any convict sentenced to death is entitled to use remedial measures such as filing an appeal and a special appeal and applying for a pardon. Once he/she appeals, the Minister of Justice must postpone signing the execution order. Moreover, the Minister of Justice will not sign the order until the internal review procedure has reached the conclusion that the death sentence is appropriate after a special panel has examined all aspects of the case and a superior panel has re-examined it and submitted its decision to the Minister. Furthermore, in cases of joint crime or where a defendant was involved in other cases, the Minister of Justice should not sign the execution order before other defendants have been tried and their conviction and sentence declared. The decision to issue an execution warrant is entirely at the discretion of the Minister as advised, and several have refused to sign them because of their Buddhist beliefs.[28]

In particular, according to Article 475 of the Criminal Procedure Law of Japan, the Minister of Justice should sign the execution order within six months after the court hands out a valid judgment of the death penalty. However, along with the increased attention to human rights protection, the provision only exists in name now because it is impossible to complete the review procedure for signing the execution order in such a short time. Therefore, in a well-known case in 1998, when the condemned brought a lawsuit against the government claiming that he was not executed in six months, the court gave a subjective explanation that the death penalty shall be executed in six months when possible, but because it had been proved to be impossible, it dismissed the prisoner's appeal.

It is therefore very likely that if China were to give to a body other than the SPC the power to make the order to issue and carry out the execution, the number of persons executed might be further decreased by allowing more time for appeals for clemency or commutation of the sentence to be considered.

Establishing a special amnesty and clemency system

Article 6(4) of the ICCPR provides that 'anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases'. Considering that China will not abolish the death penalty in the immediate future, a special

[28] Megumi Satoh, the Minister of Justice in Kaibe's cabinet from 1990 to 1996, and Sugiura Seiken, the Minister of Justice in Junichiro Komizu's cabinet from 2005 to 2006, both of them Buddhists, never signed an execution order. On Japan's practices, see Ch 9.

amnesty/clemency procedure should be provided for capital cases in order to meet the human rights standards in the ICCPR.[29]

To add a procedure for special amnesty or clemency is also the requirement of perfecting the present death penalty system. As mentioned above, Article 211 of the Criminal Procedure Law of China provides that after receiving an order from the SPC to execute a death sentence, the People's Court responsible for execution at a lower level shall cause the sentence to be executed within seven days. However, the Court at a lower level shall suspend execution and immediately submit a report to the SPC for an order under one of the following conditions:[30]

(1) if it is discovered before the execution of the sentence that the judgment may contain an error;

(2) if, before the execution of the sentence, the criminal exposes major criminal facts or renders other significantly meritorious service, thus the sentence may need to be revised; or

(3) if the criminal is pregnant.

The SPC pointed out in the 'Reply on How to Apply Law in Cases Where Conditions Make it Necessary to Change the Original Sentence before Execution' issued in 1999 that, as far as cases mentioned in Article 211 are concerned, the court granted the power of reviewing and approving death sentences (now of course the SPC) shall either change the original sentence or order courts at the lower level to conduct a retrial. However, Articles 204 and 205 of Criminal Procedure Law provide that a case shall not be retried unless some definite error has been found in a legally effective judgment or order of the trial court as to the determination of facts or application of law. The reason for changing the original sentence under the second condition in Article 211 may not be an error in a legally effective judgment as to the determination of facts or application of law. The reason for changing the original sentence under the third condition in Article 211 may also not be an error in a legally effective judgment, because the criminal might not get pregnant 'during the trial', but after trial or even after the original verdict became effective.[31] The policy of mitigating the punishment in cases where females under a death sentence get pregnant after trial is based on the humane consideration that another innocent life shall never be subject to the same punishment, and is also prohibited by Article 6(5) of the ICCPR, which provides that sentence of death shall not be

[29] It might be said that application for pardon or commutation of punishment has become an internationally recognized right. For example, Safeguard 7 of the *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty* and Article 6(4) of the ICCPR provide that anyone sentenced to death shall have the right to seek pardon, or commutation of sentence, and Art 4 of American Convention on Human Rights also provides that every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence.

[30] Article 211 of the Criminal Procedure Law of China.

[31] It might be argued that it is impossible for a criminal to get pregnant after trial or her sentence becoming valid as she would be in custody. However, it has been proven it is not totally impossible. For example, according to a report in *Jiangnan Times* published on 15 July 2000, a female death sentenced inmate got pregnant after being raped by the head of detention house and other policemen. And her death sentence accordingly was commuted to life imprisonment.

carried out on pregnant women. Therefore, I agree with the proposal that a new procedure for special amnesty be constructed for the two conditions—(2) and (3)—mentioned above.[32]

It might be argued that the special review procedure provided by the SPC in capital cases but not to other criminal cases, has shown that it can function also as an amnesty or clemency tribunal. But I cannot agree with this opinion for a number of reasons. In the first place, the review procedure in capital cases is judicial in nature, and the special amnesty procedure is independent of the judicial organ. A death sentence is not valid before completion of the review procedure, while the special amnesty or clemency procedure will not be initiated until a death sentence becomes valid. Moreover, the review procedure cannot fully replace the function of the special amnesty or clemency procedure. For example, a criminal who begins to suffer from a mental or incurable disease after being sentenced to death might deserve to be pardoned even though it may be hard to find legal grounds to exempt him/her from the death sentence in the review procedure. Furthermore, it is not redundant to add a new special amnesty procedure on top of the trial procedure of first and second instance and the review procedure. Many lessons have proved that even in a three-tier system, miscarriages of justice still cannot be fully prevented in capital cases. Even in countries such as the United States where the capital procedure seems desperately long, news has still constantly burst out in recent years that innocent people have been convicted, and many have come close to execution.[33]

The following questions should be borne in mind in designing the special amnesty or clemency procedure.

(1) It has been suggested that the SPC should be the agency,[34] but this opinion is debatable. Since the SPC has been given the authority to review and approve the death sentences, to give it also the power to grant special amnesty or clemency would mean that the decisions that should be separate would be exercised by the same organ. This may result in an uneasy mechanism and a negative effect. For example, if the SPC first approves a death sentence and then grants a special pardon or clemency, even if the decisions were made by different divisions within the institution, the SPC's authority would be surely doubted by the public. As far as special amnesty or clemency in individual cases are concerned, I suggest that the President of the State be authorized to decide and issue a special amnesty order directly, and as for the multiple cases, I suggest that the Standing Committee of the NPC make the decision and the President of PRC issue the order. In addition, China should also consider establishing a special Pardons or Clemency Board to advise the President or the Standing Committee on whether or not to grant

[32] See Zhu Huaijun, 'On Construction of Amnesty System in Capital Case' (2004) 5 *Journal of Hunan Normal University (Social Sciences)* 86–90.

[33] It is impossible to know for sure, but there may also have been executions of innocent persons in the United States since 1977, information of which is available at <http://www.deathpenaltyinfo.org/> (accessed 30 December 2011).

[34] See Huaijun (n 32).

clemency or a pardon, as is the case in many other jurisdictions that retain capital punishment.[35]

(2) As for the content of special amnesty, in cases of persons under immediate sentence of death, it might be better that their application is confined to mitigation of punishment rather than being filed for total pardon and resumption of rights. It would be psychologically difficult for the public to accept total exemption of death sentenced inmates from punishment. And because the precondition for resumption of rights is that a sentence has been served or pardoned, it is absolutely unnecessary in capital cases. Moreover, mitigation of punishment should also be limited. It would be proper to mitigate a death sentence to one with two years' suspension, because decisions made at previous trials of first and second instances and the review procedure would suggest that special amnesty should not present too much lenience.

(3) As regards to whom a special amnesty could be granted, in my opinion it should be at least applicable to four categories of persons. (a) Death sentenced inmates with circumstances provided for in Article 211 of the Criminal Procedure Law, such as before the execution of the sentence a criminal exposes major criminal facts or renders other significantly meritorious service, or is pregnant after trial. (b) Those whose cases involve diplomatic considerations: for example, Akmal Shaikh, a drug importer from Britain, who was sentenced to death and executed in China in 2009. His execution led to an 'earthquake' not only in the UK but also in the EU, since the EU countries including the UK have abolished the death penalty. However, given Chinese sentencing policy and practice with regard to cases involving the importation of a large amount of illicit drugs, no grounds were found to exempt him from the death penalty with immediate execution. If the special amnesty system had already been in place, he could have been sentenced to death and then granted a special pardon. (c) Those who suffer from insanity, mental illness, or incurable diseases after being sentence to death.[36] (d) Those who are senior citizens or have just reached the age of 18,[37] the mentally disordered,[38] and new mothers. If such persons are sentenced to death, they should be considered for clemency and if granted a period of imprisonment should be substituted for execution.

[35] On this see Hood and Hoyle (n 23) 257–64.

[36] In most countries (eg the United States), such people cannot be executed anyway.

[37] Amendment VIII to the Criminal Law added that the death penalty shall not be applied in principle to persons that have reached the age of 75 at the time of trial. This is undoubtedly a great progress. However, it leaves an exception, that is, 'except in cases that death consequences are caused by exceptionally cruel means'. Moreover, the age of 75 years old is still too high. Therefore, special amnesty is still necessary in elderly defendants' cases.

[38] The Federal Supreme Court of the United States ruled that to execute the mentally retarded constitutes 'cruel and unusual punishment' in Art 8 of the Constitution of the United States, and thus prohibits execution of the mentally retarded. See Liu Renwen, 'Enlightenment of Non-execution of the Mentally Retarded', *Procuratorial Daily*, 17 January 2004. See also United Nations Economic and Social Council, 'Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty', ECOSOC Res 1989/64 (4), adopted 24 May 1989.

As for a time limit on waiting for execution, according to the Criminal Procedure Law, once a death sentence is approved, the execution must be carried out within seven days in China. This has been criticized in academic circles. The establishment of a special amnesty system will also make it necessary to extend this time limit. Otherwise, the death penalty would have to be carried out even before the procedure of special amnesty is initiated.

6. Conclusion

From the discussion above, it is obvious that China has made great progress in the reform of its death penalty system when seen in the Chinese context. First, the judiciary holds a cautious attitude towards the death penalty at the criminal trial. Secondly, 13 types of capital offences were removed through legislation in 2011. Despite these advancements, it is necessary for China to further reduce the number of offences subject to the death penalty, starting with abolition for non-violence crimes before proceeding in stages to notorious violent crimes. When carrying out further reform of the death penalty, China needs to pay attention to the improvement of several concrete systems, such as procuratorial supervision in the review and approval procedure in death penalty cases, unification of the means of execution, separation of the organ responsible for execution from the sentencing body, and establishment of a special amnesty procedure for those under a sentence of death. In the long run, China is likely to abolish the death penalty system as this is a developmental trend in the international community. But right now, it will be more practical for China to reduce and restrict the use of the death penalty and the number of people actually executed.

7

Abolition of the Death Penalty in India: Legal, Constitutional, and Human Rights Dimensions

Amit Bindal and *C Raj Kumar*

> In criminology as in economics there is scarcely a more powerful word than 'capital'. In the former discipline it denotes death; in the latter it has designated the 'substance' or the 'stock' of life; apparently opposite meanings.
>
> Peter Linebaugh[1]

1. Introduction

The argument for the abolition of the death penalty has been advanced in different legal and philosophical frameworks. This chapter analyses the debate within the Indian legal system from the lenses of constitutional law and human rights jurisprudence.[2] As we move into the second decade of the twenty-first century, it is useful to revisit the developments, both legislative and judicial, that took place in post-independent India against the infliction of the death penalty.

One of the important reasons for the retention of the death penalty in India and abroad is its supposed unique deterrent effect on potential offenders.[3] However,

[1] Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* 2nd edn (London, Verso Books 2006) xvii. This historical text of Linebaugh explores how capital punishment in eighteenth-century England was employed as a stratagem to punish the unwanted labour during the rise of industrial revolution. The purpose to begin this chapter with these strong words is to underscore the importance of tracing the historical developments (the legal ones in our case) to fully understand the debate.

[2] For a general and admirable analysis of constitutional issues surrounding the death penalty, see Margaret Jane Redin, 'The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause' (1978) 126 *Pennsylvania Law Review* 989–1064.

[3] See Daniel S Nagin and John V Pepper (eds), *Deterrence and the Death Penalty* (Washington DC, National Academies Press 2012); Isaac Ehrlich, 'The Deterrent Effect of Capital Punishment: A Question of Life and Death' (1975) 65 *American Economic Review* 397. Ehrlich's work is relied upon quite often for advancing arguments based on deterrence. He concluded through his economic analysis that 'an additional execution per year . . . may have resulted on an average seven or eight fewer murders' through his study of statistical data from 1933–65.

this notion of general criminal deterrence has been significantly contested by contemporary theories of criminology as well as emerging trends of criminal justice. There is little empirical evidence to indicate that the countries that have abolished the death penalty are any less just or less determined when responding to serious crimes than countries that kill criminals.[4] Moreover, it has not been established that the death penalty is more effective than life imprisonment as a form of punishment. Regarding the relationship between the death penalty and homicide rates, Professor Roger Hood concluded: 'It is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment'.[5]

Hood further emphasized that:[6]

> [T]he issue is not whether the [death penalty] deters some people, but whether, when all the circumstances surrounding the use of capital punishment are taken into account, it is a more effective deterrent than the alternative sanction: most usually imprisonment for life or very long indeterminate periods of confinement . . . econometric analyses have not provided evidence from which it would be prudent to infer that capital punishment has any marginally greater deterrent effect than alternative penalties . . . It is futile therefore for such states to retain the death penalty on the grounds that it is justified as a deterrent measure of unique effectiveness.

While the abolition of the death penalty involves complex legislative processes and needs more consultations among various groups, India should at least work towards making even more use of the power of the President to grant clemency which is far less difficult to achieve. This would ensure that the Indian state is sending the right signals—that it does not accept retribution and vengeance as an objective of punishment even though the death penalty is available in our penal statutes. Besides perpetrating a culture of vengeance and retributive justice among victims, the imposition of the death penalty does not allow for any meaningful reformation or rehabilitation of the offender. Rather, the society becomes far more

[4] See generally William J Bowers and GL Pierce, 'The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment' 85 *Yale Law Journal* (1975) 187–208; Frank R Baumgartner et al, *The Decline of Death Penalty and the Discovery of Innocence* (Cambridge, Cambridge University Press 2008). Against the growing populist demand in India for providing the death penalty for rape, in light of the infamous Delhi gang rape case, Nobel Laureate Amartya Sen recorded his voice of dissent against the death penalty. He emphasized the empirical evidence that speaks against the efficacy of the death penalty as a deterrent. Not only this, he also urged that the empirical evidence has established that the death penalty serves no preventive function. 'Death Sentence Does not Serve as Deterrent: Amartya Sen', *The Hindustan Times* (7 February 2013).

[5] Roger Hood, *The Death Penalty: A World-wide Perspective* 3rd edn (Oxford, Clarendon Press 2002) 230. See also Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* 4th edn (Oxford, Oxford University Press 2008) 321–9. Professor Hood also argues that the death penalty fundamentally violates the right to life, is not sufficiently deterrent, its administration in various countries is inherently and irredeemably flawed and its effect thereby is counter-productive as it delivers a questionable moral message. Roger Hood, 'Capital Punishment: A Global Perspective' (2001) 3 *Punishment and Society* 331.

[6] Roger Hood, 'Capital Punishment, Deterrence and Crime Rates', Seminar on the Abolition of the Death Penalty, Kiev, 28–29 September 1996, Council of Europe Parliamentary Assembly, as cited in Peter Hodgkinson and William A Schabas, *Capital Punishment: Strategies for Abolition* (Cambridge, Cambridge University Press 2008) 9.

violent as it discovers one more reason for taking away life, which ought to be considered precious and to be protected by all means.

2. Capital Punishment and the Constitution of India

A fundamental issue to be considered is whether the death penalty is consistent with the Indian constitutional framework. We examine this issue with reference to section 302 of Indian Penal Code 1860 (which provides punishment of death in cases of murder), read along with section 354(3) of the Code of Criminal Procedure 1973 (CrPC), in order to determine whether the death penalty contravenes the spirit and conscience of the Constitution. Article 21 of the Constitution states that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. This means that a person *may* be deprived of life in accordance with the procedure prescribed by law. However, after the *locus classicus* decision of *Maneka Gandhi*,[7] the procedure for inflicting the death penalty on a person must be just, fair, and reasonable.

One may argue that the Indian Constitution does not forbid capital punishment, because Article 72(1)(c) of the Constitution empowers the President to suspend, remit, or commute the death sentence of any person. This textual support for the death penalty, however, should not deter anyone from appreciating the spirit of the Constitution, which undergoes transformation in tune with the changing times in order to remain socially relevant. It is arguable that since the *Maneka Gandhi* decision, the due process of law has become entrenched into the constitutional framework of India.[8] If the term 'procedure established by law' in Article 21 of the Constitution could be interpreted to embody the 'due process' requirement, it might then be difficult to sustain the constitutionality of the death penalty as a form of punishment.[9]

[7] *Maneka Gandhi v Union of India* AIR 1978 SC 597.

[8] The expression 'procedure established by law' was consciously adopted by the Founding Fathers who carefully rejected the US expression 'due process of law'. This change was made after lengthy debates in the Constituent Assembly not to incorporate the US expression and not to empower the judiciary to invalidate any law made by the parliament on the grounds that the laws are 'unreasonable'. This was because Justice Felix Frankfurter advised one of the members of the Constituent Assembly—Mr BN Rau—against the use of the expression due to its misuse by the US Supreme Court in cases like *Dred Scott v Sanford* 60 US 393 (1857). For discussions see SP Sathe, *Judicial Activism in India* 2nd edn (New Delhi, Oxford University Press 2006) 36–40.

[9] Justice Krishna Iyer in *Sunil Batra v Delhi Administration* (1979) 1 SCR 392 observed that it is 'true that our Constitution has no due process clause or the VIII Amendment, but in this branch of law, after *Cooper* and *Maneka Gandhi* the consequence is the same'. Although the 'due process' was rejected in the *Bachan Singh* case, it is worth noting that the contours of due process have been significantly enlarged by the Supreme Court in later decisions. Indeed, the Supreme Court in *Mithu v State of Punjab* AIR 1983 SC 473 struck down the mandatory death penalty provided under the Indian Penal Code (IPC). More recently, on 1 February 2012, the Supreme Court invoked the due process guarantee under Article 21 of the Constitution to outlaw the mandatory death penalty under the Arms Act. The Court held section 27(3) of the said Act unconstitutional as it provided for the mandatory death penalty. *State of Punjab v Dalbir Singh* Criminal Appeal No 117 of 2006, <http://indiankanoon.org/doc/166513655/> (accessed 12 February 2013).

In order to fully appreciate the changing developments in the post-independence era, we should briefly visit the change that took place in the legislative policy with regard to imposition of the death penalty. In the CrPC of 1898, the death penalty was the rule and imprisonment for life an exception, but there was a complete turnaround in the CrPC of 1973, which made it incumbent on the court, when awarding the death penalty, to state 'special reasons' for doing so.[10] The old CrPC was positively directed in favour of capital punishment. This was in tune with the times when the penological thrust was on retribution as justification for punishment. However, this provision was repealed in 1955, thus giving discretion to the judges to inflict capital punishment or a lesser form of punishment on a case-by-case basis. This brief survey of the legislative trend points towards the fact that in post-independent India an inclination against infliction of capital punishment was apparent. Indeed, the Supreme Court itself in *Rajendra Prasad v State of UP* observed that a survey of the legislative developments 'serve to indicate whether the people's consciousness has been protected towards narrowing or widening the scope for infliction of death penalty'.[11]

This new legislative framework permitted the courts to inflict capital punishment in exceptional circumstances with 'special reasons' to be given. However, the law never provided any guidelines as to what could be such exceptional circumstances. This was left to the discretion of the judges depending upon the facts and circumstances of each and every case.[12] The Indian Supreme Court in *Bachan Singh v State of Punjab*,[13] while upholding the constitutional validity of the death penalty, propounded the doctrine of 'rarest of rare' cases.[14] The rarest of rare formula was nothing but an expression of the idea that the extreme penalty of death should be inflicted as a last resort only in exceptional cases.

Against the backdrop of the constitutional mandate of non-arbitrariness and reasonability, the decision in *Bachan Singh* constitutes what Robert Cover would describe as 'jurispathic' behaviour:[15] the violent tendency of the judges in their very interpretive act of upholding the death penalty. Cover emphasizes the fact that the nature of judicial process is such that judges can end up becoming people of violence. Because of the violence they command, judges characteristically do not create law but kill it.[16] The violent act of *production of meaning* through interpretation justifying the death penalty can be seen as what Baxi describes as an act of epistemic/interpretive violence,[17] for the Supreme Court upheld the death penalty despite the due process guarantee.

[10] Clause (3) of section 354, Criminal Procedure Code (1973). See, for further analysis, Ch 13.

[11] 1979 SCR (3) 78, 101.

[12] Justice Bhagwati in his dexterously articulated dissenting opinion described this as a 'lethal consequence so far as the constitutionality of the death penalty is concerned'.

[13] AIR 1980 SC 898.

[14] The Court though declared unconstitutional section 303 of the IPC, which had provided for mandatory death sentence for murder committed by life convicts. *Mithu v State of Punjab* AIR 1983 SC 473.

[15] Robert Cover, 'Narrative, Violence and Law', in Martha Minnow et al (eds), *The Essays of Robert Cover* (Michigan, Ann Arbor 1995) 155.

[16] Cover (n 15) 155.

[17] Upendra Baxi, 'Violence, Constitutionalism and Struggle: Or How to Avoid Being a *Mahamoorkha*', in SP Sathe et al (eds), *Liberty, Equality and Justice: Struggles for a New Social Order* (Lucknow, Eastern Book Co 2003) 17.

3. The Dissenting Judgment of Justice Bhagwati in *Bachan Singh*

It should be noted that *Bachan Singh* also contained a strongly articulated and well-reasoned dissenting opinion given by Justice PN Bhagwati,[18] who was quite categorical in asserting that the death penalty is unconstitutional as it violates Articles 14, 19, and 21 of the Constitution. Although this dissenting opinion has been by and large forgotten, it is worth revisiting. McWilliams highlights the importance of dissent: 'The value of dissent is not purely negative; it does more than protect us from error. It often points to the truth. One could make a good case for the proposition that the heroes of science, the arts and the professions have been dissenters.'[19]

Justice Bhagwati articulated the finest contours of the jurisprudence of legal realism. His argument was based on the tradition of legal realists who critiqued the self-deception exercised by the judges with respect to judicial discretion and the potentialities of its abuse. The dissenting decision aptly quoted the words of Richard B Brandt that 'the most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none'.[20] The dissent of Justice Bhagwati accepted the claim of the legal realists that judges do make the law. The learned judge was attempting to decode *how* the judges should indulge in the process of making law.

Justice Bhagwati categorically asserted that the death penalty is an arbitrary grant of power and that such an extreme form of penalty violates the letter and spirit of the Constitution of India. He pointed out that after the *Maneka Gandhi* case, the doctrine of non-arbitrariness under Article 14 of the Constitution—which guarantees equality before the law and equal protection of laws—has been cemented as the constitutional mandate. In addition to hitting at discriminatory classifications, Article 14 prohibits a situation that:[21]

> [C]onfers discretion on an authority to select persons or things for application of the law without laying down any policy or principle to guide the exercise of such discretion. Where such unguided and unstructured discretion is conferred on an authority, the law would be violative of Article 14 because it would enable the authority to exercise such discretion arbitrarily and thus discriminate without reason.

[18] The other four judges who constituted the majority decision were Y Chandrachud, A Gupta, N Untwalia, and R Sarkaria, JJ. The dissenting opinion was published much later than the pronouncement of the original decision. *Bachan Singh v State of Punjab* 1983 SCR (1) 145.

[19] Carey McWilliams, as cited in VR Krishna Iyer, *Law, Lawyers & Justice* (New Delhi, Doaba 1989) 56.

[20] *Bachan Singh* (n 18) 272. Richard B Brandt's point is one which best illustrates the legal realist philosophy which acknowledges the primary role played by subjective element of judges in the process of decision making.

[21] *Bachan Singh* (n 18) 271. The argument that the death penalty is awarded in an arbitrary and capricious manner also forms the central argument of the widely read book of Black on capital punishment where he states that capital cases bring out the worst and most irrational in juries and judges. See Charles L Black, *Capital Punishment: The Inevitability of Caprice and Mistake* (New York, Norton & Co 1973) 228–41.

Referring to the Supreme Court decision in the *Minerva Mills* case,[22] where the apex court had observed that Articles 14, 19, and 21 of the Indian Constitution form a golden triangle, as the thread of reasonableness runs through all of them, Justice Bhagwati reasoned that since the power conferred on the judges to award the death penalty is entirely arbitrary and capricious, it fails to meet the standard of reasonableness mandated by Articles 19 and 21 of the Constitution.[23]

Justice Bhagwati asserted that the burden of proving that the process adopted for inflicting the death penalty is not arbitrary should lie on the state. He observed:[24]

> The State must place the necessary material on record for the purpose of discharging this burden which lies upon it and if it fails to show by presenting adequate evidence before the court or otherwise that death penalty is not arbitrary and unreasonable and does serve a legitimate social purpose, the imposition of death penalty . . . would have to be struck down as violative of the protection of Article 21.

The dissenting opinion went on to discuss the international human rights framework as well as the cultural ethos of India which run counter to the infliction of the death penalty.[25] The learned judge emphasized the fact of irrevocability of the death sentence and the cruelty inherent in the delayed execution of the death penalty and cited various studies challenging the deterrence element of the death penalty.[26] It will not be inaccurate to say that 'the majority determined the cases but these dissenting opinions will determine the minds of the future'.[27] Although the majority of the judges in *Bachan Singh* failed to agree that the discretion granted to the judges is 'unguided' and 'unstructured', the prophetic vision of Justice Bhagwati has turned out to be accurate about the muddled jurisprudence that has evolved around the doctrine of rarest of rare cases.

4. The Shifting Sands of the 'Rarest of Rare' Doctrine

The *Bachan Singh* doctrine vested the discretion in the judges to determine which case would fall within the category of 'rarest of rare' and thereby attract the death penalty. This doctrine turned out to be an arbitrary and capricious exercise of power by the judges and its jurisprudential basis stood on shifting sands. It has been insightfully styled as a 'judicial gamble' by another judge of the Indian

[22] (1979) 3 SCR 1014.

[23] Article 19(1)(a) guarantees the freedom of speech and expression. The restriction that can be put on this cherished right can be a *reasonable* restriction only. Further, after the decision in the *Maneka Gandhi* case, Article 21, which guarantees life and personal liberty, also stands violated if the law depriving a person of his/her life or personal liberty is unreasonable and arbitrary in nature.

[24] *Bachan Singh* (n 18) 145.

[25] Justice Bhagwati specifically referred to the fact of ratification of the provisions of the International Bill of Rights by India.

[26] *Bachan Singh* (n 18) 315–20.

[27] Zechariah Chafee, Jr on the dissents of Justice Holmes and Justice Brandeis, cited in Krishna Iyer (n 19) 55.

Supreme Court.[28] The Supreme Court discussed the issue of rarest of rare cases in *Macchi Singh v State of Punjab*.[29] Although *Macchi Singh* laid down the guidelines for identifying 'rarest of rare' cases for inflicting the death penalty, the chaos in this area of law has not settled. It would not be wrong to say that it is the personal philosophy of the judges rather than any sound policy that governs judicial discretion in this area.[30]

The court had not treated all cases of multiple murders coupled with robbery or dacoity equally. In some cases the death penalty was given, while in certain other cases life imprisonment was awarded. In *Earabhadrappa v State of Karnataka*,[31] although the accused misused his position of trust and committed a brutal murder for greed, the apex court chose not to regard the case as the 'rarest of rare'. Further, in *Mukund v State of MP*,[32] the court said that though the murders were ghastly and involved betrayal of trust, this case could not be treated as the 'rarest of rare'. This decision leaves us in darkness as to what additional circumstances are required to make it a 'rarest of rare' case.[33]

Even in cases of rape coupled with murder, the Court has sufficiently blurred the law by conveniently ignoring the guidelines prescribed in the *Bachan Singh* case. In *State v Suresh*,[34] a case involving rape and murder of a four-year-old child, the Supreme Court did not inflict death (though conceded that the case would fall in the 'rarest of rare' category) because the death penalty awarded by the trial judge had been altered by the high court. In cases where the Supreme Court refused to impose the death sentence, even though it considered the case as being 'rarest of rare',[35] it is the judge's personal whims that regulate discretion in this area. In one case the court saved the accused as they were 'ignorant, gullible and superstitious' even though they had sacrificed three children to unearth treasures.[36] In stark contrast to the instant case, consider the case of *Sushil Murmu v State of Jharkhand*,[37] where the Supreme Court widened the scope of anti-social crimes to include superstition as a reason for murder. Thus, in a complete reversal of the logic applied in the former case, a murder guided by superstition in the latter case was brought squarely within the doctrine of 'rarest of rare' cases. The Court went on to state

[28] See VR Krishna Iyer, *The Dialectics and Dynamics of Human Rights: Tagore Law Lectures* (Lucknow, Eastern Book House 2000).

[29] AIR 1983 SC 957.

[30] See Ch 13. See also NS Soman and KN Chandrasekharan Pillai, 'Rarest of Rare Cases: A Myth' (2001) 25 *Academy Law Review* 157–84.

[31] (1983) 2 SCC 330, per AP Sen and ES Venkataramaiah, JJ. The appellant who was employed as a servant in the deceased's house throttled her to death and robbed the house.

[32] (1997) 10 SCC 130, per MK Mukherjee and S Sahir Ahmad, JJ. The accused in this case was a frequent visitor to the family of the deceased. He took advantage of his position, murdered the family, and robbed the house.

[33] See also *Narayan Chetanram Choudhary* (2000) SCC (Cri) 1546, per KT Thomas and RP Sethi, JJ and *A Devendran v State* (1997) 11 SCC 720, per GN Ray and GB Patnaik, JJ.

[34] (2000) 1 SCC 471, per GT Nanavati and KT Thomas, JJ.

[35] Also see *State v Damu Gopinath Shinde* (2000) Cri LJ 2301, per KT Thomas and DP Mohapatra, JJ.

[36] See *State v Damu Gopinath Shinde* (n 35).

[37] AIR 2004 SC 394. The convict had beheaded a nine-year-old, innocent and defenceless boy, in order to promote his fortunes by pretending to appease the deity.

categorically that such a person lacked the psyche amenable to any reformation,[38] thereby completely ruling out education and counselling of the appellant.

5. Constitutional Validity of the 'Rarest of Rare' Doctrine

Since *Bachan Singh*, the Indian courts have steadfastly adhered to this doctrine and have decided cases on the basis of their own recognition of whether a particular case falls within the ambit of 'rarest of rare'. However, there has not been much systematic and jurisprudential analysis of the constitutional validity of the 'rarest of rare' doctrine.[39] The analysis below aims to help in ascertaining the constitutional validity of this doctrine.

Irreversibility inherent in the imposition of the death penalty makes it a unique and extraordinary form of punishment.[40] This irreversibility mandates a rigorous constitutional analysis, as it is important that the imposition of the death penalty does not lead to the violation of constitutional rights.[41] Irreversibility should also demand that the process of determining the award of death penalty is objective and based upon determinable and rational criteria when decisions relating to the life and death of a person will be made by judges on the basis of the facts and circumstances of the case. Furthermore, the nature of the death penalty requires the highest form of constitutional scrutiny particularly when judicial discretion will determine not just whether the death penalty be imposed in a given case, but rather the threshold condition of whether a case falls within the 'rarest of rare' doctrine.

After *EP Royappa v State of Tamil Nadu*[42] and a number of other cases decided by the Supreme Court, the doctrine of non-arbitrariness is a well-settled principle for all decision-making processes within the government. While the executive can take decisions on the basis of policy and other reasons, the courts have always stepped in to determine whether the decision was arbitrary, whether principles of natural justice were followed, and whether it was fair, just, and reasonable. There have been a plethora of cases in which the courts have struck down many laws, rules, regulations, and administrative orders, executive decisions and government notices on the ground that they were arbitrary and violative of the fundamental right to equality under Article 14 of the Indian Constitution.

In this context, it is argued that the Supreme Court's own formulation of using the doctrine of 'rarest of rare' cases as a framework for determining whether the death penalty can be imposed or not is in itself a violation of Article 14 of the Constitution. Since the decision on whether a case belongs to the category of

[38] AIR 2004 SC 394.

[39] But see Ch 13 and the materials cited therein.

[40] Redin (n 2).

[41] The fact that the death penalty is irreversible or irrevocable has been advanced frequently by various scholars to put across the point that death is more serious than loss of liberty. See Black (n 21).

[42] AIR 1974 SC 555.

'rarest of rare' is a subjective decision by the judge, it will depend upon factors that are significantly beyond the facts and circumstances of the case, eg the individual judge's own moral values, social upbringing and beliefs, level of tolerance, and views on punishment. Of course, one can argue that these factors are involved in the decision-making process of the judges in all cases and not just in cases relating to the death penalty. However, the fact that these values will determine whether a person is going to live or die leads us to question the constitutional validity of the decision-making process. Thereby, the legal objectivity gets subsumed into judicial subjectivity.

6. Judicial Process and Arbitrariness of the Supreme Court: Some Recent Trends

As a continuation of the discussion on the constitutionality of the doctrine of 'rarest of rare', we should also review the emerging trend of the judicial process concerning the death penalty. This may be helpful in understanding whether the progressive decisions made by the Supreme Court enable us to take forward the agenda of death penalty abolition in India.

In *Rajesh Kumar v State of NCT of Delhi*,[43] the Supreme Court emphasized the reformatory potential of the 'criminal' rather than the 'brutality of crime' in order to determine what constitutes 'rarest of rare'. The two-judge bench (comprising Justice AK Ganguly and Justice DK Jain) converted the death sentence imposed on the convict by the trial court and confirmed by the High Court into imprisonment for life.[44] The court underscored the point that both courts had been preoccupied with analysing the 'brutality of murder'. However, the Supreme Court emphasized that what is required to be taken into consideration while deciding upon the sentence should be the fact whether there is a possibility that the convict can be reformed or not. This approach goes a long way in changing the focus of the sentencing decision from the brutality of crime towards the reformatory potential of the criminal. This case arguably inaugurates the criminal-oriented (rather than the crime-oriented) jurisprudence of sentencing. Further, the court put the *onus probandi* of non-possibility of reformation of the criminal on the state.

This decision was in line with the point that was carefully deliberated upon in a previous decision of the Supreme Court, namely, *Santosh Kumar Bariyar v State of Maharashtra*.[45] In *Bariyar*, Justice SB Sinha emphasized the fact that *Bachan Singh* had clearly articulated a mandatory requirement to provide specific evidence on sentencing at a pre-sentence hearing stage. Further, the evidence should be related not only to the crime but also to the criminal, including the socio-economic

[43] Criminal Appeal Nos 1871–1872 of 2011, <http://www.indiankanoon.org/doc/883482/> (accessed 30 December 2011).

[44] Also see Justice AK Ganguli's dissenting opinion in *Rameshbhai Chandubhai Rathod v State of Gujarat* Criminal Appeal No 575 of 2007 decided on 27 April 2009.

[45] (2009) 6 SCC 498.

background of the criminal. The court added that the 'probability that the accused can be reformed and rehabilitated' would constitute an important mitigating circumstance against the use of the death penalty.[46]

The reasoning in *Bariyar* and *Rajesh Kumar* requires careful analysis. The duty cast on the prosecution to adduce evidence which would prove that the possibility of reform has been foreclosed is an arduous one. It would be very difficult for the prosecution to prove that any person has become so incorrigible that he or she has gone beyond any possibility of reform in the future. If such a strong burden of proof is required to be discharged on the part of the prosecution in every case, this might lead to virtual abolition of the death penalty in India.

It would have been a welcome step on the part of judiciary to consistently follow this trend and put a *de facto* closure on the possibility of imposing the death penalty. However, decisions in some other recent cases belie such a hope. For example, in *Ajitsingh Harnam Gujral v State of Maharastra*,[47] the Supreme Court upheld the death sentence imposed on the accused.[48] The Court observed that the cruel and barbaric manner in which the *crime has been committed* rules out the possibility of any reform of the offender. Dismissing the appeal, the Court further pointed out that a distinction has to be made between ordinary murders and 'gruesome, ghastly or horrendous ones' when awarding the sentence of death.[49] It is thus clear that the *Bariyar* approach—the metamorphosis of sentencing jurisprudence from focus on 'criminal' instead of 'crime'—was not followed in this case. The irony that stares in the face of the judicial process is that this decision did not even mention the judgment in *Bariyar*. This can be styled as some kind of 'cherry-picking' of the previous precedents to suit one's own purpose.[50]

A perusal of these few recent decisions reveals a striking fact. Just as in the case of *Ajitsingh Gujral* we noticed the conspicuous absence of *Bariyar*, a similar absence can be noticed in the otherwise progressive *Rajesh Kumar* case. In *Rajesh Kumar*, the apex court nowhere referred to, or criticized, the approach followed in the *Ajitsingh Gujral* case which failed to follow the true spirit of *Bachan Singh*. This alienation or non-conversation in judicial decision-making suggests that the apex court has failed to function as an institution. Such inconsistency and variance in the decisions awarded in the same month[51] also makes one wonder about the plight of lower courts as they come to grapple with the contrary pronouncements of the Supreme Court.

In view of the above analysis, we argue that isolated progressive judgments would not serve to take the debate of abolishing the death penalty to any logical

[46] (2009) 6 SCC 498, per Sinha, J, para 2.

[47] (2011) 9 SCLR 052.

[48] The judgment of the court was delivered by Markandey Katju and CK Prasad, JJ.

[49] (2011) 9 SCLR 052, para 98.

[50] It is worth pointing out that the decision of the Supreme Court in *Ajitsingh Gujral* does not otherwise lack in citing precedents, because 48 decisions were cited. This further strengthens the hypothesis that in the death penalty cases the logic of the law is guided by the subjective opinions of the judges. For the conception of cherry-picking, see Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125.

[51] The decision of *Ajitsingh Gujral* was delivered on 13 September 2011 and the decision of *Rajesh Kumar* was delivered on 28 September 2011.

conclusion. What is required is a proper comprehension of the fact that the immanent arbitrariness which lies at the core of the doctrine of 'rarest of rare' needs to be addressed properly through legislative abolition of the death penalty. This would not merely further the spirit of the Constitution which cherishes humanism but would also eliminate the possibility of arbitrary decision-making on the part of the judiciary. In the next section we argue that the legislature is *duty bound* to act towards abolition, following the idea of perfectionist liberalism as propounded by Joseph Raz.

7. Situating Joseph Raz in the Death Penalty Debate

This part attempts to contextualize the philosophy of *perfectionist liberalism* advocated by Joseph Raz within the framework of the death penalty debate. A general overview of the theoretical framework will be helpful before contextualizing it in the death penalty debate. According to the philosophy of perfectionist liberalism, governments cannot ignore something which is normatively valuable for society at large. Perfectionist liberals consider that the norm of 'personal autonomy' is an intrinsic good which must be advanced by the state in the process of policy-making.[52] Raz contests the classical liberal position of state neutrality which advocates that any political discourse must steer away from any kind of moral valuation. Raz explains the concept and importance of the notion of personal autonomy in the following words:[53]

> The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny fashioning it through successive decisions throughout their lives.

The notion of autonomy for Raz is something that allows self-authorship of life for a particular individual. He defines an autonomous person as someone who possesses the capacity to make a choice:[54]

> An autonomous person is part author of his own life. His life is, in part, of his own making. The autonomous person's life is marked not only by what it is but also by what it might have been and by the way it became what it is. A person is autonomous only if he had a variety of acceptable options to choose from, and his life became as it is through his choice of some of these options. A person who has never had any significant choice, or was not aware of it, or never exercised choice in significant matters but simply drifted through life is not an autonomous person.

[52] Joseph Raz, *The Morality of Freedom* (Oxford, Clarendon Press 1986). Perfectionist theorists reject the political argument of neutrality constraint. For them there is hardly any justification in political morality forbidding the state from promoting a particular conception of good. In this sense perfectionist liberals go a step further from the classical position held by political liberals.

[53] Raz (n 52) 369. [54] Raz (n 52) 204.

Thus, any state practice foreclosing of the possibility to make a choice subverts the autonomy of an individual. A political and moral paradigm based on perfectionist liberal ideals would be sensitive to the fact that the death penalty, as a state practice, would interfere with the ability of the convict to attain true autonomy and well-being. It must be understood that the death penalty in itself is antithetical to the ideal of human dignity, because everyone has an inherent right to develop one's personality infinitely at any stage of one's life. The state must act to secure and promote by way of laying down policies in furtherance of this benign objective. It is widely accepted that any humane criminal justice system would like to foster such a feeling amongst those who are convicted of a crime. This is a fundamental creed for any form of prison reform under any legal system to ensure that the convict is not robbed of personhood merely because he or she has been punished.[55]

One may then say that perfectionist liberalism, seen from the perspective of right of recognition of those who are convicted for serious offences, does not 'leave alone' the offenders. Its focus remains on integration of such offenders in the fabric of society by allowing them to realize their full personhood by envisaging certain positive obligations on the state. One such obligation would be to discourage any form of punishment which completely eliminates the possibility of growth of human personality. The 'right to seek pardon or commutation of anyone sentenced to death', as guaranteed by the International Covenant on Civil and Political Rights (ICCPR)[56] as well as the Constitution of India presupposes the ability of anyone to infinitely develop their own personality.

Further, the Supreme Court of India has also accepted the fact that the immense possibility of the transformation of any human being can never be disputed. This is what Justice Krishna Iyer wanted to accentuate when he observed in the case of *Rajendra Prasad* that '[t]he Indian cultural current also counts and so does our spiritual chemistry, based on divinity in everyone, catalysed by the Buddha Gandhi compassion. Many humane movements and sublime souls have cultured the higher consciousness of mankind'.[57]

The same argument of the potential of a human being to transform oneself was categorically asserted by Justice Bhagwati in the following poignant words:[58]

> In this land of Buddha and Gandhi, where from times immemorial, since over 5000 years ago, every human being is regarded as embodiment of Brahman and where it is a firm conviction based not only on faith but also on experience that 'every saint has a past and every sinner a future', the standards of human decency set by our ancient culture and nourished by our constitutional values and spiritual norms frown upon imposition of death penalty for the offence of murder.

The penalty of death discounts the fact that human transformation and development of human being is something that is most central for the existence of human

[55] For excellent discussions on this theme in the context of Indian legal system, see Rani Dhavan Shankardass (ed), *Punishment and the Prison: Indian and International Perspectives* (New Delhi, Sage Publications 2000).

[56] International Covenant on Civil and Political Rights (ICCPR) (1976) 999 UNTS 171.

[57] *Rajendra Prasad* (n 11) 106.

[58] Bhagwati's dissent in *Bachan Singh* (n 18) 145.

beings. This point is most eloquently expressed by the Japanese jurist Shigemitsu Dando as follows:[59]

> [E]very person has an infinite possibility of personality formation. And the blameworthiness of a criminal act may change in accordance with such development of the criminal's personality. The punishment of imprisonment is well adaptable to such change in the criminal's personality by way of parole. In contrast, the death penalty totally lacks such flexibility. That means it is inconsistent with the human dignity of the criminal, even apart from the problem of misjudgment.

Considered from the perspective of Raz's notion of personal autonomy, this point becomes extremely relevant for the abolition of the death penalty in that it not only provides a sound jurisprudential perspective to appreciate the argument of human dignity but also offers some very important public policy-making guidelines. Viewed from his perspective, the state becomes *duty bound* to ensure that the personality of the offender should not be hampered from attainment of its ultimate potential by imposition of the death penalty.

The development of the above Razian notion of personal autonomy can raise further important constitutional issues relevant for human rights dimensions of the death penalty in India. For instance, would the duty of intervention that lies on the state, to ensure development of autonomy, not confer a corresponding right on citizens to preserve such autonomy? Such a possibility can be path-breaking for the abolition of the death penalty in India.

8. Abolition of Death Penalty in India: Contemporary Challenges

The above discussion of Raz's perfectionist liberal framework based on personal autonomy forms an important foundation to appreciate some of the recent challenges that have arisen in abolishing the death penalty in India. The challenges have been juridical as well as popular/political. The juridical challenge stemmed from the Indian Supreme Court decision in *Md Ajmal Kasab v State of Maharastra* delivered on 29 August 2012 upholding the death penalty of Ajmal Kasab.[60] The political dimension of the case became apparent as this decision was to decide the fate of the only survivor of the horrific terrorist attack in Mumbai on 26 November 2008. The horror perpetrated by the accused along with nine other terrorists was on such a massive scale that 26/11, the date of the attack, has been compared with the 9/11 attacks in the United States.[61] The extreme brutality of the terrorist attack killed 161 people and grievously injured 238.[62] To add to this, the accused was a

[59] Shigemitsu Dando, 'Towards the Abolition of Death Penalty' (1996) 72 *Indiana Law Journal* 7, 17.

[60] Criminal Appeal Nos 1899–1900 of 2011 with *State of Maharashtra v Md Yusuf Ansari and Another*, <http://supremecourtofindia.nic.in/outtoday/39511.pdf> (accessed 12 February 2013).

[61] It is perhaps an irony that 26/11 is also celebrated as the 'Law Day' in India as this was the date when the Constitution of India was first adopted and enacted.

[62] The court provided the complete list of names of the victims, killed and injured, in Schedule I to the judgment which forms a part of the judgment. *Kasab* (n 60) 360, para 602.

Pakistani national and the entire conspiracy was proven to be hatched in Pakistan. This further flared up the nationalistic sentiment of the masses against the accused. Indeed, the High Court viewed the accused's conviction for 'waging war' against the government of India as the most aggravating circumstance for upholding the death sentence imposed on him.[63] We will shortly revert to the reasons given by the Supreme Court in confirmation of the death sentence, but before that we need to appreciate the upheaval caused by the prompt execution of Kasab.

Due to the extremely volatile political scenario as described above, prompt action followed the decision of the Supreme Court. The President of India rejected his mercy petition on 6 November 2012 and signed Kasab's death sentence file. He was executed, in a very secret process, on 21 November 2012. The hanging of Kasab elicited mixed responses. Nobel Laureates like Amartya Sen principally denounced the death penalty as having no preventive function.[64] On the other hand, the politics of due process in execution was debated by the popular media and political parties in opposition. Their argument questioned the supersession of Kasab over others waiting to be executed. Perhaps, it was this pressure of populism that on 8 February 2013, Md Afzal Guru, who was convicted in the Parliament Attack case and had been on the death row for more than seven years,[65] was executed. Although a full discussion of the case is beyond the scope of this chapter, it suffices to say that the case was radically different from Kasab's case on many grounds, including the fact that no direct evidence of Afzal Guru's involvement was available.[66]

Around the same time, India was rocked by a brutal gang rape of a girl in a moving bus in the capital city of Delhi on 16 December 2012.[67] This led to renewed demands in the popular sphere that see the death penalty as a panacea for all who show criminogenic tendencies. This kind of knee-jerk reaction to solve all social problems by the use of the death penalty seems to have made some impact on the minds of the legislative wing of the government. The new ordinance promulgated by the President of India in the wake of the Delhi gang rape case prescribed 'death' as one form of punishment for repeat offenders.[68] This was despite the rejection of

[63] *Kasab* (n 60) 341, para 559.

[64] Amartya Sen (n 4). It is also important to note that it is not merely the academia that has shown aversion towards the death penalty. The Tamil Nadu Assembly adopted a resolution recommending commutation of the death sentence awarded to Murugan, Santhan, and Perarivalan, who were convicted in the Rajiv Gandhi assassination case. The Chief Minister herself moved the resolution due to public outcry in the state anticipating the execution of the accused. See 'Tamil Nadu Assembly Adopts Resolution Recommending Commutation of Death Sentence', *The Hindu* (30 August 2011), <http://www.thehindu.com/news/national/tamil-nadu/tamil-nadu-assembly-adopts-resolution-recommending-commutation-of-death-sentence/article2411347.ece> (accessed 12 February 2013). Such moments show the possibility of transformation of minds against the brutal arbitrariness of the death penalty.

[65] *Md Afzal v State (NCT of Delhi)* Appeal (crl) 373–5 of 2004.

[66] For a critical discussion on the factual aspects and judicial verdict of the case, see Arundhati Roy, *13 December, A Reader: The Strange Case of the Attack on Indian Parliament* (India, Penguin Books 2006). For a brief account, see also Arundhati Roy, 'A Perfect Day for Democracy', *The Hindu* (10 February 2013).

[67] The victim died on 29 December 2012.

[68] Section 376E of the Criminal Law Amendment Ordinance 2013 (promulgated on 3 February 2013) reads, '[w]hoever has been previously convicted of an offence punishable under section 376 or

such a proposal in the Report submitted by the Justice JS Verma Committee set up by the government of India to suggest amendments to criminal law to deal with sexual assault cases after the diabolic incident of this gang rape.[69]

After this brief detour into the socio-political scenario concerning the death penalty in India, let us return to the juridical aspects of the *Kasab* decision that, *inter alia*, provided the trigger for resurgence of the death penalty debate in the contemporary Indian scenario. For our purpose, an analysis of the discussion on the question of sentence in the judgment is crucial.[70] After referring to the foundational precedents of *Bachan Singh* and *Machhi Singh*, the court *categorically* stated that 'every single reason that this court might have assigned for confirming a death sentence in the past is to be found in this case in a more magnified way'.[71]

For a proper appreciation of the argument made in this chapter, we need to investigate one 'single reason', that is, the impossibility of reform of the criminal. This is because the entire edifice of framework based on the autonomy theory of Joseph Raz rests on focusing on the criminal and not on the crime. A diagnostic analysis of the court's reasoning on this aspect provides 'interesting' yardsticks for the process of sentencing in capital cases. Let us diagnose the reasons briefly in the next part.

9. Emotions and Criminal Sentencing: An Analysis of *Kasab's* Case

Although the role of emotions in the criminal justice system is not altogether a novel enterprise, the manner in which the judicial discourse in the *Kasab* case employed emotions is unprecedented. The judgment not only, and unusually, provides a list of all the victims, deceased and injured in Schedule I to the judgment but also provides a postscript to the judgment.[72] Further, in a rare discourse hitherto unknown to judgment writing, the court mourns the death of the victims of the gruesome tragedy in the following words:[73]

> We mourn the death of 148 civilians, both Indians and foreign nationals, who fell victim to the orgy of terror unleashed on the city, and extend our heart-felt condolences to their families. We also extend our deepest sympathies to all the 238 people who suffered injuries at the hands of the terrorists.

section 376A or section 376C or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life, which shall mean the remainder of that person's natural life or with death'. The Ordinance has been replaced by the Criminal Law (Amendment) Act 2013.

[69] JS Verma et al, *Report of the Committee on Amendments to Criminal Law* (23 January 2013), <http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf> (accessed 12 February 2013).

[70] *Kasab* (n 60) 339–55. [71] *Kasab* (n 60) 349.

[72] We must acknowledge Latika Vashist of Jindal Global Law School for pointing this out to one of us which helped in the development of the argument made by us in this section.

[73] *Kasab* (n 60) 360.

This provides the backdrop to diagnose the reasoning of the court as to what constituted the aggravating factor so as to provide the maximum punishment of death to the accused. The court's central reasoning, which is articulated at various points, for giving Kasab the death sentence is the absence of the emotion of remorse or a sense of repentance in the accused. Responding to the arguments of counsel for the defence for not giving him the extreme penalty, the court remarks:

> The saddest and the most disturbing part of the case is that the appellant *never showed any remorse*…he made the confessional statement…not out of any sense of guilt or sorrow or grief but to present himself as a hero…he had *absolutely no regret* for whatever he had done…Even *in the course of trial* he was never repentant and did not show any signs of contrition…This, to our minds, *forecloses the possibility of any reform or rehabilitation* of the appellant.[74]

The lack of remorse aspect is reiterated by the court later in the judgment as well: 'It is already seen above that the appellant never showed any repentance or remorse, which is the *first sign* of any possibility of reform and rehabilitation'.[75]

This factor weighed heavily on the court's psyche to reject the mitigating circumstances advanced by his counsel, eg the accused being of a young age, his deplorable family and educational background, and economic circumstances. It is undisputable that the court is correct about the gravity of the crime being such that a case of this kind is 'the very rarest of rare to come before the court since the birth of the republic'.[76] However, the reasoning of the court in relation to the criminal raises two points. One, if lack of remorse is an aggravating factor enough to provide the death penalty, then how reliable a yardstick is it? What if remorse is faked by the accused in a case? Secondly, even if we assume that it is a fair yardstick to evaluate the aggravating circumstances and we imagine for a moment that genuineness of remorse is discernible, what is the time period for the display of such remorse? What about the possibility of developing remorse on later reflection after the completion of the trial? Is such a possibility necessarily foreclosed? The court itself described remorse as the 'first sign' of rehabilitation but it treated the absence of remorse (that too only during the trial) as the final indicator of impossibility of transformation. Let us briefly elaborate upon the two points raised above in some detail.

The first rationale of *lack of remorse* as an aggravating factor in criminal sentencing is arbitrary because it is almost impossible to ascertain the genuineness of the emotion. So, this becomes a factor that can be played upon or faked by the accused. Thus, an introduction into the sentencing process of emotions like remorse can encourage fakery and hypocrisy. This point is well documented by Bader in the context of Jewish law.[77] Indeed, Jeffrie G Murphy describes the impossibility of ascertaining genuine remorse as a 'practical problem' in using it for sentencing

[74] *Kasab* (n 60) 345, para 564 (emphasis added).
[75] *Kasab* (n 60) 352, para 580 (emphasis added).
[76] *Kasab* (n 60) 353, para 580.
[77] See Cheryl G Bader, '"Forgive Me Victim For I Have Sinned": Why Repentance and the Criminal Justice System Do Not Mix—A Lesson from Jewish Law' (2003) 31 *Fordham Urban Law Journal* 70.

purposes.[78] So he argues that 'a practical problem with giving credit for remorse and repentance is that they are so easy to fake; and our grounds for suspecting fakery only increase when a reward (e.g., a reduction in sentence, clemency, pardon, amnesty, etc) is known to be more likely granted to those who can persuade the relevant legal authority that they manifest these attributes of character'.[79] Here he insightfully points out the following in the context of the South African Truth and Reconciliation Commission:[80]

> Worries about fakery and inducements to fakery might have been among the reasons that prompted those who designed the South African Truth and Reconciliation Commission (TRC) not to require apology or expressions of remorse from those seeking amnesty through the Commission. All that was required was full disclosure of wrongdoing and acceptance of responsibility for that wrongdoing. Since the Commission's design was under the strong influence of Anglican Bishop Desmond Tutu, we may be confident that he—as a Christian clergyman—did not leave out apologies or expressions of remorse because he did not value them. More likely, he simply did not want to give incentives to fakery, increase cynicism about such expressions…

The point made above becomes compellingly crucial in the context of capital punishment. As lack of an emotion can be faked easily, it should never be a sufficient yardstick in the process of sentencing. In fact, this seemingly innocuous and convincing yardstick for determination of whether or not the death penalty should be imposed displays arbitrariness on a closer scrutiny. The decision in itself becomes question-begging and as a precedent remains an empty signifier.

Next, as was clear from the above-quoted passages from the judgment, the only time-frame that the accused possessed for repentance was during the course of the trial. If during this period the 'first sign' (repentance) is not displayed by the accused, as happened in the present case, that 'forecloses the possibility of any reform or rehabilitation'.[81] This is an extremely conservative and constricted conceptualization of the concept of rehabilitation. What about the possibility of transformation after trial? Are those not foreclosed by the decision of the court and that too, as we have shown, on flimsy grounds? This is where Raz's theoretical framework, invoked by us in this chapter, seems much more progressive when employed in the death penalty debate. The reason is simple: it is impossible to restrict the possibility of autonomous development of an individual to trial proceedings. Instead, a respect for autonomy in the framework of Raz entails and demands respect for autonomous transformation in future. Formulated this way, our interpretation of Joseph Raz's principle of autonomy would entitle the accused to have a right to autonomous development and a corresponding duty would lie on the state to preserve such autonomous choice and thus abolish the death penalty.[82]

[78] Jeffrie G Murphy, 'Remorse, Apology, and Mercy' (2007) 4 *Ohio State Journal of Criminal Law* 423.

[79] Murphy (n 78) 440. [80] Murphy (n 78) 440. [81] *Kasab* (n 60) 345, para 564.

[82] As we come to the closure of this part it is pertinent to add, quite appropriately in a footnote, that the last words of Ajmal Kasab were reported in a popular English daily in the following words: 'As his hands and legs were tied, his last words, according to officials who witnessed the hanging,

10. By Way of Conclusion

The death penalty debate in India has reached a stalemate where the academic discussions, seminars, and discourses end up repeating the same old arguments in one way or another. As the French author Andre Gide put it: 'Everything has been said already, but since nobody listens we have to keep going back and beginning all over again'.[83] Thus, an attempt is needed to reinvigorate and revitalize this almost lost cause of the abolition of the death penalty, amidst the heightened state security concerns in contemporary times. What is needed is to investigate the old answers and explore why they have not succeeded in producing abolition despite a reformatory movement which existed in India.

The instructive words of another French intellectual, Michel Foucault, are worthy of consideration. He remarked, though in a different context, that '[no] crime means no police. What makes the presence and control of the police tolerable for the population if not the fear of the criminal?'[84] Thus, punishment can become a means for the ruling regime to create a kind of fear-psychosis in order to provide justification of a 'repressive state apparatus'.[85] More recently, Professor Zimring has made a similar connection between authoritarian regimes and the retention of the death penalty.[86]

In order to fully combat the menace of the death penalty, we need to revisit the historical developments in India and re-conceptualize the death penalty debate from an altogether new perspective. We attempted to do so in this chapter by making a case for abolition on the lines of constitutional and human rights discourse. This discourse, couched in the language of 'personal autonomy', following the perfectionist liberalism of Joseph Raz, can be one way to re-conceptualize the issue of the death penalty from a constitutional perspective employing the language of human rights.

were: *Allah kasam maaf karna. Aisi galati dobara nahi hogi*… (Allah, please forgive me, this mistake won't happen again…)', *The Times of India* (22 November 2012), <http://articles.timesofindia.indiatimes.com/2012-11-22/india/35302180_1_ajmal-kasab-sadanand-date-yerawada-prison> (accessed 12 February 2013).

[83] For the quote, see <http://thinkexist.com/quotation/everything_has_been_said_before-but_since_nobody/10203.html> (accessed 6 March 2012).

[84] C Gordon (ed), *Michael Foucault, Power/Knowledge: Selected Interviews & Other Writings 1972–1977* (Brighton, Harvester Press 1980) 115.

[85] We borrow this expression from Louis Althusser. For a brief discussion on his distinction between repressive and ideological state apparatuses, see Louis Althusser, *Lenin, Philosophy and Other Essays* (London, Monthly Review Press 1971) 127–57.

[86] Franklin E Zimring and Gorden Hawkins, *Capital Punishment and the American Agenda* (Cambridge, Cambridge University Press 1986).

8

Singapore's Death Penalty: The Beginning of the End?

Michael Hor

1. After Amnesty

In 2004, Amnesty International released a report which catapulted Singapore to global attention as the jurisdiction with 'possibly the highest' per capita execution rate in the world, unexpectedly outdoing more usual suspects like China and Iran.[1] The swift response of Singapore's Ministry of Home Affairs was not similarly surprising. It was all necessary to deter capital crime offending—essentially drugs, murder, and firearms—which was in turn necessary to preserve Singapore as 'one of the safest places in the world to live and work in'.[2] One might have been forgiven for predicting that it would be business as usual thereafter. On the surface, that certainly appeared to be so. As recently as in early 2011, Singapore defended its use of the death penalty before the United Nations Human Rights Council, in the first ever scrutiny of human rights in Singapore endorsed by the government, in terms almost identical to the 2004 response to Amnesty.[3]

But much has happened since, and this discussion hopes to describe some of these developments, which seemed to have taken place beneath an official veneer of normality, imperceptible to most observers from within and without. In the courts, death penalty litigation has intensified in both volume and sophistication. While there has been no real success to date, the manner in which the judiciary has treated these challenges has been highly nuanced, perhaps wishing to leave a gap at the door, but not allowing anyone to pass through just yet. The publication of Alan Shadrake's book, justifiably or not, seemed to put some flesh to the fear that in the vast reaches of police and prosecutorial discretion, skeletons may reside.

[1] Amnesty International, 'Singapore: The Death Penalty—A Hidden Toll of Executions', 15 January 2004, <http://www.amnesty.org/en/library/info/ASA36/001/2004> (accessed 1 November 2011).

[2] Ministry of Home Affairs, 'The Singapore Government's Response to Amnesty International's Report "Singapore: The Death Penalty—A Hidden Toll of Executions"', 30 January 2004, <http://www.mha.gov.sg/basic_content.aspx?pageid=74> (accessed 1 November 2011).

[3] 'Singapore's Presentation at UN Human Rights Council' (8 May 2011), <http://www.scoop.co.nz/stories/WO1105/S00157/singapores-presentation-at-un-human-rights-council.htm> (accessed 15 April 2013).

The subsequent contempt proceedings against the author drew public attention to the limits of the freedom of speech with respect to criticism of the death penalty. Although death penalty activism has never been a particularly strong force in Singapore, that was the case for any sort of activism. The momentous political change that led to what has been called the 'New Normal' in Singapore might well transform the situation.[4] Most excitingly, recently released execution figures demonstrate a precipitous decline in execution rates since 2004 which are not apparently fully explicable on grounds other than an unannounced change in official policy towards the necessity of executions.[5] With execution rates falling to such low levels, it becomes increasingly difficult to argue that the death penalty, or at least in any mandatory form, is necessary and required to preserve the legendary level of law and order enjoyed in Singapore.

2. The Condemned, His Counsel, and the Court of Appeal

The unfolding saga of condemned drug trafficker, Yong Vui Kong, and the indefatigable efforts of his counsel, M Ravi,[6] have perhaps made history of a kind—providing the Court of Appeal, the apex court in Singapore, the opportunity of delivering three major death penalty decisions in quick succession. The result has not been obviously optimistic—Yong remains on death row. Yet the way in which the judgments were crafted gives reason to be cautiously hopeful for future. It is to these three decisions that we now turn.

The prequel was unremarkable. Yong was caught delivering an amount of heroin which attracted a mandatory death penalty,[7] and he was charged accordingly. His defence of ignorance of what he was conveying was rejected by the trial judge and he was sentenced to death.[8] His lawyers filed an appeal. Then matters became more interesting. Yong had become a devout Buddhist and was 'at peace with himself',

[4] Cherian George, 'Presidential Election 2011: Different Plot, Same Message', 28 August 2011, <http://www.airconditionednation.com/2011/08/28/presidential-election-2011-2/> (accessed 26 January 2013); Catherine Lim, 'How GE2011 proved me—oh, so wonderfully!—wrong', <http://catherinelim.sg/2011/05/09/how-ge-2011-proved-me-oh-so-wonderfully-wrong/> (accessed 1 November 2011). Both George and Lim are highly respected political commentators.

[5] Ministry of Home Affairs, 'Written Answer to Parliamentary Question on Judicial Executions From 2004 to 2010', 21 October 2011, <http://www.mha.gov.sg/news_details.aspx?nid=MjE0Nw%3D%3D-occ0vMiT7bI%3D> (accessed 1 November 2011).

[6] Deborah Choo, 'Lawyer M Ravi: My Biggest Weakness Is…', *Yahoo! News*, 26 October 2011, <http://sg.news.yahoo.com/lawyer-m-ravi--my-biggest-weakness-even-until-today-is---.html> (accessed 1 November 2011).

[7] Clause 5(4)(b), Second Schedule, Misuse of Drugs Act, Chapter 185, Singapore Statutes, prescribes a mandatory death penalty for trafficking in more than 15 gms of diamorphine. The threshold varies for different drugs: 30 gms of morphine or cocaine, 500 gms of cannabis, and 250 gms of methamphetamine.

[8] *PP v Yong Vui Kong* [2009] SGHC 4. Such is the clinically efficient way in which a capital trial is conducted in Singapore—the judgment was all of five paragraphs.

so he instructed his lawyers to withdraw the appeal. His appeal for Presidential clemency was turned down and a date for execution was set.

The power to re-open completed proceedings

Enter M Ravi, instructed by a brother of Yong. He filed an application to stay the execution on the ground that Yong, on his advice, now wished to revive the appeal in order to contest the constitutionality of the mandatory death penalty for drug traffickers. The prosecution understandably objected strenuously to what they perceived to be an attempt to re-litigate a clearly completed proceeding. The court was *functus officio* and no longer had jurisdiction over the matter as soon as the initial appeal was withdrawn, or so the precedents say. The prosecution realized immediately the potential administrative complications—the floodgates would be lifted, and finality swept away.

The Court of Appeal in *Yong Vui Kong v PP (No 1)* would not turn away Yong without a hearing.[9] The actual decision of the court rested on a ruling that Yong's withdrawal of his appeal was a nullity because it had been made under the mistaken impression that he was not entitled to challenge the constitutionality of the mandatory death penalty. Yong was therefore at liberty to pursue an appeal. The language employed by the Court of Appeal evinced a clear attitude that the death penalty was different and that the court had to adopt a generous stance towards the constitutional rights of the accused person:[10]

> Having regard to the *nature of capital punishment* being final and irrevocable for the applicant, and also the public interest in its legality under the Constitution, we were prepared to accept the applicant's position, implicit in his argument, that if he had known that he was entitled to re-argue the legality of the mandatory death sentence under the Constitution, he would have proceeded with his appeal on the law. In other words, we were prepared to accept that in withdrawing his appeal he had made a fundamental mistake . . . In our view, since the right to life and equal protection of the law are fundamental rights under Arts 9(1) and 12(1) of the Constitution respectively, a mistake by the applicant as to whether he was entitled to these fundamental rights under the Constitution must be a fundamental mistake. Accordingly, we were of the view that the applicant's withdrawal of his appeal was a nullity.

It does seem factually unlikely that Yong was actually thinking about the chances of a constitutional attack on the mandatory death penalty when he instructed his first counsel to withdraw the appeal. The conduct of the defence at the trial contained not a hint that it was ever in his mind, or the mind of his first counsel. His first counsel was probably aware of the failed attempt in 2005,[11] and perhaps chose not to say anything about constitutionality, concentrating instead on the issue of *mens rea*. Yong himself was unlikely to have known anything about the possibility of a constitutional defence until he was so advised by his second counsel. But that

[9] [2010] 2 *Singapore Law Reports* 192. The numbering of the *Yong Vui Kong* cases is mine.
[10] [2010] 2 *Singapore Law Reports* 192, para 28 (emphasis added).
[11] *Nguyen Tuong Van v PP* [2005] 1 *Singapore Law Reports* 103.

was rather far from the factual holding of the Court of Appeal. Indeed, M Ravi did not seem to have even made an argument along those lines. Yet the extraordinary 'nature of capital punishment' impelled the court to fashion such an implied argument on behalf of the accused and then to rule in his favour.

Even more striking were the Court of Appeal's views on what the position would have been if Yong's withdrawal of his appeal was indeed valid and the criminal proceedings completed thereby. Although the court was careful to say that it was not making a formal decision on this point, it said enough to indicate how it would be likely to rule if the matter came squarely before the court in the future. Standing in the way was the '*Vignes* line of decisions'[12]—a phalanx of fairly recent Court of Appeal cases which seemed to have consistently held that once the appeal is disposed of, the court no longer had any jurisdiction to re-open or re-examine a conviction. It did not matter what the circumstances were—the court was simply *functus officio*. The Court of Appeal was clearly unimpressed with its own prior decisions and declared that they should not be 'accorded a status of finality and immutability' and that, in a suitable case, they would have to be reconsidered. It seemed fairly certain what a future reconsideration would produce:[13]

> We note also that the main justifications of these cases, that the court is *functus* after it has delivered judgment on the case, rest on the public interest in having finality of litigation and the absence of an express provision in the SCJA to empower the court to review its decisions. The first justification is bolstered by the fear of abuse of the judicial process and the floodgates argument . . . In our view, *the finality principle should not be applied strictly in criminal cases where the life or liberty of the accused is at stake as it would subvert the true value of the judicial process*, which is to ensure, as far as possible, that the guilty are convicted and the innocent are acquitted. The floodgates argument should not be allowed to wash away both the guilty and the innocent. Suppose, in a case where the appellate court dismisses an appeal against conviction and the next day the appellant manages to discover *some evidence or a line of authorities* that show that he has been wrongly convicted, is the court to say that it is *functus* and, therefore, the appellant should look to the Executive for a pardon or a clemency? In circumstances where there is sufficient material on which the court can say that there has been a miscarriage of justice, *this court should be able to correct such mistakes*.
>
> Another argument which this court should take into account (but which has never been addressed to the court), is that Art 93 of the Constitution vests the judicial power of Singapore in the Supreme Court. The judicial power is exercisable only where the court has jurisdiction, but where the SCJA does not expressly state when its jurisdiction in a criminal appeal ends, there is *no reason for this court to circumscribe its own jurisdiction to render itself incapable of correcting a miscarriage of justice at any time*.

There was a very clear intent to break with the past and its exaltation of real or imagined managerial concerns, and technical matters like the absence of a specific statutory provision granting such jurisdiction, over substantive justice. Interestingly, *Vignes* itself was argued by M Ravi in 2003, where he attempted without success to persuade the court to reopen a conviction in order to raise an

[12] *Vignes s/o Mourthi v PP* [2003] 4 *Singapore Law Reports* 518.
[13] *Yong Vui Kong (No 1)*, paras 15 and 16 (emphasis added).

objection on the grounds of breach of the constitutional right to counsel.[14] Again, the death penalty loomed large—the court asks rhetorically 'is the court to say that it is *functus*... and the appellant should look to the Executive for a pardon or clemency?'[15] In the face of something as extraordinary as the death penalty, how indeed can an abstract need for finality be determinative of the court's jurisdiction? That would be getting our priorities wrong. With poetic flourish, the Court of Appeal turned the prosecution's floodgates imagery into the spectre of an innocent person being washed away—to the gallows, one might add. On its own motion, the Court of Appeal brought Article 93,[16] which vests judicial power in the judiciary, into the picture—and this creates the exciting possibility that, not only does the court have the power to re-open any conviction at any stage, if the circumstances so justify, but nothing short of a constitutional amendment would be sufficient to deprive the court of that power.[17]

The constitutionality of the mandatory death penalty

So the constitutionality of the mandatory death penalty was taken to the Court of Appeal. Twice before, once in the Privy Council (before appeals thereto were abolished), and once in the Court of Appeal itself, similar attempts have failed.[18] Yong's appeal met with the same fate. Yet the manner in which the decision, *Yong Vui Kong v PP (No 2)*[19] was reasoned gives rise to the distinct possibility that, although it might be business as usual for the moment, this status quo is vulnerable to change.

That which stood in the way of the Court of Appeal's decision was the body of Privy Council judgments, on appeal from Caribbean jurisdictions, which had very dramatically turned away from its own earlier Singapore decision of *Ong Ah Chuan v PP*.[20] The potentially embarrassing task the Court of Appeal had to perform was to explain just why Singapore should continue to follow a Privy Council decision which the Privy Council itself had decisively refused to, and in terms such as these:[21]

> It is no longer acceptable, nor is it any longer possible to say, as Lord Diplock did on behalf of the Board in Ong Ah Chuan v Public Prosecutor [1981] AC 648, 674 [the Singapore case], that there is nothing unusual in a death sentence being mandatory. As Lord Bingham pointed out in Reyes... the mandatory penalty of death on conviction of murder long

[14] *Vignes s/o Mourthi* (n 12). [15] *Yong Vui Kong (No 1)* (n 9), para 15.

[16] Article 93 of the Constitution of the Republic of Singapore reads 'The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force'.

[17] When Parliament sought to deprive the power of judicial review over detention without trial, which was similarly grounded in Article 93, it had to pass a constitutional amendment—now Article 149(3).

[18] Respectively, *Ong Ah Chuan v PP* [1980–81] *Singapore Law Reports* 48, and *Nguyen Tuong Van v PP* [2005] 1 *Singapore Law Reports* 103.

[19] *Yong Vui Kong v PP* [2010] 3 *Singapore Law Reports* 489.

[20] Cited in judgments outside of Singapore as [1981] AC 648.

[21] *Watson v R (Jamaica)* [2004] UKPC 34.

pre-dated any international arrangements for the protection of human rights. The decision in that case was made at a time when international jurisprudence on human rights was rudimentary…

Nobody likes to be identified with entertaining primitive conceptions of human rights, least of all a court as 'competitive'[22] as the Singapore judiciary. So the Court of Appeal embarked on a novel route—constitutional history. The Caribbean cases were based on a constitutional right against inhuman[23] punishment—a mandatory death penalty being inhuman because it deprives the offender of judicial consideration of his particular characteristics and circumstances. The Singapore Constitution does not contain an express right against inhuman punishment, only that 'No person shall be deprived of his life or personal liberty save in accordance with law'.[24] The question was whether the constitutional conception of 'law' or 'due process' could be taken to have implied in it the right against inhuman punishment. The Court of Appeal proceeded as follows:[25]

> We agree that domestic law, including the Singapore Constitution, should, *as far as possible*, be interpreted consistently with Singapore's international legal obligations. There are, however, *inherent limits* on the extent to which our courts may refer to international human rights norms for this purpose. For instance, reference to international human rights norms would not be appropriate where the express wording of the Singapore Constitution is not amenable to the incorporation of the international norms in question, or where Singapore's *constitutional history is such as to militate against the incorporation of those international norms.*

So it was not that the Court of Appeal *will* not, but that it *cannot*. This is the core of why the court thought that it did not have a choice:[26]

> …it is not possible to interpret the Singapore Constitution as incorporating a prohibition against inhuman punishment [because] a proposal to add an *express* constitutional provision to this effect was made to the Government in 1966 by the constitutional commission chaired by Wee Chong Jin CJ ('the Wee Commission'), but that proposal was ultimately rejected by the Government.…It is not legitimate for this court to read into Art 9(1) a constitutional right which was decisively rejected by the Government in 1969, especially given the historical context in which that right was rejected.

This line of reasoning is remarkably brittle. There indeed was a recommendation made by the Wee Commission to include a clause dealing specifically with inhuman punishment. The government did indicate that it agreed in principle, but as it turned out, did not act upon it, nor did it say a word more about it. I have argued elsewhere[27] that to interpret this piece of constitutional history as a *decisive* rejection of the existence of the right against inhuman punishment in the Singapore

[22] In the sense of trying to be 'world class'.

[23] I use 'inhuman' to encompass alternative expressions such as 'cruel' and 'unusual'.

[24] Article 9(1), Singapore Constitution.

[25] *Ong Ah Chuan* (n 18), para 59 (emphasis added).

[26] *Ong Ah Chuan* (n 18), para 64 (emphasis in original).

[27] Michael Hor, 'Criminal Justice in the Chan Court: Change, Contestation and Conservatism in the Court of Appeal' in Yeo Tiong Min, Hans Tjio, and Tang Hang Wu (eds), *SAL Conference 2011: Developments in Singapore Law Between 2006 and 2010, Trends and Perspectives* (Singapore, Singapore Academy of Law 2011) 147 at 167–89.

Constitution was, as a matter of historical evidence, unsupportable. Briefly, the Wee Commission may well have made the recommendation, not because such a right did not exist, but because it was desirable to make the right express. The failure of the government to act on it may well not have been motivated by decisive rejection—it could just as well have been that the government felt that it already existed, or that it did not wish, for political reasons which had nothing to do with rejecting the right, to act on it. It would have been very curious indeed if the government had wished to reserve for itself the power to impose inhuman punishment without any explanation. But even more importantly, even if there had been a clear governmental declaration that it did not think the right against inhuman punishment existed under the general due process clause of the Singapore Constitution,[28] the executive and legislative arm of government do not have the constitutional power to interpret the Constitution with finality. That power belongs undeniably to the judiciary. In interpreting the Constitution, the court may, of course, take into account how it has been construed by other arms of government, but to say that the court is bound to interpret the Constitution in a certain way because the government has decided that it should be interpreted that way is clearly contrary to accepted constitutional norms in Singapore.[29] Whatever the Wee Commission or the government may be taken to have said or implied in 1969 about the existence or not of a constitutional right against inhuman punishment simply cannot be determinative of the exclusively judicial task of deciding that issue with finality.

It is intriguing to speculate just why the Court of Appeal chose such an unpromising route. Perhaps the other paths were even less palatable. The court could have said that it had the interpretive choice to decide whether or not the right against inhuman punishment resided in the concept of Singaporean constitutional due process, and then decide that it does not so exist. But then it would have to respond to the obvious question of why, if they have a choice, they are choosing not to read into the Singapore Constitution what is perhaps one of the most incontestable human rights. Alternatively, the court could have held that the right does indeed exist, but that the mandatory death penalty for drug offences did not violate it. But this would mean flatly disagreeing with the substance of that posse of Privy Council precedents, and perhaps having to explain how something can be so clearly inhuman to the judges of the Privy Council, but perfectly human to the judges of the Court of Appeal in Singapore.

Whatever the route, one thing appears to be clear—the Court of Appeal did not wish to strike down the mandatory death penalty for drugs. The reason why peeps through here and there in the course of the judgment. The manner in which the court sought to distinguish the Indian Supreme Court decision of *Mithu v State of Punjab*[30] is telling. Singapore, like India, does not have an explicit protection

[28] Article 9(1), which reads 'No person shall be deprived of his life or personal liberty save in accordance with law'. I use the term 'due process' clause to capture the idea that 'law' does not simply mean enacted law, but also transcendent 'fundamental rules of natural justice'—an interpretation bequeathed to us by the Privy Council in *Ong Ah Chuan* (n 18) that dark cloud which turned out to have a silver lining.

[29] And in all other developed systems of constitutional government.

[30] AIR 1983 SC 473.

against inhuman punishment, and its due process clause is very similar to its Indian counterpart. Yet the Indian court was able to strike down a mandatory death penalty provision under its due process clause on the ground that it violated the constitutional guarantee that a law which deprives someone of his life or liberty must be 'fair, just and reasonable'. One might have thought that the Indian decision clearly demonstrated where the Singapore court could have gone as well. A number of reasons were given by the Court of Appeal for not taking this path, but this, in my view, was the kernel:[31]

> What we now have to consider is whether this test of fair, just and reasonable procedure employed by the Indian Supreme Court ('the "fair, just and reasonable procedure" test') for the purposes of determining the constitutional validity of laws under Art 21 of the Indian Constitution is applicable in our local context to Art 9(1) of the Singapore Constitution . . . Although the expression 'law' may include substantive law as well as procedural law, it does not follow that any procedural law must be 'fair, just and reasonable' before it can constitute 'law' for the purposes of Art 9(1). Article 9(1) contains no such qualification; nor can such a qualification be implied from its context or its wording . . . Such a test hinges on the court's view of the reasonableness of the law in question, and *requires the court to intrude into the legislative sphere of Parliament as well as engage in policy making*.

Perhaps an even clearer expression of this is to be found at the end of the judgment:[32]

> In our view, whether or not our existing MDP [mandatory death penalty] legislation should have been enacted and/or whether such legislation should be modified or repealed are *policy issues that are for Parliament to determine* in the exercise of its legislative powers under the Singapore Constitution. It is for Parliament, and not the courts, to decide on the appropriateness or suitability of the MDP as a form of punishment for serious criminal offence. In view of the decisive rejection of a constitutional prohibition against inhuman punishment in the evolution of the Singapore Constitution, any changes in CIL [customary international law] and any foreign constitutional or judicial developments in relation to the MDP as an inhuman punishment will have no effect on the scope of Art 9(1). If any change in relation to the MDP (or the death penalty generally) is to be effected, *that has to be done by Parliament and not by the courts* under the guise of constitutional interpretation.

It is my view that these sentiments reveal the underlying reason for the court's reticence. It is not so much a matter of constitutional history and the murky events of 1969, as the court was at pains to say it was, but a question of contemporary politics—that of the demarcation of the respective spheres of the judiciary and the government in 2010. The mandatory death penalty for drugs was a deliberate 'showcase policy' of the government of the People's Action Party—the only political party ever to have ruled independent Singapore. It would be intrusion indeed if the courts were to try to strike it down. It might even have been 'suicidal' in the sense that it was not beyond the realm of the possible that the government might have pushed through constitutional amendments to neutralize such audacity.

[31] *Ong Ah Chuan* (n 18), paras 79–80 (emphasis added).
[32] *Ong Ah Chuan* (n 18), para 122 (emphasis added).

It has done so before.[33] So it might well have been that a certain 'political' conception of the proper reach of the judiciary into the governmental sphere foreclosed any possibility of the court interfering with the mandatory death penalty for drugs, however the court may have felt about matters such as whether or not a right to inhuman treatment exists, and if so whether it was breached. It is, however, not easy for common law judges to be open about larger non-strictly legal motivations in judicial decision-making[34]—and so it was that constitutional history may have provided a convenient proxy.

If that were the end of the story, then one might be justified in thinking that it was just another chapter in the same old book. But it could well have been that the judges, in their implicit wisdom, realized that matters such as the extent to which judicial incursions into laws and governmental policies are acceptable, or at least tolerable, may change with time. There may come a time when it becomes politically plausible to strike down the mandatory death penalty, and when that time comes it would help the future court that the precedent in *Yong Vui Kong (No 2)* is more easily and elegantly put aside by contradicting its reading of constitutional history, rather than by being embroiled in substantive disagreement with the earlier decision. The change may come sooner than most of us think. 2011 was perhaps the most important year in the history of Singapore since 1959 when the People's Action Party took power in Singapore. Large and profound shifts were taking place in the political culture of Singapore—so much so that newly elected President Tony Tan blessed this phenomenon with the phrase 'The New Normal'.[35] In short, while the 'Old Normal' was about the centralization of power in the government, the 'New' is about measured decentralization. The old catchwords of trust in the government and governmental efficiency are giving way to the new mantras of accountability and transparency. All this has obvious implications on the degree to which the public expects the judiciary to scrutinize what the government has decided, with respect to the mandatory death penalty and perhaps almost every other matter.

[33] When the Court of Appeal declared that it was prepared to judicially review executive decisions to detain without trial, statutory and constitutional amendments were at once enacted to push the judiciary back. I recount that story in 'Law and Terror: Singapore Stories and Malaysian Dilemmas' in Victor Ramraj, Michael Hor, and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge, Cambridge University Press 2005) 273.

[34] Singapore judges are much more akin to their British brethren in their reserved attitude towards expression of larger background policies than their American counterparts. I do not by any means intend to say that taking such things into account is illegitimate—indeed, it is my view that it is inevitable.

[35] Joanne Chan, 'Strong Party in Govt Matched by Effective Opposition is "New Normal" ', *Channel Newsasia*, 15 July 2011, <http://www.channelnewsasia.com/stories/singaporelocalnews/view/1141175/1/.html> (accessed 1 November 2011). See also George (n 4). Interestingly, a passage, which appeared in the earliest versions of the judgment in *Yong Vui Kong (No 2)*, is not to be found in its final form in the law reports. This was one contemporary report of the missing portions: *The Online Citizen*, <http://theonlinecitizen.com/2010/05/breaking-news-mandatory-death-penalty-constitutional-says-court/> (accessed 4 November 2011): As a parting remark, CJ Chan observed that Yong's appeal . . . had mustered the most substantive constitutional arguments against the mandatory death penalty. As such, the rejection of this appeal would mean that 'under Singapore law as it stands, further challenges in court [against the mandatory death penalty] have been foreclosed'.

The reviewability of pardons

Yong Vui Kong, through his counsel, M Ravi, was to make a third visit to the Court of Appeal in *Yong Vui Kong v Attorney-General (No 3)*.[36] It appeared that a few days before the Court of Appeal delivered its second judgment, Singapore's Minister for Law and then Second Minister of Home Affairs had responded to a question asked of him about Yong in a community dialogue session as follows:[37]

> People assume you can have this safety and security without this framework of the law; that you can change it, and yet your safety and security will not be affected . . . But there are always trade-offs. The difficulty the Government has sometimes in explaining this is that the trade-offs are not apparent. The damage to a large number of others is not obvious.
>
> *You save one life here, but 10 other lives will be gone. What will your choice be?*
>
> *If* [the Appellant, Yong Vui Kong] *escapes the death penalty, drug barons will think the signal is that young and vulnerable traffickers will be spared and can be used as drug mules. . . .*
>
> Then you'll get 10 more. There'll be an unstoppable stream of such people coming through as long as we say we won't enforce our laws. . . .

Yong's principal challenge on the ground that the government, which possessed the power to pardon, had illegitimately predetermined Yong's case for clemency not unexpectedly failed. Whether one agrees or disagrees with the potentially adverse effect of granting a pardon to Yong which the Minister feared, it was difficult to argue that the Minister was not legally entitled to think that way. Indeed, the logic of the mandatory death penalty, which the Court of Appeal had just ruled to be constitutional, naturally leads to the conclusion that even 'young and vulnerable' offenders ought not to be spared. The force of the deterrent value of a mandatory death penalty rests on there being few if any exceptions to its imposition. More pragmatically, as the Court of Appeal said, if these kinds of pronouncements were capable of being held to be legally illegitimate, then it would be impossible for any Minister to announce any policy with respect to any discretion.[38]

The primary interest in this decision lies in its series of holdings concerning the justiciability of the power of pardon which the Court of Appeal made in the course of its judgment. It was an absorbing compound of the progressive and the conservative, demonstrating an awareness of the need for legal scrutiny of the power of pardon, but also of the fear of going too far too quickly. The first, and in my view most important, ruling was the clear decision that the exercise of the power of pardon is reviewable, and it would appear, on the now classic grounds of illegality, irrationality, and procedural impropriety. The Chief Justice, who presided and who wrote the judgment of the Court of Appeal, had an interesting history with this area of the law. More than 20 years ago, he had been party to what remains the most important public law decision in Singapore, *Chng Suan Tze v Minister for Home Affairs*,[39] which surprised the legal community and startled the

[36] [2011] 2 *Singapore Law Reports* 1189.
[37] Quoted in [2011] 2 *Singapore Law Reports* 1189, para 5 (emphasis in original).
[38] [2011] 2 *Singapore Law Reports* 1189, para 125.
[39] [1988] *Singapore Law Reports* 132. See also Hor, 'Law and Terror' in Ramraj, Hor, and Roach (eds) (n 33).

government by declaring that one of its most jealously-guarded discretions—the power to detain indefinitely without trial for national security reasons—was subject to the usual grounds of judicial review. Various statutory and constitutional amendments were hastily cobbled together to restore the executive sanctity of that particular power. The Chief Justice in *Yong Vui Kong (No 3)* described the precise significance of these events:[40]

> The effect of this constitutional amendment was to restrict our courts' supervisory jurisdiction, apropos national security decisions made under the Internal Security Act (which contained the power to detain without trial), to reviewing such decisions for procedural improprieties only. Save for this limitation, Parliament left untouched the full amplitude of the *Chng Suan Tze* principle [that all power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power], and thereby implicitly endorsed it.

The fact that Parliament had only shown its displeasure in the specific context of detention without trial under the Internal Security Act meant that it was well pleased with the reviewability of all other discretions. In 2008, the Chief Justice had presided over another decision, *Law Society v Tan Guat Neo Phyllis*, which had used the same principle to slay a second sacred cow of unreviewability—prosecutorial discretion—in these terms:[41]

> The notion of a subjective or unfettered discretion is contrary to the rule of law. In our view, the exercise of the prosecutorial discretion is subject to judicial review in two situations: first, where the prosecutorial power is abused, *ie*, where it is exercised in bad faith for an extraneous purpose, and second, where its exercise contravenes constitutional protections and rights (for example, a discriminatory prosecution which results in an accused being deprived of his right to equality under the law and the equal protection of the law under Art 12 of the [Singapore] Constitution).

As with prosecutions, so it must be with pardons. The Chief Justice in *Yong Vui Kong (No 3)* concluded:[42]

> On the basis of the *Chng Suan Tze* principle as elaborated on in *Phyllis Tan*, our courts must have the power to review the clemency power under Art 22P [which enshrines the power of pardon] on the same legal basis.

The Court of Appeal then began to flesh out the meaning of procedural due process in the context of the power of pardon. It was entitled to be governed by the fundamental rules of natural justice, though not in the same way as an accused person in a criminal trial would be so entitled. The rule against bias applied, but Yong Vui Kong failed to persuade the court that the Minister's remarks demonstrated the relevant kind of bias—ie that he had some personal interest in the matter.

[40] *Yong Vui Kong (No 3)* (n 36), para 79.

[41] [2008] 2 *Singapore Law Reports* 239, para 148. The decision was technically that of a High Court, but because it comprised the Chief Justice, a Judge of Appeal, and a High Court Judge, it appears to have assumed the authority of a Court of Appeal decision.

[42] *Yong Vui Kong (No 3)* (n 36), para 80.

Then, the Court began to pull the brakes. The condemned person is, however, not entitled to the right to be heard. In contrast to the very progressive nature of its decision on justiciability, the reasons which the court gave for denying the right to be heard had a decidedly conservative ring to them:[43]

> Historically, at [English] common law, an offender seeking mercy had no right to be heard during the clemency process . . . This was the position in Singapore when the clemency power was a prerogative power. After the clemency power in Singapore became a constitutional power . . . the common law position that an offender had no right of hearing during the clemency process continued to apply. . . . This situation is reflected by the absence of any provision in Art 22P for an offender . . . All that Art 22P(2) specifically provides for in a death sentence case is that the Art 22P(2) materials relating to the offender must be considered by the Cabinet impartially and in good faith before it advises the President on the exercise of the clemency power . . . Notably, Art 22P(2) does not provide for any right on the part of the offender in a death sentence case to file a clemency petition. Furthermore, even if the offender files a clemency petition, under the terms of Art 22P(2), the petition does not form part of the Art 22P(2) materials.

The appeal to history is all the more puzzling, following so closely after the court's decision to break with history on the issue of justiciability. If the idea of a 'prerogative power' should no longer govern the issue of justiciability, why should it continue to be determinative of the right to be heard? The historical idea of pardon as a prerogative power conjures up an image of an almighty and exalted sovereign bestowing mercy as and when he or she chooses on undeserving subjects who really have no right to expect or say anything. One would have hoped that that is no longer the predominant conception of clemency, especially in a country where divinely mandated royalty is very far indeed from the political culture. Surely a far more sensible foundation for the power of pardon in modern Singapore is the realization that the processes of the criminal law—investigation, prosecution, trial, and sentence—are not perfect and that at the end of the day, although due process might have been accorded, the result may still not be quite right. This is especially so in the context of the mandatory death penalty where the traditional role of the courts in determining sentence has been taken away from them. The clemency process ought to be seen as a mechanism to perform the necessary fine-tuning in the cases which fall through the cracks. Seen in this light, there seems to be no reason why a condemned person ought not to have some form of the right to be heard.

Equally puzzling is the court's very technical reading of the Article 22P(2). Undoubtedly that provision says nothing about a right to be heard, or even the existence of such a thing as a clemency petition. But neither does the provision say that such a process cannot exist. The fact is that, as the Court of Appeal hastened to add:[44]

> That said, it is an established procedure in death sentence cases for the Prisons Department to ask the offender (through his counsel) to file a clemency petition, if he wishes, within

[43] *Yong Vui Kong (No 3)* (n 36), paras 113–14.
[44] *Yong Vui Kong (No 3)* (n 36), para 114.

three months of his conviction (or of the conclusion of his appeal against conviction and/or sentence, as the case may be). If the offender does file a clemency petition, the Cabinet will no doubt consider it together with the Art 22P(2) materials relating to the offender before advising the President on the exercise of the clemency power.

So there is and has been a historical and consistent practice to inform the condemned person that he may file a clemency petition, and presumably, of the relevant decision-maker taking it into consideration. In other words, there is certainly, in all cases, an opportunity to be heard. Why then should the condemned not have the right to be heard? It is a perennial problem of administrative law to try to work out to what extent an administrative decision ought to be 'judicialized'. Gains in justice and fairness through increasing judicialization have to be balanced against the administrative costs of doing so. But if it is the case, as it is here, that the condemned person is, and has always been, invariably given the opportunity of being heard,[45] the administrative costs must be at the very least tolerable. It will still be a matter of debate exactly what the content of the right to be heard should be, but that is something that the courts are eminently qualified to work out. Ruling out the right to be heard *in toto* does not seem to be a very attractive thing to do.

Perhaps the clue to what the court said about the right to be heard is to be found in its next ruling—that the condemned person is not entitled to see the material which must be taken into account, namely a report each from the trial judge, the presiding judge on appeal, and the views of the Public Prosecutor on these two reports.[46] Standing in the way of this conclusion is yet another Caribbean decision of the Privy Council, *Lewis v Attorney-General of Jamaica*,[47] which had held the opposite—that the condemned person does indeed have the right to see the relevant documents—apparently on the ground that it flowed from the right (which a condemned person in Jamaica has) to apply for pardon. Perhaps it was that the Court of Appeal felt that it had to head off the disclosure issue by denying the right to be heard. That would have been unfortunate, for the right to be heard need not necessarily bring in its train the right to disclosure of the relevant reports. Indeed, the existing practice in Singapore is precisely that the condemned person is heard, but is not entitled to see the documents. We need to proceed further and ask whether or not the condemned person ought to be entitled to disclosure of the reports. Again, we encounter the problem of just how much to judicialize. There can be no doubt about the gains in fairness if the documents are disclosed to the condemned person. He or she will get to know precisely what the three reports thought were the governing considerations, and will be in a much better position to make representations thereon. Cabinet will then have arguments from three sources—the judiciary, the prosecutor, and the condemned—addressing the same matters. Drafting a petition in ignorance of the contents of the reports is not very different from conducting a defence in ignorance of the precise charge. What are the costs? There will of course be a loss of secrecy—but it is not entirely clear

[45] The practice of clemency petitions appears to have been well in place before the Second World War: 'Condemned Man's Hope: Council Will Consider Case', *Straits Times*, 10 February 1939.

[46] These documents are prescribed in Article 22P(2) of the Constitution.

[47] [2001] 2 AC 50.

what adverse consequences might flow from that. It is unlikely that the persons responsible for the reports—all holders of 'high constitutional offices'[48]—would be tempted to alter the contents thereof because they know that it will be revealed to the condemned person, and thereon perhaps to the public. There might of course be secret information, especially in the report of the Public Prosecutor, which ought to be privileged from disclosure because of the potential harm that might be caused by disclosure. But that small possibility cannot justify non-disclosure in all situations whatsoever. The law of evidence has developed sophisticated means of dealing with such information[49]—for example, where non-disclosure is challenged, a court can see the full documents to either confirm or contradict a decision to keep certain portions of it secret.

Quite apart from the use of the clemency reports in the course of preparing a petition, a right to disclosure obviously serves to provide material which may be used in an application for judicial review. It is in this regard that the court's denial of a right of disclosure is likely to keep the prospect of judicial review of a pardon decision in the realm of the theoretical. How indeed can illegality, irrationality, and procedural impropriety be ever proved if the condemned person never gets to know how the decision was made in the first place? It does not seem to make sense to say that the rule of law demands justiciability, but that the government is perfectly entitled to reveal or say nothing about how it exercised the discretion. Thus, is that which is legally reviewable made unreviewable in practice? Is the rule of law eviscerated by a rule of evidential convenience? The door is open, but the crack is too small for anyone to pass through.

3. An Author, Contempt of Court, and Death Penalty Advocacy

While the Yong Vui Kong saga was working its way through the courts, British author, Alan Shadrake, published a book, *Once a Jolly Hangman: Singapore Justice in the Dock*, which began life as a write-up of an interview with Singapore's chief executioner, but ended up being a book detailing what he perceived to be injustices in the way the death penalty was administered in Singapore.[50] The Attorney-General thought several passages had scandalized the judiciary and Shadrake was cited for contempt of court.[51] Shadrake engaged none other than M Ravi, Yong Vui Kong's tireless counsel. So yet another death penalty related case found its way to the Court of Appeal.

[48] *Yong Vui Kong (No 3)* (n 36), para 139.

[49] *Conway v Rimmer* [1968] AC 910 (HL).

[50] Alan Shadrake, *Once a Jolly Hangman: Singapore Justice in the Dock* (Petaling Jaya, Strategic Information and Research Development Centre 2010; Alan Shadrake, *Once a Jolly Hangman: Singapore Justice in the Dock* (Malaysia, Revised Edition, Petaling Jaya 2011) with additional material detailing the author's experience with the contempt proceedings; Alan Shadrake, *Once a Jolly Hangman: Singapore Justice in the Dock* (Australia, Murdoch Books 2011).

[51] 'Scandalising the judiciary' is a term of art in law denoting the kind of contempt which operates by attacking the reputation of the judiciary, usually concerning what it has already done.

The judgment which the Court of Appeal delivered in *Shadrake Alan v Attorney-General* was once again incrementally progressive. In stark contrast with judicial attitudes in the past, the court demonstrated a keen awareness of the value of free speech:[52]

> the law relating to contempt of court operates against the broader legal canvass of the right to freedom of speech that is embodied both within Art 14 of the Constitution of the Republic of Singapore . . . as well as the common law. The issue, in the final analysis, is one of *balance*: just as the law relating to contempt of court ought not to unduly infringe the right to freedom of speech, by the same token, that right is not an absolute one, for its untrammelled abuse would be a negation of the right itself.

Consistent with its emphasis on striking a 'balance' between free speech and judicial reputation, the court rejected both the 'inherent tendency' and 'clear and present danger' formulations in favour of the 'real risk' test[53] that there must be a real risk that a reasonable member of the public, on hearing or reading the offending passages, would have his or her confidence in the judiciary undermined. The court proceeded to work in a defence of 'fair criticism', and even placed the burden of proof on the prosecution to negative fair criticism beyond a reasonable doubt.[54] So a real risk that judicial reputation would be undermined is not enough, there must also be proof that there are insufficient facts and logical arguments to support the imputation.

The Court of Appeal proceeded to apply the law to the passages which the trial court had found to be contemptuous. I deal only with the death penalty related imputations. There were three. First was the Julia Bohl imputation:[55]

> Shortly before a young German woman, known to have been running a lucrative drugs ring in Singapore, was sentenced to only five years, of which she served three for good behaviour—a slap on the wrist which was arranged by the Singapore government under threat of economic reprisals by the German government.

The Court of Appeal disagreed with the trial judge and held that a reasonable member of the public would have thought that the author was blaming the prosecutorial authorities for bending to foreign pressure in reducing her charges, not the courts. That would have undermined public confidence in the Public Prosecutor, but not the judiciary.

Second was the Krol-Johnson imputation:[56]

> Following final submissions at the 28th session [of the trial] which began on 29 October, Judge Lai suddenly announced them both not guilty. . . . It was an extraordinary end to the case in which few believed she would not be found guilty and hanged. The 'I didn't know'

[52] [2011] 3 *Singapore Law Reports* 778, para 17 (emphasis in original). One only need compare this with the older decision of *Attorney-General v Wain* [1991] *Singapore Law Reports* 383, where the constitutional freedom of speech makes an appearance more in the nature of a footnote.

[53] 'Inherent tendency' was the test adopted in *Wain* (n 52) and 'clear and present danger' was urged upon the court by Shadrake's counsel, M Ravi.

[54] *Shadrake Alan* (n 52), para 80.

[55] *Shadrake Alan* (n 52), para 101.

[56] *Shadrake Alan* (n 52), para 106 (emphasis and bolding in original).

plea had seemingly and perhaps miraculously worked for her ***but in Singapore funny things tend to happen on the way to their courtrooms just as funny things happen when they arrive in a theatre to perform in a comedy show*** ... In fact, many believe that Krol-Hmelak was guilty. But to hang her following the uproar over van Damme's death sentence might not have been wise. ***So it was very likely a government verdict not a judicial one. Singapore's judiciary is not free to decide who should live and who should die when vital business, economic and diplomatic issues are at stake***.

The Court of Appeal confirmed that this was contempt. There was a clear imputation that the trial judge, in acquitting the accused persons, had somehow taken instructions from the government in order to give effect to the foreign policy of not aggravating the Dutch government. There were no facts or logical arguments to support the imputation.

Third were the Vignes Mourthi allegations:[57]

> No doubt many members of Singapore's judiciary were also aware of what was going on behind the scenes concerning the rape, sodomy and corruption charges hanging over Rajkumar, yet not one of them had the guts to speak out in protest.
>
> But I can reveal, following intensive inquiries and talking in confidence to several lawyers on condition that I would not expose them to the authorities in any way, that the high echelons of the judiciary and prosecution from the Attorney General down knew all about Rajkumar and were intent on keeping his evil, corrupt deeds under wraps until Vignes Mourthi was hanged.

Rajkumar was an officer with the Central Narcotics Bureau and the principal prosecution witness in Vignes Mourthi's capital drug trial.[58] It appeared that while Vignes Mourthi's trial and appeal was going on, Rajkumar was under investigation for and eventually charged and convicted of offering to pay off a complainant who had accused him of rape.[59] Rajkumar's own travails were not disclosed in the proceedings against Vignes Mourthi. The Court of Appeal found this to be contempt because the author had alleged, without a logical basis, that senior members of the judiciary knew of Rajkumar's colourable activities but had suppressed their knowledge in order to facilitate the prosecution of Vignes Mourthi.

There is much that can be said about this ruling from the point of view of free speech in general, but I focus on its impact on death penalty advocacy. The first thing to notice is the manner in which the 'real risk' test was applied. There can be little doubt that the author intended to undermine public confidence in the judiciary, if only in the course of what he felt to be exposing a grievous wrong done to Vignes. It is also clear that a reasonable person reading the book will form the impression that *the author thinks* that certain members of the judiciary behaved improperly on these occasions. But the Court of Appeal does not explain how this led to the conclusion that our reasonable member of the public—let us call them Beng and Lian—[60] will then

[57] *Shadrake Alan* (n 52), para 128.

[58] See the account in *Vignes s/o Mourthi v PP* [2003] 3 *Singapore Law Reports* 105.

[59] *PP v S Rajkumar* [2005] SGDC 77.

[60] A representative male and female Singaporean akin to the English man on the Clapham Omnibus, or the American Average Joe.

automatically accord reduced confidence in the judiciary. The gap in the reasoning appears to be supplied by an implicit assumption that Beng and Lian will unquestioningly believe what the author has said. This rather unflattering view of the inhabitants of Singapore is probably true for the most gullible, but it certainly is not so for the 'average' member of the public that Beng and Lian are supposed to be.[61] It surely cannot be too much to expect Beng and Lian to reason as follows: 'Alan Shadrake thinks they did something wrong, but what is the evidence that he gives for it? Nothing much, just speculation and undisclosed sources. From what I know about our judges, there is nothing that would lend support to this allegation.' Indeed, we have every reason to believe that these imputations did not in fact have the effect which the Court of Appeal feared. Shadrake's book was on sale in Singapore.[62] It is still, in 2013, on sale in huge quantities outside of Singapore, especially in airports with direct flights to Singapore.[63] The imputations were comprehensively covered in the local press in connection with the contempt proceedings, and they are now to be found permanently archived for all to see in none other than the judgments of the High Court and the Court of Appeal,[64] and in chapters such as this, which cite and discuss the judgments. It may have been that in days of old, a contempt ruling was effective in preventing dissemination of the contemptuous allegation—but in this day and age, the opposite is likely to be true. Contempt proceedings give the imputations much more publicity than they would otherwise have received. Shadrake's book, which might well have passed from public consciousness in the natural course of modern short attention spans, is now in its second edition with a sensational selling point—the author went to jail because he wrote this.[65] Censorship of the contemptuous material on the internet is, of course, practically impossible.[66] If 'real risk' there was, then the worst would have come to pass—but it has not. The reason is that the 'reasonable' member of the public is indeed reasonable and does not simply believe everything he or she reads.

When we turn to the 'fair comment' exception, one wonders whether it really is sufficiently protective of valuable speech. If we assume, *arguendo* and hypothetically,

[61] The Court of Appeal was very aware of the difficulties of pinning down just which member of the public we are to test the alleged contemptuous statements by, but does not really indicate how they are to be resolved, although the court did reject the 'some members of the public' threshold as being too low, *Shadrake Alan* (n 52), paras 32–3.

[62] 'Death Penalty Book Banned by MDA', *The Online Citizen*, 8 July 2010, <http://theonlinecitizen.com/2010/07/breaking-news-death-penalty-book-banned-by-mda/> (accessed 4 November 2011). It is likely that the book was never officially banned, but that the Media Development Authority had advised booksellers to withdraw the volume from their shelves. Indeed, Shadrake was arrested the morning after attending the book launch in Singapore.

[63] I have personally observed large quantities of this book on sale in Malaysian airport bookstores.

[64] The judgment at trial, *Attorney-General v Shadrake Alan* [2011] 2 *Singapore Law Reports* 445, contains, naturally, a detailed description of Shadrake's critique.

[65] Alan Shadrake (2011) (n 50) begins the Preface to the Revised Edition as thus: 'I never imagined that I would one day go to Singapore, write a book about its revered but much feared chief executioner and its justice system—and then end up in the dock myself, charged with "scandalising the judiciary".'

[66] A very quick search on the internet reveals a number of sites offering legitimate and illegitimate downloading of the entire book, and many commentaries by people who have read the book: see, for example, the comprehensive review of popular blogger Alex Au, 'New Book Puts Death Penalty On Trial', 10 July 2010, <http://yawningbread.wordpress.com/2010/07/10/new-book-puts-death-penalty-on-trial/> (accessed 2 November 2011).

that the imputations were in fact true, how does the concerned citizen go about saying it without incurring contempt proceedings? If in the future, a Mr Justice Invertebrate does indeed obey a government direction to acquit an accused person regardless of the evidence, it is not easy to see what he or she (our concerned citizen) can do apart from remaining silent. If the prosecution does not appeal against an acquittal, there is no obligation for the trial judge to write a full judgment. So it is unlikely that our concerned citizen will ever have the facts or the logical inferences therefrom to qualify under 'fair criticism'. All that he or she has are suspicions. It is unclear if the Court of Appeal would have allowed Shadrake to express his views as suspicions rather than fact—for example, if he had written instead 'So there is suspicion that it was a government verdict and not a judicial one'. To differentiate between this statement and the one which was actually made does seem to be a little precious. Our Beng and Lian are unlikely to draw such a distinction. So, where the allegation happens to be true, the contempt rules would work against the public interest by suppressing valuable speech which may well play a significant role in uncovering actual judicial impropriety.

Perhaps the 'fair criticism' balance adopted by the Court of Appeal has been struck at the wrong place. It makes far more sense in a situation where there is significant public access to evidence of what transpires behind the scenes of a death penalty proceeding. But the reality is that there is often no way for a member of the public to find satisfactory evidence to raise a reasonable doubt that there has been covert judicial impropriety, even where the suspicion is true. Given this gross imbalance in access to evidence, it is not entirely out of the question to consider an 'honest criticism' balance, where the line is drawn at criticism which the author believes to be true (which is not contempt) and criticism which the author either does not believe to be true or is indifferent as to its truth (which is contempt).[67]

I would venture to add that, quite apart from deterring valuable speech, the use of contempt rules to punish after publication has the potential to distract the public from the rather more important issues. Contempt proceedings focus exclusively on the reputation of the judiciary—but the lay public, our Beng and Lian, may well not be quite so aware of the narrowness of it and think that they are somehow a sufficient response to all the allegations in the book. Take the Vignes Mourthi situation. Our reasonable person might well think that because the Court found Shadrake guilty of contempt, this is all that needs to be said about it. In fact, the contempt proceedings leave a series of important questions unanswered, leaving aside the truth of the allegation against senior members of the judiciary: was the prosecution witness in fact under investigation for what appeared to be perversion of the course of justice; did those who had charge of his investigation and prosecution purposely delay those proceedings so that Vignes' counsel would not be able to use that information in his defence; if the Vignes court had been aware of this, should it have affected his conviction? Surely the alleged suppression by the police and prosecution is just as bad as the alleged suppression by the judiciary. Take the

[67] This suggestion is inspired by the corresponding defence in defamation law established by the famous United States Supreme Court decision in *New York Times v Sullivan* (1964) 376 US 254.

Julia Bohl situation. Shadrake was acquitted on this but that should not be the end of the matter: was the non-capital charge really one which was brokered between the two governments under threat of sanctions; should such considerations ever justify a reduction of charges; does this kind of phenomenon, if true, tell against the official position that the death penalty must be mandatory and uncompromisingly applied?

At the end of the day, the question must be asked whether the existence of contempt by scandalizing the judiciary is at all desirable, except for a situation where the criticism is false and the author knows it to be so. We have seen how it can operate to deter valuable criticism—ie where it may in fact be true, but because of a lack of access to evidence, the author is unable to qualify under the 'fair criticism' exception. Where the allegation is false, there is nothing to show that it cannot be satisfactorily dealt with by a reasoned rebuttal. If the judges cannot do that themselves, others can do it for them.[68] There is no justification to think that our reasonable member of the public is incapable of assessing the two conflicting views.[69] Indeed, contempt proceedings are almost always counter-productive in the sense that they simply encourage the dissemination of the contemptuous allegation—something which can be done these days in very effective ways which no one can prevent without unacceptable costs.

4. Explaining the Numbers

It is ironic that I will have the least to say about what is probably the most important development of all—the very recently released execution figures. Drawing firm conclusions about why the numbers are going this way or that always involves a bit of speculation, but evaluate the evidence we must. It was, in a sense, unfortunate that when Amnesty International reported the moderately sensational news that Singapore had the highest per capita execution rate in the world, it had included the figures for 1994–96—three years in which executions soared to an average of 66 per year.[70] The average for the three preceding years from 1991–93 was only 11 per year. This was probably caused by efficiency measures put in place to clear a

[68] It is often said that the offence of contempt by scandalizing the judiciary is necessary because judges cannot enter the fray and defend themselves in public. This ignores the many other players who can effectively speak in their favour—the government, the press (traditional or otherwise), participants of the blogosphere, and the legal community, in particular academics who have nothing to gain for siding or not siding with the judiciary. Indeed, a public defence from the entity being criticized is often less persuasive than one which comes from a source independent of it.

[69] The figures from 2011 show that Singapore enjoys a literacy rate of 95.9 per cent for residents aged 15 and above, with 91.7 per cent of residents between the ages of 25–39 with at least secondary school education. Singapore Department of Statistics, 'Population Trends 2012, Statistical Appendices, Table A1.5 Population 1871–2012', <http://www.singstat.gov.sg/publications/publications_and_papers/population_and_population_structure/population_trend.html> (accessed 20 June 2013).

[70] Amnesty International (n 1) 6. I have done a bit of rounding up for the averages in this part but the minor inaccuracies caused thereby should not affect the general picture.

huge backlog of capital cases—in particular the termination of the two-judge trial court which Singapore instituted in place of a jury trial.[71] Predictably the statistics then settled down to an average of 28 for the five-year period from 1999–2003. In January 2004, the Amnesty report on Singapore was released.

The execution figures post-Amnesty were very recently released.[72] They confirm what observers have been suspecting for some time[73]—that there has been a remarkable reduction in executions. In the six-year period from 2004–09, there was all of an average of six executions per year. This is all the more astounding considering that the population of Singapore rose by 1 million from about 4 million in 2000 to 5 million in 2010.[74] So from a rate of seven executions per million pre-2004, it has descended to 1.2 per million post-2004. The big question is: why? The figures have come out too recently for any kind of rigorous statistical analysis[75] so I hope to be forgiven for the impressionistic speculation which follows.

It is axiomatic that there are many points in the criminal justice process which may have an impact on execution rates. So we need to consider them one by one. Working backwards, we start with clemency. It is not a promising candidate—Singapore is known to be extremely stingy with clemencies. Although there do not appear to be any official figures, observers have noted only seven grants of pardon since Singapore's independence in 1965, the last one being in 1998.[76] So for the period 2000–10 there were no known pardons.

Moving to the matter of sentencing, this is an equally unlikely factor. The law does provide for discretionary death penalties—for example, in the Kidnapping Act. But again in the period we are concerned with, there were no known cases of

[71] Criminal Procedure Code (Amendment) Act (No 13 of 1992).

[72] Ministry of Home Affairs (n 5).

[73] See Alex Au, 'Singapore Reeling From Murder Spree, Drug Scourge', <http://yawningbread.wordpress.com/2011/05/21/singapore-reeling-from-murder-spree-drug-scourge/#more-4429> (accessed 2 November 2011), who first drew public attention to execution figures quietly released for 2007–09 in the Singapore Prison Service Annual Reports, now available online at <http://www.prisons.gov.sg/content/sps/default/newsaboutus/publications.html> (accessed 2 November 2011). See also Patrick Gallahue, *The Death Penalty For Drug Offences: Global Overview 2011—Shared Responsibility and Shares Consequences* (London, International Harm Reduction Association 2011) 29, <http://www.ihra.net/files/2011/09/14/IHRA_DeathPenaltyReport_Sept2011_Web.pdf> (accessed 2 November 2011).

[74] Singapore Department of Statistics, 'Population and Population Structure: Time Series on Population', <http://www.singstat.gov.sg/statistics/browse_by_theme/population.html> (accessed 2 November 2011).

[75] It is also very difficult to obtain the relevant data, even if one had the time. See Alex Au, 'Mainstream Journalists and Ministerial Bulldogs', 23 October 2011, <http://yawningbread.wordpress.com/2011/10/22/mainstream-journalists-and-ministerial-bulldogs/> (accessed 2 November 2011), for an account of the recent debate over the need for a Freedom of Information legislation in Singapore.

[76] Choo Zeng Xi, 'Past Presidents Powerless, Never Actually Decided Clemencies?', *The Online Citizen*, 18 August 2010, <http://theonlinecitizen.com/2010/08/past-presidents-powerless-never-actually-decided-clemencies/> (accessed 2 November 2011). There was much public discussion about the President's role in the clemency process generated by the *Yong Vui Kong* litigation. There is, however, little doubt that the law as it stands requires the President to act on the 'advice' (or more accurately the direction) of the Cabinet—and it was so held in *Yong Vui Kong (No 3)*—but that does not settle the question of whether the President ought to have a larger role, or whether in practice the President exercises or should exercise some sort of extra-legal influence.

discretionary death penalties being handed down.[77] Death sentences were almost invariably mandatory—as they are for drug offences, murder, and the sprinkling of capital firearms convictions.

Still within the judicial sphere is the possibility that there has been a higher rate of acquittals in capital cases. The final judgment must await the publication of reliable statistics, but there are indications that the courts have been tightening up the criminal process in a number of ways, and this has resulted in acquittals which were unlikely to have happened before. One major example in the context of murder is the court's dramatic reinterpretation of the law of 'common intention'. It used to be that participants in a non-murderous criminal enterprise were also guilty of murder if one of them committed murder in the course of a criminal enterprise. In successive decisions in 2008 and 2010, the Court of Appeal swept away this form of constructive murder and ruled that one must have the *mens rea* of murder in order to be guilty of murder.[78] Not only were a few spared as a direct result of this holding, but it was bound to have had a significant impact on charging decisions. Another significant change in the field of murder has been what I think is a shift in judicial, and perhaps professional psychiatric, predispositions towards a plea of diminished responsibility—a defence which reduces murder to culpable homicide not amounting to murder. Government forensic psychiatrists have been perceived to be rather more generous with diagnosis of mental illness, resulting in charges of culpable homicide not amounting to murder in place of murder.[79] In another eye-catching decision, the Court of Appeal preferred the expert psychiatric opinion called by the defence instead of the contrary view given by the government psychiatrist—something believed to be a very rare event indeed in the past.[80] In the context of drug-trafficking, the Court of Appeal has clarified that the requirement of knowledge of the nature of drug was intact,[81] and in one recent and striking

[77] There have been no known discretionary death sentences since the enlightened decision of the Court of Appeal in *Sia Ah Kew v PP* [1972–74] *Singapore Law Reports* 208, which overturned several of such sentences on the ground that they were not the 'worst cases'. There have been a number of potentially capital kidnapping charges since, but none which the court could find to be such a 'worst case': see eg *PP v Selvaraju s/o Satippan* [2004] 3 *Singapore Law Reports* 615; *PP v Tan Ping Koon* [2004] SGHC 205; *PP v Zhou Jian Guang* [2000] SGHC 68; *PP v Vincent Lee Chuan Leong* [2000] SGHC 78; *Abdul Nasir bin Amer Hamsah v PP* [1997] 3 *Singapore Law Reports* 643. The kidnapping example stands testimony to the proposition that a discretionary death penalty system in which the death penalty is almost never used 'works' just as well. That other source of discretionary death penalties—section 396 of the Penal Code—which renders participants in a gang robbery (where one participant commits murder in the course of the robbery) liable for a discretionary death penalty enjoyed a very brief judicial attraction (*Prasong Bunsom v PP* [1995] 3 *Singapore Law Reports* 433; *Panya Martmontree v PP* [1995] 3 *Singapore Law Reports* 341) before sinking into oblivion for the period we are looking at.

[78] *Daniel Vijay s/o Katherasan v PP* [2010] 4 *Singapore Law Reports* 1119, and *Lee Chez Kee v PP* [2008] 3 *Singapore Law Reports* 447. See the account in Hor, 'Criminal Justice in the Chan Court' in Yeo, Tjio, and Tang (eds) (n 27).

[79] See eg *PP v Barokah* [2008] SGHC 22; *PP v Aniza bte Essa* [2009] 3 *Singapore Law Reports* 327; *Purwanti Parji v PP* [2005] 2 *Singapore Law Reports* 220.

[80] *Ong Pang Siew v PP* [2011] 1 *Singapore Law Reports* 606. See also the earlier decision of *PP v Juminem* [2005] 4 *Singapore Law Reports* 536.

[81] *Nagaenthran a/l K Dharmalingam v PP* [2011] SGCA 49, which scotched a suggestion in an earlier Court of Appeal decision that knowledge includes willful blindness, which might have meant

acquittal, it held that the accused was able to rebut the statutory presumption of knowledge—again an event notable for its rarity.[82] More generally, the Court of Appeal in recent years has done much to give substance to criminal due process in Singapore resulting in trials and appeals which have achieved a higher standard of fairness than before. It has declared that it will frown upon the prosecution's use of co-accused statements as sole evidence of guilt.[83] It has carved out a hitherto unknown duty of disclosure to the defence of materially relevant evidence in the possession of the prosecution.[84] This has probably led to a few less capital convictions, and is likely to have caused the prosecution to think twice about preferring a capital charge in at least some cases.

Momentous though these judicial reforms have been, in practice it is unlikely that they would have produced any more than a small dent in conviction rates, and not the sort of precipitous drop that we see in the execution rate. So we continue our search. At both extremes of the criminal process, it is necessary to examine two scenarios. First at the tail end, it is possible that the dip in executions post-2004 is only temporary and that there are a significant number of capital defendants either waiting to be tried, to have their appeal and clemency petitions heard, or who are just waiting for execution. I have not included in the calculations the executions which took place, or rather which did not take place, in 2010. The official statistics show that there were no executions in 2010. But this is believed to have been because of an unofficial moratorium pending the disposal of *Yong Vui Kong (No 2)*[85] where the constitutionality of the mandatory death penalty was being challenged. One might perhaps expect the figure for 2011 to be higher than normal, now that executions have apparently resumed following the failure of the challenge.[86] There is, however, no reason to think that there is now such a huge backlog of capital defendants. A rough calculation would reveal an enormous category of more than 120 such persons in order to reproduce the pre-2004 figures.

At the other end of the process, it is also possible that there has been a significant drop in capital offending—primarily murder and drugs. There is nothing to indicate that in or about the year 2004, there was some phenomenon which brought capital offending down and kept it low ever since. Murder rates in stable societies like Singapore are remarkably constant. The figures that we do have bear it out.[87] Available drug figures seem to show a low level of seizures from at least

recklessness. See Hor, 'Criminal Justice in the Chan Court' in Yeo, Tjio, and Tang (eds) (n 27). *Nagaenthran* reaffirms the requirement of full knowledge, at para 30, emphasis in original: 'Wilful blindness . . . is merely "lawyer-speak" for *actual knowledge* that is *inferred* from the circumstances of the case. It is an indirect way to prove actual knowledge; *ie*, actual knowledge is proved because the inference of knowledge is *irresistible* and is the *only rational inference* available *on the facts.*

[82] *Khor Soon Lee v PP* [2011] 3 *Singapore Law Reports* 201. See also the acquittals in *PP v Mas Swan* [2011] SGHC 107, and *PP v Phuthita Somchit* [2011] SGHC 67.

[83] See *Lee Chez Kee* (n 78).

[84] *Muhammad bin Kadar v PP* [2011] 3 *Singapore Law Reports* 1205.

[85] *Yong Vui Kong (No 2)*. See 'The Death Penalty Project: Human Rights Litigation in Asia', <http://www.deathpenaltyproject.org/content_pages/47> (accessed 2 November 2011).

[86] It appears that executions have since resumed, from anecdotal accounts.

[87] Statistics collected by the United Nations Office on Drugs and Crime shows a remarkably consistent homicide rate from 2004–09 of between 0.4 and 0.5 per 100,000 population: see United

2002–06, and significantly higher levels thereafter and rising.[88] This does not appear to account for the sudden drop in executions in 2004 and the years following that. Again it may be that capital drug offending has decreased significantly over the years, but it is unlikely that that alone accounts for the sudden dip in executions in 2004.

The preceding discussion is but a rather long-winded introduction to the one factor which may well explain the reduction in executions—prosecutorial discretion. Could it be that there has been some sort of policy change with respect to the preferment of capital charges? Astute observers of the death penalty in Singapore have noticed a curious phenomenon—that of the '14.99 charge'.[89] Trafficking in more than 15 gm of heroin attracts a mandatory death penalty. Any amount less than that is non-capital. A charge of trafficking in just a hair's breadth below the capital amount normally means that the accused was in fact caught with enough drugs for a capital charge, but for some reason, the prosecution has exercised its discretion to prefer a lesser charge. That the Public Prosecutor ought to have such a power and ought to exercise it is not in question. Indeed, one of the primary functions of prosecutorial discretion is to fine-tune the potential rigidity of the criminal law. The significance of the 14.99 charge phenomenon is this—if indeed prosecutorial discretion is exercised in this manner in a significant way, the argument that the mandatory death penalty is necessary crumbles. Indeed, a mandatory death penalty does not mean, and has never meant, that execution inexorably follows apprehension. If indeed the Public Prosecutor retains this discretion of life and death importance, it is not easy to see why the court ought to be deprived of its say, especially when it can do so in a far more transparent and accountable way. Further down the road, if Singapore can well afford a reduction in executions from 28 to six per year, a reasonable member of the public might well ask why it is unacceptable to make a rather less drastic move from six to none.

5. The Beginning of the End?

It is always risky to attempt to foretell the future. But once in a while the temptation to do so is irresistible, especially when the stars seem to be moving into

Nations Office on Drugs and Crime, 'Intentional Homicide, Count and Rate per 100,000 Population', <http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Homicide_data_series.xls> (accessed 2 November 2011). It is highly unlikely that the pre-2004 rates would have been very different. The rate in 2000 was 0.7 per 100,000: 'Singapore Crime Rate Continues Decline', *Agence France Presse*, 2 August 2000, <http://www.singapore-window.org/sw00/000802a1.htm> (accessed 2 November 2011).

[88] Pieced together from the annual Drug Situation Report: Central Narcotics Bureau, 'Drug Situation Report 2010', <http://www.cnb.gov.sg/drugsituationreport/drugsituationreport2010.aspx> (accessed 2 November 2011).

[89] See 'The "14.99g" Charge', <http://sgdeathpenalty.blogspot.com/p/1499g-charge.html> (accessed 2 November 2011). For a very recent example of a 14.99 charge, see Khuswant Singh, '21 Years for "Cobbler" Heroin Trafficker', *Straits Times*, 12 November 2011, where the charge in the past would almost certainly have been for a capital 1.2 kg.

alignment. Unless there is a sudden and alarming increase in capital offending, one can be cautiously optimistic that it might well be the beginning of the end of at least the mandatory death penalty, if not the death penalty itself. The recent wave of 'activist litigation' exemplified by the *Yong Vui Kong* line of cases is likely to intensify.[90] The court's response has been enigmatic, but that is already a shift from what appeared to have been a clearly dismissive attitude in the past. The softening of contempt of court rules is very much in tandem with a growing demand for a greater degree of the freedom of expression which is very much part of the political culture of the 'New Normal' following the twin General and Presidential Elections of 2011. This will encourage the fledgling lobby against the death penalty or the mandatory use thereof.[91] The 'New Normal' is also about pushing for greater official transparency, accountability, and humanity—this was perhaps shown by the willingness of the government to push for legislative reform in 2012 to create exceptions to the mandatory death penalty regime, a development described below. Away from cases directly concerning the death penalty, the court has been much clearer about improving the fairness of the criminal process—and this has had an indirect effect on dampening the use of the death penalty. In a way the judges seem to have presaged the general political changes of 2011 by a few years. But most importantly, the drastic reduction in executions since 2004, if it was, as I have speculated, the result of a greater use of prosecutorial discretion to exempt potentially capital offenders, demonstrates an increasing awareness amongst the police and prosecutorial authorities that the death penalty, if it is needed at all, need not be mandatory in order to preserve a high level of law and order. It is against this backdrop that the legislative changes of 2012 were conceived.

It can be said that 2012 proved to an exciting year for Singapore death penalty watchers. The irrepressible M Ravi brought a fourth challenge to the Court of Appeal—again without success. In *Yong Vui Kong v PP*,[92] the court was asked to review an allegedly discriminatory exercise of prosecutorial discretion—the prosecutor had, it was claimed, preferred a capital drug charge against Yong, but had withdrawn charges against the 'mastermind' who had procured the services of Yong. In a decision highly reminiscent of the challenge concerning pardons, the Court of Appeal stoutly affirmed the justiciability of prosecutorial discretion,[93] but held that the challenge failed on a number of grounds. The most disturbing

[90] Andrew Loh, 'Can the Courts Review Prosecutorial Decisions', 10 September 2011, <http://publichouse.sg/categories/focus/item/65-can-the-courts-review-prosecutorial-decisions> (accessed 2 November 2011), describing a pending challenge to the Public Prosecutors to reduce the charge of one of two capital offenders to trafficking in 499.9 gms of cannabis mixture—500 gms being the threshold for the mandatory death penalty.

[91] The informal coalition of anti-death penalty/mandatory death penalty advocates comprises specialists like <http://sgdeathpenalty.blogspot.com/> and <http://webelieveinsecondchances.blogspot.com/>; more generalist commentators like <http://theonlinecitizen.com/>, <http://publichouse.sg/>; and <http://yawningbread.wordpress.com/>; human rights groups like <http://maruah.org/> and <http://www.thinkcentre.org/index.cfm>, and the occasional forays of the Law Society of Singapore <http://www.lawsociety.org.sg/feedback_pc/pdf/execSummary.aspx>.

[92] [2012] 2 *Singapore Law Reports* 872.

[93] It had done so in the slightly earlier decision of *Ramalingam Ravinthran v Attorney-General* [2012] 2 *Singapore Law Reports* 49, where the challenge also failed.

feature of the judgment was the steadfast refusal of the court to require the prosecution to explain why it had behaved the way it did. Instead, the court seized upon indications in the record that there might have been a lack of evidence—something which might well have been true, but must surely have been for the prosecution to declare and not for the court to speculate. Oddly, the court also sought to 'justify' the prosecution's actions on the ground of a lack of jurisdiction over extra-territorial abetment—something which the prosecution had never even suggested before.[94] To put a seal on the failed challenge, the court held that even if there was evidence that Yong had been unfairly discriminated against, all the court could do was to issue a declaration to that effect. Yong would not have been entitled to any other remedy, and in particular any order affecting the conviction and sentence—it would have been up to the Public Prosecutor to decide how to remedy the situation. It seems clear that the courts, at the end of 2012, are where they were at the end of 2011 and are simply not willing to go much further than recognizing the general principle of judicial review of death penalty decisions.

The government then picked up the action with the surprise announcement that soon after the informal suspension of executions occasioned by the *Yong Vui Kong* litigation, it had put in place, unannounced, a further suspension in order to allow it to effect changes to the mandatory death penalty in Singapore.[95] The changes were eventually enacted into law in the course of the year.[96] Undeniably, this development is symbolically the most important thing to have happened in the annals of the death penalty in Singapore since its introduction for drug offences in 1975. Never before has there been a legislative move to reduce the use of the death penalty.

Substantively, the changes were much more circumspect. As regards murder, although the mandatory death penalty is to be retained where there is an intention to cause death, all other forms of murder, and in particular the infamous 300(c) type of murder, where an intention to cause any injury is sufficient, is now to be subject to a discretionary death penalty.[97] Operationally, it is entirely possible that even before the changes, prosecutorial discretion was already exercised along these lines. Nonetheless, even if this were so, the amendment is a real one—that which only existed in the hazy realm of administrative discretion is now to be a matter for judicial decision with its greater attendant transparency and accountability.

[94] The lack of criminal jurisdiction over an extraterritorial abetment of a crime to be committed in Singapore had never been judicially decided until this case. Although a provision in the Penal Code explicitly covered an abetment in Singapore of a crime to be committed elsewhere, it was not at all clear that the reverse was also true. There is ample authority in the common law (*Somchai Liangsiriprasert v Government of the USA* [1991] AC 225) that the problem of potential extraterritoriality can possibly be circumvented by a doctrine of intended effect—simply, an abetment outside of Singapore of a crime to be committed in Singapore can be considered to be a crime committed in Singapore because the abetment 'continues' and merges with the commission of the crime in Singapore.

[95] Deputy Prime Minister Teo Chee Hean, 'Enhancing our Drug Control Framework and Review of the Death Penalty', *Singapore Parliamentary Debates*, Vol 89, 9 July 2012, para 3.

[96] The Penal Code (Amendment) Act, 32 of 2012, and the Misuse of Drugs (Amendment) Act, 30 of 2012, both passed on 14 November 2012 and came into effect on 1 January 2013.

[97] Section 302, Penal Code.

The change for drug offences is much more illusive. The amendments create two exceptions to the imposition of the mandatory death penalty for drug trafficking.[98] Both come with a precondition—that the offender must have played no role further than being a mere courier.[99] That satisfied, the offender must qualify under two alternative situations. The first is that the Prosecutor has issued a certificate, in his 'sole discretion', declaring that the offender has 'substantively[100] assisted' in disrupting trafficking activities. The second is that the offender was acting under what is known in the homicide world as diminished responsibility. Quite apart from the obvious practical difficulty of drawing the line between merely being a courier and doing something more,[101] both exceptions are highly problematic. It is immediately obvious that the substantive assistance exception contains a core contradiction—it is almost never the case that a mere courier will have enough information about the criminal enterprise to offer much assistance to law enforcers. It is also hardly conceivable that, even before the amendment, a Prosecutor who would today issue such a certificate would have in the past charged a mere courier who has offered substantive assistance with an offence carrying a mandatory death penalty. The diminished responsibility exception[102] sounds a little more promising. Although it could well have been that, even before the amendment, a prosecutor who believed an offender to be suffering from diminished responsibility would have never preferred a capital charge, the amendment nonetheless moves the locus of the decision from the prosecutor to the court. An offender who has failed to persuade the prosecutor can now bring it before the court. More practically, unlike in the context of murder where diminished responsibility is not infrequently raised and argued, it is difficult to conceive of practical circumstances under which a drug courier might be suffering from diminished responsibility. I can only find two cases in which the closely allied defence of 'unsoundness of mind' was discussed in the context of drug offences.[103] The reason is not hard to guess—persons suffering

[98] Section 33B, Misuse of Drugs Act.

[99] Essentially someone who did no more than 'transporting, sending or delivering' the drug.

[100] Perhaps the better word would have been 'substantial'. I use the statutory term in the text.

[101] It is yet unclear what is to be done with an offender who in addition to transporting the drug, also helped to pack the drugs into separate packages for delivery.

[102] Soon after the introduction of the defence of diminished responsibility in the United Kingdom, Singapore enacted an almost identically worded defence which applied only to a charge of murder (exception 7 to section 300, Penal Code). The 2012 amendment to the Misuse of Drugs Act uses the same language to create a defence specific to drugs.

[103] The defence of unsoundness of mind (the Penal Code equivalent of the defence of insanity) was indeed discussed in two unsettling cases: *PP v Rozman bin Jusoh* [1995] 2 *Singapore Law Reports* (R) 879, and *Chou Kooi Pang v PP* [1998] 3 *Singapore Law Reports* (R) 205. There was evidence that the offender had subnormal intelligence, but the convictions in both cases were upheld on appeal because the court was not convinced that the low intelligence of the offenders affected either their *mens rea* (because they knew they were carrying illicit drugs) or qualified them for the defence of unsoundness of mind (because they seemed to know that what they were doing was wrong). There was evidence of official entrapment, but under Singapore law, that does not affect the criminal liability of the offender. It is yet uncertain if the new defence of diminished responsibility will make a difference if the two cases were heard today. Extremely low intelligence no doubt qualifies as an abnormality of the mind, but the position of 'borderline IQ' (at the bottom of the 'normal' IQ range) offenders is much less clear.

from either unsoundness of mind or an abnormality of the mind will be most unlikely candidates to be entrusted with as delicate an operation as the transportation of illicit drugs. Troubling questions of principle also arise when we compare the defence of diminished responsibility for drug offences with that which applies to murder. If the offender is suffering from diminished responsibility, why is it that he or she escapes the mandatory death penalty only if he or she is a mere courier? There is no such equivalent limitation for its operation in murder cases. Furthermore, a successful plea of diminished responsibility to a charge of murder mandatorily relieves the offender from the death penalty—in the drug situation the offender still stands in the shadow of a discretionary death penalty.

Although it is perhaps much too early to cast judgment on these changes, it can only be hoped that if indeed there is no substantive improvement, then at the very least they should do no harm. My speculation is that the bulk of the responsibility for the apparent death penalty avoidance programme post-2004 will continue to be shouldered by the Public Prosecutor when he or she decides how to charge. Additional evidence of the prosecutor's role came in the form of death row figures revealed in the course of Parliamentary discussion on the 2012 amendments.[104] In mid-2012, there were 34 offenders on death row, 28 for drugs and six for murder. It will be recalled that if the pre-2004 practice had still been in place there would have been more than 120 offenders on death row. We can only pray that the amendments will not have the perhaps unintended effect of affecting adversely this policy of parsimony with respect to capital charges.[105] In a longer term, there are grounds for a degree of optimism that these amendments are but the start of a progressive phasing out of the death penalty.

The changes mean, symbolically or practically, that the institution of the mandatory death penalty, and perhaps the death penalty itself, is not as sacred as it was once thought to be. Although the amendments were obviously driven by a spirit of caution, and perhaps an excess of it, once it is realized that death penalties and executions are unlikely to have a significant impact on offending and law enforcement, the path to bolder reform is set. Ironically, Singapore which once held the title of the jurisdiction with the highest per capita execution rate in the world looks set to become a shining example of how crime can be satisfactorily controlled without a mandatory death penalty, and perhaps in time to come, without the death penalty at all.

[104] *Singapore Parliamentary Debates* (n 95). The figure revealed was 35, but subsequent to that a death row offender convicted of murder succeeded on appeal: *Phathip Selvan s/o Sugumaran v PP* [2012] 4 *Singapore Law Reports* 453.

[105] One can imagine that in a situation where evidence of the excusing circumstance (whether it is the lack of an intention to cause death, or that the offender is suffering from diminished responsibility) is unclear. In the past the prosecutor might have given the benefit of the doubt to the offender and chosen to charge the accused with a non-capital charge. Now the prosecutor might reason that since the court now has a say in the matter, the offender ought to bear the burden of convincing the court—and he or she might fail in the process.

9

Progress and Problems in Japanese Capital Punishment

David T Johnson

1. Japanese Exceptionalism in Historical Perspective

It is often observed that Japan is, with the United States, one of only two rich democracies to retain capital punishment and to continue executing on a regular basis. Less well known is that Japan is exceptional within the Asian context, for it is one of few countries in the region to have experienced sustained increases in death sentences and executions during the last 20 years. Executions and death sentences have declined markedly in many Asian nations, including South Korea, Taiwan, Singapore, Indonesia, India, and China, but in Japan the total number of executions went from eight during the years 2001–05 to 37 between 2006 and 2010—an increase of almost fivefold. Death sentences in Japan also surged, from an average of 4.8 per year in courts of first instance in the 1990s to 12.3 per year in the 2000s—a 150 per cent rise. As of September 2012, the 131 men and women on death row in Japan (under a finalized sentence of death) were more than five times the 26 persons who were awaiting execution in 1985. Japan stands out in Asia in one other way as well, because it is the only country in the region to have experienced increases in capital punishment *and* imprisonment in recent years.[1]

Japan's death penalty exceptionalism is recent. Compared to the United States, where death penalty studies are legion, there is little scholarship attempting to explain why Japan clings to capital punishment when most peer nations have abandoned it. But there are some plausible hypotheses, including a missed opportunity to abolish the death penalty during the Occupation that followed Japan's defeat in the Pacific War, and the long-term rule (1955–2009) of Japan's conservative Liberal Democratic Party. These hypotheses remain hunches in need of more research. What *is* clear is that in the centuries prior to the death penalty surge that started in the 1990s, Japan experienced many significant declines in capital punishment, the earliest of which was a 350-year moratorium on executions during

[1] David T Johnson, 'Japanese Punishment in Comparative Perspective' (2008) 33 *Japanese Journal of Sociological Criminology* 46.

the Heian period (794–1195). In the four centuries that followed, executions were often carried out on a grand scale and by methods as gory as any the world has seen. In the Tokugawa period (1603–1868), Japan closed its doors to much of the rest of the world, but after American Commodore Matthew Perry forced the country's doors open in 1853, there occurred the most dramatic death penalty drop in Japanese history: a 97 per cent decrease in executions and a 73 per cent drop in death sentences in only three decades.[2]

Capital punishment in Meiji Japan (1868–1912) was transformed in ways which suggest that the country was travelling much the same death penalty trajectory that many Western nations have travelled, albeit a little later in time. The range of capital offences and eligible offenders was narrowed considerably. Hanging became the only method of execution, and technologies were adopted to speed death and reduce pain for the condemned. Aggravated death sentences (such as mutilation of an executed corpse) were abolished. Executions were moved from the public square to behind prison walls. Discourses emerged to challenge the propriety of capital punishment. And a variety of legal procedures and protections were adopted, including the abolition of torture as a means of obtaining confessions. These shifts around the turn of the twentieth century parallel many of the changes that occurred during the decline of capital punishment in Western nations from the seventeenth century onwards.[3]

Capital punishment in Japan also decreased from the end of the Pacific War until the period of post-war decline culminated in a 40-month moratorium on executions that ended in 1993. During that moratorium, Japan's abolitionist leader Yoshihiro Yasuda believed that abolition was not only 'inevitable' it was 'not far off' and many other observers expected that Japan would soon end capital punishment. But 10 years later Yasuda and other abolitionists were much gloomier. As he lamented at a sparsely attended death penalty conference in 2003:[4]

> This was a severe year for abolition. The bill to stop executions and create a life-without-parole alternative to death could not even get introduced in the Diet. Three of the key abolitionist Members of Parliament were defeated in the last election. After 36 years on death row, Tsuneki Tomiyama died [of kidney failure] at age 86. Shinji Mukai was executed in Osaka. Masaharu Harada [a critic of capital punishment whose brother was murdered by a man who later was hanged] gave two talks in Takamatsu. On each occasion there were seats for 30 people but only three persons showed up. And today, Shizuka Kamei [a faction chief in the ruling LDP and chairman of the Diet Members League for the Abolition of Capital Punishment] did not attend our gathering. He said he would come. I don't know what has happened.... (quoted in Johnson, 2005).

[2] David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (New York, Oxford University Press 2009) 54.

[3] David Garland, 'Capital Punishment and American Culture' (2005) 7(4) *Punishment and Society* 347.

[4] David T Johnson, 'The Death Penalty in Japan: Secrecy, Silence, and Salience', in Austin Sarat and Christian Boulanger (eds), *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Palo Alto, Stanford University Press 2005) 251.

2. Recent Reforms

Although events of the past two decades have turned Japan into something of a death penalty anomaly,[5] the country has taken a few modest steps towards reform in recent years. Executions have fallen under the Democratic Party of Japan (DPJ), which took control of government in 2009, and the surge in death sentences has also subsided as the more general move towards 'harsher criminal sanctions' (*genbatsuka*) has ebbed and as prosecutors became more cautious about charging cases in the years leading up to the start of a new lay judge system of adjudication. More books and articles are being published about capital punishment (most from an abolitionist perspective), and there is more public discussion of the institution, largely because of increased media coverage. In October 2011, The Japan Federation of Bar Associations came out for the first time in opposition to the death penalty. This was especially welcomed by abolitionists in Japan because for many years the Federation had refused to take a clear stance on capital punishment out of concern for its many members who support it.

The first executions carried out under the DPJ occurred in July 2010, when Minister of Justice Keiko Chiba, a lawyer and longtime abolitionist Member of Parliament, signed the execution warrants for two men on death row in Tokyo—and then she went to the gallows to watch them hang, something no modern Minister has done. Shortly afterwards, Chiba permitted select members of the media to observe the gallows in Tokyo, and she established a 'study group' in her Ministry to examine the death penalty from various perspectives. The group met only eight times in its first 15 months, the meetings were closed to the public, and insiders reported that its discussions were superficial. After Chiba was replaced as Minister of Justice after she lost her seat in the 2010 election, her first three successors—Minoru Yanagida, Yoshito Sengoku, Satsuki Eda—did not sign any execution warrants. The fourth, Hideo Hiraoka, sparked widespread criticism from death penalty supporters by encouraging an active debate on capital punishment and stressing the need for Japanese leaders to take into account how the country's commitment to capital punishment is viewed by other developed nations. But in response to pressure from other members of the Cabinet of Prime Minister Yoshihiko Noda, Hiraoka also suggested that he might order executions while in the Minister position.[6] He did not, but two of his three successors did. Toshio Ogawa ordered three hangings in March 2012, and Makoto Taki ordered two hangings in August 2012 and two more in September 2012,[7] for a total of seven executions under the DPJ in 2012. On each occasion the person in charge justified

[5] David T Johnson and Maiko Tagusari, *Koritsu Suru Nihon no Shikei* [Japan's Isolated Death Penalty] (Tokyo, Gendai Jinbunsha 2012).

[6] Minoru Matsutani, 'Hiraoka Urges "Active" Debate on Executions', *Japan Times*, 20 September 2011; and *Mainichi Daily News*, 'Justice Minister Hiraoka Hints He May Order Execution', 28 October 2011.

[7] One of the two persons hanged in September 2012 was 65-year-old Sachiko Eto, a faith healer who had been convicted of killing six persons. She was the first woman executed in Japan since 1997 and the fourth since 1950. Tsuyoshi Tamura, 'Woman Among 2 Death Row Inmates Executed in

the hangings by asserting that the Minister of Justice has a 'duty to order executions', a belief which illustrates Jean-Paul Sartre's conception of 'bad faith'—pretending that something is necessary when in fact it is voluntary.[8] In all, four of the eight persons who served as Minister of Justice during the three years the DPJ held power ordered executions, leading some analysts to conclude that Japan's 'progressive' party returned to the same death penalty position that prevailed when the conservative LDP ruled the country prior to 2009.[9] Most of the promises in the DPJ's 2009 election manifesto—including assurances that it would proceed cautiously on capital punishment—'ended in failure'.[10] The 'crushing defeat' of the DPJ in the national election of December 2012 reflected voters' frustration at its inability to govern effectively, and few people expect the resurgent LDP to pursue significant death penalty reform.[11] In 2013 the LDP's Shinzo Abe began to serve his second term as Prime Minister. During his first term in 2006–07, his Minister of Justice (Jinen Nagase) ordered ten executions in an eight-month period.

The murder trial of Sunao Takami in Osaka in 2011 also raised the profile of capital punishment in Japan, because defence lawyer Sadato Goto challenged the constitutionality of hanging as a method of execution—something which has not happened since 1955, when Japan's Supreme Court held that hanging was *not* unconstitutionally cruel. The Chief Judge in Osaka permitted the defence to call two expert witnesses to testify about the reality of hanging: Dr Walter Rabl, President of the Austrian Society of Forensic Medicine and author of several studies of botched executions, and Takeshi Tsuchimoto, a retired Japanese prosecutor who witnessed one hanging in 1974 and facilitated another when he charged a man with capital murder in 1967. The Osaka trial generated considerable publicity and caused Japan's public to reflect on the propriety of hanging more seriously than it ever has before, but in the end the Osaka District Court held that 'agony and cruelty to some extent are inevitable' in a system of capital punishment, and it sentenced Takami to death.[12] Subsequent research discovered that hangings carried out from 1948 to 1951 during the American occupation of Japan ranged from 11 to 21 minutes in length and averaged about 14 minutes. Kenji Nagata, who conducted this research, believes 'the

Japan', *Asia and Japan Watch*, 27 September 2012, <http://ajw.asahi.com/article/behind_news/social_affairs/AJ201209270078> (accessed 6 December 2012).

[8] David T Johnson, 'Executions Are Not "Inevitable" ', *Japan Times*, 22 September 2012, <http://www.japantimes.co.jp/text/eo20120922a1.html> (accessed 7 December 2012).

[9] *Asahi Shimbun*, 'Shikei e Shincho Shisei, Itten', 3 August 2012 (evening edition), 15. Makoto Taki served as Minister of Justice twice, from June to October 2012 and again from October to December 2012. In between those two terms, Keishu Tanaka served as Minister of Justice for 23 days; he was forced to resign because of scandals involving his connections to organized crime and political contributions he had received from a Taiwanese company. Tanaka did not authorize any executions but his comments at press conferences suggested that if he had served longer he probably would have.

[10] *Asia and Japan Watch*, 'VOX POPULI: Retirement of 'Innocent' Hatoyama', 22 November 2012, <http://ajw.asahi.com/article/views/vox/AJ201211220050> (accessed 6 December 2012).

[11] *Japan Times*, 'LDP Flattens DPJ in Bruising Return to Power', 17 December 2012, <http://www.japantimes.co.jp/text/nn20121217a1.html> (accessed 17 December 2012).

[12] *Mainichi Daily News*, 'Osaka Court Imposes Death Sentence on Pachinko Parlor Arsonist', 1 November 2011.

duration is likely to be the same today as no changes have been made to the method of execution'.[13]

Japan's most significant death penalty reform took effect in May 2009, when the nation began using a new trial system in which ordinary citizens sit with professional judges in order to adjudicate guilt and determine sentence in serious criminal cases. This change—the lay judge system—injected a meaningful dose of lay participation into Japanese criminal trials for the first time since 1943, when Japan's original Jury Law was suspended during the Pacific War. A year after the current reform took effect newspapers reported that the new system 'has had a smooth first year', though they also stressed that it 'has yet to be really tested by cases involving complex chains of evidence or demands by prosecutors for the death sentence'.[14]

The new system is now being tested. Lay judge panels have tried many defendants who denied guilt, and they handed down complete or partial acquittals to eight defendants during the system's first two years, for an acquittal rate of 0.4 per cent. This is about the same rate as that which prevailed in criminal trials under the previous system of adjudication by professional judges. Measured by the propensity to appeal to higher courts, defendants tried by lay judge panels are also significantly less satisfied with trial outcomes than are their counterparts in the procuracy, as they are about 100 times more likely to appeal a verdict or sentence.

In October 2010, Japanese citizens started to decide who the state should kill. As of November 2012, lay judge panels had made 19 life-or-death decisions, resulting in 14 death sentences, four life sentences, and one acquittal. Thus, the new system has delivered a death sentence in almost three-quarters of the trials where prosecutors sought the ultimate punishment. This rate is slightly higher than the death sentencing rate that prevailed under Japan's old trial system, and it is substantially higher than the death sentencing rates produced by juries in the state and federal systems of America. The evidence so far is thin, but it does suggest that the proposition posed in 1972 by US Supreme Court Justice Thurgood Marshall—the more you learn about capital punishment, the less you will like it—receives little support from Japan's new trial system.[15]

3. Cautious About Capital Punishment?

In 2011, leaders of Japan's Diet Members League for the Abolition of Capital Punishment drafted a 'Be Cautious about Capital Punishment' Bill (*shikei*

[13] Nagata found these facts in microfiche at Japan's National Diet Library after the Ministry of Justice refused his repeated requests for information about hangings in more recent years. *Kyodo News*, 'Japanese Executions Took Average of 14 Minutes in 1940s, 1950s', 9 October 2012.

[14] David T Johnson, 'Capital Punishment without Capital Trials in Japan's Lay Judge System' (2010) 8(52) *Asia Pacific Journal* 1, <http://www.japanfocus.org/-David_T_-Johnson/3461> (accessed 17 January 2013).

[15] Marshall's hypothesis also receives little support from capital jurors in America, where 80 per cent of those who serve do not change their mind about capital punishment, and where those who

handan shinchoka hoan). The Bill had three main planks, and some progressive Parliamentarians predicted it would pass by September of that year. The first reform was the introduction of a 'life without parole' punishment, which many abolitionists believe would narrow the gap between an ordinary life sentence and a capital sentence while at the same time giving lay and professional judges an attractive alternative to the punishment of death. The 'Be Cautious' Bill also required *all* judges and lay judges to agree that death is the appropriate punishment before permitting that penalty to be imposed. Thirdly, this Bill established a four-year moratorium on executions while research committees in the Diet would examine various issues related to capital punishment. In short, this Bill proposed a third way between abolition and retention which can be summarized as follows:

Caution about Capital Punishment = LWOP + Consensus + Study during Moratorium

But the Bill never made it out of committee. In Japan's present political context—economic recession, earthquake and tsunami disaster, nuclear leaks, demographic crisis, and a shortage of effective leadership—this Bill was ambitious, but it hardly reflected a comprehensive vision of reform for Japanese capital punishment. The rest of this chapter aims to reflect more broadly on the problems in Japanese capital punishment, chiefly by comparing Japan to the United States. America may not be a good model for reform of Japan's death penalty practices, but thinking about America does provide an opportunity to consider what is distinctive and problematic in Japan, where almost everyone associated with capital punishment—prosecutors, judges, lay judges, defence lawyers, Ministers of Justice, the media, politicians, and victims and survivors—agrees that life-and-death decisions should be made as 'carefully' as possible. But the institutional and procedural reality in Japan is that capital cases are treated no differently than other criminal cases. In Japan, death is *not* different.

Since the 1970s, the US Supreme Court has repeatedly held that 'death is different' from all other criminal punishments, in two main respects. First, death is different in its severity and enormity: it is 'the ultimate punishment' in that it denies the offender's humanity and the possibility of his or her reform. In addition, death is also different because the finality of execution makes the consequences of error irreversible.[16] In America, the recognition that 'death is different' justifies a wide

do change their mind are slightly more likely to become *more supportive* of capital punishment than to become more opposed to it. As explained later in this article, the strongest support for Marshall's hypothesis comes from the conversions that several Justices have experienced as the result of hearing capital appeals at the US Supreme Court. See Carol Steiker, 'The Marshall Hypothesis Revisited' (2009) 52(3) *Howard Law Journal* 525.

[16] For example, Justice William Brennan stated that 'death is a unique punishment' and 'in a class by itself' (*Furman v Georgia* 408 US 238, 92 S Ct 2726 (1972) [a Supreme Court case]); Justice Potter Stewart argued that 'the penalty of death differs from all other forms of criminal punishment, not in degree but in kind' (*Gregg v Georgia* 428 US 153, 96 S Ct 2909 (1976) [a Supreme Court case]); and Justices Potter Stewart, Lewis Powell, and John Paul Stevens observed that 'the penalty of death is qualitatively different from a sentence of imprisonment, however long' (*Woodson v North Carolina* 428 US 280 (1976)).

array of special procedural protections for capital defendants. Most fundamentally, ordinary due process is not enough; there must be 'super due process' (international human rights law proceeds from a similar premise).

Super due process has at least five implications in American criminal procedure. For starters, capital trials must be carried out in two separate stages: first determining the guilt of a defendant and, if the defendant is convicted in stage one, then deciding the sentence. Secondly, capital juries must be given guidelines in the form of 'aggravating' and 'mitigating' factors that will help to direct their discretion at the sentencing stage. Thirdly, after a death sentence has been imposed it receives automatic appellate review, regardless of the defendant's wishes. In most American jurisdictions, defendants who have been sentenced to death cannot waive the right to appeal, as did two of the first eight defendants who were sentenced to death under Japan's lay judge system. Fourthly, many American appellate courts engage in proportionality review in order to identify inappropriate disparities in sentencing practice. The principle that underlies this practice is the notion that like cases should be treated alike—and different cases differently. Finally, in order to impose a capital sentence, all 12 jurors must agree that death is the appropriate sanction. For the defence this means that a sentence of death can be prevented by convincing a single juror to oppose a capital sentence.[17] Clarence Darrow, the most famous defence lawyer in American history, defended more than 100 persons in capital trials during a career that spanned half a century and ended in the 1930s, and not a single one of them was sentenced to death. If Darrow had faced a majority rule like the one that prevails in Japan's lay judge system, he would have had a very different record.

Although American law promises super due process, it routinely fails to deliver it. The seminal study of error rates in capital cases found that 'serious error—error substantially undermining the reliability of capital verdicts—has reached epidemic proportions throughout America's death penalty system'.[18] In this research, the 'overall error rate' was defined as the proportion of fully reviewed capital judgments that were overturned on appeal due to serious error between 1973 and 1995. America's 'overall error-rate' was 68 per cent; more than two out of every three capital sentences reviewed by appellate courts were reversed because they were found to be seriously flawed. Nationwide, only 15 per cent of all death sentences imposed by American trial courts since 1977 have resulted in execution.[19] The most common errors include police and prosecutors who suppressed exculpatory evidence or committed other professional misconduct, incompetent defence lawyers, jurors who were misinformed about the law, and biased judges and jurors. More than eight out of every 10 cases sent back for retrial ended in a sentence less

[17] Robert M Bohm, *Ultimate Sanction: Understanding the Death Penalty Through Its Many Voices and Many Sides* (New York, Kaplan 2010) vii.

[18] James S Liebman, Jeffrey Fagan, and Valerie West, 'A Broken System: Error Rates in Capital Cases, 1973–1995' (2000), <http://www2.law.columbia.edu/instructionalservices/liebman> (accessed 17 January 2013).

[19] Among states that have carried out at least one execution since 1977, this conversion rate ranges from 0.8 per cent in Pennsylvania to 72.5 per cent in Virginia. See <http://www.deathpenaltyinfo.org> (accessed 17 January 2013).

than death, including nine per cent that ended in acquittal. There are similarly high rates of capital error in the US military's death penalty system. A follow-up study examined *why* there is so much error in American capital cases, and it arrived at a conclusion that has important implications for Japan. This study concluded that: 'The more often officials use the death penalty…the greater the risk that capital convictions and sentences will be seriously flawed'.[20]

It is widely believed that Japan uses capital punishment less commonly than the United States, but this view is mistaken. In per capita terms (executions per million population), Japan's execution rate is lower than that for the United States as a whole, and it is much lower than the rates in states such as Texas and Virginia. But the per capita rate of execution is a highly imperfect measure of frequency of use because (Stalinist nightmares aside) persons are not selected randomly for death; they are condemned and executed from a larger pool of potentially capital cases. In the United States and Japan, this pool, in practice if not law, consists entirely of homicide crimes. Hence, to assess the scale of capital punishment in any given country, one must consider the size of the relevant capital-crime pool. In the United States from 1977 through 1999, about 2.2 per cent of all known murder offenders were sentenced to death. By state, the range ran from a low of 0.4 per cent in Colorado to a high of six per cent in Nevada. Texas was at the median, with two per cent of known murderers being sentenced to death.[21]

The probability of a known murderer being sentenced to death in Japan is not much different than that in many American jurisdictions. For example, from 1994 through 2003, the chance of a Japanese murderer being sentenced to death was 1.3 per cent—about the same rate as in the American states of California and Virginia. And in 2007, when Japan had 14 death sentences in courts of original jurisdiction and the United States had 110, the ratio of death sentences to homicides was higher in Japan than in the United States. By measures such as these, Japan is not 'careful' in its use of capital punishment; it is a vigorous killing state.[22]

4. The Dirty Dozen

Japan's legal system employs capital punishment as often as many American states, but it makes no promise of super due process. This section describes 12 ways in which death is *not* different in Japan.[23]

[20] James S Liebman, Jeffrey Fagan, Andrew Gelman, Valerie West, Garth Davies, and Alexander Kiss, 'A Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can Be Done About It' (2002), <http://www2.law.columbia.edu/brokensystem2/index2.html> (accessed 17 January 2013).

[21] John Blume, Theodore Eisenberg, and Martin T Wells, 'Explaining Death Row's Population and Racial Composition' (2004) 1(1) *Journal of Empirical Legal Studies* 165.

[22] David T Johnson, 'Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings' (2006) 7(2) *Asia-Pacific Law and Policy Journal* 106; Johnson and Zimring (2009) 77–8.

[23] This account of how death is *not* different in Japan is not exhaustive. In addition to the twelve characteristics described here, Japan has not signed several international treaties related to capital punishment (including the Second Optional Protocol to the International Covenant on Civil and Political

1. *No advance notice whether a case is capital*: Japanese prosecutors make no advance announcement as to whether they will seek a sentence of death; the disclosure is only made on the penultimate day of trial, after all the evidence has been presented and immediately before the defence makes its closing argument. This non-disclosure policy makes it difficult for Japanese bar associations to provide institutional support of the kinds that American capital defenders take for granted.[24] The non-disclosure policy also means that while Japan has a system of capital punishment, it does not have anything that can be called a 'capital trial' because nobody except the prosecutor knows until the trial ends whether the defendant's life is at stake.

2. *No separate stage for sentencing*: Capital trials in Japan are not bifurcated into separate guilt and sentencing phases even when the defendant denies guilt, as Kazuo Ino did in a murder trial in Tokyo in March 2011. Ino was ultimately sentenced to death by a lay judge panel that learned almost nothing about what kind of person the 60-year-old defendant was, or what kind of life he had lived so far. For a system that purports to value 'precise' decision-making (*seimitsu shiho*) as one foundation of its criminal process, this is a peculiar way to make judgments about life and death. Similarly, in the murder trial of Tatsumi Tateyama in Chiba in June 2011, Chief Judge Masanori Hatoko did not allow an expert witness to appear for the defence and testify about one of the central issues in the trial: whether Tateyama had a cognitive and developmental disorder. Judge Hatoko ruled in the pretrial process that such testimony would only confuse the lay judges.

3. *Victims' demands for punishment distort fact-finding*: Since capital trials are not bifurcated in Japan, victims and survivors are allowed to make statements about what punishment they want *during* the fact-finding procedure. This is a risky practice because research by Keio University Professor Yuji Itoh and other scholars has found that courts are much more likely to convict defendants if they are permitted to hear such a sentencing request—even though the victim's wishes about punishment are supposed to be irrelevant with respect to the question of guilt.[25] There is no principled way to justify this practice, and Japan's Code of Criminal Procedure gives judges ample discretion to prevent it from happening. Yet judges routinely allow it to occur. The advent of the Victim Participation System in 2008, which greatly expanded the rights and amplified the voices of victims and survivors, raises the risk that emotional demands for harsh punishment will distort the core function of truth-finding at trial.[26] In the murder trial of Kazuo Ino in Tokyo, the victim's bereaved son was permitted to state that he wanted the defendant

Rights), nor has it established the punishment of 'life without parole', which would give judges and lay judges a sentencing option between life with the possibility of parole and the penalty of death.

[24] I have attended several sessions of the recently created 'Death Penalty Defense Lawyers Project Team' in the Japan Federation of Bar Associations, which tries to provide assistance to defence lawyers in capital cases. From my perspective as an American, it is remarkable how much time the Team spends trying to discern which trials will be 'capital'.

[25] Johnson (n 14) endnote 91.

[26] Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process* (Cambridge MA, Harvard University Press 2012) 172.

sentenced to death—and this was on the second day of trial, when fact-finding had barely begun. And in the murder trial of Tatsumi Tateyama in Chiba, a parade of two surviving parents, their attorney, four victims, and two prosecutors spent 195 minutes in the final trial session explaining why Tateyama should be sentenced to death. The defence's allotted time was 60 minutes.

4. *Simple scripts and rough justice*: The advent of the lay judge system has reduced the importance of 'precision' (*seimitsusa*) in Japan's criminal process, and this is especially conspicuous in capital trials. Before that reform, capital trials lasted for many months or years, as trial sessions were held discontinuously, with one every few weeks or months. This gave all parties to the case time to revisit issues while the trial walked towards the finish line. There were costs to that method—justice delayed can be justice denied, and judges sometimes were transferred in mid-trial—but whatever they were, the previous system could not be accused of being insufficiently deliberate. By contrast, many of the capital trials in Japan's lay judge system have followed simple scripts, and many judges push hard to keep trials 'on schedule'. This preoccupation with efficiency may satisfy a Supreme Court that has instructed judges to finish 90 per cent of lay judge trials in five days or less, but there is a big difference between the convenience of judges and lay judges and the 'careful' (*shincho*) application of capital punishment.[27]

5. *Vague sentencing standards*: The '*Nagayama* standards' issued by Japan's Supreme Court in 1983 provide little guidance to the judges and lay judges who make life-and-death decisions. Several lay judges have noted this in post-trial press conferences, and many legal professionals regard the factors as little more than a list of talking points that courts might consider.[28] According to this decision, a death sentence should be imposed only if, all factors considered, 'it is unavoidable' and 'cannot be helped' (*yamu o enai*). Decision-makers are also supposed to consider questions of deterrence and proportionality. In reality, the *Nagayama* factors are an impossibly vague grab bag of criteria for structuring life-and-death decision-making. The punch line—that death is the appropriate sentence when it is 'unavoidable'—simultaneously denies the reality of *choice* in capital decision-making, fails to provide guidance on how to *weigh* the various factors, and begs the question of *when* death should be chosen instead of life.[29]

6. *No automatic appellate review*: In Japan, there is no automatic appellate review for defendants who have been sentenced to death. From 2000 to 2010, some 35 per cent (17/48) of all executions did not reach the Supreme Court.[30]

[27] Johnson (n 14) endnote 93.

[28] The *Nagayama* factors are: (1) the character of the crime, (2) the defendant's motive, (3) the crime situation (cruelty and heinousness), (4) the importance of the result (especially the number of victims), (5) the feelings of the victims and survivors, (6) the social effects of the crime, (7) the age of the defendant, (8) his or her prior record, and (9) the circumstances after the crime (such as whether the defendant repents and apologizes).

[29] For an analysis of how the *Nagayama* factors have been interpreted, applied, and criticized, see *Asahi Shimbun*, 'Shikei no Shakudo Fukai Nayami: Nagayama Kijun Saibanin Saiban de Kawaru ka', 23 November 2010, 37; and Kenji Nagata, 'Sentencing Standards between the Death Penalty and Life Imprisonment in Japan' (2011) 32 *Kansai University Review of Law and Politics* 1.

[30] Maiko Tagusari, 'The Death Penalty in Japan' (2010) 1(2) *East Asian Law Journal* 93.

Half or more of death row inmates file requests for retrial in order to avoid execution, but these requests (like requests for executive clemency) have no legal effect on the Minister of Justice's authority to order a hanging, and some inmates (such as Teruo Ono, who was hanged in 1999) have been executed despite submitting a petition or while preparing to submit one (such as Sachiko Eto, who was hanged in 2012). There is also a trend towards speedier execution of the inmates on Japan's death row. The 14 persons who were hanged between 2005 and 2007 waited an average of eight-and-a-half years after their death sentences were finalized before being taken to the gallows. By contrast, the 24 persons who were hanged in the subsequent three-year period (2008–10) waited an average of only four years. The lack of a system of mandatory review increases the risk of executing the innocent or undeserving, and this risk is magnified because no inmate on death row has received executive clemency in Japan since Kenjiro Ishii had his death sentence commuted to life imprisonment in 1975.[31]

7. *No special procedures for selecting lay judges*: In Japan, there is no special procedure for selecting citizens to serve as lay judges in potentially capital trials. The defence and the prosecution have several opportunities each to remove prospective lay judges from the panel, but the selection procedure amounts to little more than a guessing game because the parties receive almost no information about the citizens who have been called to serve, nor are they allowed to ask meaningful questions during the selection process. There are also questions about when lay judges should be replaced while a trial is in session. In the capital trial of Kazuo Ino, a lay judge who asked many questions in open court was replaced during the deliberations that followed the final trial session, yet Chief Judge Noriaki Yoshimura did not inform the parties about the change; the defence discovered it only several days *after* Ino was sentenced to death. Similarly, in the capital trial of Tatsumi Tateyama, one lay judge slept repeatedly during the first eight trial sessions. Defence lawyers asked Chief Judge Masanori Hatoko to address this issue in order to ensure that Tateyama received a fair trial, but Hatoko (who also dozed during the trial) refused to act until the day before the final trial session, when his hand was forced by a written petition from the defence that was supported by statements from several persons who had been watching the trial in dismay over how much this lay judge slumbered.

8. *Law is not explained in open court*: In Japan, the presiding judge instructs (*setsuji*) lay judges about the law in the privacy of the deliberation room, not in open court where the prosecution, the defence, and trial observers can hear these important directives. There is reason to wonder whether some judges present a pro-prosecution—and pro-death—version of the law to lay judges. For example, in August 2010, Takashi Takano, an attorney who leads the Japan Federation of

[31] Ishii was paroled in 1989, but his co-defendant in the 1947 'Fukuoka incident' (Takeo Nishi) was executed on the same June day in 1975 that Ishii's death sentence was commuted to life imprisonment. Japanese officials have never explained this split decision. Ishii admitted shooting two men (in self-defence), while Nishi argued that he was not at the scene of the crime. See Masami Ito, 'Retrial a Tall Order in Quests to Prove Innocence', *Japan Times*, 26 May 26 2005, <http://www.japantimes.co.jp/text/nn20050526f1.html> (accessed 7 December 2012).

Bar Association's efforts to train lawyers in trial advocacy, was conducting a training course in Osaka, and he happened to eat lunch in a deliberation room (*hyogishitsu*) used by Chief Judge Hiroaki Higuchi and his colleagues. On entering the room Takano was initially pleased to see that 'Rules for Criminal Trials' had been posted on a whiteboard, presumably to instruct the citizen-judges who are amateurs in the law. But the more Takano studied the Rules, the more concerned he became. Incredibly, the whiteboard presented guidelines for convicting defendants but omitted language about when it is appropriate to acquit. In Takano's words:

> I was amazed. I trembled a little. And I was indignant. *You mean they'll even do shit like this!* This is what I cried out in my heart. If judges feel like it, they can use clever methods in the secrecy of the deliberation room to lead lay judges to their preferred conclusion without anyone noticing. This is precisely the fatal danger of the lay judge system that does not exist in a jury system.[32]

The failure to instruct lay judges in open court may violate the defendant's right 'to a speedy and public trial' under Article 37 of the Constitution.

9. *Death by majority*: As mentioned above, there is no requirement that all judges and lay judges agree that a death sentence is deserved, nor is there a requirement that a 'super-majority' of six, seven, or eight of the nine people on a panel agree before the ultimate penalty can be imposed. In Japan, a 'mixed majority'—five votes, with at least one from a professional judge—is enough to condemn a person to death. In all American jurisdictions that retain capital punishment, a death sentence may only be imposed if all 12 jurors agree that death is the appropriate sanction.

10. *Passive defence lawyers*: The assumption that death is not different also influences defence lawyers, mainly by inhibiting them from aggressively challenging the state's case for death. In two of the three capital trials I watched under the lay judge system, defence lawyers were strikingly passive about contesting the state's case against the defendant and about challenging the propriety of capital punishment (the exception was the trial of Tateyama in Chiba). More striking still is the fact that for the past half-century, Japanese lawyers have almost never challenged the constitutionality of capital punishment in general or hanging in particular. There are several reasons for this passivity, including the fact that Japan's Supreme Court has long been conservative. So why bother? In comparative perspective the reluctance of Japanese lawyers to raise legal challenges that are routinely made in American jurisdictions reflects the widely-shared assumption that the penalty of death is nothing special. To make matters worse, Japanese defence lawyers seldom present much information about the defendant's life history. In American jurisdictions, one important cause of the dramatic decline in death sentences over the last decade—a two-thirds drop in ten years—has been the ardent efforts of 'mitigation specialists' who thoroughly investigate a capital defendant's life story and then tell

[32] Quoted in David T Johnson, 'Keiji Bengoshi to Saibanin Seido: Henkaku no Naka no Toso' (2011) 819 *Sekai* 266.

it in detail to the jurors who will decide whether to condemn the defendant to death.[33] Japan has more than 30,000 lawyers but not a single mitigation specialist. Moreover, the guidelines for paying state-appointed attorneys (*kokusen bengonin*), who do the bulk of criminal defence work in Japan, create little incentive for expending the effort that is needed to construct a compelling and sympathetic account of a defendant's life. Akira Sugeno, the senior defence lawyer for Tateyama in the trial in Chiba, was paid no more for his work in this capital case than he was paid for working in other criminal cases where the stakes were significantly lower. Sugeno asked for a more appropriate fee, but his request was rejected because there is no special provision for capital cases in the current fee guidelines. In this economic sense as well, death is not different in Japan.

11. *Prosecutors can appeal sentences less than death*: In Japan, prosecutors are allowed two or even three bites of the death penalty apple. If a District Court fails to deliver the sentence they seek, an appellate court may reverse the original decision, as occurred in the case of the juvenile who was sentenced to death by the Hiroshima High Court in 2008 for killing a mother and her infant daughter in Hikari City nine years earlier. In principle, the right of prosecutors to appeal non-death sentences serves the value of consistency by allowing appellate courts to check whether like cases are being treated alike—at least among those cases that are appealed. But the reality of criminal trials at the appellate level is that they tend to be much faster and rougher than first-instance trials where oral testimony is heard. Here, too, one sees evidence of the assumption that capital sentencing does not require special procedures or protections.

12. *Secrecy*: The administration of executions in Japan is surrounded by secrecy and silence to an extent seldom seen in other death penalty nations. Sociologist Georg Simmel observed that 'the purpose of secrecy is above all protection'. The main function of Japan's policy of secrecy is to protect the system of capital punishment—including the premise that death is not different—from outside scrutiny and criticism. If there is no government power greater than the power of life and death and no government intrusion more invasive than the death penalty, then there is no government power in greater need of public oversight. In Japan that oversight is missing. There is also a problem of secrecy related to lay judges, who are not permitted to disclose 'confidential' information about their experiences at trial. This coerced silence not only prevents lay judges from talking about their trial experiences after the fact, it prevents the public from learning how life and death decisions are made.[34]

5. Two Ways Law Can Fail

In the years leading up to the start of Japan's lay judge system in 2009, more than 500 'mock trials' were held. The main objective of those test trials was to anticipate

[33] Jeffrey Toobin, 'The Mitigator', *The New Yorker*, 9 May 2011, 32.

[34] Johnson (n 14).

the problems that might occur in the new trial system and to prepare for the complexities that inevitably accompany fundamental reforms of this kind. Despite the scale of this preparation, not a single mock trial was held in which prosecutors sought a sentence of death and a lay tribunal was asked to make a life-or-death decision. Like the 12 problems described above, this absence reflects the Japanese tendency to assume death is not different.

The assumption that there is nothing special about capital cases is evident at every level of adjudication, including the Supreme Court. Recently, I asked veteran *Asahi* newspaper journalist Susumu Yamaguchi (co-author of a seminal new book on Japan's Supreme Court) whether Japan's highest court considers death a 'special' (*tokubetsu*) punishment.[35] His reflex answer was yes, but when I asked *how* death is different, he offered two replies, neither of which provides meaningful support for the assertion that Japan's Supreme Court views death as a different form of punishment. Yamaguchi's first point was that before deciding whether to finalize a sentence of death, the Supreme Court gives defence lawyers an opportunity to present an oral argument—a privilege seldom granted to defence lawyers in other criminal cases. But when I asked whether these oral arguments are more than 'empty rituals' (as some defence lawyers contend), Yamaguchi conceded that they are largely ceremonial. Yamaguchi's second reason for believing that death is different to the Justices on Japan's Supreme Court is his perception that they read the relevant documents 'carefully' in capital cases. This claim is striking in at least two ways. For one thing, it suggests that the Justices may not read the record all that carefully in other kinds of cases. For another, trusting judges to read the record carefully assumes there is no need for special procedures or protections in capital cases—much less for 'super due process'. I have studied criminal justice in Japan for the past quarter-century, and I see no good reason to trust Justices (or other judges) in this way. Indeed, there are reasons to worry that Japan's judiciary will continue to defer to the prosecution as it routinely has done throughout the post-war period.[36]

Yamaguchi's book also provides some basis for reflection about what happens to Justices in the United States and Japan as the result of hearing capital appeals. In a decision by the US Supreme Court in 1972 (*Furman v Georgia*), Justice Thurgood Marshall observed that if the American people were better informed about the reality of capital punishment, they would find it 'shocking, unjust, and unacceptable'.[37] This hunch (known as the 'Marshall hypothesis') has been the subject of much study, and the strongest evidence in its support comes from the death penalty conversions that many American Justices have experienced while sitting on the Supreme Court.[38] For example, in 1976 America's highest Court held by a seven to two majority in *Gregg v Georgia* that the new capital statutes enacted by states after the *Furman* decision had found capital punishment unconstitutional were

[35] Susumu Yamaguchi and Yu Miyaji, *Saikosai no Anto: Shosuiken ga Jidai o Kirihiraku* (Tokyo, Asahi Shinsho 2011).

[36] Daniel H Foote, 'Policymaking by the Japanese Judiciary in the Criminal Justice Field' (2010) 72 *Hoshakaigaku* 6.

[37] *Furman v Georgia* 408 US 238, 362, 92 S Ct 2726 (1972) [a Supreme Court case].

[38] Steiker (n 15).

now constitutionally kosher.[39] The *Gregg* decision restarted the machinery of capital punishment that had been stopped by *Furman* four years before, and three of the majority votes were cast by Justices Powell, Stevens, and Stewart. By the end of their tenures on the bench—after many years of confronting the kinds of 'capital error' described earlier in this article—all three had come to conclude that it is impossible to administer the death penalty in a manner that is fair, just, and accurate. As Justice Powell observed after his retirement, whatever attractions capital punishment might have in principle, its actual practice 'serves no useful purpose and brings discredit on the whole legal system'.[40]

One leading scholar of American capital punishment put the point a little differently when he said that the actual practice of capital punishment is so inconsistent with America's core legal values that 'if you love the law, you must hate the death penalty'.[41] Similarly, in 2009 the American Law Institute, the most prestigious law reform organization in the United States, withdrew its approval for the death penalty standards it had created in the Model Penal Code of 1963 because those standards had failed to provide adequate guidance for the juries who must decide which defendants should die. As another scholar observes:[42]

> Now that the creators of the modern system of death penalty sentencing have disowned that system, there is no support for distinguishing the current death penalty lottery from the lawless system that *Furman* condemned [in 1972]. The apparatus that the Supreme Court rushed to embrace in [the *Gregg* decision of] 1976 has been exposed as a conspicuous failure.

Despite these damning conclusions, some analysts continue to contend that American capital punishment is not 'broken beyond repair'.[43] Here is my own conclusion: in America there are lots of legal promises to administer the ultimate penalty fairly, justly, and accurately—and there are broken promises galore.

But law can fail in more than one way. If the law of capital punishment in America fails to fulfil many of its promises, law in Japan fails by refusing to make many promises at all. This is largely a failure of aspiration and political will. The low ideals Japan has for the administration of capital punishment help explain why Justices on its Supreme Court seldom change their mind about this issue. When there are few requirements to satisfy before imposing a sentence of death, there is less room for hesitation or frustration.[44]

[39] *Gregg v Georgia* 428 US 153, 96 S Ct 2909 (1976) [a Supreme Court case].

[40] Quoted in Kathleen A O'Shea, *Women and the Death Penalty in the United States, 1900–1998* (Westport, CT, Greenwood 1999) 29.

[41] Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton, Princeton University Press 2001) 253.

[42] Franklin E Zimring, 'Pulling the Plug on Capital Punishment', *The National Law Journal*, 7 December 2009.

[43] Charles Lane, *Stay of Execution: Saving the Death Penalty from Itself* (Lanham, MD, Rowman & Littlefield 2010) 64.

[44] There are two other reasons why death penalty 'conversions' often occur among Justices on the US Supreme Court and rarely occur in Japan. First, Justices in America serve much longer terms than their Japanese counterparts: an average of 26 years, compared with six years in Japan (Yamaguchi and Miyaji (n 35) 37). The longer term means that American Justices encounter many more capital cases and much more capital error. Secondly, because of the different ways in which Justices are selected in these two countries, Justices in America tend to be more ideologically diverse.

6. Japanese Futures

An astute analyst of comparative criminal justice offers this insight about the value of thinking comparatively:[45]

> Comparative research should be seen not only as a means of identifying best practices to be adopted wholesale but also as an opportunity to reflect on our own practices and values in the light of what others do . . . The best practice for 'us' to learn from may not always be best practice as such, but rather that which stretches our imagination about what is possible.

In the years to come Japan could 'stretch' its collective imagination about what is possible and impossible in capital punishment, and it could change its approach to the ultimate punishment in two ways. On the one hand, the country could start to take seriously the assertion its Supreme Court made in a 1948 decision upholding the constitutionality of capital punishment—that 'a single life weighs more than the entire earth'. This road to reform would require changes to the Code of Criminal Procedure and other laws so as to address the 'dirty dozen' problems, but an equally urgent task is to ensure greater fidelity to existing law on the part of all legal professionals, especially judges. At the top of my own list of urgent legal reforms are the introduction of a separate stage for sentencing in capital cases (especially when the defendant denies guilt), and a decision rule requiring more than a mere majority to condemn a person to death.

In the second path to reform, Japan would renounce capital punishment on the grounds that it is impossible to administer it in a manner that is consistent with the country's (and the Constitution's) core legal values. America has tried much harder than Japan to construct such a system, and the most reasonable conclusion to reach is that it has failed. As US Supreme Court Justice Harry Blackmun concluded in 1994:[46]

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored . . . to develop . . . rules that would lend more than the mere appearance of fairness to the death penalty endeavor . . . Rather than continue to coddle the court's delusion that the desired level of fairness has been achieved . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies . . . [T]his court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness in the infliction of [death] is so plainly doomed to failure that it and the death penalty must be abandoned altogether . . . I may not live to see that day, but I have faith that eventually it will arrive.

If Japan spends as long as America—40 years or so—trying to construct its own system of 'super due process', perhaps the outcome will be less disappointing than Blackmun's lament concludes it is in the United States. Perhaps, but I doubt it.

[45] David Nelken, *Comparative Criminal Justice* (London, Sage 2010) 23.
[46] *Callins v Collins* 510 US 1141 (1994).

Comparative research should stretch our minds about what is possible as well as impossible. America's long experiment with capital punishment suggests that it is impossible to 'construct a system of justice that reaches only the rare right cases without also occasionally condemning the innocent or the undeserving'.[47] This is the pivotal issue in both the United States and Japan, and Japan would be foolish to ignore the abundant evidence from the only other rich democracy that retains this 'peculiar institution'.[48]

Whatever road Japan chooses to travel in the future, one thing is clear: the present presumption that death is not different is problematic. It may turn out that Japan cannot do much better at administering capital punishment than it is doing now. But if the country retains this institution, surely it should try.

[47] Scott Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* (New York, Picador 2003) 114.

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

PART III

PUBLIC OPINION AND DEATH PENALTY REFORM

10

Capital Punishment Reform, Public Opinion, and Penal Elitism in the People's Republic of China

Børge Bakken

As recently as ten years ago we could see little evidence of reduction in the extensive use of capital punishment in China. There had been a strong upsurge of so-called 'hard strikes against crime' or '*Yanda*' (严打) campaigns, and the overall number of executions was estimated to be a stunning 15,000 per year in the period from 1997 to 2001.[1] On top of that, public opinion survey data collected by the Chinese Academy of Social Sciences as late as 1996 showed an equally stunning popular support for the death penalty of 99.2 per cent. Only 0.8 per cent of the surveyed population said they were against its use.[2] Nothing seemed to be able to alter the draconian practices or the fact that the general population regarded the death penalty as more or less a taken-for-granted phenomenon. The situation today is that China still uses the death penalty more than any other country in the world. Indeed, China judicially executes more people than the rest of the world combined and punitive opinions still linger on. Change, however, has recently been very evident, both in terms of the practices of the state and in terms of the norms and opinions linked to the use of the death penalty among the population at large.

1. Current Legal Reforms and Chinese Death Penalty Practices

The formative period of Communism represented a potential humanizing factor in China. True to the slogan 'barbarism versus socialism', the communists regarded the death penalty as a cruel method of punishment. More precisely, on 15 June 1922, the Chinese Communist Party (CCP) formally suggested that the death penalty

[1] Chen Xingliang, 'Kuanyan xiangji xingshi zhengci yanjiu (shang)' ('Severity and Leniency of Mutual Benefit to Criminal Policy Research (1)') (2006) 7 *Xingshi faxue* (Criminal Law) 7, 13.

[2] Hu Yunteng, *Cun yu fei: sixing jiben lilun yanjiu* (*Retain or Abolish: Basic Theoretical Research on the Death Penalty*) (Beijing, Zhongguo jianchu chubanshe 2000) 342.

should be abandoned.[3] In the period of war and revolution that followed this position was abandoned. Yet after the CCP took power in 1949, but before the Cultural Revolution, in his political report to the Eighth Party Congress in 1956, Premier Liu Shaoqi still spoke on behalf of the Party when he again advocated the future abolition of the death penalty.[4] Likewise, legal textbooks from the 1950s advocated 'gradual abolishment' and stressed the necessity to apply it to a minimum number of cases only. 'Thought reform' and rehabilitation together with prevention were seen as far more viable methods. Although the death penalty was frowned upon in Chinese Marxist discourse—and is still seen as an affront to Marxist orthodoxy in theory—the regime has always resorted to the use of capital punishment, all the time claiming that it is necessary 'at this stage of development'. It is well worth noting, however, that this harshness was justified by short-term political discourse on the need to maintain order in current circumstances rather than an appeal to a need to respond to a deep-rooted popular retributive culture. The 'stage of development' argument is still a frequently used argument despite important reforms to reduce the use of capital punishment.

The most important reform in reducing the number of death sentences imposed and carried out in China was introduced on 1 January 2007. China then re-centralized the power to approve death sentences by returning the power of final review of death sentences from the Provincial High Courts, to whom it had been delegated during the 'strike hard' campaigns beginning in 1983, to the Supreme People's Court (SPC).[5] The campaigns had led to a rapid rise in the use of the death penalty: some reports estimate that about 30,000 people were executed during the first wave of the 'strike hard' campaigns in 1983. These discretionary powers of the provincial courts had been retained even after 1997 when the new Criminal Law and the Criminal Procedure Law had statutorily placed the power of final review of death penalty cases with the SPC. It took ten years and a new reform to implement that procedure. The reason why several groups pressed for this reform is that the discretionary powers exercised in the provinces produced very different usage of the death penalty for similar crimes depending on where they occurred. Thus, the same act could lead to a prison sentence or the death penalty depending on local circumstances.

The 2007 reform is expected not only to bring about greater uniformity in the use of capital punishment but to weed out local influence on the judicial system. This re-centralization appealed to leading political circles because they were striving towards more centralized control overall. The reforms have been criticized because the SPC was not well prepared to take the workload of the many reviews that would come to it although many new judges have been recruited to the SPC since the reform came into effect. The reviews are mostly based on reading

[3] Zhao Binzhi, 'Cong Zhongguo sixing chengce kan fei moli fanzui sixing de zhubu feizhi wenti' ('On the Chinese Policy of Gradual Abolishment of the Death Penalty for Non-violent Crimes'), in Zhao Binzhi, *Zhongguo feizhi sixing zhi lu tansuo* (*The Road of the Abolition of the Death Penalty in China*) (Beijing, Zhongguo renmin gong'an daxue chubanshe 2004) 11, 18.

[4] Leng Shao-Chuan, *Justice in Communist China: A Survey of the Judicial System of the Chinese People's Republic* (Dobbs Ferry, New York, Oceana Publications 1967) 50–1, 167.

[5] For further information on this, see Ch 6.

documents from the lower courts rather than leading to new open court sessions. This practice represents a limitation of the SPC's power. Still, the reforms seem to have functioned in line with the intentions of re-centralization and reduction of death sentences due to the reasons discussed below.

After the reform of 2007, it was reported in 2008 that 15 per cent of the death sentences handed down by lower-level courts (meaning Provincial High Courts) had been overturned by the SPC at the start of the year.[6] The reasons for overturning the death penalties were mainly due to inappropriate procedures or lack of sufficient evidence. This news came one month after an SPC official said that there had been a drop of 30 per cent in death penalty cases compared to 2006. The irony behind these percentages is of course that the number of death penalty sentences and executions in China is still regarded as a 'state secret'. Although no official number is available, strong rumours emanating from inside the public security system give a rough but fairly reliable indication of the size of the decrease in resort to the death penalty in China. The Dui Hua Foundation has published a rough estimate of about 5,000 executions in 2010. The real number may be higher or lower (and I think the Dui Hua estimate may be a rather optimistic one), but high as this number for 2010 is, it is only a third of the number estimated less than ten years ago. We also know from former SPC President Xiao Yang that the number of death sentences ordered to be carried out immediately in the year following the 2007 reform was for the first time outnumbered by suspended death sentences, where those convicted would receive a life sentence instead of execution if they did not commit a crime and behaved in a proper way during the first two years of imprisonment.[7]

The reason why the reform of 2007 has led to a reduction in the number of death sentences and executions is that apart from the SPC overturning sentences imposed in the lower courts, these courts themselves have been forced to exercise greater caution when handing down death sentences. This 'self-censorship' is probably more effective in reducing the level of capital punishment than the number of cases finally overturned by the SPC. The main reason why judges might avoid meting out death sentences is clearly more banal and practical than it being due to a sudden spark of enlightenment striking state officials and judges. Where judges formerly received a good reputation for showing resolve in the terms of harshness, they now risk being criticized if they use capital punishment too frequently.

The reforms are therefore undoubtedly an important procedural step towards preventing wrongful convictions. At the same time the reforms represent regained power to the SPC although this court is still under strong political pressure and control. The SPC is not at all an independent branch of the judiciary. No independent judiciary exists in China and a move in that direction does not seem to have support at the highest political level today. The whole court system at all levels is still dependent on the political-legal committees (*zhengfa weiyuanhui*) whose

[6] Ng Tze-wei, 'Quashing of Death Penalties Hailed, but More Action Needed', *South China Morning Post*, 28 June 2008, A4.

[7] Xinhua News Agency (2008), 'China Sees 30% Drop in Death Penalty', 10 May 2008.

power still rests in the political rather than the legal sphere. The political body can still overturn sentences at every level of the court system. There is no division of power in this regard in China.

'Self-censorship' by the judges operates as an effective self-reinforcing process as a result of the 2007 reforms. Practical and administrative factors play an important role in this respect. One may talk about a change in legal culture here, but if we choose to call these cultural influences the culture is of an organizational nature. The change in sentencing behaviour is linked to internal organizational and administrative matters like reward systems, career incentives, and the importance of reputation among judges. Judges will simply be more cautious in meting out death penalties because they do not want to appear incompetent by being corrected by the SPC. While there was earlier an incentive to appear tough, and when a tough judge was seen as a good judge, the result was very many death sentences. 'Tough' gave good personal charisma on top of being legally in line with a harsh punishment policy.

An indication that self-censorship was already part of the process was found in a survey by Wang Lirong[8] who interviewed judges about reasons for giving or not giving the death penalty before the reforms of 2007.[9] Death sentences according to Wang's interviewees needed to be reviewed by the sentencing committee (*shenpan weiyuanhui* 神判委员会), or signed by the Head of Court (*yuanzhang* 院长) at the intermediate court level even if they were not taken up to the SPC level. If the judge's original sentence was not accepted, the judge ran the imminent risk of being seen as incompetent, and he or she would not be recognized as adequately qualified, particularly if this pattern was repeated. The pressure was also on the Head of Court. If the Head of Court's judgment was rejected by the SPC, the result would be a loss of respect and recognition. The effect of this career-based reputation game is that the judges felt compelled to mete out 'safe' sentences or, in other words, they tended to avoid the death sentence because they were all under review by a higher level court.

This effect must clearly have become even more important when the review was undertaken by the SPC after 2007, with the objective of making sentencing decisions more uniform and reducing the number of people sentenced to death. According to Wang Lirong's interviewees, if two of a judge's decisions were changed in one year it would mean that socially he or she would be regarded as incompetent in terms of abilities to reach the legally correct sentence. Reputation or authority (*quanwei xing* 权威性) as a judge would be damaged, his or her level

[8] Wang Lirong, 'Xianzhi sixing shiyong de sifa tujin' ('Judicial Approaches to Restricting the Death Penalty'), in Chen Zexian (ed), *Sixing—zhongwai guanzhu di jiaodian* (*Death Penalty: The Focus of Domestic and International Concern*) (Chinese Public Security University) 119, 124.

[9] The 2007 reforms were based on a trial procedure started a few years earlier. Renowned Beijing criminologist, Professor Zhao Bingzhi claims that in 2003, according to the Supreme People's Court report in 2004, the review of 300 death penalty cases dealt with by the SPC found that in 182 (54.6 per cent) of cases the court ruled that the death penalty should be retained, while 94 of the cases (28.2 per cent) were overturned by the SPC. The SPC ordered a new trial in 24 cases (7.2 per cent). See Zhao Binzhi, *Sixing gaige yanjiu baogao* (*Report on the Reform of the Death Penalty*) (Beijing, Falüchubanshe 2007) 9.

of legal knowledge would be deemed to be inferior, and his or her 'sentencing ability' (*shenpan nengli* 神判能力) would be in disrepute. These career consequences would simply be too serious to risk, and the end result is simply a reduction in death sentences. There is an internal logic of 'career risk' here since the sheer volume of death penalty cases to be reviewed is another factor that makes judges frequently and routinely avoid such sentences.

Thus, it is important to understand the inner workings of the bureaucratic apparatus and its career system to gauge the significant effect of the 2007 reforms. The social and cultural norms of 'face' and reputation belong to that end game. Organizational sociology and organizationally formed social norms among judges seem to give us better answers in this regard than does the study of legal texts and norms in themselves. 'Career risks' alone have brought down the number of death sentences. More explicit sentencing guidelines may affect this logic, but as long as the present policy of 'strict control' of the death penalty is in favour politically and legally, these consequences cannot but take the number of death penalties down from previous record high levels. We cannot say for sure how much the 2007 reform has speeded up this process, but we have reason to believe that they have been fairly effective and self-reinforcing in this respect.

As discussed in Chapter 6, China recently abolished the death penalty for 13 economic, non-violent crimes, bringing the number down from 68 to 55. The 13 crimes include forging and selling invoices to avoid taxes, and smuggling cultural relics and precious metals such as gold out of the country. Simultaneously, capital punishment for offenders over the age of 75 has been abolished in all but exceptional circumstances.[10] Furthermore, the government has officially announced that it will consider further revisions in the future.

The reduction in the number of offences punishable by death is unlikely to significantly reduce the overall number of people executed in China because people convicted of those crimes in the past were rarely given the maximum penalty. Abolishing capital punishment for the elderly, which was described officially as an act 'to demonstrate the spirit of humanity', is also unlikely to have a sizeable impact on the number of executions (although there is no data indicating how many people over the age of 75 had been put to death annually in China). Yet, these reforms have an important symbolical effect, as it is the first time the communist government has reduced the number of crimes that are subject to the death penalty since 1979, when the Criminal Law took effect. Even so, Chinese reformers believe that still far too many crimes remain punishable by death. For example, Professor Liang Genling of Peking University Law School recently said that they want to reduce the present use of the death penalty by 90 per cent.[11]

[10] 'China Drops Death Penalty in "Symbolic" Move' (*Stuff*, 26 February 2011), <http://www.stuff.co.nz/world/asia/4707196/China-drops-death-penalty-in-symbolic-move> (accessed 26 January 2011).

[11] This remark was made at a workshop held at the Australian National University in October 2010. It should be recalled that when Deng Xiaoping gave his talks on the death penalty in 1981 there were only 14 capital offences. The number was extended during the 1980s in particular, and Deng Xiaoping's firm belief in execution as a means of social control as well as his agenda of 'hard strikes' to 'eradicate' crime are the main reasons for that development.

The official view is, however, much more restrained. Lang Sheng, Head of the Legal Committee of the Standing Committee to the National People's Congress, China's legislature, in a comment to the new revisions of the death penalty practices, noted that:[12]

> Of course, there are still some crimes that we've kept the death penalty for. For these, we will have to continue to study further according to the requirements of our economic and social development, the needs of maintaining public order and also the people's will.

This is the typical formulation explaining the continued very high level of the use of the death penalty. While it is always very unclear what the reference to 'economic and social development' means, the note about 'maintaining public order' still rests in the Dengist flawed belief in the deterrent effect of the death penalty. The last part about 'the people's will' is of course the argument of people's revenge that should be thoroughly condemned as a valid argument for the current death penalty practices.

2. The False Explanation of the Chinese 'Culture of Death Penalty'

When it comes to the reasons for and strength of popular support for the death penalty in China, we are faced with a number of myths that have recently being challenged by new representative survey data. Notably, the Chinese government and many Chinese intellectuals share the assumption that support for the death penalty among Chinese citizens has deep cultural roots. China's Premier Wen Jiabao has claimed that China would not abolish the death penalty due to 'consideration of China's national conditions'.[13] In a recent anthology on the uses of the death penalty in China, Professor Gao Mingxuan, a distinguished spokesman for the reduction of the use of capital punishment in China, has argued similarly that execution is based in what he sees as a 'deeply rooted' Chinese retributive culture. Gao went on to assert that the consequence of such deeply rooted punitive preferences is that 'China will not abolish the death penalty at present or in the near future'.[14] Again and again, in Chinese journals and books we are told that China has a '5,000-year-old tradition of death penalty', and that this accounts

[12] See (n 10). A spokesman for the Chinese People's Political Consultative Conference said in Beijing in March 2011 that those convicted of manufacturing adulterated food could face the death penalty under recent revisions to the Criminal Code. The step comes as a reaction against the many scandals involving tainted food products. In particular, the adulterated powered baby milk scandal of 2008 triggered a very punitive response from the government, when two senior civil servants were executed. See Fiona Tam, '2 Arrested in Raid on Fake Formula Factory', *South China Morning Post*, 3 March 2011, A7, and 'Melamine: China Tainted Baby Formula Scandal', *New York Times*, 22 February 2012.

[13] Wen Jiabao, 'Zhong guo bu neng qu xiao si xing' ('China Cannot Abolish Death Penalty') (*xinhuanet*, 14 March 2005), <http://news.xinhuanet.com/newscenter/2005-03/14/content_2695390.htm> (accessed 2 April 2013).

[14] Gao Mingxuan, 'Lüetan wo guo de sixing lifa jiqi fazhi qushi' ('On Chinese Legislation Concerning the Death Penalty'), in Zhao Binzhi (2004) 15, 19, 23, 29.

for why China today adheres to the practice. One may ask, is there any country that does not look back at a heritage of thousands of years of 'death penalty traditions'? Professor Chen Xingliang of Peking University, a major player in reforming the Chinese legal system, also uses the cultural argument to argue why capital punishment should not be abolished in China today, citing popular feelings of retribution, or the masses' 'revenge psychology' (*baoying xinli* 报应心理) as a factor not easy to change.[15] While he warns against such 'revenge psychology', he still uses this explanation to argue that the continued use of capital punishment is an unfortunate necessity.

There is also a myth about the need to uphold the death penalty for economic crimes because of an alleged popular support for such practices due to extreme hatred of corrupt officials. This version of the 'people's will' argument is even upheld by Western human rights activists. Joshua Rosenzweig, research manager for the human rights group Dui Hua Foundation, recently commented on the practice of using the death penalty as a weapon against corruption by alluding to the myth that people demand the death penalty for such crimes:[16]

> The big obstacle, I think, is corruption. Because there still is a very strong sense that corrupt officials must die, among the Chinese population at large . . . The revulsion for that offense is so strong that there would be a potential political cost to eliminating the death penalty for corruption.

When the former national drug chief, Zhang Xiaoyu, was sentenced to death in 2007, the authorities used similar arguments about the alleged 'people's will'. Chinese media claimed that the sentence should be seen in light of the anti-corruption drive and public opinion. One headline in *The People's Daily* said it all: 'He Must Face Execution or Our Penal Code Will Be in Shame'.[17] The government seemed eager to address public anger over corruption.

Terence Miethe and Hong Lu, in an otherwise excellent book on the death penalty in China, make a mistake about the level of analysis when they talk about 'the public's view' of the death penalty. They start by stating the obvious, that 'The use of the death penalty has frequently been portrayed and justified by the strong public support in China's official records and statements'.[18] But this is to confuse 'official records' with popular culture. It is obviously true when they say that the death penalty has been a frequently used means to get rid of political opposition in China, but when they add that Mao, Deng, Jiang, and Hu, the leaders of the CCP, 'have all mentioned the public's indignation and outrage about crime when commenting on the imposition of the death penalty', they still refer to 'official records'

[15] Chen Xingliang, 'Cong "qiangxia liuren" dao "faxia liuren" ' ('From "Saving Life From the Gun" to "Saving Life From the Law" '), in Chen Zexian (ed), *Sixing: Zhongwai meizhu de jiaodian* (*Death Penalty: The Global Focus*) (Beijing, Zhongguo gong'an daxue chubanshe 2005) 71, 75.

[16] See (n 10).

[17] Josephine Ma, 'Death Sentence a Warning to Others', *South China Morning Post*, 30 May 2007, A4.

[18] Hong Lu and Terance D Miethe, *China's Death Penalty. History, Law, and Contemporary Practices* (New York, Routledge 2007) 121.

and the elite's *proclamation* of 'people's indignation' as the unit of analysis rather than actual popular sentiments. Ethnographically this amounts to a fatal mistake, and this mistake is important because it is a common 'culturalist' misconception that an alleged populist culture drives Chinese death penalty practices. Official records are of course overwhelmingly about politics, not culture, even though it is not at all unfounded to talk about penal populism and popular indignation in the context of China. The official proclamations of such populism, however, are orchestrated political statements rather than true reflections of the sentiments of *the people*—another proclaimed and laden political concept. So, let us make an attempt to let the elusive 'people' talk instead, and the 'people' do talk increasingly openly on such matters in the information age of the internet. We no longer have to listen to the 'people' through the slogans of official propaganda. The 'people's indignation'—*minfen* 民愤 in Chinese—is a long-standing official political slogan that undoubtedly touches the realities of China, but still operates as a *political* slogan deeply embedded in a specific political history rather than in a general cultural context. It is primarily an important ingredient in the official legitimizing process, although no doubt there is widespread support for that game as there is always to some extent in every political legitimizing effort. *Minfen*, however, now seeps through the unofficial blogs of indignation too, and not always do these blogs of *minfen* support the game of official China. Sometimes the people's anger is even directed against the legal official weapon of execution.[19]

Of course there is the normal 'penal populism' in China as elsewhere where people believe in the alleged effectiveness of harsh punishment,[20] and there are traditions of revenge in China as there are in many other places. But the need for poor peasants to seek vengeance for harm visited upon them in the past was only politicized and used as a major claim for the legitimacy of capital punishment in political campaigns during the Maoist era. Richard Madsen has written well on peasant 'communities of memory'—memories that cry out for revenge—in China and the dangers involved with such memory.[21] Elizabeth Perry has noted that certain policies of the Chinese state have contributed to the survival and strengthening of traditional patterns of violent activity. We may see the political uses of traditional revenge as such a contribution, but then we no longer talk of 'cultural violence' but of the interaction between culture and politics.[22]

[19] There was an outcry in China when Yang Jia, a man who killed six policemen in a revenge attack in Shanghai in 2008 was executed. There were demonstrations outside the courthouse, and the blogs saw lots of support for the killer because of a blatant misuse of legal procedures. Yang's mother was detained, effectively hindering her to hire an independent lawyer. The suggested insanity plea was not heard by the prosecutors, and the death sentence was resented by many. See 'Insanity Plea Over Killing of Officers in Shanghai', *South China Morning Post*, 13 October 2008, A9 and Bill Savadove, 'Shanghai Police Killer Appeals Death Sentence: Psychiatric Review Seen as Key to Yang Jia's Case is Rejected by Court', *South China Morning Post*, 14 October 2008, A11.

[20] John Pratt, *Penal Populism* (London, New York, Routledge 2007); Julian V Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford, Oxford University Press 2003).

[21] Richard Madsen, 'The Politics of Revenge in Rural China During the Cultural Revolution' in Jonathan N Lipman and Steven Harrell, *Violence in China: Essays in Culture and Counterculture* (New York, State University of New York Press 1990) 175–98.

[22] Elizabeth J Perry, 'Rural Violence in Socialist China' (1985) 103 *The China Quarterly* 414.

3. Public Opinion and the Death Penalty in China

Not until very recently has the degree of support for capital punishment in China been scientifically documented and/or empirically verified properly by research, although some interesting data had been forthcoming from a large opinion survey carried out by the Chinese Academy of Social Sciences in 1995[23] and a string of other surveys of greater or lesser importance and methodological stringency published over the last decade or so.

A methodologically sophisticated survey of public opinion on the death penalty in China, carried out in 2007–08 by the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany, in collaboration with the Research Centre for Contemporary China of Peking University, has presented for the first time information from a large representative sample of almost 4,500 members of the Chinese public. The survey was conducted in three provinces (Hubei, Guangdong, and Beijing) and published in 2009.[24] Parallel to this survey, the Wuhan University School of Law, in consultation with the Max Planck Institute, conducted a survey among legal professionals using a very similar questionnaire.[25]

The Max Planck Institute general population survey from 2007/08 moved away from the single-item question 'what is your attitude towards the death penalty' used in former Chinese surveys such as that conducted by the Chinese Academy of Social Sciences in 1995, which found that 99.2 per cent of the 12,000 strong sample supported the death penalty. Later surveys, usually based on samples of students and therefore not representative of the larger population, have confirmed the firm support for the death penalty in China although the level was lower (between 69 and 83 per cent) than in the 1995 survey. Although these earlier surveys have frequently been dismissed because of serious concerns about reliability and validity, the findings, if treated with caution, are still a useful basis of comparison with the Max Planck survey.

The Max Planck survey is particularly interesting because its methodology is far more sophisticated, and the questions asked are much more diverse than the abstract question 'are you for or against the death penalty'. One extremely important finding is that the question of the death penalty does not seem to have a high salience among people at large in China. Depending on the questions asked, up to three-quarters of the respondents had no opinion at all about the death issue, and readily answered: 'don't know' or 'not sure'. When asked specifically whether they were interested in the issue of the death penalty only 26 per cent of all respondents

[23] Hu Yunteng (n 2).

[24] Dietrich Oberwittler and Shenghui Qi, 'Public Opinion on the Death Penalty in China: Results From a General Population Survey Conducted in Three Provinces in 2007/08' (Freiburg, Max Planck Institute for Foreign and International Criminal Law 2009), <http://www.mpicc.de/shared/data/pdf/forschung_aktuell_41.pdf> (accessed 19 March 2013).

[25] Kang Junxin, *Lixiang yu xianshi: Zhongguo sixing zhidu baogao* (*Ideals and Reality: Report on the Chinese Death Penalty*) (Beijing, Zhongguo renmin gong'an daxue chubanshe 2005). Professor Roger Hood of Oxford University acted as consultant to both these surveys.

said that they were very interested (3 per cent) or interested (23 per cent).[26] The fact that the issue has limited salience is one of the basic reasons why there has been a slow, drifting change in public opinion.[27] When the public does not really pay attention to the death penalty question, this could be functioning as a conservative element against change. At the same time low salience shows the large possibilities for change, it certainly does not show the 'strong cultural roots' of support for capital punishment as claimed by the cultural reductionist argument. Salience is also related to level of education. It was consistently found that people with higher education were more decided in their views than people with less educational attainment. Both the support for and the opposition towards the death penalty was higher among those with higher education. Forty-one per cent of those with an education level up to middle school gave no answer or preference, while only 23 per cent of those with high school and higher education uttered such doubt.[28] When asked directly whether 'in general' they were in favour or opposed the death penalty, most respondents (58 per cent) said they were in favour, 14 per cent opposed it, and 28 per cent were 'not sure'. Asked from the opposite end whether or not they thought China should 'speed up to abolish the death penalty', still only a moderate majority of 53 per cent said they would oppose abolition with 33 per cent being 'unsure'. When asked more specifically whether they supported the death penalty for various named crimes, as many as 78 per cent chose this penalty for murder, a much higher percentage than the response to the broader question.[29] But among a lengthy list of offences currently punishable by death a majority in favour of capital punishment was found only for murder, intentional injury resulting in death (circa 65 per cent), drug dealing (circa 55 per cent), and sexual abuse of a girl under fourteen (circa 52 per cent). Although, as mentioned above, Joshua Rosenzweig of the Dui Hua Foundation believed that corruption so stirs up the emotions among the Chinese public that abolition for this crime might face a 'big obstacle' because of its 'political costs', the Max Planck survey found that only about a third of the respondents supported the death penalty for corruption.[30] The 'potential political cost' of abolishing the death penalty for corruption may be smaller than he and the Chinese authorities think. So public opinion, when measured properly, does not seem to lend much credibility to the popular myths of people's revenge against corruption. Of course penal populism and penal sentiments still exist in China, but the extent of such opinions has faded considerably over the last decade or so. The full abolitionist standpoint has increased from 0.8 per cent support in 1995 to 14 per cent in the recent survey. The debate on reducing the death penalty, however, seems to have produced a massive change in opinion. In a Public Security survey carried out in 1992 as many as 60 per cent of respondents thought punishments were 'too lenient' and only two per cent thought the draconian death penalty regime was 'too strict'.[31]

[26] Oberwittler and Qi (n 24) 9–10.

[27] Frank R Baumgartner, Suzanna L De Boef, and Albert E Boydstun, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge, New York, Cambridge University Press 2008) 182.

[28] Oberwittler and Qi (n 24) 16.

[29] Oberwittler and Qi (n 24) 16.

[30] Oberwittler and Qi (n 24) 10.

[31] Zhonghua renmin gongheguo gonganbu (ed), (The PRC Ministry of Public Security, ed) *Nin ganjue anquan ma?* (*Do You Feel Safe?*) (Beijing, Qunzhong chubanshe 1992) 42, 60, 250 ff.

In the 1995 survey this number had increased marginally to just over three per cent who thought the death penalty 'too strict', including the 0.8 per cent who wanted the death penalty abolished. In the most recent surveys a majority of the population supports a reduction in the use of capital punishment.[32]

Another piece of evidence that the moralist core argument is unsatisfactory is the growing awareness of class bias in the administration of capital punishment. The Max Planck survey asked the question: 'If a poor or a rich person in China committed the same serious crime for which the death sentence could be imposed, is one more likely to be sentenced to death than the other in real life?' Nearly 70 per cent of the respondents answered 'the poor person'.[33] The common man in China has begun to see the flaws of the judicial system. We know from scattered data that the jobless and the poor are victims of capital punishment in China, like anywhere else. Jeffrey Reiman's famous line: 'The rich get richer and the poor get prison' also applies to China, even if we substitute 'prison' with 'death penalty'.[34] In a survey of executions where the offenders' occupation was known, it was found that 62 per cent were either unemployed or rural residents. Nearly 70 per cent held a low-status job. The vast number of Chinese executed for common street-crimes had low status occupations or held no jobs.[35]

4. Public Opinion, Evidence Procedures, and the Emerging 'Innocence Frame'

The assumption of an age-old unchangeable revenge culture does not fit the picture of rapid change that is occurring in China and the rest of the world today. The massive change in capital punishment practices and opinions throughout the world over the last few decades has found a similar development in China. The change in global death penalty attitudes and policies is one of the most rapid and unlikely norm reversals of our time. The picture is complex, but the most prominent change has been what is termed the 'innocence frame'. The fact that innocent people were convicted and that probably some were executed; the discoveries of forensic science; the use of DNA evidence: all of this has diverted attention away from theoretical and philosophical issues of morality to focus instead on the possibility of errors in the criminal justice system. A 'tipping point' has been reached in the death penalty debate where changes in public opinion have led to further changes in policy, which in turn has reinforced those same changes in public opinion.[36] The sudden doubt in the justice provided by the system has added to

[32] Yuan Bin found a 60.1 per cent majority for either abolishing or reducing the death penalty in his survey. The survey, however, is not a representative sample of China, so caution must be applied to his conclusion. Yuan Bin, 'Sixing minyi jiqi neibu chongtu de diaocha yu fenli' ('Survey and Analysis of the Internal Conflicts of Popular Opinion on the Death Penalty') (2009) 1 *Faxue* 99, 105.

[33] Oberwittler and Qi (n 24) 22.

[34] Jeffrey F Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class and Criminal Justice* (New York, Wiley 1979).

[35] Lu and Miethe (n 18) 80.

[36] Baumgartner, De Boef, and Boydstun (n 27) 10.

these facts. Questions about fallibility and unjust treatment suddenly challenged the former truisms of the unquestioned belief in the unique deterrent effects of the death penalty.

Instead, the accurate description of class bias of capital punishment despite the secrecy of the number executed in China, represent exactly the core of the 'innocence frame' that has changed public opinion in so many countries recently. Through the media, and in particular through the internet, the Chinese public has become aware of the fact that innocent people have been sentenced to death because of sloppy procedures, unjust treatment, and a corrupt non-caring justice system. The same 'innocence frame' that has changed opinions in the rest of the world has now reached China. Let us look at a few recent cases that have caught the public's eye.

In 2005 the Ministry of Public Security ordered court authorities to reopen a rape-murder case where a new suspect was caught ten years after 21-year-old Nie Shubin was executed for the crime. Nie Shubin was convicted of murder and rape in Shijiazhuang in 1994 and was executed after Hebei's Higher People's Court upheld a lower court's ruling to sentence him to death in April 1995.[37] Similarly, a butcher in Mayang County in Central China's Hunan Province was wrongfully convicted and executed for a crime he did not commit. A local woman's dismembered and unidentifiable body was found floating in a river. The authorities investigating the crime claimed at the trial that the murderer must have been someone experienced with a knife—someone like a butcher—because the techniques used to dissect the body were 'very professional'.[38] But after the execution, the woman he was supposed to have murdered suddenly reappeared alive. In another well-publicized case, a man was sentenced to death with a two-year reprieve in 2000, but his alleged victim, presumed dead for 11 years, turned up at his home in the spring of 2010.[39] Often there are problems involved in clearing the names of innocently executed victims of flawed justice. A resident of Inner Mongolia, Hugejiletu, was executed in 1996 for the rape and murder of a woman in the toilet of a textile factory in the city of Hohhot. Hugejiletu had reported the case to the police, and maintained his innocence despite attempts by the police to get him to confess. He was executed without much evidence. In October 2005 a man named Zhao Zhihong was arrested and confessed to killing ten people in Inner Mongolia, among them the woman murdered in the factory toilet. However, four years later serial murderer Zhao remained in detention and had not been brought to trial despite efforts by Hegejiletu's parents to clear their son's name.[40] Such cases have begun to appear on internet blogs fairly regularly. In another recent example, 'netizens' took an interest in the case when a Henan citizen named Zhao was released

[37] 'Reporters, Execution case asked to reopen', *Shanghai Daily*, 18 March 2005, 1.

[38] Dwight Daniels, 'Deadly Consequences if Justice Fails', *China Daily*, 23 June 2005, 4.

[39] Wang Xiang, 'Henan "Murder" Victim Turns Up Alive, Well After 11 Years', *Shanghai Daily*, 8 May 2010, A08.

[40] Agence France Presse, 'China Killer Awaits Trial After Innocent Man Executed', *The China Post*, Beijing, 6 August 2009, 13.

from prison thanks to the reappearance of the neighbour he supposedly murdered more than a decade ago.[41]

Flaws in the evidence process are systematic. SPC Vice President Zhang Jun recently admitted grave flaws in capital punishment cases in China, stating: 'For example, [evidence in] murder cases must be subjected to DNA tests…but this is not always carried out'.[42] He also eluded to the fact that verbal testimony, meaning confessions, are relied upon rather than physical evidence. Guidelines introduced by the SPC in 2010 on the use of evidence in death penalty cases and on the exclusion of illegally obtained evidence have now been formally implemented, and welcomed by the legal community. However, the poor quality of criminal procedure in death penalty cases still poses a major problem because of the continued uneven application of evidence standards. One leading criminal lawyer, Zhang Qingsong, complained that one of the reasons for the poor quality of such cases was because defence lawyers had 'limited power to carry out independent investigations, review court documents or cross-examine evidence and witnesses'.[43] Defence lawyers also complain about their lack of participation in the SPC review procedure, a fact reflecting the general weak standing of defence lawyers in China. They are still seen as something of a nuisance among personnel in the procuracy, the police, and the courts, someone who 'slows down' or 'obstructs' the rapid (sometimes far too rapid) decisions of the courts. To this day the court is not even required to hear the opinion of defence lawyers during the hearing of SPC death penalty case reviews. It is therefore not easy for lawyers to initiate the procedure to exclude illegally obtained evidence, which is so important for questions of guilt or innocence.

The Max Planck survey of Chinese death penalty opinions addressed the issue of innocence for the first time in China. The findings confirm very well the potential for radical change in this country. Asked whether or not they agreed with the statement 'Innocent people may be wrongly executed', as many as 60 per cent agreed, while only 26 per cent disagreed.[44] Of even greater interest is the finding that when asked whether they would support the death penalty 'if it were proven that innocent people had been executed' as many as 44 per cent of the undecided and pro-death penalty respondents said they would instead oppose the death penalty. This would mean that overall only 25 per cent of the population would still support the death penalty.[45] Since the innocence debate is yet to dominate the Chinese media despite more and more reports in this direction, this is remarkable. Elasticity and change is the picture here, not that of a retributive core culture. We find similar evidence of the potential for rapid change in non-representative surveys. When 2,000 persons in China were polled in 2002, 82 per cent had supported the death penalty, while close to 14 per cent said they wanted it abolished.[46] Yet when the question was changed and rephrased on the assumption

[41] Ng Tze-wei, 'Wrongly Jailed Villager Seeks More Compensation', *South China Morning Post*, 14 May 2010, A5.

[42] Ng Tze-wei, 'Death Penalty Cases Rife with Evidence Flaws', *South China Morning Post*, 11 January 2012, A5.

[43] Ng Tze-wei (n 42).

[44] Oberwittler and Qi (n 24) 18.

[45] Oberwittler and Qi (n 24) 16.

[46] Zhao Zuojun, 'You xianzhi dao feizhi: sixing lujing jiqi jueze' ('From Restriction to Abolishment: Choices and Approaches for the Death Penalty'), in Chen Zexian (ed) (n 15), 221, 226.

that the death penalty had already been abolished by the state, only 61 per cent said they wanted to retain it, while the proportion who favoured abolition increased to 33 per cent.[47] This reflects what we already know from death penalty opinion research in other countries; namely, that if the state passes legislation banning the use of the death penalty, as a rule public opinion will follow suit. For our purposes here it is enough to conclude that there are no fixed and culturally strong incentives that force Chinese opinion to routinely support the death penalty.

5. From 'Penal Populism' to 'Penal Elitism'

The Chinese common man—the so-called 'hundred names' or *laobaixing* (老百性)—is not to blame for China's use of the death penalty. It seems that the so-called Chinese masses are not the conservative 'deeply rooted retributive' element holding back reforms. The survey data points, rather, in quite an opposite direction. Public opinion seems to have changed faster than legal institutions and the slogans of the government and the CCP. Let us examine these data again. A 1995 survey conducted by the Chinese Academy of Social Sciences found that those they identified as 'high class' respondents were less likely to support the death penalty than respondents from the 'low class' category. Very few in both categories in 1995 supported abolition or reduction of the death penalty, but the highest and the lowest class respondents chose this option more often than the 'middle-class' respondents.[48] The absolute highest support for capital punishment among various job categories was found in military personnel, where as many as 43 per cent responded that there was 'too little' use of capital punishment in 1995. The second most punitive group was the one named 'retired officials'. Personnel in the legal sector were the most liberal among the elites in the 1995 survey. Young people under 25 were the most likely group to support abolition, and those over 61 were the most conservative of the age cohorts, with the lowest proportion of abolitionists.[49] Women were slightly less punitive than men,[50] and among the allegedly revengeful 'masses' (*qunzhong* 群众), twice as many ticked off the questionnaire for abolition or reduction of capital punishment compared to the category 'central Party cadres' (*zhonggong dangyuan* 中共党员). Central Party cadres were 50 per cent more likely to want more capital punishment than the category of 'masses'.[51]

Even liberal 'reductionist' legal scholars and personnel who want to reduce the impact of capital punishment in China have a somewhat 'schizophrenic' attitude towards the question. The basic argument they use is to blame the 'masses' for the continued use of capital punishment instead of looking at the penal political elitism that prevents China from abolishing the practice. An interesting discussion between three leading scholars may shed some light on this debate. The discussion

[47] Zuojun (n 46), 221, 226.
[48] Hu Yunteng (n 2) 342.
[49] Hu Yunteng (n 2) 344.
[50] Hu Yunteng (n 2) 342.
[51] Hu Yunteng (n 2) 345.

was published in the 2010 September issue of the leading journal *Faxue* (Legal Studies).[52]

Professor Gao Mingxuan at Beijing Normal University supports the future abolition of capital punishment and holds that today's practices are too harsh. He claims, however, that at present this kind of punishment is part of the basic 'social value' (社会价值 *shehui jiazhi*) among the Chinese masses (群众 *qunzhong*).[53] This is allegedly the main obstacle against changing the present situation. While he is correct in pointing out general support among the majority of people at large, he again fails to see that it is the intellectual and political elites who are pushing an attitude that is now waning as a 'social value' among the common man. Gao claims that abolition would be 'quite impossible (to achieve) at this stage', and that such a reform—although sorely needed—'would take from several years to several decades' to accomplish.[54]

Professor Su Huiyu from the East China University of Politics and Law is even less optimistic about rapid change. Su, like Gao, supports the idea (and official political line) that abolition should eventually take place, but adds that this 'would take a long time' and can only be achieved 'step by step'.[55] At the same time he recognizes the 'irrationality' (不合理性 *bu heli xing*) of capital punishment, justifying his 'slow pace' argument solely by referring to 'the public belief in the retributive and deterrent effect of the death penalty'.[56]

Professor Yu Zhigan from the Chinese University of Politics and Law likewise pushes the 'people's argument' to the front of his agenda, claiming that 'the people's opinion is the central factor' regarding the use of capital punishment. Yu disagrees with Gao Mingxuan who holds that the death penalty should be abolished for economic crimes since 'a life should not be measured by money'.[57] Yu—even if he claims to hold 'the right to life' as the highest principle—claims that 'punishment in China is too lenient although it sounds too harsh', and that 'capital punishment should be kept for deterring the high numbers of economic crimes' in order to 'uphold the effect of high level deterrence'.[58] Yu does not refer to any scientific finding supporting such an alleged 'high deterrence' effect, and he certainly does not follow his own argument of 'right to life' or 'public opinion as the central factor'. It was clearly shown in the Max Planck survey that the death penalty for economic crimes had only minority support among the respondents of that survey—only 30 per cent, the lowest of all crimes listed in the survey.[59]

Professor Gao is also concerned about how the 'harsh condemnation attitude' (*yanli qianze xing* 严厉谴责性) towards crime can be upheld if the death penalty is abolished too rapidly. It seems 'harshness' is a taken-for-granted entity in the

[52] Su Huiyu, Yu Zhigan, Gao Mingxuan, 'Cong cita shang fazhi sixing de zhengtu (Xingfa xiuzhengan (ba) caoan): Sixing wenti san ren lun' ('Embarking on the Road Towards the Abolishment of Capital Punishment' (The Draft Criminal Amendment (no 8)): Conversation Between Three Persons on Capital Punishment), (September 2010) 9 *Faxue* 3.

[53] (n 14).

[54] Su, Yu, and Gao (n 52) 15.

[55] Su, Yu, and Gao (n 52) 4.

[56] Su, Yu, and Gao (n 52) 15

[57] Su, Yu, and Gao (n 52) 5.

[58] Su, Yu, and Gao (n 52) 8, 5.

[59] Oberwittler and Qi (n 24) 11.

intellectual universe even of reform-minded scholars like Gao.[60] Thus, even liberally minded 'reductionist' intellectuals tend to blame 'penal populism' for the slow pace of capital punishment reform.[61] Even those who regard the death penalty as an 'irrational' form of punishment tend to give priority to such alleged 'penal populist' determinism. Although there seem to be some differences between Gao, Su, and Yu concerning questions regarding the deterrence effect, all of them resort to an argument that is conveniently identical to the official Party line, even in cases where this line clearly contradicts their own arguments about 'right to life', 'popular attitudes', and the 'irrationality of the death penalty'. This looks much more like 'penal elitism' hiding behind a politically correct argument of 'penal populism'. This tendency is also shown in the survey material we have discussed here.

If the idea is leading by example to overcome the things of the past, then certainly the Party cadres are not standing in the front lines to educate the masses. The same can be said about intellectuals. The survey showed that illiterates and those with primary school education were twice as likely to support abolition or reduction than respondents with 'university' education. The higher the education, the higher was also the percentage in the most pro-death category of answers. Close to 30 per cent of those with the highest education wanted more capital punishment, while only 20 per cent of illiterates and respondents with primary school education favoured this. In sum, the strongest support for the death penalty was found among military personnel, party cadres, those with the highest education, and the elderly. The lowest support was found among those with the least education, the category called the 'masses', and those under 25 years of age. The only elite groups contradicting the trend towards elite support for the death penalty were legal elites and the richest cohort. Among the legal elites there were few abolitionists, but much more support for reducing the death penalty. High-income respondents' fear of capital punishment for corruption or economic crime made them more liberal confronted with a poorly regulated financial market where the distinction between right and wrong conduct is not always clear. These facts muddle somewhat the categories 'high class' and 'low class' in the survey, and leave the findings in that general category somewhat irrelevant.

Today we have three excellent representative surveys, covering the attitudes of the general population as well as the legal elites. The most liberal group of intellectuals in the 1996 Academy of Social Sciences survey, the legal elite, and the common people can be compared in much detail through these surveys. While 88.4 per cent of the legal elites supported the death penalty in 2005, a smaller but more recent survey even showed an increase to 91.2 per cent support among

[60] Su, Yu, and Gao (n 52) 8.

[61] In private, I have been attacked by allegedly liberal-minded Chinese scholars for 'being against the people' when I argue that the people will follow suit if the Party takes the lead in this question and abolishes the death penalty now. After all, the support for capital punishment in China today is lower than it was when President Mitterand moved to abolish it in France in 1981. In 1981, Le Figaro carried out a survey the day after the vote for abolition. It indicated that 62 per cent of the French were for maintaining the death penalty. 'Capital Punishment in France' (Wikipedia), <http://en.wikipedia.org/wiki/Capital_punishment_in_France> (accessed 30 March 2013).

this elite group.[62] Only 57.8 per cent in the public survey, however, supported the death penalty. While 7.5 per cent of the legal elites wanted to abolish the death penalty immediately, 14 per cent of the general survey respondents held this opinion. Furthermore, 28 per cent of the general population were unsure what position to take compared with 21 per cent of the legal elites.[63] The conclusion to be drawn from this comparison is that the alleged 'backward' group of common people is actually more liberal on the death penalty question than any of the elite groups. The evidence here does not support the hypothesis of a 'deeply rooted revenge psychology' among the masses or a general 'penal populism' in China. Rather, it provides evidence of 'penal elitism'. The death penalty is a political instrument held aloft not by a 5,000-year-old 'culture', but by the state and its elites. This is a political, not a cultural issue, and involves a conservative, too slow moving state and Party bureaucracy. In terms of the secrecy of the numbers executed in China, the general public was also more advanced than the Party and state elite. Asked whether the Chinese government should publish the annual number of executions, 64 per cent of the respondents to the Max Plank survey answered yes, and less than 16 per cent were against publishing the execution figures.[64]

In conclusion, we can say that the recent reforms have had a significant effect on death sentencing practices in China. Perhaps the annual number of executions is down by half or even two-thirds today compared with the turn of the millennium, from 15,000 to 5,000 executions in ten years. Public opinion in China is moving even faster than the reforms of the system itself. The popular political magazine *Liaowang* published a special issue on the death penalty in China in its November 2010 issue, commenting directly on the Max Planck survey. So hard was it to stomach the findings of the survey for the elites that the cultural truisms seem to stand in the way of the journal's analysis. The misinterpretations are predictable and many, following the well-established Chinese myths about the death penalty. First, the journal claimed that ordinary people want to retain the death penalty while legal scholars want to abolish it, something that is exactly opposite of what is shown in the survey. To underline their misconception it claimed that peasants are more punitive than others because 30 per cent of the supporters of the death penalty are peasants. Unfortunately for the magazine's writers, the group called peasants in the survey made up nearly 35 per cent of the survey population. In other words, peasants are less punitive than the average population. The magazine also played up to the myth that 'a great number of people want to use the death penalty against corrupt officials'. As we have seen in this chapter, the survey shows

[62] Kang (n 25) 143. The Wuhan Law School survey of legal professionals found that 91 per cent generally supported the death penalty. Information supplied by Roger Hood, consultant to that project. See Great Britain China Centre, 'Death Penalty Reform', 13 January 2013, <http://www.gbcc.org.uk/death-penalty-reform.aspx> (accessed 19 February 2013).

[63] Kang (n 25) 28, 143, and Oberwittler and Qi (n 24) 10.

[64] Oberwittler and Qi (n 24) 21. In the Wuhan Survey of judicial elites, 58 per cent agreed that the government should publish the statistics, 27 per cent agreed that the government should be free to publish when it wants to, and 15 per cent were opposed to publication. Information provided by Roger Hood.

that only a minority of about a third wanted the death penalty for corruption. While this may indeed be 'a great number', the magazine failed to see that the *proportion* in support was actually very low compared to many other types of crime. Unfortunately, the magazine in many instances brought myths rather than facts to its analysis of the survey, but nevertheless, the question of the death penalty has become an issue of media attention.[65]

The only thing that seems 'deeply rooted' in the Chinese death penalty debate is the deeply rooted *myth* of a general retributive and revengeful opinion standing in the way of legal reducing or abolishing the death penalty. The penal norm in China is not part of a never changing, deeply rooted core-culture. Opinions in China are changing rapidly and substantially. The new innocence frame is one of the driving forces in the change we have seen on a global scale for some years already. This frame is beginning to establish itself also in China. Sentencing practices are changing, the number of executions has gone down significantly, and public opinion has become significantly less punitive over the last decades of modernization. China is still exceptional in its frequent use of the death penalty, but can no longer claim any basis in an exceptionally punitive population. The issue is one of politics, not of culture, one of penal elitism, not of penal populism.

[65] 'Sixing de shehui taidu' ('Social Attitudes Towards the Death Penalty'), *Liaowang*, No 46, November 2010, <http://news.sina.com.cn/c/sd/2010-11-15/162521474622.shtml> (accessed 18 November 2010).

11

Challenging the Japanese Government's Approach to the Death Penalty

Mai Sato

1. Introduction

Appeals to human rights principles backed by judicial and political leadership have been the major driver of abolition. State institutions in abolitionist countries treat the death penalty as a human rights issue, which should be universally applied. Japan—being a retentionist country—argues that the death penalty is a matter of individual domestic policy, based on popular sovereignty. The Japanese government's official justification for retention is public opinion. This chapter criticizes the government's position not by deploying human rights arguments but by challenging the validity of claims about 'majority public support' used to justify retention. It considers the implications of the Japanese approach and offers recommendations as to how the Japanese government, and more generally other retentionist countries, should interpret and make use of social survey evidence concerning the death penalty.

2. An Endless Dialogue: 'It's Human Rights', 'No, It's Public Opinion'

An examination of the development of international human rights law demonstrates that numerous international instruments and decisions have restricted the scope of the death penalty as a legitimate exception to the right to life. However, governments in retentionist countries argue that total prohibition is not yet established as a human rights norm, and that international treaties can only be binding on those that choose to be bound by them. Japan is one such country. Japan ratified the International Covenant on Civil and Political Rights[1] (hereafter, the

[1] International Covenant on Civil and Political Rights, GA Res 2200A (XXI), UN Doc A/6316 (1966) 999 UNTS 171, adopted on 16 December 1966 and entered into force on 23 March 1976.

Covenant) in 1979 but has not yet signed or ratified the Second Optional Protocol to the Covenant.

The UN Human Rights Committee (hereafter, the Committee) has repeatedly raised concerns over Japan's unfulfilled obligations under the Covenant, such as reducing the number of crimes punishable by the death penalty, improving the conditions under which prisoners are held on death row, and providing prior notice of the date of executions.[2] The salient feature of the relationship between the Committee and the Japanese government is the static exchange between two parties: the Japanese government cites majority public support as an obstacle to abolition, and the Committee reminds Japan of its obligation under Article 6(6) of the Covenant, to work towards abolition without preventing or delaying its progress. For example, the Japanese government in 1997 explained to the Committee why Japan could not abolish the death penalty in the following manner:[3]

> As stated in the third periodic report, abolition of the death penalty is directly related to the national sentiments and the domestic legislation, which is based on such sentiments. The conclusion of this Optional Protocol (which aims at the abolition of the death penalty) must therefore be examined carefully.

In response, the Committee argued in 1998 that:[4]

> The Committee recalls once again that the terms of the Covenant tend towards the abolition of the death penalty and that those States which have not already abolished the death penalty are bound to apply it only for the most serious crimes. The Committee recommends that Japan take measures towards the abolition of the death penalty…

Ten years later, both parties are still (dis)engaged in the same dialogue. The Japanese government in 2007 submitted the following State Party Report to the Committee:[5]

> The Government believes that whether to retain or abolish the death penalty should be determined individually by each country, taking into account the public sentiments, crime trends, criminal policies and other relevant factors…Japan, considering, inter alia, that the majority of the public believes the death penalty to be inevitable for extremely heinous and atrocious crimes (the latest survey was conducted in September 1999[6]) and since such heinous crimes as murder and death on the occasion of robbery resulting in multiple deaths are still being committed, the Government's view is that…abolishing the death penalty is not appropriate.

[2] See eg UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Japan', 5 November 1993, CCPR/C/79/Add.28 (1993); UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Japan', 19 November 1998, CCPR/C/79Add.102 (1998); UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Japan', 18 December 2008, CCPR/C/JPN/CO/5 (2008).

[3] UN Human Rights Committee, 'Fourth Periodic Reports of States Parties Due in 1996: Japan', 1 October 1997, CCPR/C/115/Add.3 (State Party Report) (1997), para 67.

[4] UN Human Rights Committee, 'Concluding Observations' (1998) (n 2) para 20.

[5] UN Human Rights Committee, 'Fifth Periodic Reports of States Parties Due in 2002: Japan', 25 April 2007, CCPR/C/JPN/5 (State Party Report) (2007), para 130.

[6] Parentheses in original. This information is incorrect. The latest survey conducted at the time of this state report was in 2004.

The Committee responded in 2008 by stating:[7]

> Regardless of opinion polls, the state party should favourably consider abolishing the death penalty and inform the public, as necessary, about the desirability of abolition.

A similar relationship can also be seen with the Council of Europe.[8] The Council—with its strong commitment to abolition—has passed numerous resolutions about Japan, even threatening to take away its observer status if it does not abolish the death penalty.[9] For example, the Council warned in 2001 that Japan may lose its observer status should no significant progress in the implementation of the resolution be made by January 2003.[10] Regardless, Japan carried out five executions between 2001 and 2003.[11] In April 2006 the Council of Europe again found it 'inadmissible'[12] that their appeals had gone unheeded, but Japan to this date has retained its observer status.

This type of dialogue, where both parties argue from diametrically opposed standpoints is how the Committee—and to some extent the Council of Europe—have communicated with the Japanese government over the past 30 years since the ratification of the Covenant. It is worth noting that during this time, Japan has openly continued to carry out executions almost every single year.

3. Taking a Closer Look at the Japanese Government's Approach

As noted above, the Japanese government argues that the death penalty cannot be abolished as long as the public supports it. It is in this sense that research into public opinion on the topic becomes relevant. But is it really relevant? Critics who question the relevance of public opinion to the death penalty would argue that, historically, public opinion has never been the driver for abolition, and almost all countries that abolished the death penalty did so through judicial or political leadership—despite public support for the death penalty.[13]

[7] UN Human Rights Committee, 'Concluding Observations' (2008) (n 2), para 16.

[8] Japan was granted observer status in 1996, and under the Statutory Resolution (93) 26, it must accept the principles of democracy, the rule of law, and the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms.

[9] Council of Europe, Resolution 1253 (2001), Abolition of the Death Penalty in Council of Europe in Observer Status (2001); Council of Europe, Resolution 1349 (2003), Abolition of the Death Penalty in Council of Europe in Observer Status (2003); Council of Europe, Document 10911, Position of the Parliamentary Assembly as Regards the Council of Europe Member and Observer States Which Have Not Abolished the Death Penalty. (Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe) (2006).

[10] Council of Europe, Resolution 1253 (n 9), paras 10–11.

[11] Council of Europe, Resolution 1349 (n 9), para 5.

[12] Council of Europe, Document 10911 (n 9), para 6.

[13] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford, Oxford University Press 2008); David Johnson and Franklin Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford and New York, Oxford University Press 2009); Roger Hood, 'Abolition of the Death Penalty: China in World Perspective' (2009) 1(1) *City University of Hong Kong Law Review* 1–21; Peter Hodgkinson, 'Replacing Capital Punishment: An Issue of Effective Penal Policy', in *The International Leadership Conference on Human Rights and the*

While I do not disagree, I would however argue that public opinion is relevant—particularly for retentionist countries—for the following reasons. First, Japanese public opinion should be examined carefully simply because prisoners in Japan *are* executed in the name of public support. While public opinion may not provide the justification for abolition—in the way that human rights arguments can—it cannot be ignored, given the limited impact international organizations have had in the case of Japan. It creates a case for examining the justification for retention in its own terms. The intention here is not to undermine the importance of human rights principles. Rather, this chapter's purpose is to look at the death penalty debate from a retentionist perspective, exploring and testing their arguments both conceptually and empirically, instead of simply putting forward universalistic arguments about human rights norms.

Secondly, it could be argued that in countries which achieved abolition and have not experienced any resistance from the public, the public were ready to accept abolition. In other words, although on the surface opinion polls may show strong support for the death penalty, the public may still consider abolition as 'legitimate'.[14] This brings the reliability of the usual opinion poll methodology into question; but it does not imply that public opinion is irrelevant to the death penalty debate. Thirdly, more broadly, it is a very bold statement to dismiss public opinion completely when talking about penal policy. The interdependence of law and public opinion, and the need for legal systems to command popular support have long been recognized. Public perceptions of the legitimacy of governmental policies or laws are key determinants of public acceptance of, and compliance with, these policies and laws.

Here, I turn to look more closely at the Japanese case. There has been an officially sponsored poll on the death penalty roughly every five years. The most recent Government Survey, conducted in 2009, found that 86 per cent of respondents favoured retention.[15] The 2009 Government Survey has been interpreted by Keiko Chiba—a former Minister of Justice—as 'a very high figure which should be taken seriously, and should be respected as an expression of the voice of the people'.[16] The result of the Government Survey has been taken as long-standing proof of public support by the judiciary and the government.

The Japanese government's argument is twofold. First it is asserting a principle—that the decision to retain or abolish should depend on public opinion. The

Death Penalty Conference Brochure 1 (European Commission, American Bar Associations, and Japan Federation of Bar Associations, unpublished).

[14] In addition, surveys carried out in abolitionist countries *prior to* abolition have generally shown that removal of the death penalty did not command public support. However, those carried out *after* abolition have generally shown public tolerance for abolition, but a preference for retention remains in some public opinion polls: Hood and Hoyle (2008) 361–6.

[15] Prime Minister's Office, *Kihonteki Ho-Seido ni Kansuru Yoron Chosa, Heisei 21 nen 12 gatsu (Fundamental Legal System Survey, December 2009)* (Prime Minister's Office, Minister's Secretary Management and Coordination Agency 2010).

[16] 'Kako saiko no shikei yonin: tsuyoku uket omeru to hoso' ('Highest Support Towards Retention Recorded: Results to be Taken Seriously, Says Minister of Justice'), *Yomiuri Newspaper*, 9 February 2010.

principle is derived from the idea of popular sovereignty whereby states represent the will of the public—not human rights. And secondly it offers empirical evidence for public support. In the first part of the argument, what the Japanese government is trying to argue is that the retention of the death penalty is so central to popular trust in the criminal justice system that its abolition would result in the erosion of political and judicial legitimacy. What is meant by the erosion of legitimacy is, for example, non-compliance with the law, lack of cooperation with the criminal justice system, and in the worst case scenario, vigilantism where victims' families take justice into their own hands.

Whether the 'principle' about responsiveness to public opinion is accepted or not is a complex issue, which I do not propose to examine in detail. This is because, in my view, the bigger challenge for the Japanese government is *how* to prove their 'empirical' claims. The weakness of the approach is that its argument is dependent on presenting empirical evidence that demonstrates the absolute necessity for retaining the death penalty in the eyes of the Japanese public. Literature in this area is inconclusive, both on feasibility and its methodology. However, if surveys on crime and justice are to serve as a social barometer to inform policy-makers about public acceptance of their policies, their methodology and analysis must be sound. The Japanese government in this case has chosen its Government Survey as evidence to support its claim—and there are significant weaknesses in its handling of this evidence.

4. The Source of Majority Public Support: The Japanese Government Survey

The debate on public attitudes to the death penalty in Japan to date has been mainly descriptive and speculative.[17] This is because the Japanese Government Survey data is not made public, making secondary analysis impossible. Therefore, previous literature on Japanese public attitudes to the death penalty has focused on the assessment of questions used in the Government Survey published in government reports.[18] In this

[17] Exceptions are: Jon P Alston, 'Japanese and American Attitudes Towards the Abolition of Capital Punishment' (1976) 14(2) *Criminology* 271–6; Koichi Kikuta, *Death Penalty and Public Opinion* (Tokyo, Seibundo 1993); Koichi Hamai, 'The Death Penalty in Japan', *Japan Echo*, June 2008, 44–50; Ichiro Tanioka, 'Saibansho no hanketsu to shikeiseido saibansho e no shinraikan: hanzai no kyoakuka zoka wa hontoka' ('Court Decisions, and Trust in the Death Penalty System and the Courts: Increase and Worsening of Crimes True?' in Noriko Iwai and Hiroki Sato (eds), *Nihonjin no sugata JGSS ni miru ishiki to kodo* (Tokyo, Yuhikaku 2002) 217–21 Shiho Kenshujo (ed), *Keiryo ni kansuru kokumin to saibankan no ishiki ni tsuite no kenkyu*: *satsujinzai no jian wo sozai toshite* (*Public and the Courts' Attitudes Towards Sentencing: Using Murder as a Case Study*) (Tokyo, Hosokai 2007).

[18] Japan Federation of Bar Associations, *Recommendations on the Capital Punishment System* (Tokyo, Japan Federations of Bar Associations 2002); Japan Federation of Bar Associations, *21 Seiki: Nihon ni Shikei wa Hituyou ka? (21st Century: Does Japan Need the Death Penalty?)* (Tokyo, Japan Federation of Bar Associations 2005); Japan Federation of Bar Associations, *Shikei Kakuteisha no Shoguu ni Kansuru Anke-to Kekka:2006 nen 1gatu-2gatu (Survey Results Concerning the Treatment of Prisoners on Death Row: January–February 2006)* (Tokyo: Japan Federation of Bar Associations 2006); International Federation for Human Rights, *The Death Penalty in Japan: A Practice Unworthy of a Democracy* (Paris, International Federation for Human Rights 2003); Koichi Kikuta, *Q&A: Shikei*

section, the critique of the Government Survey is restricted to the analysis of the main survey question—the question measuring the overall proportion of those who support the death penalty—which is the most often reported question.

There have been nine sweeps in total of the Government Survey (see the Appendix). The Survey has been criticized for phrasing questions in a way that would increase support towards the death penalty. For example, the 1989 Government Survey asked a set of three questions, with the first two serving as stepping-stones to the third. Respondents were first asked: 'Do you think serious crimes such as murder have increased in comparison to four to five years ago?' followed by 'Do you think serious crimes will increase after the abolition of the death penalty?' Finally respondents were asked: 'Considering the current situation in Japan, do you think that the death penalty should be abolished unconditionally?' The first two questions were likely to have given respondents the impression that serious crimes were increasing, and connect the death penalty with a deterrent effect. Hence, by the time respondents had reached the third question, they were likely to have read 'the current situation of Japan' as 'a country where serious crimes will be out of control without the death penalty'.

The question used for the last four sweeps, including the 2009 Government Survey, is more balanced than the example above, but the options are phrased in a manner that would again favour retention: 'I would like to ask you about Japan's punishment system. Which of the following opinions concerning the death penalty do you approve of? 1) the death penalty should be abolished *unconditionally*; 2) the death penalty is *unavoidable* in some cases; and 3) difficult to say/don't know' (emphasis added).

The second option 'the death penalty is unavoidable in some cases' is more likely to gain votes than the first option 'death penalty should be abolished unconditionally'. This is because the first option is designed to measure a narrow definition of abolitionist by using the term 'under all circumstances' and the second option to measure a wide definition of retentionist by using the term 'unavoidable in some cases'. In other words, abolitionists are defined as those who are strongly committed to abolition, but retentionists include a wider range of positions from very committed retentionists to reluctant retentionists.

In addition, the Government Survey treats those who support future abolition as retentionist. In fact, out of 86 per cent who chose 'the death penalty is unavoidable in some cases', a third agreed with statement 'the death penalty could be abolished in the future if conditions change'.[19] In this sense, it is possible to argue that the 'pure' retentionists—those who favour retention without any

Mondai no Kiso Chishiki (Q&A: Basic Knowledge of the Issues Surrounding the Death Penalty) (Tokyo, Akashi Shoten 2004); Shigemitsu Dando, 'Toward the Abolition of the Death Penalty' (1996) 72 *Indiana Law Journal* 7–19.

[19] The question asked was: 'Do you think the death penalty should not be abolished in the future, or should it be abolished if circumstances change in the future?' Options included: 'Should not be abolished in the future' (61 per cent); 'It should be abolished if circumstances change' (34 per cent); and 'Don't know' (5 per cent).

possibility of future abolition—actually account for 56 per cent of the population surveyed.[20]

A broader criticism of the Japanese Government Survey, and the context in which that needs to be interpreted, is the secrecy that surrounds Japanese death penalty practice.[21] In December 2007 the Japanese government, for the first time, announced the names of prisoners and the crimes they committed after each execution.[22] Before this, the number of executions was published in newspapers in a simple sentence—for example, 'today, two people were executed'. It is still the case that a prisoner who is about to be executed is notified only a few hours before the execution, which gives no time for them to get in touch with their lawyer or to meet their family. In most cases, the families of prisoners are informed only after the execution has taken place. Furthermore, there is still no official information about the selection process for executions, the treatment of prisoners on death-row, or the cost of executions. This kind of information is only available informally through those who are involved in the execution process, and through somewhat speculative secondary sources. Although not available at the time of the latest Government Survey, it should be noted that on 28 September 2010, for the first time in Japanese history, the execution room in the Tokyo detention centre was opened to TV cameras. This step was prompted by Justice Minister Keiko Chiba who authorized two executions—despite being an abolitionist—in exchange for information disclosure. This situation has led scholars to state that 'the secrecy that surrounds capital punishment in Japan is taken to extremes not seen in other nations'[23] and that the public only has very 'abstract' ideas about the punishment.[24] This inevitably poses the question: on the basis of what knowledge do the public support the death penalty?

5. Questioning the Importance of the Death Penalty for the Japanese Public: Methodology and Findings

I have conducted three types of survey to explore Japanese public attitudes to the death penalty further.[25] The results convey a consistent message: the vast majority of the Japanese public do not hold *strong* views about the death penalty, and they are certainly not strong enough to erode the legitimacy of state institutions

[20] Those who considered the death penalty to be unavoidable in some cases were 1,665 out of 1,944. Out of the 1,665, 567 people considered that the death penalty should be abolished 'if circumstances change', leaving 1,098, which is 56 per cent of 1,944.

[21] David Johnson, 'When the State Kills in Secret: Capital Punishment in Japan' (2006) 8(3) *Punishment and Society* 251–85; Kikuta (n 18) 73–8.

[22] Amnesty International, 'Japan: Amnesty International Condemns Executions', 7 December 2007, <http://www.amnesty.org/en/for-media/press-releases/japan-amnesty-international-condemns-executions-20071207> (accessed 28 November 2011).

[23] Johnson (n 21) 251. [24] Dando (n 18) 10.

[25] The three surveys carried out were funded by the following institutions: Research Foundation for Safe Society (Japan), Suntory Foundation (Japan), Daiwa Anglo-Japanese Foundation (UK), Great Britain Sasakawa Foundation (UK), University of London Central Research Fund (UK), and King's College London (UK).

if the death penalty were to be abolished. The first study was a large-scale online panel survey, asking the Japanese public about their views on the death penalty.[26] The second study was again a survey, but with an experimental design, using two sub-samples from the first survey.[27] This survey focused on the role of information (or the lack thereof) in support for the death penalty, which loosely followed the Marshall hypothesis tested in the United States.[28] One group was given a package of information about the death penalty and the criminal justice system but the other group received no additional information, and differences in attitudes towards the death penalty were measured. The third survey used a mixed method approach—combining both qualitative and quantitative data. The aim of the experiment was to measure the role of deliberation in support for retention. Like conventional attitudinal research, this relied on structured surveys. Participants were assembled to learn about the Japanese death penalty system, discuss and exchange opinions on the issue, answer pre- and post-consultation surveys, and take part in a follow-up interview. This study was designed to identify the considered attitudes and policy preferences that people express when they have been given the time and information to consider the issues fully.

In the first survey, the following question was used to measure the degree of support for the death penalty: 'People have various opinions about the death penalty. Do you think that it should be kept as a form of criminal penalty, or do you think it should be abolished?' Respondents were asked to rank the level of their agreement on a five-point scale, ranging from 'definitely' and 'probably' keep to 'definitely' and 'probably' abolish with 'cannot say' in the middle.

Attention should be paid to the fact that slightly more than half of the respondents did not seem to have a strong opinion about the death penalty. Fifty-five per cent chose either: 'should probably be kept', or 'should probably be abolished', or 'cannot say'. This shows that 'undecided' or 'lukewarm' responses comprised around half of the Japanese public on attitudes towards the death penalty. It should be added that 44 per cent of the respondents expressed the most committed position to retention, namely that the death penalty 'should definitely be kept'.

While the first survey showed the degree of commitment (or the lack thereof) to the death penalty—which the Government Survey failed to do—it can also be used

[26] The sample was a large quota sample. Data collection was commissioned to a large Japan-based market research company. The sample was later compared against the Government Census data and was weighted against sex and age.

[27] Both groups were equally divided in sex, age, and opinion (retentionists, abolitionists, and 'cannot say') towards the death penalty, based on responses given in the first study.

[28] Robert M Bohm, Louise J Clark, and Adrian F Aveni, 'Knowledge and Death Penalty Opinion: A Test of the Marshall Hypotheses' (1991) 28 *Journal of Research in Crime and Delinquency* 360–87; John K Cochran and Mitchell B Chamlin, 'Can Information Change Public Opinion? Another Test of the Marshall Hypotheses' (2005) 33 *Journal of Criminal Justice* 573–84; Robert M Bohm, 'American Death Penalty Opinion: Past, Present, and Future' in James R Acker, Robert M Bohm, and Charles S Lanier (eds), *America's Experiment with Capital Punishment* (Durham, NC, Carolina Academic Press 1998) 25–46; Robert M Bohm, 'American Death Penalty Opinion: Past, Present, and Future', in James R Acker, Robert M Bohm and Charles S Lanier (eds), *America's Experiment with Capital Punishment* 2nd edn (Durham, NC, Carolina Academic Press 2003) 27–54; Carol S Steiker, 'Marshall Hypothesis Revisited' (2008–09) 52 *Howard Law Journal* 525–58.

to argue that the vast majority supported retention: 79 per cent of the respondents either absolutely or probably supported the death penalty (see Figure 1). This then runs into the problem of 'how much' support is enough support to justify a state policy—is the 86 per cent reported in the Government Survey enough—and conversely, is 44 per cent small enough to support abolition? If social surveys are used by a government to inform policy, it should not only focus on the overall percentage of death penalty supporters (especially without clarifying how 'support' is defined) but also on the factors behind supposed support or non-support. The next two surveys attempted to do this.

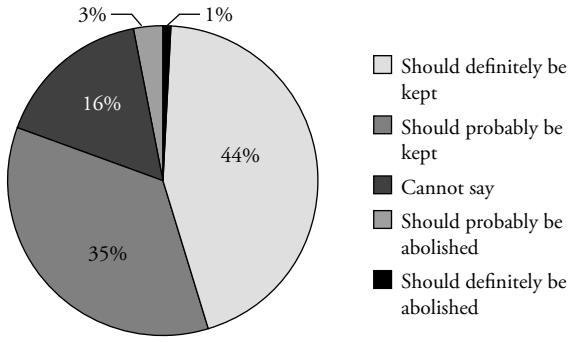

Figure 1 'People have various opinions about the death penalty. Do you think that it should be kept as a form of criminal penalty, or do you think it should be abolished?' (N = 20,769)

The second survey explored how *committed* respondents were in their selection of attitude. This was an experimental survey using two purposively selected sub-samples from the first survey, the focus was on the malleability of death penalty attitudes following exposure to information about the penalty. Both sub-samples answered the same question on their position towards the death penalty using the question examined above, though one group was given a package of information relating to the death penalty and the criminal justice system before answering the question. Information ranged from basic statistics on the death penalty, such as execution rates, to general criminal justice facts, such as trends in murder rates.[29]

Nearly all respondents who received the package were not already aware of most of the information presented to them. The three items which respondents lacked

[29] The complete list of information provided to participants was:
- world trend towards abolition;
- crimes punishable by death;
- number of executions, death sentences, and death row inmates;
- everyday life of death row inmates;

most knowledge of were: that life sentences in Japan were now, in practice, life without parole (92 per cent answered they had 'little' or 'no knowledge' of this); that murder rates had been going down since World War II and reached their lowest level in 2007 (85 per cent); and that there was no conclusive evidence on the deterrent effects of the death penalty (82 per cent). More important to note is that respondents were also 'unaware' of their lack of knowledge, with only half of them being conscious of their ignorance.

Figure 2, which summarizes the results from this experiment, shows the impact of exposure to information. The overall finding is that with information, people were less supportive of the death penalty. An independent samples t-test showed that these differences were highly statistically significant ($p < 0.01$). It is also interesting that a higher proportion of the informed group chose 'cannot say'. This could be linked to their misconceptions being challenged, leading them to doubt their initial position.

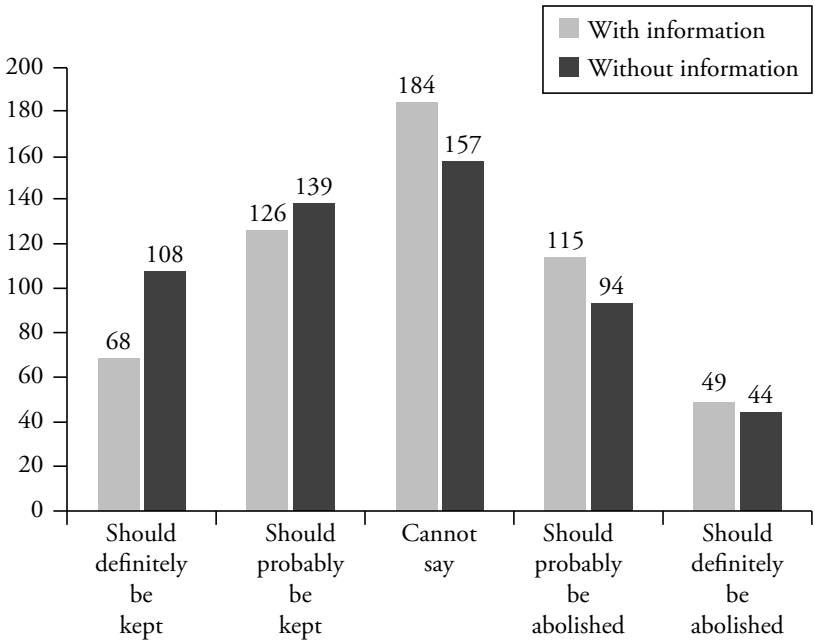

Figure 2 Malleability of opinion—with information (N = 542); without information (N = 542)

– execution methods;
– miscarriages of justice;
– declining murder rates; and
– life sentence becoming life without parole.

The largest difference between the two groups was in proportions considering that the death penalty 'should definitely be kept'—with the informed group showing much lower levels of commitment to retention. This demonstrates that even though, on the surface, people who chose 'definitely keep' may have appeared committed to retention, their opinion was in fact very sensitive to information—showing more malleability than other positions towards the death penalty.

In the third survey, 50 participants spent a whole day deliberating on the death penalty, in discussion groups as well as questioning experts. The aim was to examine the impact not only of providing information but of providing the opportunity to reflect properly on the issues. This survey used the same question as that employed in the two previous surveys to measure respondents' position on the death penalty. In short, results showed that half of respondents did not change their position.[30] For those who did change, some moved their position towards retention and some moved towards abolition.

At first glance there appears to be some disparity between the results of the second and the third survey. The second survey showed a clear tendency for more information to decrease support for the death penalty, whereas the third survey showed no statistically significant change in the respondents' position on the death penalty. It should be pointed out that the third survey used a much smaller sample (N = 50) in comparison to the second survey, and therefore discussion of the third survey should focus more on the qualitative data it produced. The qualitative data described below paint a fuller picture of what went on behind participants' decision to stick—or change—their opinion. What may have been an easier task to choose from a five-point scale death penalty position in the second survey (after 10 minutes of reading about the death penalty without any discussion with others) may have become a more complex and ambivalent task in the third survey, making the five positions offered to participants no longer an adequate index of opinions.

Qualitative data from discussion groups and follow-up surveys allow some conclusions to be drawn about reasons for both changing and retaining positions on the death penalty. In general, participants became more ambivalent, and more torn between abolition and retention—even though these two positions represent different ends of the spectrum. Yankelovich explains the complexity of opinion and the need to distinguish 'public judgment' from top of the head 'public opinion':[31]

> The single most important reason people have for failing to accept the consequences of their opinions is their difficulty in resolving their own conflicting values and ambivalences. The ability to resolve internal conflicts of values is the foundation of good-quality opinion.

[30] Wilcoxson signed rank test showed there was no statistically significant difference between pre-deliberation and post-deliberation.

[31] Daniel Yankelovich, *Coming to Public Judgment: Making Democracy Work in a Complex World* (Syracuse, New York, Syracuse University Press 1991).

Follow-up interviews and dialogues in discussion groups showed that those who remained as retentionists were able to sympathize and see sense in an abolitionist perspective, and vice versa. For example, and rather surprisingly, some abolitionists stated that they understood the emotions of retentionists when they argued that the death penalty is necessary for the victims' family. Some retentionists also stated that even though they did not want to abolish the death penalty, they agreed that wrongful conviction is a possibility and should be avoided at all costs. One retentionist suggested a compromise where the state keeps the death penalty in law but stops carrying out executions.

6. Conclusion

At the beginning of this chapter, arguments were laid down as to why it is important to examine public opinion of the death penalty in Japan. The point was made that international human rights treaties, combined with judicial and political leadership, have been successful in restricting the scope of the death penalty and increasing the number of abolitionist states across the world. However, some countries—including Japan—have not followed this trend. Despite condemnation by international organizations, Japan has to date continued to execute prisoners without suffering much international political damage. In the light of this situation, this chapter took a unique view of Japanese death penalty policy. It took a step back from the universalistic claims based on human rights commonly made by abolitionists and international organizations in trying to persuade countries to abolish capital punishment, and examined the issue from the retentionist's perspective—in this case scrutinizing the Japanese government's argument. This chapter aimed to construct a critique of the Japanese government's argument for retention of the death penalty in their own terms, *without* relying on human rights arguments.

I set out a hypothetical argument that the Japanese government may defend its approach to retention only if relevant evidence can demonstrate that abolition would result in serious erosion of legitimacy in the criminal justice system—a claim which I have questioned. On the empirical validity of the Japanese government's claim, I first argued that the design of the questions used in the Japanese Government survey was problematic, and that the results should be interpreted with great caution. Secondly, using three different survey methods, I have tried to demonstrate that a considerable proportion of the public do not have strong opinions about the death penalty; that even those who express strong support towards the death penalty modify their views in response to new information; and that deliberation made Japanese people more tolerant towards those who hold opposite views on the death penalty.

It is important for the Japanese government to disclose more information about the death penalty and to promote more public debate. However, my point is not to argue for abolition until public opinion changes through public education. It

is probably unrealistic to think that governments can do on a national scale what experiments have done on a small scale. The important thing is not for the government to wait passively until a change occurs in public opinion or attempt to demonstrate a majority abolitionist nation through various forms of public education, but for them to push actively towards abolition.

The way in which the Government Survey has been interpreted by the government, the courts, and politicians, namely to look simply at the proportion in support of the death penalty is not a good way of using empirical evidence as a social barometer. Furthermore, by asserting that a majority of citizens support the death penalty whereas most do not have fixed opinions on this topic, the Japanese government is in fact re-enforcing the view that there is consensus on death penalty opinion and that the Japanese are unified on this question.

The Japanese government should open their minds to possibilities beyond the rhetoric of 'majority support'. Instead they should start examining if the public will tolerate abolition—and not to overstep the limits of public tolerance. This approach to surveys provides state institutions with the room to exercise leadership as well as being responsive to public demands. So, the question that should be asked is not whether a majority 'support' the death penalty, but whether the Japanese public will 'accept' abolition. Based on the finding from the studies reported above, it has been argued that the Japanese public is likely to accept the abolition of the death penalty, and if this were done, they would continue to regard the Japanese criminal justice system, and other state institutions as legitimate authorities.

Appendix: Government Survey Results

Year	Retention (%)	Abolition (%)	Other (%)
1956	65	18	17
1967	70	16	13
1975	57	21	22
1980	62	14	23
1989	67	16	18
1994	73	14	13
1999	79	9	12
2004	81	6	13
2009	86	6	9

Note:

– 1956, 1967, 1975, 1980, and 1989 surveys

Question: 'Do you think the death penalty should be abolished unconditionally?'
Options: 'Agree', 'Disagree' or 'Don't know'

– 1994, 1999, 2004, and 2009 surveys

  Question: 'I would like to ask you about Japan's punishment system. Which of the following opinions concerning the death penalty do you approve of?'

  Options: 'Death penalty should be abolished without conditions', 'Death penalty is unavoidable in some cases' or 'Difficult to say/don't know'

– Not all columns add up to 100 per cent due to rounding up of figures at the first decimal point.

Source: Prime Minister's Office, 'Special Poll', available at: <http://www8.cao.go.jp/survey/y-index.html> (accessed 24 February 2013).

PART IV

THE POLITICS OF CAPITAL PUNISHMENT IN PRACTICE

12

Suspending Death in Chinese Capital Cases: The Road to Reform

Susan Trevaskes

1. Introduction

Capital punishment has a distinctive place in China's 30 years of reform. Throughout these years, just as in the preceding Mao period, the Party-state has recognized serious crime as a threat to the nation's social stability and thus to its own place at the national helm. For more than two decades from the early 1980s, the policy, philosophy, and practices of '*Yanda*' (*严打*), to 'strike hard' at crime, set the nation on a criminal justice path marked by particularly severe punishment as crime deterrent.[1] The number of state killings soared, positioning China as the world's number one in capital punishment.[2] A culture of 'heavy penaltyism' moulded severe punishment through court sentencing, pushing for immediate execution even while Criminal Law offered another option for death penalty sentencing. This other type of death sentence, *sihuan* (死缓), is a suspended death sentence that is effectively a life sentence—almost always commuted after a two-year reprieve.[3]

[1] For a fuller discussion on *Yanda*, see Susan Trevaskes, *Policing Serious Crime in China: From 'Strike Hard' to 'Kill Fewer'* (London, Routledge 2010).

[2] The precise number of people killed through the death penalty remains a state secret but it is widely acknowledged that China executes more people each year than the rest of the world combined. The number peaked in the first eight months of the first *Yanda* campaign in 1983–84 when at least 24,000 people were executed, according to the *People's Daily*. See '1984 10 yue 31 ri: yanda diyizhanyi chengguo xianzhu' ('31 October 1984: The Fruits of Yanda's First Offensive are Outstanding') *renminwang ziliao* (*People's Daily Resources* online), <http://www.people.com.cn/GB/historic/1031/3642.html> (accessed 10 September 2010). Numbers stayed high, with up to 15,000 executed annually in some years of the 1990s when anti-crime campaigns were part of everyday criminal justice. Estimates for the early to mid-2000s are 8,000 to 10,000 annually, but with a significant reduction to between 3,000 and 6,000 annually from 2007–10. For an insightful discussion in the literature on estimations of the number of executions, see David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change and The Death Penalty In Asia* (New York, Oxford University Press 2009) 231–42.

[3] Michelle Miao's chapter in this book notes that since 2007, 99 per cent of those given a *sihuan* sentence have escaped execution. Note also that the 8th Amendment of the Criminal Law (1997) in March 2011 now places limits on minimum sentences commuted from *sihuan* to life imprisonment and *sihuan* to fixed-term imprisonment. Prisoners convicted of intentional homicide, rape, robbery, arson, bombing, poisoning, and violent organized crime activities whose sentence is commuted to

Here I shine the torch on *sihuan* in recent years, when it has come of age as a useful instrument for reform on the politico-legal landscape. From the mid-2000s, *sihuan* is a vital instrument in the push for less-harsh punishment under a new criminal justice policy that has replaced *Yanda*'s 'strike hard' with 'balancing leniency and severity' (*kuanyan xiangji* 宽严相济), or as some Chinese media outlets puts it, 'tempering justice with mercy'. As 'the death sentence that isn't', the *sihuan* suspended death sentence has acquired a new role as a lynchpin in the move to blunt China's harsh regime of capital punishment. *Sihuan* presents a more lenient but still severe death sentence option, especially since it has been equipped in recent years with much more detail about its usage to guide judges deciding between *sihuan* and immediate execution. In this way, since the mid-2000s *sihuan* has been instrumental in the reformist push to 'kill fewer' to achieve a better balance between lenient and severe criminal punishment.

Party-state policy, the product of politics on the nation's politico-legal landscape, continues to heavily inform judicial interpretation of criminal law for capital case sentencing in China's march towards modernization. This makes death penalty decision-making vulnerable to political vicissitudes at both the central and provincial levels. The post-Olympics period is marked by perceptions of a deepening social, economic, and political divide between the interests of China's educated and well-connected 'haves' from the cities and the have-not 'masses' from rural backgrounds. The Politburo has focused on questions of how to address disunity and instability, with stabilizing and re-unifying relations between 'the masses' and society's political, social, and economic elites the driving issue of Chinese politics. Towards the end of the 2000s, judicial politics played out on a national political canvas that featured politicking in anticipation of a new Party leader, the PRC President, and a new politburo standing committee in late 2012, national anti-corruption drives and anti-mafia drives, 'rise of China' posturing in the print and electronic media, and more than 100,000 mass protests annually against injustice and abuse of power. A few polemical criminal cases have been drawn into political battles that the media have brought to public attention. These cases highlight contested views in the Party, judiciary, and Chinese society over the use of *sihuan* for leniency in capital case decision-making. Media coverage of these cases has drawn the public as a new player into the balancing act of implementing the 'balancing leniency and severity' policy.

In this chapter, I consider the direction of death penalty reform after 2007 with particular attention to the three years from 2008 to 2011. The focus is on China's

life, must now serve a minimum of 25 years. For the small minority of those whose sentences are commuted from *sihuan* to a fixed term, the minimum sentence they must now serve is 20 years. This decision was made to curb the practice of *sihuan* sentences being progressively cut to around 12 years' imprisonment, a practice which in the past, had discouraged judges from handing down *sihuan* and encouraged them to sentence convicted offenders to death with immediate execution. The first case in China to employ these new sentencing rules was announced on 28 December 2011. See 'Dongying shouli shiyong xianzhi jianxingan xuanpan' ('Dongying Intermediate Court the First to Use the New Rules Placing Limits on Reducing Sentences of *Sihuan* Cases'), *Xinmin wanbao* (*New Citizen Evening News*), 29 December 2011, <http://news.xinmin.cn/shehui/2011/12/29/13131480.html> (accessed 29 December 2011).

highest court, the Supreme People's Court (SPC), as the primary vehicle for this reform and on the Party Central Committee (CPC). In the pre-2008 period when the SPC was headed by a legally-minded reformist, *sihuan* was promoted and institutionalized within the court system as an alternative to the previous policy of 'striking hard'. In the post-2008 period, a more conservative and cautious SPC under a new Party-minded leader has still kept *sihuan* in place alongside the policy of 'balancing leniency and severity', which has become firmly rooted as the foundation of criminal justice policy. To provide context, let us turn first to criminal justice policy, the conduit for practice and reform of capital punishment across the three decades of China's reform.

2. The Three Supreme Criminal Justice Policies in China

Broader criminal justice policy greatly influences the course of the death penalty in contemporary China since the absence of detail in criminal law forces judges to draw from policy to interpret law in capital sentencing. Since the 1980s, three main national criminal justice policies have guided death penalty decision-making, each of these the synthesis of a continuing dialectic between leniency and severity, shaped by perception of the political benefits of institutionalizing severe or lenient criminal punishment depending on the prevailing need for social stability. The PRC's first criminal code promulgated in 1979 (CL79) recommitted judicial authorities to the Maoist idea of tempering severe punishment of a minority of criminals with comparatively lenient punishment of those whose crimes were deemed less threatening to the stability of society. It inscribed a policy of 'combining punishment and leniency' (*chengban yu kuanda xiangjiehe* 惩办与宽大相结合) into Article 1. This policy encouraged the courts to punish the most serious criminals while sparing minor criminals or accomplices from harsh punishment. It encouraged relative leniency for those who confessed to crime and relative severity for those who refused to admit guilt, and to reward criminals who have surrendered to police and performed what are described as 'meritorious acts' such as handing over information about others' crimes.[4] This was the first and 'foundational' criminal justice policy in post-Mao China. The policy was supposed to ensure an ongoing balance between 'severity' for the minority and relative leniency for the majority. But this policy barely saw the light of day in a political atmosphere that overwhelmingly favored the *Yanda* approach to crime control and therefore relegated leniency from criminal punishment policy and practice.

Within a year or two, '*Yanda*' or 'strike hard' was effective in punishment practice and in a few years was the new criminal justice policy, to punish serious crime 'severely and swiftly' (*congzhong congkuai* 从重从快). *Yanda* campaigns were conducted against specific types of crime that were considered a serious threat to

[4] Dai Yuzhong, 'The Pursuit of Criminal Justice', in Cai Dingjian and Wang Chengguang (eds), *China's Journey Toward the Rule of Law: Legal Reform, 1978–2008* (Leiden, Brill 2010) 191.

social order and stability. To facilitate *Yanda*'s swiftness and severity, the CL79 and the Organic Law of the People's Court were amended through National People's Congress (NPC) decisions. This allowed the Party-state to delegate the bulk of the SPC's role as legal gatekeeper over death penalty sentencing—exercising exclusive authority to review and approve all death penalty decisions—to provincial courts, to clear the way for the scale and pace of *Yanda*'s punish severely and swiftly approach.[5] Provincial courts, therefore, had the dual role as appellate courts and the final approver of their own appellate decisions for 24 years until 2007 in order to facilitate 'striking hard' at serious crime. *Yanda* policy is, therefore, arguably the main reason for China's high number of death sentences in the three decades of reform in China. Serious offences under the *Yanda*-targeted categories were routinely given the most severe punishment that law allowed, often without regard for the individual circumstances of the crime. The more than 20-year dominance of *Yanda*-style campaign justice through to the mid-2000s meant that the harsh punishment side of the 'combining punishment and leniency' mix prevailed over leniency and balance.[6]

Harsh punishment was pursued to deter crime, to sustain social order, and to enhance social stability, as the undergirding for national economic development and through it the Party-state's dominion. Throughout the 1980s and 1990s, protecting social order and guarding against social instability placed a tacit obligation on judges who tried serious criminal cases to ascertain the extent of social harm that the crime had caused. 'Social harm' damages not only the individual victim but also the cause of state development and the national modernization drive in general. Treating harm from crime as aggregate harm to the society and its goals rather than solely to an individual victim often had direct, lethal consequences for offenders convicted of social order crimes such as aggravated robbery, which were deemed especially threatening to the social fabric.

Severe punishment according a crime's social harm encouraged a sentencing culture of 'heavy penaltyism' (*zhongxing zhuyi* 重刑主义) that relied on the indeterminacy of the Criminal Law. The CL79 was amended in 1997 to become the 1997 Criminal Law (CL97). This law's Article 48, the centrepiece of China's death penalty legislation, begins, 'The death penalty shall only be applied to criminals who have committed extremely serious crimes'. But it did not then proceed with details for judges to interpret which circumstances render crimes as 'extremely' serious and thus warranting the death penalty. This left judicial discretion heavily dependent on Party-state policy for sentencing. We see then that 'extremely serious crime' is deliberately vague so as to leave interpretive space for the Communist Party, as creator of policy, to be the main interpreter of which types of offenders (that is, for which types of crime) deserve 'immediate execution' (*liji zhixing* 立即执行).

[5] On the course of the death penalty through the first 30 years of China's reform, see Susan Trevaskes, *The Death Penalty in Contemporary China* (New York, Palgrave Macmillan 2012).

[6] Chen Xingliang, 'Kuanyan xiangji xingshi zhengce yanjiu' ('A Study of the Criminal Justice Policy of Balancing Leniency and Severity') (2006) (1) *Faxue zazhi* (*Law Science Magazine*) 18–19.

Article 48 also states that if the immediate execution of a criminal punishable by death 'is not deemed necessary', judges can impose the *sihuan* two-year suspension of execution which, as noted above, is almost always commuted to a life sentence after the probationary period is completed. *Sihuan* has been part of criminal justice practice in the PRC since the 1950s but had been underused as a sentencing option in the *Yanda* years. The *Yanda* policy's drive to strike hard with swiftness and severity made immediate execution the automatic 'default' choice of judges when sentencing for social order crimes such as robbery and homicide that are subject to capital punishment. For death penalty reformers in the SPC, institutionalizing a less severe punishment system that would balance leniency and severity to 'kill fewer' required establishing a politically acceptable alternative to immediate execution as the 'default' choice. The *sihuan* alternative was considered especially appropriate for homicides and assaults resulting in death that had escalated into violence from domestic or neighbourhood disputes. These crimes of passion were generally not politically sensitive, unlike other violent crimes that were seen to threaten social order.

The conduct of capital case sentencing, subject to the swiftness and severity compelled by the *Yanda* policy and now without the highest court as legal gatekeeper to watch over it, resulted in disregard for legal propriety in determining the death penalty. Little wonder that moves for legal reform of this system came from the SPC as the abandoned legal gatekeeper. With the legally expert, reform-minded president Xiao Yang at its helm from the end of the 1990s, the SPC was positioned to proceed when propitious circumstances presented. Xiao Yang recognized a prime opportunity to push ahead with death penalty reform after the rhetorical move by President Hu Jintao and colleagues in 2004 to make 'Building a Harmonious Society', the central pillar of the Party's political agenda in the 2000s. Momentum for reform was already building, propelled especially by the continuous malfunction of *Yanda* policy and *Yanda* campaigns that not only failed to reduce levels of serious crime but also brutalized rather than stabilized Chinese society. In this context in the mid-2000s, 'balancing leniency and severity' emerged as the new synthesis of the 'severity/leniency' dialectic to become China's third major criminal justice policy. It differed from its 1979 predecessor in that it gave greater emphasis to the role of leniency and to the importance of individuated sentencing. This policy encouraged judicial decision-makers to deal with each case individually by taking into account its particular circumstances, rather than applying the same or similar across-the-board 'light' or 'heavy' sentences for particular crime categories. This approach was to ensure:[7]

> . . . that individual cases that should be dealt with leniently are indeed dealt with leniently [*gaikuan zekuan* 该宽则宽], that individual cases that should be treated harshly are indeed treated harshly [*gai yan zeyan* 该严则严], and that leniency and severity can be used in

[7] Article 1, 'Zuigao renmin fayuan guanyu guanche kuanyan xiangji xingshi zhengce de rougan yijian' ('SPC Opinion on Implementing the Criminal Justice Policy of Balancing Leniency and Severity'), 8 February 2010. Hereafter referred to as the '2010 SPC Opinion', <http://news.xinhuanet.com/legal/2010-02/10/content_12960937.htm> (accessed 22 February 2013).

balance with each other so that crimes correctly fit their punishment. Only very isolated cases and therefore a small minority of offenders are to be 'attacked' [ie treated harshly], so the vast majority of offenders are dealt with through education, persuasion and reform.

The SPC used the ambiguity of criminal law as a space where the judiciary interprets law for sentencing and into which the Court could provide detail through its own legal mechanisms: judicial opinions and circulars.[8] In late 2006 and early 2007, the SPC harnessed the presidential rhetoric of 'Building a Harmonious Society' with the criminal justice policy rhetoric of 'balancing leniency and severity', to begin national moves to institutionalize *sihuan* as the default choice for sentencing in the majority of capital cases. The SPC achieved this goal through a series of judicial opinions and circulars recommending that lower courts mete out less-severe punishment in the majority of homicide cases, especially those resulting from domestic or neighbourhood disputes. These opinions and circulars provided detail about death penalty and *sihuan* to inform judicial discretion in sentencing.

3. The Two SPCs

As newly appointed SPC President in 1999, Xiao Yang mobilized colleagues to begin work on reforming the predominant mindset of heavy-penaltyism in the lower courts. The plan was to gradually introduce a 'kill fewer, kill cautiously' (*shaosha shensha* 少杀慎杀) approach in increments. The SPC's plan to encourage sentencing with *sihuan* rather than with immediate execution was initially directed at cases of serious assault resulting in death in rural areas. It began in October 1999, when the SPC issued minutes from a national forum on criminal trial work relating to protecting social stability in rural areas. The minutes stated that in relation to giving the death penalty in cases of homicide and intentional assault resulting in death, lower courts would now need to take into consideration: 'the circumstances of the case as a whole', specifically, that immediate execution should be applied 'extremely cautiously' in three case-types: (1) courts should treat cases where the victim was in some way partially responsible for an initial dispute differently from crimes where this was not so; (2) courts should treat cases in which the crime was a result of a domestic or neighbourhood dispute that escalated into violence differently from crimes where this is not so; and (3) courts should treat cases with mitigating circumstances more leniently and in a different way from cases with no mitigating circumstances.[9] For these case types, courts should not

[8] For a discussion on the nature of opinions and other SPC documents, see Susan Finder, 'The Supreme People's Court of the People's Republic of China' (1993) 7(2) *Journal of Chinese Law* 166. Finder notes that the SPC establishes and supervises procedures in the lower courts by issuing opinions and interpretations to lower courts. Official opinions and explanations are 'general statements about normative rules… Some provide an authoritative opinion concerning the whole of a major new law, others are issued in the absence of relevant law, while yet others interpret a section of existing legislation'. Finder (n 8) 167.

[9] 'Quanguo fayuan weihu nongcun wending xingshi shenpan gongzuo zuotanhui jiyao' ('Minutes of the SPC National Meeting of Criminal Trial Work on Maintaining Stability in Rural Areas'), 27 October 1999.

hand down a sentence of immediate execution. The death sentence should be given only in cases where the defendant shows extremely grave malicious intent or where the circumstances are particularly odious. Further, courts should not even consider giving the death penalty (immediate or suspended) in assault cases resulting in serious injury short of death unless the crime was extremely odious.[10]

This 1999 SPC report signalled a change in the intended direction of the SPC, even if it could not yet exercise its gate-keeping authority to approve and review all death penalty sentences and did not have the weight of the Party-state behind it in preferring *sihuan* over immediate execution. As the report detailed and validated, the SPC could now more tightly control use of immediate execution in the provinces. But a two-year national *Yanda* anti-crime campaign that the Party-state launched in April 2001 put a temporary stop to these plans. With mounting evidence of the failure of the *Yanda* policy after 2003, the political winds began to blow in the direction of a softer, more 'balanced' state response to crime. Hu Jintao's 'Building a Harmonious Society' agenda gave the SPC the rhetorical platform it needed to outsmart political resistance and institute death penalty reform more extensively, particularly through *sihuan*.

The SPC's ambition was to institutionalize *sihuan* as a viable alternative to immediate execution in most capital cases, especially homicide cases resulting from personal disputes (domestic or neighbourhood disputes). As a way of deterring overzealous use of the death penalty, in late 2006 and early 2007, with the return of the gate-keeper role over final decision-making officially in place from 1 January 2007, the SPC president Xiao Yang instructed lower court judges to use immediate execution only as a last resort and only for the most serious criminals in society. *Sihuan* should be used for the majority of violent criminal cases that had escalated from domestic or neighbourhood disputes. Immediate execution only as 'last resort' was extended to other serious crimes such as drug-trafficking and transportation, especially in provinces where drugs were especially prevalent. During this time, higher courts began setting their death sentence thresholds, such as for quantity of drugs trafficked, at levels much higher than the minimum threshold provided in the CL97.[11]

The watershed moment in death penalty reform occurred on 1 January 2007. In the months before and after 1 January 2007 when the SPC regained its exclusive authority from the provincial courts to review and approve death sentences, the debate about the future of China's longstanding *Yanda* policy was played out around the issue of the new criminal justice policy 'balancing leniency and severity'. Supporters of *Yanda* policy such as head of the CPC's Politico-legal Affairs Committee Luo Gan, and most Party bosses in the provinces, continued to emphasize harsh justice for a wide gamut of serious criminals. Supporters of 'balancing leniency and severity' backed reforms that would mete out harsh justice only to

[10] Han Hong, *Woguo sixing anjian shenpan chengxu yanjiu* (*Research on Death Penalty Trial Procedure in China*) (Beijing, China Social Sciences Press 2009) 151.

[11] In some provinces this had actually begun to occur before the mid-2000s.

a much narrower range of the most serious criminals, by encouraging widespread use of *sihuan* instead of immediate execution.[12]

With momentum from regaining authority to review and approve death sentences, the SPC soon rolled out more extensive reforms. In March 2007, immediately after promulgation of a Joint Opinion on the new death penalty procedural rules,[13] a Deputy President of the SPC, Liu Jiachen, revealed the SPC's ambitions for wider judicial reforms. Liu declared that in reforming the death penalty, the SPC was attempting to 'grab [the social institution of punishment] by the hairs of its head so the rest of the body of punishment has no alternative but to be dragged along (*qian yifa dong quanshen* 牵一发动全身)'.[14] This momentum, which caught the wave of Hu Jintao's 'Building a Harmonious Society' rhetoric, was harnessed in 2006 and 2007 to reform no less than the political culture of harsh punishment itself. By the end of 2007 the consequences of allowing immediate execution 'only as last resort' were evident; the number of *sihuan* decisions overtook 'immediate execution' decisions for the first time in the PRC history.[15] As Michelle Miao notes in her chapter in this book, since 2007, it has been claimed by at least one expert that 'half of the defendants who would have previously been executed instead received a death sentence with a two-year reprieve, of which 99% escaped execution eventually'.[16]

Despite the deep passion for reform evident in Liu's vivid metaphor, ambitions for wide-ranging reform were achieved only in part. When Xiao Yang retired from the SPC presidency in 2008, the CPC installed its own man in the top position in the SPC. Wang Shangjun, who hailed directly from the CPC's Politico-legal Affairs Committee, brought to the SPC helm his deep Party experience and commitment but no legal experience. Almost immediately, the mood within the SPC shifted from Xiao Yang's Harmonious Society-inspired reform atmosphere towards the rule of law, to a post-Harmonious Society 'politics first, Party first' atmosphere. This new political appointee immediately renewed emphasis on Party supremacy in Chinese courts and began a push to reinstate the importance of the Party in all policy areas. New rhetoric included 'The Three Supremes'—upholding the supremacy of the Party's work, the people's interests, and the constitution and the law (in that order)—to guide the work of justice officials. His appointment signalled the type of work required of the new president and it became apparent quickly.

[12] Susan Trevaskes, 'The Death Penalty in China Today: Kill Fewer, Kill Cautiously' (2008) 43(3) *Asian Survey* 393–413.

[13] 'Zuigao renmin fayuan zuigao renmin jianchayuan gonganbu sifabu guanyu jinyibu yange yifa ban'an, quebao sixing anjian zhiliang de yijian' ('Joint Opinion from the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Pubic Security, and the Ministry of Justice on Further Measures to Strictly Apply the Law in Case Work and to Ensure the Quality of Decision-making in Capital Cases'), 9 March 2007. Hereafter referred to as the 'Joint Opinion'.

[14] 'Sixing hezhun bukaiting, shi chu you yin' ('Ratification of Death Sentences are Not Heard in Open Court for Good Reason'), *Xinhua Net*, 10 March 2007, <http://news.xinhuanet.com/legal/2007-03/10/content_5825329.htm> (accessed 10 March 2007). For details on the March Opinion, see Trevaskes, 'The Death Penalty in China Today' (n 12) 407–9.

[15] 'China Sees 30% Drop in Death Penalty' *Xinhua News*, 5 May 2008, <http://www.chinadaily.com.cn/china/2008-05/10/content_6675006.htm> (accessed 30 May 2008).

[16] Miao cites this from an interview of researcher Liu Hainian.

Courts were swiftly caught up in the broad political wave of post-Harmonious Society 'maintaining stability' (*weiwen* 维稳) and mass-line justice rhetoric, inspired by the new 'politics-first and Party first' mood in the political front across the nation.

Yet an interesting twist is this. Even in this more conservative atmosphere, the Party and now conservative SPC continued to endorse the 'balancing leniency and severity' policy as a 'foundational' (*jiben* 基本) criminal justice policy. Indeed, on 8 February 2010, the SPC further institutionalized a softer punishment culture through a new 'Judicial Opinion on Balancing Leniency and Severity'. This supported the policy by providing courts across the nation with detailed guidelines on how to interpret the foundational policy.[17]

According to the 2010 SPC Opinion, balancing leniency and severity accentuates both the concept of mitigating and aggravating criminal circumstances that already exists in the CL97 and the use of judicial discretionary circumstances in order to deliver a more balanced approach to criminal sentencing. It reinforces SPC advocacy for using *sihuan* in a wide range of criminal circumstances and further encourages judges to 'individuate' decision-making: to make choices about immediate execution and *sihuan* on a case-by-case basis rather than apply an across-the-board type of harsh punishment for certain crime categories. This is an impressive headway for *sihuan* and for the SPC considering that just three or four years earlier the *Yanda* policy was still being touted as the key response to a wide range of serious offences, particularly by Luo Gan in the Politburo.

4. Three Post-2007 Key Developments

In discussing the period 2007–11, it is useful to consider three distinctive stages of development. The first stage is 2007, particularly in the months after the 1st January return to the SPC of authority to review and approve death sentences, when criminal court work in many parts of the country was dominated by relative leniency in capital case decision-making. The second stage involved the political cementing of a commitment to 'balancing leniency and severity' policy through a politburo-approved Party blueprint for justice system reform in late 2008, and the 2010 SPC Opinion discussed above grounded the new 'balancing' policy in judicial practice. The third, contemporary, stage emerged in 2010–11. It is the post-Harmonious Society period dominated by dual agendas of 'stability maintenance' aimed at quelling social unrest such as public protests, and the 'mass line'.[18] Both agendas in their own way aim to

[17] 2010 SPC Opinion (n 7).

[18] 'Mass-line' in contemporary China is a catch-all term that stresses the importance of the masses in the formulation and implementation of policy. It is a watered-down version of Mao's 'mass-line'. In Maoist China, the 'mass-line' was an organizational strategy for directing popular participation as a means of recruiting both mass organizations and political organizations into the tasks of national reconstruction and class struggle. This methodology of leadership was based on the concept of taking the 'scattered and unsystematic' ideas of the masses and transforming them in 'a concentrated and systematic way'. 'Mass-line' came to be articulated not only as a means of decision-making but also as a method of solving the protracted social contradictions between and within classes.

address community disquiet about the depth of corruption and abuse of power at the heart of social discord. In the brief outline of these three stages below, we see each as a part of the contemporary balancing act, putting into practice the ongoing dialectic between relative severity and leniency to establish the appropriate balance of leniency and severity in criminal punishment for the current stage of China's economic, social, political, and legal development.

2007 and the 'cash for clemency' controversy

Media coverage of the SPC move to more tightly control use of immediate execution had immediate impact on the use of *sihuan*, disparaging the more lenient suspended death sentence among the general public. In 2007, the SPC encouraged courts to hand down *sihuan* in many homicide cases where two legally mitigating factors applied: the defendant had surrendered to the police and offered financial compensation to the victim's family. Many commentators and members of the public saw this as excessively lenient. Media presentations of a number of polemical *sihuan* cases triggered widespread public debate about perceived overuse of *sihuan* in the post-2007 environment of 'harmonious justice'. Particularly controversial were several extremely vicious murders of women and children for which offenders were seen to have escaped death by paying for a *sihuan* sentence.

The idea of being rewarded with a life sentence (via *sihuan*) rather than a death sentence for paying compensation to the crime victim or their relatives is based on an established legal provision of supplementary civil compensation and the related practice of 'paying financial compensation and receiving a reduced sentence'. The Criminal Procedure Law of 1996 provides for hearing, concurrent with the criminal trial, a 'subsidiary civil action' in which the victim or the victim's family can demand payment from the defendant for damages.[19] The defendant can pay damages through criminal reconciliation, a system developed through the decade of the 2000s that came to be touted as a way of reducing 'social disharmony' for minor criminal cases. Around the mid-2000s and particularly after 2007, courts and prosecutors promoted damage compensation in capital cases as well. Increasingly, courts and prosecutors offered defendants deserving the death sentence the chance to receive a reduced sentence in exchange for the offender's prompt payment of civil compensation to the victim or the victim's family.

A key rationale for the 'pay for a reduced sentence' scheme, beyond ideas about reducing 'social disharmony', was that rewarding the offender for payment might help to curb a practice common to criminal trials involving subsidiary civil action. The majority of offenders failed to follow through on judgment execution orders to pay compensation after they had been prosecuted and sentenced.[20] 'Receiving a reduced

[19] Subsidiary civil action is dealt with in Ch 6 of the Criminal Procedure Law (1997). For an outline of supplementary civil compensation, see Mike McConville et al, *Criminal Justice in China: An Empirical Inquiry* (Cheltenham UK/Northampton MA, Edward Elgar 2011) 198–205.

[20] Susan Trevaskes, 'Restorative Justice or McJustice with Chinese Characteristics?', in Mary Farquhar (ed), *Twenty-first Century China: Views from Australia* (Cambridge, Cambridge Academic Press 2009) 91.

sentence for paying compensation' was, therefore, seen as a practical way to resolve offenders' non-compliance in paying compensation, by giving them a strong incentive to pay upfront. As this practice became embroiled in death penalty reforms in 2007, it attracted widespread reaction in the media and scholarly circles, the bulk of which was highly critical. Critics complained that money can buy lenient sentencing, that the 'haves' with wealth can buy their way out of severe criminal punishment. The market had been drawn into the courtroom. The cleavage between the 'haves' and the 'have nots' was ruptured further.

The 'paying for a reduced sentence' controversy had died down by late 2008, to some extent because fewer courts were taking the risk of inviting a public storm of protest by suspending the death sentence in cases involving heinous crimes. The media now had less fuel to stoke the fire of public discontent. The balancing act had reached a new equilibrium after what was perceived to be an excess of leniency, with the public at large brought into the act through media coverage. In 2008, as the controversy was receding, the CPC began to play a much more visible role in articulating and promulgating the 'balancing leniency and severity' policy, to facilitate achievement of the balance that it favoured. During the decade to 2008, the discourse and action on reforming the criminal justice system was dominated by Xiao Yang as the SPC president. But with Xiao Yang's retirement, the politico-legal ground shifted significantly. Now the Party would involve itself directly in the discourse and action on reform/balancing.

Party and the SPC endorsement of balancing leniency and severity

The CPC Politico-legal Affairs Committee is the Party's main body for policy-making on law and order. In 2008, the Committee announced that at the behest of the Politburo it had devised a new blueprint for reforms across the justice system, highlighting 'balance' as a leading principle of this reform and with a particular focus on criminal justice issues. This plan had four main goals.[21] It was endorsed and passed by the Politburo on 28 November 2008 and was referred to in senior politico-legal circles as 'Document No 19'.[22] *The People's Daily* of 29 November 2008 announced the 2008 Party Plan but did not discuss its content since details were withheld from media scrutiny.[23] In an interview with *Legal System Daily* reporters, Deputy Secretary

[21] The four key points (*zhongdian*) or goals of the 2008 Party Plan are: to optimize the distribution of oversight functions and appropriate allocation of powers that mutually restrict judicial authority; to implement the policy of 'balancing leniency and severity' [in sentencing]; to strengthen the contingents of the political-legal ranks; and to strengthen guarantees of funding for political-legal organs. See Susan Trevaskes, 'Political Ideology, the Party, and Politicking: Justice Reform in China' (2011) 37(3) *Modern China* 321–34.

[22] Referred to hereafter as the 'Party Plan'.

[23] 'Zhonggong zhongyang zhengzhiju zhaokai huiyi fenxi yanjiu 2009 nian jingji gongzuo he taolun shenhua sifa tizhi gaige gongzuo. Hu Jintao zhuchi huiyi' ('The CPC Politburo Convenes Conference on 2009 Economic Work and Discussions on Optimising Justice System Reform Work: Hu Jintao Chairs the Conference'), *Renmin ribao* (*The People's Daily*), 29 November 2008. For an examination of the plan, see Trevaskes, 'Restorative Justice or McJustice with Chinese Characteristics?', in Farquhar (n 20).

of the CPC Politico-legal Affairs Committee, Mr Wang Qijiang, stated that the 2008 Party Plan was a major strategy set out under the auspices of the 17th Party Congress report. The Politburo gave the CPC Politico-legal Affairs Committee the responsibility for coordinating, supervising, and assessing the reforms.[24]

To date, the only one of the 2008 Party Plan's four main goals that has been translated into actual policy is implementing 'balancing leniency and severity' in criminal justice practice. This was already national policy from the mid-2000s and the Party Plan supports the SPC's attempts to amend and refine criteria for imposing criminal sentences, improve further criminal procedural law and laws pertaining to the death penalty, gradually reduce the number of capital offences in the Criminal Law, revise sentencing standards clarifying the divide between cases that deserve a life sentence and those that deserve a death penalty, establish a strict enforcement system for terms of imprisonment in relation to *sihuan* and life sentences, and make precise the minimum number of years of imprisonment for life sentences commuted from death sentences with a two-year reprieve.[25]

Following Party endorsement of the 'balancing leniency and severity' policy, just over a year later in February 2010, the SPC issued an action plan in the form of a Judicial Opinion discussed above for implementing this policy. The 45-article Opinion provided detailed stipulations for judicial interpretation in sentencing. It tightened the scope of interpretation on who deserves to be 'executed immediately'. It signalled the Party's continued commitment to encouraging alternatives to immediate execution for all but the most heinous crimes. Perhaps most importantly, it encouraged sentencing determination case-by-case rather than the *Yanda* style across-the-board 'heavy punishment' delivered upon whole categories of serious criminal cases such as robbery without regard for the *sui generis* circumstances of any case.

The 'stability maintenance' craze of 2010–11

The post-2008 conservative turn in PRC politics can largely be understood as a reaction by central Party authorities to the increasing toxicity of relations between society's educated elites in urban areas and the underclass of the 'masses'. Social instability remains a top Party concern and addressing it remains a foremost purpose of criminal justice policy. Now the toxicity was becoming increasingly apparent in the dramatic increase in individual petitioning activities, mass incidents of social protest, and other indicators of social disquiet such as debates in the blogosphere. These expressions of dissent made it clear that in the post-Olympics climate many of the 'masses' had become even less confident than in the past that the Party would deliver as much harmony and prosperity to them as it had

[24] Sun Chunying and Chai Li, 'Zhuoli tuijin sifa tizhi he gongzuo jizhi gaige' ('Direct All Efforts into Promoting Justice System Reform and Reform to Work Mechanisms'), *Fazhi ribao* (*Legal System Daily*), 2 January 2009, 1.

[25] Trevaskes, 'Justice Reform in China' (n 21) 329–34.

done to many educated people in the main cities. Central Party authorities had begun to recognize an alarming drop of community confidence in Party ability to control abuses of official power and corruption that were eroding social and economic life in the provinces. The burgeoning of mass protests each year (now well over 100,000 annually) signalled to central authorities that the restive mood had become a real threat to the social fabric and social stability.

Death penalty issues were not immune from the wider political atmosphere of fear and loathing (Party fears of the masses' loathing). Violent incidents that the media reported around this time were increasingly interpreted through the dialectical tension between society's 'elites' and 'non-elites'. This tension has played out in death penalty decision-making to some degree. Some violent incident cases involving defendants who are relatively well-off and who have been given a *sihuan* sentence have encouraged the perception that elites escape justice while the masses are punished severely. Unlike the fate afforded many of the masses who commit serious or extremely serious crimes, when some of society's more privileged escape execution, they are seen by the masses to have escaped justice by dint of their status in society.

The case of Yao Jiaxin is one such incident. Yao was a 21-year-old junior at the Xi'an Conservatory of Music. In October 2010, he accidentally hit a poor young mother with his car. He reasoned from the victim's obvious peasant-like features that she might try to take advantage of the situation. Fearing that she would report his licence plate number and demand compensation, he stabbed the young woman to death. Immediately, internet rumour spread that Yao had a powerful family background (which turned out to be false) and his unusual cold-bloodedness drew great attention to the case. During Yao's trial and appeal and in the days afterwards, it became one of the most talked about issues in the media. Internet users overwhelmingly voted in favour of a death sentence and the music student was executed in June 2011.[26] The victim's family was offered compensation in exchange for his life (that is, a *sihuan* sentence), but refused it, preferring to see Yao executed.

2011 and beyond

The fact that the national political mood of fear and loathing led to a deepening conservative mood in provincial courts is unlikely to surprise observers. Two provincial courts in particular became the stage for two different political battles, both concerned with public opinion on controversial death penalty cases. The first was played out in Yunnan provincial Higher Court, which had become the paragon of 'balancing leniency and severity' in the post-2007 period. The second was played out in Henan Higher Court, which had become a self-styled paragon for conservative judicial politics.

[26] 'Murderous Driver Yao Jiaxing Executed', *Xinhua News*, 6 June 2011, <http://www.china.org.cn/china/2011-06/07/content_22728216.htm> (accessed 18 June 2011).

China's drug capital Yunnan province has been the nation's most active executioner in the reform era. Since 2007, however, this provincial court has transmogrified into the nation's champion of 'balancing leniency and severity'. In drug-transporting cases, which make up the majority of capital cases in the province, the court system sets some limits on the leniency that a judiciary can grant. But there is still some interpretive space for the judiciary to exercise leniency. Because illicit drugs can cause extensive social harm, the Criminal Law allows courts to hand down the death penalty to drug mules who transport large amounts, even though most are peasants who make very little money from the criminal enterprise. The CL97 put the death penalty threshold for transporting or trafficking heroin at 50 grams, but drug provinces set their own internal benchmarks and Yunnan's is particularly high in recent years: 350 to 500 grams (and in some types of cases much higher).

This high threshold increased the level to which the judiciary could apply leniency through *sihuan* rather than automatically hand down immediate execution. After 2007, the Yunnan Higher Court increasingly portrayed itself as a leading advocate for the new 'kill fewer, kill cautiously' environment, with the media even calling the new lenient atmosphere in China the 'Yunnan mood' (*Yunnan qihou*云南气候). Some commentators saw Yunnan's 'kill fewer, kill cautiously' stance as overly liberal, putting the Yunnan Higher Court on the wrong side of the increasingly conservative line that Chinese politics took in 2011. In September 2011, a journalist Li Cheng analysed a groundbreaking case that involved homicide rather than drugs but even so pitted the relatively lenient Yunnan Court against the relatively severe force of mass opinion.[27]

The homicide in this case had escalated from a domestic-neighbourhood dispute, a case type that SPC president Xiao Yang had earmarked for leniency in his moves to instal a more permanent 'kill fewer' template of death penalty decision-making. Li Changkui, a Yunnan rural worker, murdered his former girlfriend and neighbour and her younger brother, in an act of violence, which the court recognized as having escalated from a personal dispute. The serious violence escalated when she struggled with Li. He struck her, knocking her unconscious, then raped and killed her and in the struggle he threw her three-year-old brother against a hard surface, killing him. The court of first instance sentenced him to immediate execution but, on appeal, the Yunnan Higher Court classified the crime as one that originated as a domestic-neighbourhood dispute. In this category it warranted lenient treatment since the offender immediately gave himself up to police and offered the family financial compensation. The Yunnan Higher Court downgraded the sentence to *sihuan* and even publicly praised its own decision as a 'landmark' case in death penalty decision-making.[28] A media frenzy ensued. Weeks later, the Higher Court made an about-turn and acquiesced to public outrage and political pressure. In

[27] Liu Cheng, 'Shaosha shensha, jintui weigu' ('"Kill Fewer, Kill Cautiously" Has Reached an Impasse') (2011) 35 *Xinshiji* (*New Century Magazine*) 3–4.

[28] Cheng (n 27).

an almost unprecedented twist, on 22 August 2011 the Yunnan Higher Court announced Li Changkui's resentencing to 'immediate execution'.

It is highly unusual for a higher court to use an obscure loophole in the law to withdraw its own commutation of sentence and have the case resentenced.[29] Most likely the SPC did not force the Yunnan Higher Court to change its own appeal sentence, but there is speculation that political pressure from other more powerful sources was at work here.[30] In any case, the SPC approved Li's execution in September 2011 at lightning speed. Some death penalty experts see the move by Yunnan provincial court to create this 'landmark' case as potentially counter-productive since it attracted such widespread public attention to the use of *sihuan* as a device for allowing vicious murderers to escape death.

The Yunnan Higher Court represents the lenient side of the post-2008 death penalty debate. The Henan Higher Court, or at least one of its judges, exemplifies the debate's severe arm. The severity of the position articulated by the President of this Court in August 2011 might have made even the greatest *Yanda* proponents blush. At a provincial criminal trial work conference he stated about cases that:[31]

> …where nothing but the execution of the offender will assuage the masses' anger courts must hand down a sentence of immediate execution… When deciding death penalty cases, lower courts must take into full consideration community attitudes and public opinion. We must grasp the correct interpretation of which kinds of crime circumstances can be used as mitigating conditions for lenient treatment in (potential) capital cases.

He urged all heinous crime cases with the following circumstances to be given the death penalty: where consequences of the crime are grave; the criminal motive is heinous; the criminal act is a revenge homicide; the offender intended to inflict serious injuries on, or to kill, an indiscriminate number of people; and the offender is unremorseful or refuses to admit his or her crime.[32] This list includes cases that escalated from domestic or neighbourhood disputes and even cases with legally recognized mitigating circumstances including surrender to police or performing a meritorious service.[33] All are the types of cases earmarked by the SPC in 1999 and again in the mid-2000s as those for which the most severe penalty should be *sihuan*. The Henan Court President then re-emphasized, through inversion of text from the 2010 SPC Opinion rallying for leniency: 'If these offenders deserve to be sentenced to death then courts must sentence them to death'. He proclaimed that courts must 'suit measures to local conditions (*yindi zhiyi* 因地制宜)' and 'to the local circumstances of a case (*yinshi zhiyi* 因事制宜)'.[34] His references to 'local'

[29] There is an SPC judicial interpretation that allows for this turnaround. See Art 312(2) of the 'Zuigao renmin fayuan guanyu zhixing "Zhonghua renmin gongheguo xingshi susongfa" rugan de jieshi' (SPC Judicial Interpretation on the Implementation of the PRC Criminal Procedure Law), issued in 1998. Cheng (n 27).

[30] Cheng (n 27).

[31] 'Henan gaoyuan cheng: busha bu zuyi pingmin fen, jianjue pan sixing' ('Henan Higher Court States: Not Killing (Offenders) Will Fail to Satisfy the People's Anger, We Must Therefore Resolutely Continue to Sentence Offenders to Death'), *Caixin wang* (*Caixin online*), 25 August 2011, <http://www.policy.caing.com/2011-08-25/100294793.html> (accessed 27 August 2011).

[32] 'Henan gaoyuan cheng' (n 31).

[33] 'Henan gaoyuan cheng' (n 31).

[34] 'Henan gaoyuan cheng' (n 31).

may imply that local courts should have a greater say in interpreting the national criminal justice policy of 'balancing leniency and severity', erring on the side of severity when the local community demands it. Clearly his keenness to draw in the general public as another, very powerful voice in the judiciary's ear, is motivated by recognition that the overall mood among the Chinese public favours relatively more severity than leniency, while national policy continues to pursue the balance its name declares.

5. Conclusion

This examination of *sihuan*'s role in China's national debate about leniency and severity in capital punishment and thus using *sihuan* in death penalty reform reveals the inextricable presence of politics at all levels, from the lowest level intermediate courts across cities nationwide to the pinnacles of power in the Standing Committee of the Politburo in Beijing. In any criminal justice system, institutionalizing a softer regime of punishment is inevitably fraught and complex. For China, the difficulty has been intensified during the decade of the 2000s, while a culture of heavy-penaltyism remnant from over 20 years of *Yanda*'s severe strike hard policy is still deeply embedded in the court system, the political system, and society at large. The conservative direction of national politics in the latter part of the decade has also helped fuel resistance to reform leanings that seek a more lenient 'kill fewer' policy position.

We have identified effectively two SPCs over the past decade: in the reformist years (pre-2008) and in the newly politically conservative years (from 2008). From the mid-2000s the SPC has brought *sihuan* to the centre of debates and has attempted to redefine the use of the death penalty in twenty-first-century China while seeking to establish a new, firmer balance between leniency and severity. Still at issue in ongoing debates in scholarly and judicial circles today are questions about what constitutes an 'extremely serious crime', how to most effectively improve both protection of defendants against 'overkill', and the prospects for ensuring procedural justice in the 330 or so intermediate courts across the country that try first-instance death penalty cases. These issues are unresolved despite the positive steps taken since 2007, as the dialectic between relative severity and leniency and pursuit of balance in practice and policy continues. In 2011, the SPC President Wang Shangjun was more conservative and certainly more closely aligned to the CPC than his legally minded predecessor Xiao Yang. Even so, China's highest court continues to demonstrate its commitment to reforming the court system away from severe punishment and legal impropriety towards an ideal balance for the nation at this stage of its national transition, albeit in extremely cautious steps.

The controversy over potentially excessive leniency in some recent *sihuan* cases is true to the contemporary political context marked by ever more conspicuous social contradictions between elites and non-elites. In China today, the Party sees the masses themselves as the main threat to social stability. Mass protests and petitioning are seen as an antagonist reaction to abuses of power at local level, abuses

so widespread that central authorities are powerless to control them. Placating the masses through mass-line posturing and 'get tough' responses to homicides that attract widespread indignation are part of the overall game of national politicking in China today.

The issue for judges in capital cases about how to interpret the difference between 'serious crime' and 'extremely serious crime' and how to determine which offenders deserve 'immediate execution' is essentially political. It is not just that criminal justice policy links directly to the political context of maintaining social stability but that policy itself links directly to decision-making for sentencing capital cases in the courtroom; courts still draw directly from policy and from directives from the Party passed through the SPC to interpret the still indeterminate criminal law. This political context has grounded death penalty decision-making firmly within the punishment rationale of state security and development. In the next few years, it is unlikely that the balance between leniency and severity will tip further towards leniency, especially in controversial homicide cases. Concerns about other 'imbalances'—in the distribution of wealth, opportunity, and power between elites and non-elites, urban and rural, 'haves' and 'have nots'—and the accompanying fears of social instability that they inspire within the Party-state will ensure that in the short term at least a highly cautious approach to the death penalty will be maintained by the key policy players on the politico-legal landscape.

Victory of the SPC reformers in 2007 was in redefining the scope of death penalty decision-making, first through law, with the return of exclusive approval and review authority over death sentences to the SPC, and second through court practice, by replacing immediate execution with *sihuan* as the preferred default setting for sentencing the majority of offenders convicted of homicide cases where mitigating circumstances apply. These advances give cause for some hope that further positive change is possible even in this tightly controlled political environment, so that defendants receive fair trial and sentencing in a court system mindful of legal propriety. Central Party authorities are unlikely to encourage sweeping reform in the politically volatile environment at this stage of China's national transition. Nor are they likely to shift their understanding that serious crime is a threat to the nation's stability and thus to the Party's own place at the national helm. We can, therefore, be sure that policy and politics will continue to firmly shape legal practice as the place of capital punishment in China's national reform continues to evolve.

13

Death Penalty in the 'Rarest of Rare' Cases: A Critique of Judicial Choice-making

*Surya Deva**

1. Introduction

In 1980, the Indian Supreme Court in *Bachan Singh v State of Punjab* interpreted the 'special reasons' requirement[1] for the death penalty to mean that the death penalty should be awarded only in 'the rarest of rare cases when the alternative option is unquestionably foreclosed'.[2] This judicial interpretation, which might have operated as a barrier on the number of executions in India, may suggest that the Supreme Court has been progressive on the issues of death penalty. But has this really been the case? This chapter seeks to verify this assumption by critically reviewing all decisions delivered by the Supreme Court between 1 January 2000 and 10 October 2011. The main aim of this study is to investigate how the Court exercised its discretion and what reasons it advanced to impose (or not impose) the death penalty.

A review of 86 decisions rendered during this period (summarized in the Appendix and identified by their case number at relevant places in this chapter) reveals that the Supreme Court has neither been consistent in applying its own 'rarest of rare' yardstick nor in offering normative justifications to sustain the death penalty in these cases. In a few cases, it has also imposed the death penalty by reversing acquittal by the High Court, or substituted the death penalty for life imprisonment.[3] Moreover, the Court has advocated the idea of capital punishment

* I would like to thank Professor Roger Hood for encouraging me to explore this area, to Mr Shailendra Singh for sending me an important article at a very short notice, and to Ms Xin Xin Silvia for providing assistance in editing the Appendix.

[1] Section 354(3) of the Code of Criminal Procedure 1973 (CrPC) provides: 'When the conviction is for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.'

[2] AIR 1980 SC 898, para 207; 1983 SCR (1) 145.

[3] See eg *Rajasthan v Ram* (2003) 8 SCC 224 (case 19); *Simon v Karnataka* (2004) 2 SCC 694 (case 25); *UP v Satish* (2005) 3 SCC 114 (case 28); *Singh v Sonia* (2007) 3 SCC 1 (case 38); *UP v Sattan*, Crim App Nos 314–15 of 2001 (27 February 2009) (case 47); and *Shinde v Maharashtra*, Crim App Nos 881–2 of 2009 (30 April 2009) (case 48).

in certain situations[4]—thus acting totally contrary to the common perception of the apex court being a progressive court performing the role of a vigilant gatekeeper to stem the flow of executions.

The most problematic part of the Supreme Court jurisprudence, however, is the manifest arbitrariness in its exercise of discretion to decide the question of life or death. I argue that this arbitrary exercise of sentencing power by the Supreme Court, which has not been curbed much by the *Bachan Singh* guidelines, violates the equality guarantee of the Indian Constitution,[5] because even courts can violate human rights.[6] Although 'judiciary' is not explicitly included in the definition of 'state' under Article 12 of the Indian Constitution,[7] it should be interpreted to be included implicitly, especially in view of how the Indian Supreme Court has indulged in the task of formulating policies-cum-regulations in a wide range of areas and monitoring their implementation.[8] Such an interpretation is also consistent with evolving developments in this area. Section 6 of the UK Human Rights Act, for example, provides that it is unlawful for courts or tribunals, as a 'public authority', to act in a way which is incompatible with the rights enumerated in the European Convention on Human Rights. Similarly, section 8(1) of the South African Constitution of 1996 states that the 'Bill of Rights . . . binds the legislature, the executive, the judiciary and all organs of state'.

In view of these findings, it is suggested that the principle of 'rarest of rare' cases has outlived its utility and that the Indian Supreme Court might not have been as progressive as it has been commonly believed. At best, some judges of the Court—rather than the whole institution—have been progressive on the issue of capital punishment. It is, therefore, desirable for the legislature to intervene and remove the death penalty from the statute book, at least for the offence of murder and other 'ordinary' crimes which do not threaten the national unity and integrity. As long as capital punishment remains an option, courts in India (or elsewhere) are likely to continue awarding death sentences in an arbitrary manner.

Let me outline at this stage the theoretical and methodological paradigms used in this chapter. The question of death penalty essentially relates to the sentencing

[4] In *Dass v NCT of Delhi*, Crim App No 1117 of 2011 (9 May 2011) (case 68), the Court ruled that 'All persons who are planning to perpetrate "honour" killings should know that the gallows await them'. Regarding fake encounters, the Supreme Court in *Kadam v Gupta*, Crim App No 1174–8 of 2011 (13 May 2011) (case 67) observed: 'We are of the view that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake "encounters" are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law'.

[5] Article 14 of the Constitution—which provides that the 'State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'—has been interpreted by the Supreme Court to strike at arbitrariness in state action. See Mahendra P Singh, *Shukla's Constitution of India*, 11th edn (Lucknow, Eastern Book Co 2008) 74–81.

[6] See the observations made by the Supreme Court in *Chauhan v Das*, Rev Petition (c) No 1378 of 2009 (19 November 2010) (case 61) (paras 57–62).

[7] Singh (n 5) 32–4.

[8] See Surya Deva, 'Constitutional Courts as Positive Legislators: The Indian Experience', in Allan R Brewer-Carias (ed), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (New York, Cambridge University Press 2011) 587.

policy and practice adopted by courts. Sentencing generally involves an exercise of discretion on the part of judges—something that is considered vital to administer justice in view of the unique facts and circumstances of each case. However, if this discretion is exercised in an inconsistent or arbitrary manner or in disregard of guidelines that seek to regulate discretion, it starts to undermine justice, because flexibility completely overtakes certainty and predictability. The nature of judicial discretion between the death penalty and life imprisonment (or any lesser sentence) is very different from discretion to award varying levels of imprisonment or fine. The former leads to a difference between life and death, while the latter only affects certain living conditions of life.

The decisions of the Supreme Court reviewed in this chapter were downloaded from the official website of the Court.[9] Two phrases—'rarest of rare' and 'Bachan Singh'—were used to scan all decisions delivered between 1 January 2000 and 10 October 2011 and then out of this search list, all decisions concerning the death penalty were downloaded and analysed. A brief summary of the relevant information (eg offence committed, bench composition and decision reached by different courts) of the analysed cases is provided in the Appendix. For the sake of simplicity, only the key offences that led to the death penalty or life imprisonment have been mentioned in the table. Similarly, in cases involving multiple offenders, only those accused who were convicted and sentenced to death at any stage are taken into account. While it is possible that not all decisions delivered by the Supreme Court during the last decade are available on its website and thus some decisions may not have been analysed here, this should not affect the validity of the conclusions drawn here, because quite a long time span (more than ten years) has been used and the sample size is quite large (86 decisions).

Since there have been a few previous studies that have examined court decisions on the death penalty, it will be pertinent to put this chapter in the context of past research. In the 1970s, Professor Blackshield analysed 70 Supreme Court decisions concerning the death penalty delivered between April 1972 and March 1976. He concluded that reviewed decisions revealed 'confusions, contradictions and aberrations' and that in the cases reaching the Court, the reasons for confirmation or commutation of death sentence 'defy coherent analysis'.[10] A more recent and quite comprehensive analysis of death penalty decisions rendered by the Supreme Court can be found in Bikramjeet Batra's report for Amnesty International entitled *Lethal Lottery*.[11] This study examined over 700 reported decisions delivered by the Court between 1950 and 2006[12] and concluded that whether an accused got sentenced to death or not was an arbitrary decision depending on a number of unpredictable variables.[13] Another unpublished study reviewed the sentencing

[9] Supreme Court of India, 'The Judgment Information System', <http://judis.nic.in/supremecourt/chejudis.asp> (accessed 24 March 2013).

[10] Anthony R Blackshield, 'Capital Punishment in India' (1979) 21 *Journal of the Indian Law Institute* 137, 157, 162.

[11] Amnesty International India, *Lethal Lottery—The Death Penalty in India: A Study of Supreme Court Judgments in Death Penalty Cases 1950–2006* (May 2008).

[12] Amnesty International India (n 11), 39.

[13] Amnesty International India (n 11), 241.

data/practice of trial courts in India and pointed out that they tended to be quite generous in awarding the death penalty and that they often did not pay adequate regard to the 'rarest of rare' guidelines issued by the Supreme Court.[14]

This chapter builds on these prior studies and extends the analysis in several ways. First, it reviews decisions rendered subsequent to 2006, thus offering an updated analysis. More importantly, this extended review takes cognizance of several important decisions concerning terrorist attacks directed not at political leaders but national institutions (like the parliament) or places of national interest (such as the Red Fort and heritage hotels in Mumbai). Such decisions in turn raise the question whether courts are appropriate institutions to rule on policy matters underpinning those decisions. Secondly, this chapter highlights that the Supreme Court has not only been inconsistent in applying the 'rarest of rare' guidelines but has also mechanically cited general passages from *Bachan Singh* and *Machhi Singh*,[15] without drawing a balance-sheet of aggravating and mitigating circumstances or conducting any case-specific analysis. The latter situation shows a clear non-application of mind, a ground on which the Court routinely quashes decisions taken by the executive. Thirdly, in this chapter I also offer a feminist critique of the Supreme Court decisions concerning rape and murder (especially involving girls of tender age) and argue that the Court has been insensitive to violent sexual crimes against helpless victims. If the death penalty is justified at all for any crime, rape-cum-murder should fit that requirement from all angles—retribution, deterrence, protection, and punitive. Feminists oppose the death penalty generally and for rape specifically on a number of grounds.[16] I do not contest that position here. Rather I argue that if courts do not find rape-cum-murder a sufficiently grave crime to justify inflicting the death penalty, they should not sentence anybody to death, say, for committing murders—in whatsoever cruel way and irrespective of the number of people killed.

2. From 'Special Reasons' to the 'Rarest of Rare' Cases

This part describes briefly how the Supreme Court ended up propounding the 'rarest of rare' principle in *Bachan Singh*. The Indian Penal Code (IPC) of 1860, a

[14] Kartikeya Tripathi, 'India's Death Penalty System: What the Supreme Court Says and Trial Courts Do' (unpublished dissertation, MSc in Criminology and Criminal Justice) (University of Oxford, 2011).

[15] *Machhi Singh v State of Punjab* 1983 SCR (3) 413; 1983 AIR 957.

[16] See eg Amy E Pope, 'A Feminist Look at Death Penalty' (2002) 65 *Law & Contemporary Problems* 257; Corey Rayburn, 'Better Dead than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes' (2004) 78 *St John's Law Review* 1119; Laura Huey, 'The Abolition of Capital Punishment as a Feminist Issue' (2004) 78 *Feminist Review* 175; Phyllis L Crocker, 'Is the Death Penalty Good for Women?' (2001) 4 *Buffalo Criminal Law Review* 917; Silvia Federici, 'Why Feminists Should Oppose Capital Punishment', <http://www.ocf.berkeley.edu/~marto/adpp/federici.htm> (accessed 12 October 2011).

colonial piece of legislation that has generally withstood the test of time, prescribes the death penalty for certain offences which are either serious or seek to protect vulnerable people.[17] In addition to the IPC, some special statutes also provide for the death penalty.[18]

In line with the then prevailing punishment ideology, the death penalty was considered a normal sentence until the mid-1950s and judges were required to give reasons if the death penalty was not awarded for a crime for which capital punishment was a stipulated option.[19] Two amendments of the Code of Criminal Procedure (CrPC) tried to change this position. The first amendment, introduced in 1955, was in the form of deleting section 367(5) of the CrPC of 1898, which had required that reasons should be given for not awarding the death penalty.[20] The second and more far-reaching amendment was the introduction of section 354(3) under the new CrPC of 1973. Section 354(3) provides:[21]

> When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

This amendment, which introduced the 'special reason' requirement, sought to make capital punishment an exception rather than a rule for offences for which the death penalty was one of the stipulated punishments.[22] It was this special reason requirement that was used by the Supreme Court in *Bachan Singh* to lay down certain broad parameters within which the death penalty should be awarded only in the 'rarest of rare' cases.[23] Speaking for the majority, Justice Sarkaria observed: 'A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed'.[24] Courts should pay regard to all mitigating and aggravating circumstances related to both 'crime' and 'criminal'.[25]

[17] See eg section 121 (waging, or attempting to wage war, or abetting waging of war, against the Government of India); section 132 (abetment of mutiny); section 302 (murder); section 364A (kidnapping for ransom); and section 396 (dacoity with murder).

[18] See eg the Explosive Substances Act 1908; the Arms Act 1959; the Defence of India Act 1971; the Narcotic Drugs and Psychotropic Substances Act 1985; the Commission of Sati (Prevention) Act 1987; and the Prevention of Terrorism Act 2002.

[19] Amnesty International India (n 11), 50.

[20] This provision reads: 'If the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed'.

[21] The object and reason of making this change was stated by the Joint Committee of Parliament to be the following: 'A sentence of death is the extreme penalty of law and it is but fair that when a Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence'. As quoted in *Bachan Singh* (n 2), para 151.

[22] S Muralidhar, 'Hang Them Now, Hang Them Not: India's Travails with the Death Penalty', *IELRC Paper*, 2, <http://www.ielrc.org/content/a9803.pdf> (accessed 22 October 2011).

[23] For an excellent analysis of this evolution, see Amnesty International India (n 11), 61–74.

[24] *Bachan Singh* (n 2), para 207.

[25] *Bachan Singh* (n 2), para 199.

Without being exhaustive or fettering its judicial discretion, the Supreme Court endorsed the following to be aggravating circumstances:[26]

A Court may, however, in the following cases impose the penalty of death in its discretion:
(a) if the murder has been committed after previous planning and involves extreme brutality; or
(b) if the murder involves exceptional depravity; or
(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—
  (i) while such member or public servant was on duty; or
  (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
(d) if the murder is of a person who had acted in the lawful discharge of his duty under section 43 of the CrPC 1973, or who had rendered assistance to a magistrate or a police officer demanding his aid or requiring his assistance under section 37 and section 129 of the said Code.

The Court similarly gave its endorsement to certain mitigating circumstances.[27]

In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:
(1) That the offence was committed under the influence of extreme mental or emotional disturbance.
(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
(6) That the accused acted under the duress or domination of another person.
(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.[28]

It is worth recalling that although the Court had rejected the strict 'categorization' approach in *Bachan Singh*,[29] various categories of what constitutes 'rarest of rare' have been proposed in *Machhi Singh* and subsequent cases. In *Machhi Singh*, the Supreme Court observed that in the rarest of rare cases when the 'collective

[26] *Bachan Singh* (n 2), para 200.
[27] *Bachan Singh* (n 2), para 204.
[28] *Bachan Singh* (n 2), para 204.
[29] '[T]his Court should not venture to formulate rigid standards in an area in which the Legislature so warily treads. Only broad guidelines consistent with the policy indicated by the Legislature in Section 354(3) can be laid down', *Bachan Singh* (n 2), para 178. See also paras 170–5.

conscience' of the community is shocked, it 'will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty'.[30] The court then went on to outline some examples when the community may entrain such a sentiment:[31]

I Manner of commission of murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house.
(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.
(iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II Motive for commission of murder

When the murder is committed for a motive which evince[s] total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward; (b) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or *vis-à-vis* whom the murderer is in a dominating position or in a position of trust; (c) a murder is committed in the course for betrayal of the motherland.

III Anti-social or socially abhorrent nature of the crime

(a) When murder of a Scheduled Caste or minority community etc, is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance.
(b) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV Magnitude of crime

When the crime is enormous in proportion. For instance, when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V Personality of victim of murder

When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder; (b) a helpless woman or a person rendered helpless by old age or infirmity; (c) when the victim is a person *vis-à-vis* whom the murderer is in a position of domination or trust; (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

[30] *Machhi Singh* (n 15), para 431. [31] *Machhi Singh* (n 15), paras 431–2.

Several observations can be made about the above judicial formulations in *Bachan Singh* and *Machhi Singh*. First, although murder is not the only crime for which the IPC prescribes the death penalty, the guidelines are very much murder-focused. Secondly, these guidelines certainly lay down a sentencing policy, a domain of the other two branches of government. While the Court was more conscious of this 'constitutional trespass' in *Bachan Singh*, no similar cautionary sentiment was visible in *Machhi Singh*. Thirdly, considering that these categories are not fixed, there is always a possibility of adding new situations in which the death penalty is justified. This again goes against the assumption that the Supreme Court has been all for controlling the number of executions. Fourthly, while the above 'rarest of rare' guidelines in *Bachan Singh* and *Machhi Singh* have acquired a ceremonial status, a review of the Supreme Court decisions indicates that judges do not always pay close attention to the application of these guidelines.

A final point that can be made is that the categories of 'rarest of rare' cases laid down in *Machhi Singh* were in the context of Indian society of the early 1980s and they might not offer adequate or accurate guidance to deal with criminal activities of the current time. A three-judge bench of the Supreme Court in *Swamy Sharaddananda v State of Karnataka* rightly pointed this out:[32]

> In 1983 the country was relatively free from organised and professional crime. Abduction for Ransom and Gang Rape and murders committed in course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code. At the time of *Machhi Singh*, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and 'whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today.

3. Judicial Choice-making: A Critique

Out of 86 cases reviewed in this chapter, the Supreme Court affirmed the death penalty in 32 cases (37.2 per cent). In addition to these cases, the Court considered five cases (5.8 per cent) fit to inflict the death penalty, although this extreme punishment could not be imposed for some reason, eg no charge was made for murder, which would have entailed capital punishment. This means that of all the reviewed capital punishment cases that reached the Supreme Court in the last 11 years, the Court was supportive of the death penalty in 43 per cent of the cases. This might come as a surprise for a court perceived to be progressive on the issue of capital punishment, because the Supreme Court reversed the High Court's death penalty

[32] AIR 2008 SC 3040 (case 45), para 28.

decisions and awarded life imprisonment only in 31.4 per cent of cases analysed here (27 cases).[33]

In some cases, the Supreme Court expressed its displeasure with the High Court for having reduced a death sentence imposed by the trial court to life imprisonment. In *Simon v State of Karnataka*,[34] a case in which 22 people died in a land mine blast directed at the police force trying to catch Veerappan (a notorious smuggler/criminal), the Supreme Court converted the sentence of life imprisonment imposed on all four accused into the death penalty, as they deserved no sympathy for the pre-meditated planned attack on the police party. The Court observed:[35]

> It is evident that the crime was diabolically planned. The appellants are [a] threat and grave danger to society at large. They must have anticipated that their activity would result in elimination of [a] large number of lives. As a result of criminal activities, the normal life of those living in the area has been totally shattered. It would be [a] mockery of justice if extreme punishment is not imposed. Thus, having given anxious consideration to all the circumstances aggravating and mitigating, in our view, there can hardly be a more appropriate case than the present one to award maximum sentence.

Similarly, in a more recent case, the Supreme Court asked why the life sentence given to a man should not be enhanced to the death penalty for the 'ghastly and brutal' murder of his wife and four children.[36] The Court reasoned: 'We cannot imagine a more ghastly act and we are, prima facie, of the opinion that this falls in the category of rarest of rare cases in which death sentence should have been given'.[37] The Supreme Court did not find the High Court's reasoning of the accused being in 'financial difficulty' to be a mitigating factor to justify leniency.

On a positive note, one may refer to a relatively new trend of finding a middle ground between the death penalty and life imprisonment in some cases. Where the Supreme Court did not wish to impose the death penalty but felt that life imprisonment (which may result in release from prison in 14 years) might not do justice or be an adequate sentence, it has awarded life imprisonment for the whole natural life or specified a minimum period to be spent in jail, eg 25 years or more.[38]

However, apart from this positive development, the Supreme Court has generally exercised its discretion in a questionable way and/or advanced unsound reasons (if any) to support its conclusions. Some specific aspects related to arbitrariness, non-application of mind, lack of adequate reasoning or analysis, and gender insensitivity are dealt with below. All these aspects show that the Supreme Court has

[33] This number does not include those cases where the Supreme Court merely upheld the life imprisonment order of the High Court.

[34] *Simon* (n 3). [35] *Simon* (n 3).

[36] 'Supreme Court Wants Death Penalty for Man Who Killed Wife and Children', (*NDTV*, 4 September 2011), <http://www.ndtv.com/article/india/supreme-court-wants-death-penalty-for-man-who-killed-wife-and-children-131174> (accessed March 2013).

[37] See 'Supreme Court Wants Death Penalty for Man Who Killed Wife and Children'.

[38] *Sharaddananda* (n 32); *Ramraj v Chhattisgarh*, (2010) 1 SCC 573 (case 54); *Mulla v UP* (2010) 3 SCC 508 (case 56); *Rathod v Gujarat*, Crim App No 575 of 2007 (24 January 2011) (case 62); *Mahto v Bihar*, Crim App No 211 of 2009 (26 July 2011) (case 69); *Ghosh v West Bengal* (2009) 15 SCC 551 (case 82); and *Muniappan v Tamil Nadu*, Crim App Nos 127–30 of 2008 and Nos 1632–4 of 2010 (30 August 2010) (case 84).

been acting in breach of the fundamental right to equality enshrined in Article 14 of the Constitution.

Contentious reasons for imposing the death penalty

The Supreme Court has not invoked consistent or sound normative reasoning to justify the death penalty in what it considered to be the 'rarest of rare' cases. While dealing with a case of honour killing, the Court relied on deterrence as a justification. It observed:[39]

> In our opinion, honour killings, *for whatever reason*, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. *This is necessary as a deterrent for such outrageous, uncivilised behaviour. All persons who are planning to perpetrate 'honour' killings should know that the gallows await them*.

The Court employed the same deterrence argument to propose death sentence for police personnel involved in extra-judicial killings (fake encounters).[40] However, it seems that the Supreme Court did not find deterrence a good enough reason to sustain the death penalty for a terrorist who attacked the Red Fort and killed three army personnel. Rather, the Court relied, among other considerations, on the public opinion argument to justify the death sentence. It observed: 'We feel that this is a case where the conscience of the community would get shocked and it would definitely expect the death penalty for Ashfaq'.[41] In the *Parliament Attack* case too, the Supreme Court invoked, among other justifications, the collective conscience of society in support of inflicting the death penalty:

> In the instant case, there can be no doubt that the most appropriate punishment is death sentence. . . . The present case, which has *no parallel in the history of Indian Republic*, presents us in crystal clear terms, a spectacle of rarest of rare cases. The very idea of attacking and overpowering a sovereign democratic institution by using powerful arms and explosives and imperiling the safety of a multitude of peoples' representatives, constitutional functionaries and officials of Government of India and engaging into a combat with security forces is *a terrorist act of gravest severity*. It is a classic example of rarest of rare cases.
>
> . . . *The incident*, which resulted in heavy casualties, *had shaken the entire nation and the collective conscience of the society will only be satisfied if the capital punishment is awarded to the offender*. The *challenge to the unity, integrity and sovereignty of India* by these acts of terrorists and conspirators, can only be compensated by giving the maximum punishment to the person who is proved to be the conspirator in this treacherous act.[42]

[39] *Dass* (n 4), para 8 (emphasis added).

[40] 'Cops Behind Fake Encounters Should be Hanged, Says SC', *Times of India*, 9 August 2011, <http://articles.timesofindia.indiatimes.com/2011-08-09/india/29864790_1_fake-encounters-death-penalty-death-sentence> (accessed 24 March 2013).

[41] 'Supreme Court Upholds Death for Red Fort Attacker', *Times of India*, 11 August 2011, <http://articles.timesofindia.indiatimes.com/2011-08-11/india/29876090_1_farooq-ahmed-qasid-ashfaq-death-penalty> (accessed 24 March 2013).

[42] *NCT of Delhi v Guru*, Crim App Nos 373–8 of 2004 (24 August 2005) (case 31) (emphasis added). Afzal Guru, the accused in this case, was executed on 9 February 2013 in secrecy and even without giving adequate notice to his family members about the execution.

The Supreme Court could have given a number of reasons to bring cases within the 'rarest of rare' category, but one wonders if it was appropriate to take into account public opinion or societal expectations for upholding the death penalty. Courts can convict and sentence people to match public opinion or public sentiments only at the risk of losing their independence. This may also result in unfairness because the general public is unlikely to get involved in cases of all convicts to the same extent.

Dictating to the lower courts

If a public authority acts under the dictation of superior authorities, such decisions can be quashed for abdicating one's discretionary powers and non-application of mind.[43] Even if we disregard that a precise categorization of cases may amount to dictation to lower courts, there is at least one instance where the Supreme Court expressly requested all courts to take cognizance of its position. The Supreme Court directed all trial courts and High Courts to treat 'honour killings' as rarest of rare cases and award the death sentence.[44] Leaving aside the merits of the death penalty for honour killings, it is clear that such a recommendation contradicts the judicial claim that what amounts to 'rarest of rare' is a matter of fact to be decided in each and every case after drawing a balance sheet of all aggravating and mitigating factors. Such a direction also tramples another principle of fundamental importance: judicial independence from internal pressures. It is arguable that by acting under the dictation of the Supreme Court, lower courts would be surrendering their autonomy and independence on the issue of awarding sentence in cases involving honour killings. If the death penalty is to be a forgone conclusion in such cases, then unique facts of a given case and arguments of the opposing counsels would become meaningless. In fact, this would convert it into a mandatory sentence for that crime and make redundant the right of the accused to be given an opportunity to address the court on the question of sentence.[45]

Lack of adequate reasoning and/or analysis

The review of decisions indicates a sharp contrast in terms of the extent of analysis and reasoning. While the Supreme Court dealt with the issue of awarding (or not awarding) the death penalty in detail in many cases, in some cases this critical aspect was given a passing treatment, eg the Court merely stated that the

[43] See HWR Wade and CF Forsyth, *Administrative Law* 9th edn (Oxford, Oxford University Press 2004) 322–4.

[44] The Supreme Court in *Dass* (n 4) directed that a copy of the said judgment be circulated to all judges of the High Courts and Sessions Courts. See also J Venkatesan, 'Treat "Honour" Killings as Rarest of Rare Cases: Court', *The Hindu*, 9 May 2011, <http://www.thehindu.com/news/national/article2003854.ece> (accessed 24 March 2013).

[45] Section 235(2) of the CrPC provides: 'If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provision of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law'.

given situation is not 'rarest of rare' in the facts and circumstances of the case.[46] This situation is unsatisfactory, especially when specific opposing arguments were made on the desirability of awarding the death penalty. Equally unsatisfactory are those judgments where the Supreme Court ruled that the case is 'rarest of rare' in view of the guidelines laid down in *Bachan Singh* and *Machhi Singh*, but without offering any specific reasons.[47] Rather than paying lip service to these guidelines and quoting the same *general* passages in a routine manner, the Court should offer *specific contextual* application of the guidelines to the unique facts of a given case.

It is in fact quite worrying that the apex court judges are reusing (almost verbatim) multiple paragraphs from previous judgments—which at a general level raises questions about the quality of judgments.[48] Let me offer one concrete example. Judgments in case 44 and case 46 were delivered by a bench comprising Justice Pasayat and Justice Sharma. Although the two judgments concerned quite similar factual matrix (rape and murder of a girl of tender age) and were delivered within one year of each other, it is inexcusable to import literally almost the whole judgment of case 44 into the judgment of case 46.[49] The judgments delivered by the same bench in case numbers 47 and 48—involving a totally different factual matrix (murder of multiple members of a family)—again borrow generously from the judgment in case 44.[50] This practice raises serious concerns as to the 'casual' attitude of the Supreme Court judges in considering the serious question of life and death.

Ideally, the court at all levels should list all aggravating-mitigating factors and then reach a conclusion as to the appropriate sentence, rather than merely quoting past precedents or authorities. Case numbers 30, 43, and 50 are good illustrations of this rare approach. While the Supreme Court in case 32 rightly reminded the High Court to undertake the exercise of drawing a balance sheet of all aggravating and mitigating factors, a review of decisions in the last decade reveals that the Supreme Court itself has not followed this practice consistently.

Inconsistency and personal subjectivity *vis-à-vis* the *Bachan Singh* guidelines

The Court has not been consistent in applying its own 'rarest of rare' yardstick.[51] Although this question has to be decided on the facts of each case, it is difficult to

[46] See eg *Farooq v Kerala* (2002) 4 SCC 697 (case 15); *Babu v Babu* (2003) 7 SCC 37 (case 20); *Sagar v Dharambir*, Crim App Nos 242–3 of 2003 (29 October 2003) (case 22); and *Prithvi v Raj* (2004) 2 SCR 530 (case 27).

[47] See eg *Satish* (n 3); and *Shivu v RG High Court of Karnataka* (2007) 4 SCC 713 (case 39).

[48] Justice Ruma Pal, a former judge of the Supreme Court, mentioned 'plagiarism and prolixity' as one of the seven deadly sins of judges. Ruma Pal, 'The Seven Deadly Sins of Judges', *The Indian Express*, 12 November 2011, 13.

[49] Compare paras 10–18 of *Bantu v State of UP* (2008) 11 SCC 113 (case 44) with paras 15–22 of *Shivaji v State of Maharashtra* (2008) 13 SCR 81 (case 46); paras 22–36 of *Bantu* with paras 25–39 of *Shivaji*. There is a striking similarity even regarding concluding/operating parts of the two judgments (ie paras 38–40 of *Bantu* and paras 41–43 of *Shivaji*). Paragraphs 22–36 of *Bantu* are again reproduced as paras 23–37 of *Rathod* (n 38), in the judgment delivered by Justice Pasayat.

[50] Compare paras 22–37 of *Bantu* (n 49), with paras 11–26 of *Sattan* (n 3) and paras 14–29 of *Shinde* (n 3).

[51] See N Rahul, '"Rarest of Rare" Criterion Questioned', *The Hindu*, 8 February 2011, <http://www.thehindu.com/news/national/article1165689.ece> (accessed 24 March 2013).

reconcile precedents even if the bench composition was not very different. In case 4, the Supreme Court did not consider the accused—who had raped and killed an 18-month-old girl—to be a danger to the community and, therefore, converted his sentence from the death penalty to life imprisonment. However, this 'humanist' approach to sentencing was not visible in case 2 or 3, even though Justice KT Thomas was on the bench in all these cases.

One possible explanation of this disparity might be that the number of deceased was higher (four to seven) in case numbers 2 and 3. Nevertheless, the abduction and murder of three children in case 1 did not warrant the death penalty, even though the Supreme Court had considered the case to be 'an extremely rare' one. In case 6 too, life imprisonment was awarded despite the murder of five people. So, one may say that the number of deceased is not always a clinching factor.[52] This is arguably consistent with the *Bachan Singh* test, which requires courts to consider all relevant aggravating and mitigating factors by drawing a balance sheet. The difficulty, however, is that there is no normative basis to judge the relative importance of given factors and, consequently, judges end up giving undue weight to any one factor over other factors. Since different judges may attach different weight to any given variable,[53] the imposition of the death penalty then becomes more a matter of chance than holistic deduction flowing from relevant circumstances. A certain degree of flexibility and discretion in awarding an appropriate sentence is a desirable attribute to doing justice. However, this flexibility also proves counter-productive if the discretion is not exercised consistently.

In case 35, the Supreme Court itself admitted that 'different criteria have been adopted by different benches of this Court, although the offences are similar in nature'.[54] Similarly, in case 45, the Court again conceded that the 'truth of the matter is that the question of the death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench'.[55] Let me offer two concrete examples of how personal views/preferences of judges play a crucial role in determining if the accused would get the death penalty or not. First, out of 86 cases reviewed in this chapter, Justice SB Sinha was part of the bench in 10 cases and he did not award the death penalty even in a single case, though these cases related to a range of crimes—from attempted rape and murder

[52] In *Prajeet Kumar Singh v State of Bihar* (2008) 4 SCC 434 (case 80), life imprisonment was awarded even though 21 people were killed. Even in *Krishna Mochi v State of Bihar* (2002) 6 SCC 81 (case 14), which involved the murder of 35 people, the Supreme Court relied on other considerations to justify the death penalty, eg all the deceased were from a particular community and that the killing was done in an extremely diabolic, revolting, and dastardly manner.

[53] See, for instance, *Mayakaur Baldevsingh Sardar v State of Maharashtra* (2007) 10 SCR 752 (case 43), where the trial court, three High Court judges, and the Supreme Court emphasized different factors in deciding whether to award the death penalty or life imprisonment.

[54] See also Manoj Mitra, '"Rarest of Rare" Doctrine Subjective, Arbitrary', *Times of India*, 7 October 2010, <http://articles.timesofindia.indiatimes.com/2010-10-07/india/28266452_1_priyadarshini-mattoo-case-death-penalty-santosh-kumar-singh> (accessed 24 March 2013).

[55] The research conducted by Blackshield also shows that different judges have different attitudes towards the death penalty. Blackshield (n 10) 166.

of a girl to kidnapping and murder, multiple murders of family members, rape and murder of a girl of tender age, and murder of one's wife for greed or dowry demands. Except in case 40, he has also been able to persuade his fellow judge to support life imprisonment rather than the death penalty. On the other hand, Justice Pasayat was part of the bench in 15 cases. Out of these 15, he awarded the death penalty in 12 cases—including in one case where the death penalty was awarded after reversing the acquittal order of the High Court (ie case 19). The death penalty was not imposed only in the following three instances: case 9 (life imprisonment because it was an impulsive crime), case 22 (life imprisonment because the High Court rightly took into account the relevant mitigating circumstances), and case 32 (because this case was remitted back to the High Court for its failure to draw a balance sheet of aggravating and mitigating factors). The contrast between the attitude of Justice Sinha and Justice Pasayat towards the death penalty is thus apparent.

Secondly, case 49 illustrates how two learned judges of the Supreme Court may analyse the given factual matrix (rape and murder of a nine-year-old girl), available evidence and crime/criminal characteristics very differently and come to opposite conclusions. Justice Pasayat found that the circumstances highlighted both by the trial court and the High Court 'unerringly point at the accused to be author of the crime in the present case' and that those circumstances 'establish the depraved acts of the accused and they call for only one sentence i.e. death sentence'.[56] Justice Ganguly, however, found gaps in the same set of circumstantial evidence and also noticed serious flaws in the sentencing procedure adopted by the trial court (the accused was not offered an adequate and effective hearing before sentencing), which remained unaddressed at the High Court level. In view of this, he sentenced the accused to life imprisonment. Justice Ganguly reasoned 'that "cry for justice" is not answered by frequent awarding of death sentence on a purported faith on "deterrence creed" ' and that before 'choosing the option for death sentence, the Court must consciously eschew its tendency of "retributive ruthlessness" '.[57] He went on to say that the 'Court cannot afford to prioritize the sentiments of outrage about the nature of the crimes committed over the requirement to carefully consider whether the person committing the crime is a threat to the society'.[58] When this case came before a three-judge bench (case 62), it noted that the line between awarding the death penalty and life imprisonment is 'very thin' and that a case may be decided either way, including because of the 'subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence'.[59]

The inconsistency and subjectivity in sentencing illustrated above—a difference between life and death—is tantamount to judicial arbitrariness[60] and is

[56] *Rathod* (n 38), paras 4 and 39. [57] *Rathod* (n 38), para 92. [58] *Rathod* (n 38), para 94.

[59] The Court opined: 'We notice that there is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out'.

[60] See the dissenting opinion of Justice Bhagwati in *Bachan Singh v State of Punjab* (1982) 3 SCC 24 and the opinion of Justice Sinha in *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra* (2009) SCALE 341 (case 50).

unacceptable on this ground in itself.[61] As already pointed out, this blatant arbitrariness would run afoul of the equality mandate of Article 14 of the Indian Constitution.[62]

Based on his study of 70 Supreme Court cases, Blackshield pointed out that only a limited number of judges heard death penalty cases and that discernible judicial arbitrariness may be attributed partly to the formation of small benches to hear the death penalty appeals.[63] His study reviewed pre-*Bachan Singh* cases. However, as I have tried to show in this chapter, even the 'rarest of rare' guidelines have not curtailed this judicial arbitrariness to a significant level.[64] The Supreme Court itself conceded this in case 50: 'it is now clear that even the balance-sheet of aggravating and mitigating circumstances approach invoked on a case by case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system'.[65] It also seems that even if the Indian Supreme Court had sat as a full court (like the US Supreme Court) or all the death penalty cases were heard by a special large bench, there is no guarantee that the problem of arbitrariness would have been fixed. The real problem lies in the amorphous nature of the guidelines formulated in *Bachan Singh* and *Machhi Singh* and the lack of any normative basis to assess the relative weight of various aggravating factors *vis-à-vis* mitigating factors. Even if a normative yardstick existed, striking a balance between competing factors is a difficult task, as the Supreme Court acknowledged in case 44.

Gender insensitivity

It is puzzling that the Supreme Court seems to have adopted a softer sentencing approach in several cases that involved the rape and murder of a girl of tender age, eg cases 4, 7, 34, and 37.[66] Rape is arguably a more serious crime than murder in at least one sense: unlike the murder victim, a rape victim survives to face the constant trauma, degradation of status, and fear.[67] So, from the victim's point of view, if the death penalty is to be justified at all it should be in cases involving extreme sexual violence such as rape, for the victim would never like to face the offender again.[68] It is, therefore, difficult to imagine if the two most heinous crimes against an innocent and defenceless girl child (rape and murder)—that should shock the

[61] Blackshield (n 10) 166.

[62] Justice Sinha in *Mohd. Farooq Abdul Gafur v State of Maharashtra* (2009) 12 SCR 1093 (case 51) observed: 'It is universally acknowledged that judicial discretion is subjective in nature and left to itself has potential to become erratic and personality based which makes it antithetical to the spirit of Article 14. Article 14 applies to judicial process including exercise of judicial discretion as it applies to the executive process'.

[63] Blackshield (n 10) 166.

[64] See also Amnesty International India (n 11).

[65] *Santosh Kumar Satishbhushan Bariyar* (n 60).

[66] The Court, however, took a tough stand in *Satish*, *Bantu*, and *Shivaji*, and sentenced the accused (who in all these cases had raped and killed a girl of tender age) to the death penalty.

[67] It is estimated that raped adult women are four times more likely to contemplate suicide and one-third of raped victims are permanently traumatized by the incident. See Rayburn (n 16) 1153.

[68] Life imprisonment leaves the possibility of a rape victim facing the offender again because he may be released after spending a certain number of years in jail.

collective conscience of the community—do not justify the extreme punishment, what else could or should? In case 34, the Supreme Court went on to justify a lesser punishment of life imprisonment for the rape and murder of a seven-year-old school girl in the following words: 'The manner in which the deceased was raped may be brutal but *it could have been a momentary lapse on the part of Appellant, seeing a lonely girl at a secluded place*'.[69] It is totally incomprehensible how raping a 'lonely' girl at a 'secluded place' can be considered a mitigating factor. Is rape an offence that is generally committed against girls in the company of others or at crowded public places?

The Supreme Court's insensitive attitude towards women generally is also noticeable from certain other cases reviewed in this study.[70] In case 13, the husband (accused) was convicted for killing his two sons. The Court seemed to justify reducing the sentence of the accused from the death penalty to life imprisonment, among others, on the ground that he suspected the character of his wife and that he might have held a painful belief of not being the father of these boys.[71] Similarly, in case 12, the Court showed leniency in awarding life imprisonment to a husband who had burned to death his wife and four daughters. One of the reasons for such leniency was that the wife and daughters were not very pleased with the husband and that they used to nag him constantly. Case 26 highlights another dimension of this insensitivity. The accused—who had kicked his pregnant wife leading to abortion, harassed her for dowry, ultimately killed her and then tried to destroy evidence by setting the dead body on fire—was given the death penalty by the High Court by reversing the life imprisonment order of the trial court. On appeal, the Supreme Court set aside the death sentence, primarily because the state had neither appealed nor advanced arguments before the High Court to enhance the sentence from life imprisonment to the death penalty. The Court did not consider the fact that the killing in this case was akin to 'dowry death' and that the victim was a helpless woman—the two factors that should lean towards the imposition of the death penalty as per the *Bachan Singh* yardstick.

One reason for this visible judicial insensitivity to crimes against women could be the 'maleness' of the Supreme Court. Out of the 86 death penalty cases reviewed here, only one woman judge (Justice Gyan Sudha Misra) was part of the bench in a mere six cases (ie cases 59, 66–69, and 86), all decided after September 2010. It seems that if these cases involving rape and murder of girls were decided by women judges (or at least by a bench comprising a woman judge), the sentence outcome might have been different. A comparison of case 26 with case 59 illustrates this

[69] *Amrit Singh v State of Punjab* (2006) SCALE 309 (case 34) (emphasis added).

[70] The patriarchal attitude of the Court is clear from another recent case, where it justified the imposition of the death penalty for kidnapping and murder of a seven-year-old child as follows: 'Agony for parents for the loss of their male child, who would have carried further the family lineage, and is expected to see them through their old age, is unfathomable. Extreme misery caused to the aggrieved party certainly adds to the aggravating circumstances'. D Mahapatra, 'SC Awards Death for Killing "Male Child"', *Times of India*, 5 February 2013, <http://articles.timesofindia.indiatimes.com/2013-02-05/india/36764294_1_male-child-sc-awards-death-gunny-bag> (accessed 5 March 2013).

[71] The Court did not, however, give importance to such a factor in *Ram* (n 3).

possibility. Broadly speaking, both these cases involved dowry demands and the consequent killing of the wife by her husband. As noted above, the Supreme Court in case 26 declined to award the death penalty. However, in case 59, the Court was willing to impose the death penalty, but for the lack of charge under section 302 of the IPC.[72] One key difference, in my view, was that case 59 was decided by a bench comprising Justice Gyan Sudha Misra, a woman. The difference in the attitude of the Court is clear from the following passage:[73]

> *Crimes against women are* not ordinary crimes committed in a fit of anger or for property. They are *social crimes*. They disrupt the entire social fabric. Hence, they call for harsh punishment. Unfortunately, what is happening in our society is that out of lust for money people are often demanding dowry and after extracting as much money as they can they kill the wife and marry again and then again they commit the murder of their wife for the same purpose. This is because of total commercialization of our society, and lust for money which induces people to commit murder of the wife. *The time has come when we have to stamp out this evil from our society, with an iron hand*.

Inconsistency in resolving contentious social issues

Even during this information age, killing and sacrificing of children for superstitious or religious reasons is not unheard of in (rural) India. Should such an honest but mistaken belief be a treated as a mitigating factor? The Court seemed to agree in case 1 and consequently awarded life imprisonment to a person who had sacrificed three children to find a hidden treasure. However, in case 24, the death penalty was upheld for the accused who had sacrificed a nine-year-old child before Goddess Kali. The Court in the instant case noted that: 'Superstition cannot and does not provide justification for any killing, much less a planned and deliberate one. No amount of superstitious colour can wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenceless child'.[74] It is not easy to reconcile the sentencing decision or reasoning in these two decisions, for three children were abducted and sacrificed in case 1, while only one was sacrificed in case 24. It is true that the accused in the latter case was facing trial on a similar accusation. But this fact (especially devoid of conviction) should have been less relevant than the repeated attempts made by the accused in case 1 to abduct three children and kill them.

[72] The Court observed: 'In fact, it was really a case under Section 302 IPC and death sentence should have been imposed in such a case, but since no charge under Section 302 IPC was levelled, we cannot do so, otherwise, such cases of bride burning, in our opinion, fall in the category of rarest of rare cases, and hence deserve death sentence.'

[73] (Emphasis added.) Justice Misra was also part of the bench that decided *Mahto* (n 38). In this case, the husband had invited a friend to rape his wife and then together they killed her. The Court commuted the death penalty to life imprisonment (full natural life), because although none of the factors taken up individually would perhaps be sufficient to call for a commutation of death sentence, if taken cumulatively, some extenuation in the sentence was called for.

[74] *Sushil Murmu v State of Jharkhand* (2004) 2 SCC 338 (case 24).

Honour killing is another social issue on which one can notice contradictions in the reasoning of the apex court on the quantum of punishment. In case 83, the Supreme Court took 'wrong but genuine caste considerations' held by the accused as a mitigating factor. It observed:[75]

> If he became the victim of his wrong but genuine caste considerations, it would not justify the death sentence. The murders were the outcome of social issue like a marriage with a person of so-called lower caste. However, a time has come when we have to consider these social issues as relevant, while considering the death sentence in the circumstances as these. The caste is a concept which grips a person before his birth and does not leave him even after his death. The vicious grip of the caste, community, religion, though totally unjustified, is a stark reality. The psyche of the offender in the background of a social issue like an inter-caste-community marriage, though wholly unjustified would have to be considered in the peculiar circumstances of this case.

However, as noted before, in case 68, the Supreme Court advocated the death penalty for those who kill a girl to redeem the reputation of the family that was perceived to be lowered on account of an inter-caste marriage, because honour killings come within the purview of the rarest of rare principle 'for whatever reasons'. Apart from an apparent contradiction in the reasoning of the Court in cases 68 and 83 as to the weight accorded to case considerations, it is puzzling that the Court seemed content to justify the death penalty for whatever reasons.

Possibility of reform

The possibility of an offender's reformation should be a critical factor in determining if the death penalty should be awarded or not. However, courts in India do not have access to relevant information to make a risk assessment in individual cases. The Supreme Court in case 50 noted that courts do not generally have 'information relating to characteristics and socio-economic background of the offender'.[76] In the absence of this crucial information as well as the lack of a system to collect such information, courts should be reluctant to award the death penalty.

An aspect related to reformation is past convictions of the accused. Should courts take into account previous convictions in awarding the death sentence? In case 29 (involving the murder of a mother and her young daughter), the Supreme Court awarded the death penalty on the ground, among others, that the accused committed the crime while serving life imprisonment. However, in case 82, the Court read the previous conviction and the sentence of life imprisonment somewhat in favour of the accused, who had murdered a mother and her young son, and awarded life imprisonment with a minimum jail term of 35 years.[77] So, once again one can note inconsistency in how the Supreme Court treated previous convictions in the death penalty cases.

[75] *Tiwari v Maharashtra* (2010) 1 SCC 775 (case 83) para 41.
[76] *Santosh Kumar Satishbhushan Bariyar* (n 60).
[77] *Ghosh* (n 38), para 18.

4. Conclusion

On reviewing 86 cases decided by the Indian Supreme Court between January 2000 and October 2011, I have tried to demonstrate that the principle of awarding the death penalty in the 'rarest of rare' cases has outlived its utility. One primary reason is the Court's application of the 'rarest of rare' guidelines of *Bachan Singh* in quite an inconsistent and arbitrary fashion.[78] This arguably results in an infringement of the fundamental right to equality under Article 14 of the Constitution. Moreover, rather than taking a progressive stand on the question of death penalty, the Supreme Court has on occasions advocated the idea of capital punishment for certain types of crimes and has somewhat expanded the scope of capital punishment by adding new categories.

As long as the IPC or other statutes continue to provide for the imposition of the death penalty, it is very likely that Indian courts will keep on awarding the death penalty in an inconsistent and arbitrary fashion. The issuance of further sentencing guidelines or altering the bench composition is unlikely to redress the problem. A legislative intervention is required to eliminate this judicial anarchy concerning the question of life and death. The Indian parliament should intervene and abolish the death penalty simply because of the arbitrariness associated with its administration by the courts. Equality is a paramount value and no amount of guidelines—legislative or judicial—can guarantee that people convicted of serious crimes will be shown equal respect at the time of sentencing. At times, the best way to control the abuse of discretion is to take away the discretion altogether, because any refinement of the 'rarest of rare' sentencing criteria—recently mooted by the Supreme Court[79]—is unlikely to cure subjectivity and the abuse of discretion.

[78] In *Santosh Kumar Satishbhushan Bariyar* (n 60), the Supreme Court itself expressly acknowledged the following: 'It can be safely said that the Bachan Singh threshold of "*rarest of rare* cases" has been most variedly and inconsistently applied by the various High Courts as also this court'.

[79] D Mahapatra, 'Supreme Court for a Relook at Norms on Death Penalty', *Times of India*, 21 November 2012, available at <http://articles.timesofindia.indiatimes.com/2012-11-21/india/35257123_1_death-penalty-death-sentence-constitution-bench> (accessed 5 March 2013).

Appendix: The List of Reviewed Decisions Delivered by the Indian Supreme Court between 1 January 2010 and 10 October 2011

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
1	*State of Maharashtra v Damu* Crim App Nos. 992–993 of 1999 (1 May 2000)	KT Thomas & DP Mohapatra	Abduction and murder of three children	LI; an extremely rare case, but still no DP because the accused genuinely but ignorantly held a superstitious belief that a hidden treasure could be found by scarifying infants	DP by TC; acquittal by HC
2	*Ram Deo Chauhan v State of Assam* Crim App No. 4 of 2000 (31 July 2000) AIR 2000 SC 2679; (2000) 7 SCC 455	KT Thomas & RP Sethi	Murder of four members of a family	DP; because 'when a man becomes a beast and menance [*sic*] to the society, he can be deprived of his life according to the procedure established by law'. 'The awarding of lesser sentence only on the ground of the appellant being a youth at the time of occurrence cannot be considered as a mitigating circumstance in view of our findings that the murders committed by him were most cruel, heinous and dastardly.'	DP by TC; confirmed by HC

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
3	*Narayan Chetanram Chaudhary v State of Maharashtra* Crim App Nos. 25–26 of 2000 (5 September 2000) AIR 2000 SC 3352; (2000) 8 SCC 457	KT Thomas & RP Sethi	Murder of five women (including one pregnant) and two teenage children	DP; brutal murders of soft targets after calculated planning in order to commit robbery—young age of accused (20–22 years) cannot justify LI on the face of other aggravating factors	DP by TC; confirmed by HC
4	*Mohd. Chaman v NCT of Delhi* Crim App Nos. 68–69 of 1999 (11 December 2000) (2001) 2 SCC 28	DP Mohapatro, & KT Thomas	Rape and murder of an 18-month-old girl	LI; not a rarest of rare case because the accused is not 'such a dangerous person that to spare his life will endanger the community'—a more humanist approach to punishment should be adopted	DP by TC; confirmed by HC
5	*Suresh v State of UP* Crim App No. 821 of 2000 (28 March 2001)	KT Thomas	Murder of four children and their parents	DP; hardly any analysis—just affirmation of the cogent reasoning of the lower courts	DP by TC; confirmed by HC

6	*Shri Bhagwan v State of Rajasthan* Crim App No. 242 of 2000 (10 May 2001) (2001) 6 SCC 296	MB Shah & KG Balakrishnan	Murder of five persons of a family (three girls and their grandparents) and robbery	LI; because the punishment of LI 'should be sufficient so as to have deterrent effect as well as no further chance to the accused for relapsing into the crime and becoming danger to the Society'	DP by TC; confirmed by HC
7	*Raju v State of Haryana* Crim App No. 581 of 2000 (2 May 2001)	MB Shah & Brijesh Kumar	Rape and murder of an 11-year-old girl	LI; because there was no premeditated intention to murder the girl and the accused did not have any past criminal record	DP by TC; confirmed by HC
8	*Subhash Chand v State of Rajasthan* Crim App Nos. 230–231 of 1999 (16 October 2001)	Dr AS Anand, RC Lahoti & Ashok Bhan	Rape and murder of a five-year-old girl	Conviction set aside, as the circumstantial evidence did not prove the guilt of the accused beyond reasonable doubt	DP by TC; converted to LI by HC
9	*Lehna v State of Haryana* Crim App No. 733 of 2001 (22 January 2002) (2002) 3 SCC 76	MB Shah, BN Agrawal & Arijit Pasayat	Murder of three people (mother, brother and sister in law)	LI; because it was an impulsive crime on the part of accused, who was not mentally stable after being deprived of his livelihood on account of father taking away land	DP by TC; confirmed by HC

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
10	*Deepak Kumar v Ravi Virmani* Crim App Nos. 927–928 of 2000 (1 February 2002)	Umesh C Banerjee & KG Balakrishnan	Murder of four members of a family	Conviction set aside because the lower courts failed to consider evidence in its proper perspective	DP by TC; converted to LI by HC
11	*Ashok Kumar Pandey v State of Delhi* Crim App No. 874 of 2001 (15 March 2002) AIR 2002 SC 1469; (2002) 4 SCC 76	MB Shah & BN Agrawal	Murder of two people (wife and daughter)	LI; because collective conscience of the community was not so shocked by the crime that it will expect the holders of the judicial power centre to inflict death penalty	DP by TC; confirmed by HC
12	*Vashram Narshibhai Rajpara v State of Gujarat* Crim App No. 1178 of 2001 (24 April 2002) AIR 2002 SC 2211; (2002) 9 SCC 168	Doraiswamy Raju & Brijesh Kumar	Murder of five family members (wife and four daughters)	RI; because the accused did not have any prior criminal record and might have suffered on account of constant nagging on the part of his family	DP by TC; confirmed by HC

13	*Dhamramnes Nidnrgasria Nthansinh v State of Gujarat* Crim App No. 927 of 2001 (17 April 2002) AIR 2002 SC 1937; (2002) 4 SCC 679	Doraiswamy Raju & Brijesh Kumar	Murder of two children (own sons)	RI; because a weapon commonly found in any farmer's house was used and the crime was not driven by any lust of power or land grab—the accused also suspected the character of his wife	DP by TC; confirmed by HC
14	*Krishna Mochi v State of Bihar* Crim App No. 761 of 2001 (15 April 2002) AIR 2002 SC 1965; (2002) 6 SCC 81	BN Agrawal & Arijit Pasayat	Murder of 35 members of a particular community—prosecution also relied on the Terrorist and Disruptive Activities (Prevention) Act (TADA)	DP; because 'the villagers were done to death in an extremely diabolic, revolting and dastardly manner' and the crime was of enormous proportion	DP by TC; confirmed by HC
15	*Farooq v State of Kerala* Crim App Nos. 656l–657 of 2001 & 1049–1050 of 2001 (9 April 2002) AIR 2002 SC 1826; (2002) 4 SCC 697	MB Shah & BN Agrawal	Murder of one under-trial prisoner by using explosives	LI; because the cases did not fall within the rarest of rare category (not much reasoning)	DP by TC; confirmed by HC

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
16	*Ram Anup Singh v State of Bihar* Crim App No. 59 of 2002 (7 August 2002) (2002) 6 SCC 686	MB Shan, Bisheshwar Prasad Singh & HK Sema	Murder of four members of the extended family	LI; as there is no evidence to suggest that accused are a menace to society and that the immediate reason that triggered the crime was unknown	DP by TC; confirmed by HC (except for one accused who did not fire)
17	*Subhash Ramkumar Bind v State of Maharashtra* Crim App No. 18 of 2002 (12 November 2002)	Umesh C Banerjee & BN Agrawal	Murder of one person	LI; although brutality was involved in shooting an unarmed victim, brutality by itself will not bring the case within the ambit of the rarest of the rare cases	DP by TC; confirmed by HC
18	*Devender Pal Singh v NCT of Delhi* Review Petition (Crl) No. 497 of 2002 & 626–627 of 2002 (17 December 2002) AIR 2003 SC 886; (2003) 2 SCC 501	MB Shan, BNAgrawal & Arijit Pasayat	Facts not given in the review petitions that were filed under Article 137 of the Constitution against the SC judgment	DP (per Justice Agrawal and Justice Pasayat), because DP may be awarded for compelling reasons even if there was acquittal by the TC/HC; LI (per Justice Shah), because when one of the three judges of the High Court preferred LI than DP, then that fact should be sufficient to conclude that the case is not the rarest of rare	DP by TC; confirmed by HC as well as the SC

19	*State of Rajasthan v Kheraj Ram* Crim App No. 830 of 1996 (22 August 2003) AIR 2004 SC 3432; (2003) 8 SCC 224	Doraiswam Y Raju & Arijit Pasayat	Murder of four family members (wife, two daughters and brother-in-law); the accused suspected that his wife was a lady of easy virtues	Acquittal reversed and DP confirmed; because of 'the cruel and diabolic manner in which the killings were conceived and executed'—the accused did not act in any spur of the moment and did not show any remorse	DP by TC; HC acquitted
20	*Babu s/o Raveendran v Babu s/o Bahuleyan* Crim App Nos. 270–271 of 1996 (11 August 2003) (2003) 7 SCC 37	Doraiswam Y Raju & HK Sema	Murder of one (wife); wife declined to have sexual intercourse with husband on finding out that he had pre-marital sexual affair	Acquittal reversed and LI awarded; although the murder was gruesome, it was not rarest of the rare category in facts and circumstances of the case (not much reasoning)	DP by TC; HC acquitted
21	*Gurdev Singh v State of Punjab* Crim App Nos. 392–393 of 2002 (1 August 2003) AIR 2003 SC 4187; (2003) 7 SCC 258	KG Balakrishnan & BN Srikrishna	Murder of 17 people	DP; even though the accused did not have any past criminal record and there was no direct evidence of motive, the crime was 'so gruesome, merciless and brutal that the aggravating circumstances far outweigh the mitigating circumstances'	DP by TC; confirmed by HC

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
22	*Prem Sagar v Dharambir* Crim App Nos. 242–243 of 2003 (29 October 2003)	Doraiswam Y Raju & Arijit Pasayat	Murder of three people	LI; because the HC rightly took into account mitigating factors (not much analysis)	DP by TC; converted to LI by HC
23	*Gyasuddin Khan v State of Bihar* Crim App No. 190 of 2002 (7 November 2003) AIR 2004 SC 210; (2003) 12 SCC 516	S Rajendra Babu & P Venkatara Ma Reddi	Murder of three fellow policemen within the police station	LI; although there was indiscriminate firing, the killing was done without any premeditation or motive	DP by TC; confirmed by HC
24	*Sushil Murmu v State of Jharkhand* Crim App No. 947 of 2003 (12 December 2003) AIR 2004 S.C. 394; (2004) 2 SCC 338	Doraiswam Y Raju & Arijit Pasayat	Murder of a nine-year-old child (sacrificed before Goddess Kali)	DP; because the accused did not possess the basic humanness and he completely lacked the psyche or mind set which can be amenable for any reformation—he was also facing trial for another similar accusation	DP by TC; confirmed by HC

25	*Simon v State of Karnataka* Crim App Nos. 149–150 of 2002 (29 January 2004) AIR 2004 SC 2775; (2004) 2 SCC 694	YK Sabharwal & BN Agrawal	Murder of 22 police personnel who went to catch Veerappan (land mine blast); prosecution also under the TADA	DP; as the accused, who did not act under duress or Veerappan, did not deserve any sympathy—the crime was diabolically planned and the accused are a threat and grave danger to society at large	LI by Special Court (rarest of rare case, but still no DP because the accused did not start their career as criminals and might have joined the gang on the direction of Veerappan)
26	*Sardar Khan v State of Karnataka* Crim App No. 852 of 2003 (20 January 2004)	Doraiswamy Raju & SB Sinha	Murder of one person (wife); past dowry demands and harassment	LI (reversed HC's order); because the state did not appeal to enhance the sentence to DP and brutality in taking the life is only one of the factors to be considered	LI by TC; DP by HC
27	*Prithvi v Mam Raj* Crim App Nos. 1844–1846 of 1996 (19 February 2004) (2004) 2 SCR 530	KG Balakrishnan & BN Srikrishna	Murder of three members of a family	Reversed HC's acquittal order, but converted DP of one accused into LI; it was not a rarest of rare case (not much analysis)	TC awarded DP to one and LI to two other accused; HC acquitted all
28	*State of UP v Satish* Crim App Nos. 256–257 of 2005 (8 February 2005) (2005) 3 SCC 114	Arijit Pasayat & SH Kapadia	Rape and murder of a six-year-old girl	DP (by reversing HC's acquittal order); because the case falls into the rarest of rare category (not much reasoning)	DP by TC; acquittal by HC

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
29	*Saibanna v State of Karnataka* Crim App No. 656 of 2004 (21 April 2005) (2005) 4 SCC 165; (2005) 3 SCR 760	KG Balakrishnan & BN Srikrishna	Murder of two (wife and daughter); the accused was convicted earlier with LI for the murder of his first wife; attacked the second wife suspecting infidelity	DP; affirmed the reasoning of the HC (eg, committed murder while serving LI; victims were helpless and asleep; planned killing)	DP by TC; confirmed by HC
30	*Holiram Bordoloi v State of Assam* Crim App No. 1063 of 2004 (8 April 2005) (2005) 3 SCC 793	KG Balakrishnan & BN Srikrishna	Murder of three members of a family	DP; because the accused led the gang, pre-planned barbaric killings and did not show any repentance	DP by TC; confirmed by HC
31	*NCT of Delhi v Afsan Guru* Crim App Nos. 373–378 of 2004 (24 August 2005)	P Venkatarama Reddi & PP Naolekar	Murder of nine people; terrorist attack on the parliament by five terrorists: charges were also framed under Sections 121, 121A and 122 of the IPC and under the Prevention of Terrorism Act and the Explosive Substance Act	DP confirmed for Mohd. Afzal; Shaukat was sentenced with ten years of imprisonment; Afzal's case was the rarest of rare, but not enough evidence against Shaukat	Special Court awarded DP to three (Mohd. Afzal, Shaukat Guru and Gilani) and five years of imprisonment to Afsan Guru; HC confirmed DP for two accused but acquitted Gilani and Afsan Guru

32	*Union of India v Devendra Nath Rai* Crim App No. 206 of 2003 (10 January 2006) (2006) 2 SCC 243	Arijit Pasayat & Tarun Chatterjee	Murder of two army personnel	Case remitted back to HC, because it did not draw a balance sheet of aggravating and mitigating factors; it came to an abrupt conclusion without undertaking this exercise	DP awarded in court martial; confirmed by the central government; HC ruled that the case was not of a rarest of rare category
33	*Gagan Kanojia v State of Punjab* Crim App Nos. 561–562 of 2005 (24 November 2006)	SB Sinha & Markandey Katju	Kidnapping and murder of two children	LI; as the HC committed no error in concluding that the case is not rarest of rare (not much analysis)	DP by TC; converted to LI by HC
34	*Amrit Singh v State of Punjab* Crim App No. 1327 of 2005 (10 November 2006) (2006) SCALE 309	SB Sinha & Dalveer Bhandari	Rape and murder of a seven-year-old girl	LI; not a rarest of rare case, as the killing was neither intentional nor the offence pre-meditated	DP by TC; confirmed by HC

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
35	*Aloke Nath Dutta v State of West Bengal* Crim App Nos. 867–868 of 2005 (12 Dec 2006) (2006) 10 Suppl. SCR 662	SB Sinha & Dalveer Bhandari	Murder of one person (brother); property dispute	LI; although the murder may be gruesome (deceased was sleeping at the time of killing), but the method applied cannot be said to be cruel (the accused was pushed back to a situation in which he killed his brother for greed of money)	DP by TC; confirmed by HC
36	*Bablu v State of Rajasthan* Crim App No. 1302 of 2006 (12 December 2006) AIR 2007 SC 697; (2006) 13 SCC 116	Dr Arijit Pasayat & SH Kapadia	Murder of five members of a family (wife and four children)	DP; acts diabolic in conception and cruel in execution—no remorse shown	DP by TC; confirmed by HC
37	*Bishnu Prasad Sinha v State of Assam* Crim App No. 453 of 2006 (17 January 2007) AIR 2007 SC 848; (2007) 11 SCC 467	SB Sinha & Markandey Katju	Rape and murder of a seven-year-old girl	LI; conviction based only on circumstantial evidence and the accused showed repentance in his confession	DP by TC; confirmed by HC

38	*Ram Singh v Sonia* Crim App No. 895 of 2005 (15 February 2007) AIR 2007 SC 1218; (2007) 3 SCC 1	BN Agrawal & PP Naolekar	Murder of eight members of one's family	DP (by reversing LI); murders in question were committed in a diabolic manner while the victims were sleeping, without any provocation whatsoever—the accused caused death in a cold-blooded and premeditated manner	DP by TC; converted to LI by HC
39	*Shivu* *v* *RG High Court of Karnataka* Crim App No. 202 of 2007 (13 February 2007) (2007) 4 SCC 713	Dr Arijit Pasayat & Lokeshwar Singh Panta	Rape and murder of an 18-year-old girl; the accused had previously tried to rape victim's sister	DP; rarest of rare case (not much reasoning)	DP by TC; confirmed by HC

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
40	*Swamy Sharaddananda v State of Karnataka* Crim App No. 454 of 2006 (17 May 2007) AIR 2007 SC 2531 (*see also* case 45)	SB Sinha & Markandey Katju	Murder of one person (wife)	Difference of opinion, so the case to be heard by a larger bench: LI (Justice Sinha), because the murder of the wife for usurping property is not a particularly rarest of rare incident; DP (Justice Katju), because it was a cold-blooded, calculated, diabolical murder—the accused deceived the victim into marrying her. *Because of a difference in opinion, refer to the decision of the 3-judge bench (case 45)*	DP by TC; confirmed by HC
41	*Kulwinder Singh v State of Punjab* Crim App No. 116 of 2006 (6 August 2007)	SB Sinha & Markandey Katju	Murder of two (one girl and an old lady); accused wanted to rape the girl, but victim resisted	LI; because the crime was committed in a fit of passion (not much analysis)	DP by TC; sentence set aside by HC and case referred back to TC
42	*Des Raj v State of Punjab* Crim App No. 648 of 2007 (7 September 2007) (2007) 9 SCR 774	RV Raveendran & B Sudershan Reddy	Murder of three members of a family; attempted murder of two more members	LI; because this was not a murder to satisfy any greed or lust—the act was not brutal, diabolic or revolting	DP by TC; confirmed by HC

43	*Mayakaur Baldevsingh Sardar v State of Maharashtra* Crim App Nos. 1364–1366 of 2004 (8 October 2007) (2007) 10 SCR 752	SB Sinha & Harjit Singh Bedi	Murder of four members of a family	LI; because the HC had awarded LI; although the case falls within the rarest of rare category (on account of the 'diabolical nature of thecrime and the murder of helpless individuals committed with traditional weapons with extreme cruelty and pre-meditation'), no DP was given by reversing the HC order	DP by TC; converted to LI by HC by a majority of 2:1
44	*Bantu v State of UP* Crim App No. 117 of 2007 (23 June 2007) (2008) 11 SCC 113	Dr Arijit Pasayat & Dr Mukundakam Sharma	Rape and murder of a five-year-old girl; the accused enticed the girl away	DP; because the 'depraved acts of the accused call for only one sentence that is death sentence'	DP by TC; confirmed by HC
45	*Swamy Sharaddananda v State of Karnataka* Crim App No. 454 of 2006 (22 July 2008) AIR 2008 SC 3040 (*appeal from case 40*)	BN Agrawal,GS Singhvi &Aftab Alam	Refer to case 40	LI (without any remission); because the 'absolute irrevocability of thedeath penalty renders it completely incompatible to the slightest hesitation on the part of the court'	Refer to case 40

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
46	*Shivaji v State of Maharashtra* Crim App No. 1409 of 2008 (5 September 2008) (2008) 13 SCR 81	Dr Arijit Pasayat & Dr Mukundakam Sharma	Rape and murder of a nine-year-old girl	DP; the case falls within the rarest of rare category (not much specific analysis—mostly general discussion justifying death penalty in appropriate cases)	DP by TC; confirmed by HC
47	*State of UP v Sattan* Crim App Nos. 314–315 of 2001 (27 February 2009)	Dr Arijit Pasayat & Dr Mukundakam Sharma	Murder of six members of a family	DP (for all, as the HC should not have altered DP to LI); 'Murder of six members of a family including helpless women and children having been committed in a brutal, diabolic and bristly manner and the crime being one which is enormous in proportion which shocks the conscious of law'	DP by TC; confirmed by HC for certain accused and altered to LI for others
48	*Ankush Maruti Shinde v State of Maharashtra* Crim App Nos. 881–882 of 2009 (30 April 2009)	Dr Arijit Pasayat & Dr Mukundakam Sharma	Murder of five members of a family and rape of a woman of the family	DP for all six; brutal murders without any animosity—four victims were of tender age	DP for six by TC; HC confirmed DP for three accused, but converted it to LI for the other three

49	*Rameshbhai Chandubhai Rathod v State of Gujarat* Crim App No. 575 of 2007 (27 April 2007) (*see* case 62)	Dr Arijit Pasayat & Asok Kumar Ganguly	Rape and murder of a nine-year-old girl	Difference of opinion, so the case was heard by a larger bench: DP (Justice Pasayat), depraved acts of the accused; LI (Justice Ganguly), young man, married with two children, with no previous criminal record. *Because of a difference in opinion, refer to the decision of the 3-judge bench (case 62)*	DP by TC; confirmed by HC
50	*Santosh Kumar Satishbhushan Bariyar v State of Maharashtra* Crim App Nos. 1458 of 2005 & 452 of 2006 (13 May 2009) (2009) SCALE 341	SB Sinha & Cyriac Joseph	Kidnap and murder of a person	LI; because there are no special reasons to award DP and the mitigating factors were sufficient to put the case out of the rarest of rare category	TC; HC confirmed DP for one accused and LI for other accused
51	*Mohd. Farooq Abdul Gafur v State of Maharashtra* Crim App Nos. 85–86 of 2006 (6 August 2009) (2009) 12 SCR 1093	SB Sinha & Dr Mukundakam Sharma	Murder of three people; seven to eight people injured; attack on a Shiv Sena leader, who survived the attack	LI for all three accused (reversed HC's acquittal order against two accused); no reason to award different sentences to these accused	TC awarded DP to three accused; HC acquitted two accused and converted DP of one to LI

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
52	*Jagdish v State of MP* Crim App No. 338 of 2007 (18 October 2009) (2009) 9 SCC 495	Harjit Singh Bedi & JM Panchal	Murder of six (wife and five minor children)	DP; horrifying murders by a person in a position of trust, enormous nature of crime and helpless victims—the plea of accused being of unsound mind was made but rejected by the court	DP by TC; confirmed by HC
53	*Sushil Kumar v State of Punjab* Crim App No. 670 of 2009 (1 September 2009)	VS Sirpurkar & Deepak Verma	Murder of three (wife and two children)	LI; not a habitual offender—poverty-stricken, so may have eliminated the family to overcome the problem	DP by TC; confirmed by HC
54	*Ramraj v State of Chhattisgarh* Special Leave Petition (Crl) No. 4614 of 2006 (10 December 2009) (2010) 1 SCC 573	Altamas Kabir & BS Chauhan	Murder of one (wife); on hearing cries of a child, the husband tried to wake up his wife, but she did not wake up, so he started beating her with a stick; buried the dead body to suppress evidence	LI (remission may be considered after 20 years); as the petitioner is fortunate to have escaped DP, release on completing 14 years is not justified	Not clear from the SC judgment, but TC and HC seemed to have awarded LI

55	*Vikram Singh v State of Punjab* Crim App Nos. 1396–1397 of 2008 (25 January 2010) (2007) 3 SCC 1	Harjit Singh Bedi & JM Panchal	Kidnapping for ransom and murder of a boy	DP of two accused confirmed (HC rightly drew a balance sheet of aggravating and mitigating factors); a lady accused was awarded LI (as she was not present at the time of kidnapping and might have joined the conspiracy under the pressure of her husband)	DP to three accused by TC; confirmed by HC
56	*Mulla v State of UP* Crim App No. 396 of 2008 (8 February 2010) (2010) 3 SCC 508	P Sathasivam & HL Dattu	Abduction and murder of five people	LI (extendable to their full lives, subject to any government remission); because the crime was committed for want of money and they had already spent many years in jail	DP by TC; confirmed by HC
57	*NCT of Delhi v Ajit Seth* Crim App No. 1059 of 2004 (17 August 2010)	Harjit Singh Bedi & Chandramauli Kr Prasad	Murder of two children of tender age (burned to death because the accused suspected that they knew about his affair with their mother)	LI; although the facts did not justify any mercy, the convict should be released, as he had already spent more than 20 years in jail	DP by TC; converted to LI (at least 20 years in jail) by HC—although the crime was heinous and barbaric, still not the rarest of rare

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
58	*Atbir v NCT of Delhi* Crim App Nos. 870 & 877 of 2006 (9 August 2010) AIR 2010 SC 3477	P Sathasivam & Dr BS Chauhan	Murder of three people of a family	DP for one and LI for another (HC's order upheld); the murder was carried out in an extremely brutal, gruesome, diabolical, and revolting manner; lust for property; helpless victims	DP to one accused and LI to another awarded by TC; confirmed by HC
59	*Satya Narayan Tiwari v State of UP* Crim App No. 1168 of 2005 (28 October 2010)	Markandey Katju & Gyan Sudha Misra	Wife burned to death; dowry death	LI; as no charge was levelled under Sec 302 of the IPC, DP cannot be awarded, otherwise this was a fit case for DP	Acquittal by TC; LT by HC
60	*Santosh Kumar Singh v State* Crim App No. 87 of 2007 (6 October 2010)	Harjit Singh Bedi & Chandramauli Kr Prasad	Rape and murder of a girl; previous harassment of the girl	LI; if the court feels difficulty in deciding whether to award DP or LI, the latter should be awarded; the accused also got married after acquittal and became the father of a girl child; 15 years have passed since the incident	Acquittal by TC; DP by HC

61	*Remdeo Chauhan v Bani Kant Das* Review Petition (Crl) No. 1378 of 2009 in Writ Petition (Crl) No. 457 of 2005 (19 November 2010)	Aftab Alam & Asok Kumar Ganguly	Murder of four members of a family; defence was raised that the accused was less than 16 years old at the time of crime, but the plea did not succeed	LI commutation order of the governor upheld (SC had previously quashed this order of the governor for lack of disclosing reasons); various aspects of this case (including the question of age) were also reviewed by the National Human Rights Commission and the SC in two review petitions	DP by TC; confirmed by HC; DP upheld by SC (*see case 2 above*), but the governor commuted DP to LI
62	*Rameshbhai Chandubhai Rathod v State of Gujarat* Crim App No. 575 of 2007 (24 January 2011)	Harjit Singh Bedi, P Sathasivam & Chandramauli Kr Prasad	Refer to case 49	LI (extendable to full natural life, subject to any government remission); necessary to find via-media between DP and LI—although a grave crime, there were mitigating factors	Refer to case 49

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
63	*Rabindra Kumar Pal/ Dara Singh v Republic of India* Crim App No. 1366 of 2005 (21 January 2011)	P Sathasivam & Dr BS Chauhan	Murder of three (father and two minor sons); the father was an Australian Christian Missionary; victims burned to death and not allowed to get out of the vehicle on fire	LI; not a rarest of rare case—'the intention was to teach a lesson to Graham Staines about his religious activities, namely, converting poor tribals to Christianity'; the conspiracy charge could not be proved and there were also inconsistencies in evidence; in view of the controversy generated by certain portions of the judgment, the SC *suo moto* revised those paragraphs	DP by TC; converted to LI by HC
64	*Sheo Shankar Singh v State of Jharkhand* Crim App Nos. 791–794 of 2005 (15 February 2011)	VS Sirpurkar & TS Thakur	Murder of one (a member of the state Legislative Assembly)	LI; murder was not 'particularlybrutal, grotesque, diabolical, revolting or dastardly'; the accused were not professional killers; there was a difference of opinion between TC and HC	LI by TC; enhanced to DP by HC

65	*BA Umesh v Registrar General, High Court of Karnataka* Crim App Nos. 285–286 of 2011 (1 February 2011) (2011) 3 SCC 85	Altamas Kabir & AK Patnaik	Rape and murder of a woman	DP; because of 'the extreme depravity with which the offences were committed and the merciless manner in which death was inflicted on the victim'; the accused was involved in similar crimes previously, so no hope for rehabilitation	DP by TC; confirmed by HC
66	*Mehboob Batcha v State* Crim App No. 1511 of 2003 (29 March 2011)	Markandey Katju & Gyan Sudha Misra	Murder of one person in police custody and rape of the victim's wife, but no charge was leveled under Section 302 of the IPC (death was treated as suicide)	Conviction and sentence upheld; it was a fit case for DP, but since no charge was framed under Section 302 of the IPC, the court felt constrained	Imprison-ment of 3–10 years; confirmed by HC
67	*Prakash Kadam v Ramprasad Vishwanath Gupta* Crim App Nos. 1174–1178 of 2011 (13 May 2011)	Markandey Katju & Gyan Sudha Misra	Murder of a person; contract killing by policemen (fake encounter)	HC was justified in cancelling the bail; 'where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases.'	Bail granted by TC; cancelled by HC
68	*Bhagwan Dass v NCT of Delhi* Crim App No. 1117 of 2011 (9 May 2011)	Markandey Katju & Gyan Sudha Misra	Murder of one; father killed his daughter (honor killing)	DP; honor killings should attract DP	DP by TC; confirmed by HC

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
69	*Surendra Mahto v State of Bihar* Crim App No. 211 of 2009 (26 July 2011)	Harjit Singh Bedi & Gyan Sudha Misra	Murder of a person (husband killing wife); before killing, the husband led his friend to rape her	LI to husband (extendable to full natural life, subject to any government remission); the accused had one daughter from the deceased wife; reformation a possibility	TC awarded DP to husband and LI to the other accused; HC confirmed convictions and sentences
70	*State of Maharashtra v Goraksha Ambaji Adsul* Crim App Nos. 999 & 1623 of 2007 (7 July 2011)	Dr BS Chauhan & Swatanter Kumar	Murder of three members of a family	LI; not a rarest of rare case—constant quarrels over division of property contributed to the desire to take revenge	DP by TC; converted to LI by HC
71	*Mohd. Arif Ashfaq v NCT of Delhi* Crim App Nos. 98–99 of 2009 (10 August 2011)	V.S.Sirpurkar & T.S. Thakur	Murder of three people (army personnel); terrorist attack on the Red Fort—also charged for waging war against the government of India under Section 121 of the IPC	DP; well-planned conspiracy—'a blatant, brazenfaced and audacious act aimed to overawe the Government of India'; an 'attack on a symbol like Red Fort was an assault on the nation's will and resolve to preserve its integrity and sovereignty at all costs'	DP by TC; confirmed by HC

72	*Ajitsingh Harnamsingh Gujral v State of Maharashtra* Crim App No. 1969 of 2009 (13 September 2011)	Markandey Katju & Chandramauli Kr Prasad	Murder of four family members (wife and three children); all burned to death	DP; 'Burning living persons to death is a horrible act which causes excruciating pain to the victim'—'a person like the appellant who instead of doing his duty of protecting his family kills them in such a cruel and barbaric manner cannot be reformed or rehabilitated'	DP by TC; confirmed by HC
73	*State of UP v Alok Verma* Special Leave Petition (Crim) No. 6718 of 2011 in CRLMP No. 16406 of 2011	Markandey Katju & Chandramauli Kr Prasad	Murder of five family members (wife and four young children), because the wife protested against his indulgence in gambling, taking liquor and crimes like kidnapping	Notice issued to increase LI to DP; 'We cannot imagine a more ghastly act and, we are, *prima facie*, of the opinion that this falls in the category of rarest of rare cases'	DP by TC; converted to LI by HC
74	*Sunder Singh v State of Uttaranchal* Crim App No. 1164 of 2005 (16 September 2010)	VS Sirpurkar & AK Patnaik	Murder of five members of a family; victims burned to death	DP; because the whole family was wiped out and the 'murder was committed in a cruel, grotesque and diabolical manner'—hardly any mitigating factor	DP by TC; confirmed by HC

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
75	*Surendra Singh Rautela v State of Bihar* Crim App Nos. 628–629 of 2011 (27 November 2001) AIR 2002 SC 260; (2002) 1 SCC 266	MB Shah & BN Agrawal	Murder of a person; charges also under the Arms Act	LI; because the HC did not give an opportunity to the accused to enhance the sentence from LI to DP	DP by TC (not under Section 302 of the IPC, but under Section 27(3) of the Arms Act); HC acquitted the accused under the Arms Act, but upheld conviction under Section 302 and awarded DP
76	*State of Maharashtra v Bharat Fakira Dhiwar* Crim App No. 1246 of 1997 (2 November 2001) (2002) 1 SCC 622	KT Thomas & SN Variava	Rape and murder of a three-year-old girl	LI (by setting aside acquittal); simply because the HC had passed an acquittal order, otherwise this case was in the region of the 'rarest of rare'	DP by TC; HC acquitted (as the evidence of two child witnesses could not be believed)
77	*State of Punjab v Gurmej Singh* Crim App No. 318 of 2001 (2 August 2002) AIR 2002 SC 2811; (2002) 6 SCC 663	RC Lahoti & Brijesh Kumar	Murder of three members of a family and causing hurt/grievous hurt to others	LI; because facts of the case do not fall within the rarest of rare category—mistrust over money between the accused and deceased (two brothers) led to the heinous crime	DP by TC; converted to LI by HC

78	*Dayanidhi Bisoi v State of Orissa* Crim App No. 116 of 2003 (23 July 2003) AIR 2003 SC 3915; (2003) 9 SCC 310	N Santosh Hegde & BP Singh	Murder of three members of a family and robbery	DP; because the murder was committed in a deliberate and diabolic manner while the victims were sleeping, without any provocation whatsoever; cold-blooded and premeditated crime to gain some monetary benefit	DP by TC; confirmed by HC
79	*Ram Pal v State of UP* Crim App No. 178 of 2003 (6 August 2003) AIR 2003 SC 4168; (2003) 7 SCC 141	N Santosh Hegde & BP Singh	Murder of 21 people (including children) by members of one group; previous animosity between two groups	LI; because the 'number of deaths cannot be the sole criterion for awarding the maximum punishment of death'; previous animosity and murders operated as provocation—the accused spent 17 years in jail and played a role similar to the one played by others who received lesser sentence	DP by TC; confirmed by HC
80	*Prajeet Kumar Singh v State of Bihar* Crim App No. 1621 of 2007 (2 April 2008) (2008) 4 SCC 434	PP Naolekar & Lokeshwar Singh Panta	Murder of three members of a family	DP; murders of three innocent children committed in a ghastly and brutal manner and without any provocation; the accused was living with the family of the deceased	DP by TC; confirmed by HC

(*Continued*)

No	Case Name and Citation	Bench Composition	Key Facts	SC Decision and Reasoning	Lower Courts History
81	*State of Punjab v Manjit Singh* Crim App Nos. 786 –789 of 2003 (28 May 2009)	Dr Mukundakam Sharma & Dr BS Chauhan	Murder of four people	LI; because the crime is driven more by infatuation; the accused lost their balance and acted in a cruel manner upon being told of maltreatment (by the deceased husband) by a woman with whom they had illicit relationship	DP by TC; converted to LI by HC
82	*Haru Ghosh v State of West Bengal* Crim App No. 1173 of 2008 (27 August 2009) (2009) 15 SCC 551	VS Sirpurkar& Deepak Verma	Murder of two people (mother and her 12- year-old son); the accused was already serving LI and had committed murders while on bail	LI (a minimum of 35 years); because the crime was not pre-meditated—there was a long-standing hatred and animosity between the accused and family of the deceased	DP by TC; confirmed by HC
83	*Dilip Premnarayan Tiwari v State of Maharashtra* Crim App Nos. 1025–1026 of 2008 (10 December 2009) (2010) 1 SCC 775	VS Sirpurkar & Deepak Verma	Murder of three people; the main accused was opposed to his sister's inter-caste marriage and this led to the killing	LI (a minimum of 25 years to be spent in jail); because the accused were between 20–25 years of age, did not have any past criminal record and the crime was triggered by an inter-caste marriage	DP by TC; confirmed by HC

84	*C Muniappan v State of Tamil Nadu* Crim App Nos. 127–130 of 2008 & 1632–1634 of 2010 (30 August 2010)	GS Singhvi & Dr BS Chauhan	Murder of three people; college girls were burned to death in their bus by the accused, who were reacting angrily to the one-year sentence given to the then former Chief Minister Ms Jayalalitha	DP; 'Causing the death of three innocent young girls and causing burn injuries to another twenty is an act that shows the highest degree of depravity and brutality'—the well-planned offence was committed without any provocation	DP by TC; confirmed by HC
85	*Ramesh v State of Rajasthan* Crim App Nos. 1235–1236 of 2006 (22 February 2011)	VS Sirpurkar & TS Thakur	Murder of two people (husband and wife) and theft	LI; because the murder was cruel but not brutal, grotesque or diabolical—'nor could it be said that the murder was committed in a revolting manner so as to arise intense and extreme indignation'; the original intention was to commit theft and the murder was committed to avoid detection; possibility of reformation is not foreclosed	DP by TC; confirmed by HC
86	*Surendra Koli v State of UP* Crim App No. 2227 of 2010 (15 February 2011)	Markandey Katju & Gyan Sudha Misra	Murder of several children; the accused allured and killed several children, chopped their bodies and ate the body parts after cooking	DP; because 'this case clearly falls within the category of rarest of rare case and no mercy can be shown to the accused'; 'horrifying and barbaric' killings by a serial killer	DP to both accused by TC; HC confirmed DP of one accused, while acquitted another

Abbreviations and Symbols

A = Abduction
DP = Death penalty
HC = High Court
IPC = Indian Penal Code
K = Kidnapping
LI = Life imprisonment
M = Murder
R = Rape
SC = Supreme Court
TC = Trial Court

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♫ *Don't Be Cruel…* ♪: The 'Death Row Phenomenon' and India's 'Delay' Jurisprudence

*Bikramjeet Batra**

1. Introduction

Although many aspects of the death penalty are prohibited in international law, the prohibition of the death penalty is not yet universal—Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) allows for the death sentence, albeit 'only for the most serious crimes'.[1]

The United Nations Human Rights Committee (HRC) has stated that where the death penalty is applied by a state, 'it must be carried out in such a way as to cause the least possible physical and mental suffering'.[2] Article 6(2) also expressly notes that the imposition of the death penalty should not be 'contrary to the provisions of the present Covenant'. As a result, a sentence of death that violates the Article 7 prohibition against torture or cruel, inhuman or degrading (CID) treatment or punishment, would be prohibited.[3]

Many scholars and abolitionists argue that the death penalty itself is CID punishment.[4] Such a view does lead to an obvious tension with the text of Article 6(2) which specifically allows for the death penalty. However, given that corporal punishment is recognized as torture or other CID, it leads to an absurd situation where whipping of a person may be CID, but killing by breaking the neck in a hanging is not.[5] The former United Nations Special Rapporteur on torture,

* Views expressed here are personal and not that of Amnesty International.

[1] International Covenant on Civil and Political Rights (ICCPR) (1976) 999 UNTS 171.

[2] General Comment 20 on Art 7 of the ICCPR, adopted on 10 March 1992, para 6.

[3] The term 'ill treatment' is commonly used to mean cruel, inhuman, or degrading treatment. However, this chapter uses the acronym 'CID' instead.

[4] See, for instance, the opinion of Judge Garlicki in the European Court of Human Rights judgment in *Ocalan v Turkey* (2005) 41 EHRR 985. See also William Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge, Cambridge University Press 2002). Amnesty International regards the death penalty as the ultimate form of CID.

[5] An argument well made in the South African constitutional court judgment in *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

Manfred Novak, suggests that it may be appropriate to interpret the meaning of CID treatment and punishment in the light of the present-day understanding of these words.[6] Although not yet universally accepted, this is a view that is growing.[7]

Regardless of the above, various aspects of the death penalty have already been found to constitute CID treatment or punishment.[8] This chapter focuses on one particular controversial aspect of the death penalty: the death row phenomenon. It briefly refers to jurisprudence in the past two decades on this subject—particularly in the HRC—before examining the issue in the Indian context.

2. The Death Row Phenomenon

> '[A] man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second.'
>
> Albert Camus, Reflections on the Guillotine[9]

Whether worse than death or not, there is no doubt that waiting for execution leads to unique mental anguish and suffering, regardless of the length of the wait. Moreover, lengthy periods under sentence of death, added to periods of *de facto* solitary confinement and poor prison conditions, further place the condemned prisoner under tremendous strain. As Hudson points out, there is no single definition of 'death row phenomenon' although most involve two components—a temporal one (the length of time that an inmate spends on death row) and a physical one (the harsh conditions that an inmate is subjected to on death row).[10] This chapter uses the following as a working definition for death row phenomenon: the peculiar suffering caused to a condemned prisoner due to awaiting execution on death row, invariably under harsh conditions. A related concept that has also emerged is 'death row syndrome'—the psychological harm that results from death row phenomenon.[11]

[6] See 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak', UN Doc A/HRC/10/44, 14 January 2009.

[7] The current Special Rapporteur, Juan E Méndez, has also indicated that he will examine the question of the death penalty *per se* constituting CID and has suggested this as an issue for further research by the Human Rights Council. Report Submitted by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/HRC/16/52, 3 February 2011, para 70.

[8] Certain types of executions (eg stoning) and even the mandatory death penalty have been found to be CID.

[9] Albert Camus, *Resistance, Rebellion, and Death* (New York, A Knopf 1969) 205.

[10] Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?' (2000) 11(4) *European Journal of International Law* 833, 837.

[11] Although the use of the term 'syndrome' implies an illness, it has not yet been accepted by medical or psychiatric bodies as such. For the difficulty of diagnosis as well as possibly unintended consequences, see Harold I Schwartz, 'Death Row Syndrome and Demoralization: Psychiatric Means to Social Policy Ends' (2005) 33 *Journal of the American Academy of Psychiatry and the Law* 153.

A review of jurisprudence

Although the concept of death row phenomenon has existed for at least a couple of decades, Schabas notes that the term entered mainstream human rights vocabulary only after its recognition by the European Court of Human Rights (ECtHR) in its judgment in *Soering* in July 1989.[12] In this case, the United States sought the extradition of Soering on charges of a double murder. Soering challenged the extradition not on the ground that he would be sentenced to death, but instead on the ground that the extended period he would spend on death row in Virginia would violate his right not to be subjected to inhuman or degrading treatment or punishment under Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (analogous to Article 7 of the ICCPR).

The ECtHR observed that the average time spent on Virginia death row was six to eight years, largely due to optional appeals available to the condemned prisoner, but nonetheless concluded:[13]

> [J]ust as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.

The decision of the ECtHR was not based on time spent on death row alone, but took into account the harsh conditions of death row in Virginia. It eventually ruled against the extradition 'having regard to the very long period of time spent on death row in such extreme conditions'.[14]

The *Soering* judgment certainly impacted the Judicial Committee of the Privy Council—the highest court of appeal for many Caribbean and other commonwealth states—which had rejected similar arguments over the past two decades. In its 1993 judgment in *Pratt and Morgan*, the Privy Council not only reaffirmed *Soering*, it went much further.[15] Observing that the two condemned prisoners in this case had been on death row for 14 years, the Privy Council observed that there was 'an instinctive revulsion against the prospect of hanging a man after he has been under sentence of death for many years'.[16] It differed from *Soering* in that the Privy Council did not require the necessity of harsh conditions—delay alone was sufficient for a violation of rights. However in calculating the delay, *Pratt and Morgan* made clear that while delay caused due to frivolous appeals by the prisoner or escape from custody would be excluded—only that attributable to the state and to the prisoner's legitimate appeals would be counted.

[12] *Soering v UK* (1989) 11 EHRR 439. For a background on the *Soering* case, see William Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (Boston, Northeastern University Press 1996) 105.

[13] *Soering v UK* (1989) 11 EHRR 439, para 106.

[14] *Soering* (n 13), para 111.

[15] *Pratt and Morgan v The Attorney General for Jamaica and Another* [1993] UKPC 1.

[16] *Pratt and Morgan* (n 15), para 60.

The Privy Council also put forward 'a general rule' that a five-year gap between sentencing and execution was strong ground for a violation of the right against inhuman or degrading treatment. Subsequently the Privy Council further refined this point clarifying that the length specified was a guide and not a limit or yardstick.[17] Further, it observed that where international courts were not approached, three-and-a-half years was the rough estimate within which constitutional appeals ought to be completed.[18]

Even before the Privy Council ruled in *Pratt and Morgan*, the Inter-American Commission on Human Rights (IACHR) had found the four years spent by Pratt and Morgan on death row, awaiting the decision by the Jamaican Court of Appeal, 'tantamount to cruel, inhuman and degrading treatment'.[19] Since then, the IACHR does not appear to have developed its jurisprudence much further, although it recognized the 18-year delay in execution as one of the ingredients of a prisoner receiving cruel, infamous, or unusual punishment in violation of Article XXVI of the American Declaration of the Rights and Duties of Man.[20] Further, in March 2010, the IACHR also admitted a petition where the prisoner challenged his 15-year stay on death row in California.[21] In *Hilaire, Constantine, and Benjamin et al* in 2002, the Inter-American Court of Human Rights cited *Soering* and, despite not discussing the time spent on death row, found, 'the detention conditions that all the victims in this case have experienced and continue to endure compel the victims to live under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment'.[22]

A number of national courts have also recognized death row phenomenon as CID, although the United States Supreme Court has remained unmoved. The Supreme Court of Uganda held that a delay of more than three years between the confirmation of a prisoner's death sentence on appeal and execution constitutes cruel, inhuman, or degrading treatment or punishment.[23] The Zimbabwe Supreme Court has also held that delays of 52 and 72 months between the imposition of a death sentence and execution constitute inhuman punishment.[24]

[17] *Guerra v Cipriani Baptiste and Others* (Trinidad and Tobago) [1995] UKPC 3.

[18] *Henfield v Attorney General of the Commonwealth of the Bahamas* [1996] UKPC 36.

[19] This conclusion was, however, never published and its existence was only known after it was referred in the Privy Council judgment in 1993. For the full history of the case, see Schabas (n 4).

[20] *William Andrews v United States* Case 11.139, Report No 57/96, IACHR (1997), para 178.

[21] *NI Sequoyah v United States* Petition 120/07, Report No 42/10, IACHR (2010). Two other petitions on similar grounds were also previously admitted, but a final decision on the merits do not appear to have been made. See *Tracy Lee Housel v United States* Case 129/02, Report No 16/04, IACHR (2004) and *John Elliott v United States* Case 28/0, Report No 68/04, IACHR (2004).

[22] *Hilaire, Constantine, and Benjamin et al*, Inter-American Court of Human Rights, (Ser C) No 94 (2002), para 169.

[23] *Kigula and Others v Attorney General*, Supreme Court of Uganda, Constitutional Appeal No 03 of 2006, 56–7.

[24] *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General* (1993) 14 *Human Rights Law Journal* 323.

The Kenyan Court of Appeal has referred to the 'obvious injustice of the "death row syndrome" '.[25] Even the Canadian Supreme Court, which had previously distinguished *Soering* in dismissing challenges to extradition to the United States, has come around to accepting that the death row phenomenon is 'a relevant consideration that weighs in the balance against extradition without assurances [that the death penalty would not be imposed]'.[26]

Jurisprudence of the United Nations Human Rights Committee

> 'Life on death row, harsh as it may be, is preferable to death.'
>
> UN Human Rights Committee, *Errol Johnson v Jamaica*, 22 March 1996[27]

The view of the United Nations HRC—the body of experts that monitors the implementation and publishes interpretations of the ICCPR—has been more conservative than the above-mentioned courts with respect to the death row phenomenon and cruel, inhuman, or degrading treatment (Article 7) and treatment of prisoners with humanity and dignity (Article 10, paragraph 1).[28]

The first significant case in which the HRC ruled on the death row phenomenon was *Pratt and Morgan* in April 1989—shortly before the ECtHR's *Soering* decision (and much before the *Pratt and Morgan* judgment in the Privy Council). The HRC declared that although prolonged judicial proceedings do not *per se* constitute CID treatment even if they are a source of mental strain for the prisoner, the situation could be different in capital punishment cases and an assessment of circumstances of the case would be necessary.[29]

In *Barett and Sutcliffe*, the HRC further observed that some delay was inherent in an appeal and review process: 'thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies'.[30] This view on attribution was in contrast to the view taken by the ECtHR in *Soering*, which was relied upon in the minority

[25] *Godfrey Ngotho Mutiso v Republic* [2010] eKLR, para 16.

[26] *United States v Burns* 2001 SCC 7, para 123.

[27] Communication No 588/1994 (1996), para 8.4.

[28] For a comprehensive chronological overview of jurisprudence until July 2002, see PR Ghandhi, 'The Human Rights Committee and the Death Row Phenomenon' (2003) 43(1) *Indian Journal of International Law* 1.

[29] *Earl Pratt and Ivan Morgan v Jamaica*, Communication Nos 210/1986 and 225/1987, UN Doc Supp No 40 (1989), para 13.6. In this particular case, the HRC found that there had been violation of Arts 7 and 14 (right to fair trial), but attributed it not to the many years on death row, but instead to the 20-hour delay in informing them of a stay of execution. See Schabas (n 4) 114. The HRC did not seem aware of the IACHR decision on CID in this case.

[30] *Randolph Barrett and Clyde Sutcliffe v Jamaica*, Communication No 271/1988, UN Doc CCPR/C/44/D/271/1988 (1992), para 8.4. In this case, the HRC noted in para 8.4 that 10 years on death row between the judgment of the Court of Appeal and the Privy Council was 'disturbingly long', but no violation of Art 7 took place as the delay was attributable to the prisoner.

opinion by Christine Chanet who concluded that the state could not be exonerated even if the delay was caused partially due to the failure of the condemned prisoner.[31]

After the Privy Council's decision in *Pratt and Morgan* set a five-year guideline, the HRC clarified its position in *Simms* stating that prolonged detention on death row would not be considered cruel and inhuman treatment 'in the absence of some further compelling circumstances'.[32] The HRC elaborated its position in *Errol Johnson* in 1996 where, despite finding that over 11 years on death row was 'certainly a matter of serious concern', the HRC found no further compelling circumstances for a violation of Article 7.[33]

The majority opinion explained that setting a cut-off date would give states a deadline to carry out executions adding that even if the length was not fixed, states would be 'tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past'.[34] The HRC stressed that by taking this position it did not 'wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not', but neither did it wish to convey a message to states that they should carry out a capital sentence as expeditiously as possible after it was imposed.[35]

In a minority opinion, four members stated that although the refusal to examine length of detention *per se* as CID had previously been acceptable in the facts of each previous communication, its applicability in this case revealed:[36]

> [A] lack of flexibility that would not allow [the Committee] to examine any more the circumstances of each case, so as to determine whether, in a given case, prolonged detention on death row constitutes cruel, inhuman or degrading treatment within the meaning of article 7 of the Covenant.

The above members associated themselves with the opinion of Christine Chanet, who reiterated her previous dissent in *Barett and Sutcliffe* and also took the opportunity to explain her views. Chanet argued that the majority opinion was too subjective—claiming to understand what was preferable from the supposed standpoint of the prisoner (death or awaiting death) as also focusing on the misinterpretation by states of the Committee's decisions.[37]

[31] UN Doc CCPR/C/44/D/271/1988 (1992), Appendix, individual opinion submitted by Christine Chanet.

[32] *Simms v Jamaica*, Communication No 541/1993, UN Doc CCPR/C/53/D/541/1993 (1995) para 6.5.

[33] *Errol Johnson v Jamaica*, Communication No 588/1994, UN Doc CCPR/C/56/D/588/1994 (1996).

[34] UN Doc CCPR/C/56/D/588/1994 (n 33), para 8.3.

[35] UN Doc CCPR/C/56/D/588/1994 (n 33), para 8.4.

[36] UN Doc CCPR/C/56/D/588/1994 (n 33), para 8.4, individual opinion by Committee members Prafullachandra N Bhagwati, Marco T Bruni Celli, Fausto Pocar, and Julio Prado Vallejo.

[37] UN Doc CCPR/C/56/D/588/1994 (n 33), para 8.4, individual opinion by Committee member Christine Chanet. The sixth and final dissenting member began by stating that capital punishment in itself constituted CID punishment and agreed with Chanet's opinion on most points. See UN Doc

Despite the divide amongst its members, the jurisprudence of the HRC has remained the same. It was further reiterated in two other cases from Trinidad and Tobago in 1997 where the length of stay on death row was 18 and 16 years respectively. In *LaVende*, despite finding the period of 18 years 'unprecedented and a matter of serious concern', the HRC majority stuck to its previous position.[38] A six-member minority disagreed both on the case (finding further compelling circumstances) and on the jurisprudence: 'Keeping a person detained on death row for so many years, after exhaustion of domestic remedies, and in the absence of any further explanation of the State party as to the reasons thereof, constitutes in itself cruel and inhuman treatment'.[39]

Given that all the HRC members agreed on the case-by-case assessment, it is understandable no list of compelling circumstances has been laid down. Instead, in *Francis* the HRC mentioned the following as circumstances to bear in mind in making an assessment: 'the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned'.[40] Schabas also notes that the HRC gives importance for petitioners to show they are specially and personally affected by the conditions.[41]

Deterioration in mental health of the prisoner has been considered a 'further compelling circumstance' by the HRC. In *Nathaniel Williams*, the HRC found that the prisoner's mental condition had seriously deteriorated during his seven-year incarceration on death row.[42] In addition the state party had failed to investigate the author's state of mental health or provide adequate medical treatment for his mental condition while detained on death row. The HRC concluded that the situation constituted a violation of Article 7 as well as Article 10(1) of the ICCPR.

This approach is spelt out more clearly in *Wilson* where the HRC found that the prisoner's mental condition (extreme anxiety, depression, and suffering from severe longstanding Post Traumatic Stress Disorder that can lead to severe and sudden self-destructive behaviour) 'was exacerbated by his treatment in, as well as the conditions of, his detention, and resulted in documented long-term psychological damage to him'. The HRC concluded that these were 'aggravating factors constituting further

CCPR/C/56/D/588/1994 (n 33), para 8.4, individual opinion by Committee member Francisco José Aguilar Urbina.

[38] *Robinson LaVende v Trinidad and Tobago*, Communication No 554/1993, UN Doc CCPR/C/61/D/554/1993 (1997), para 5.2.

[39] *Ramcharan Bickaroo v Trinidad and Tobago*, Communication No 555/1993, UN Doc CCPR/C/61/D/555/1993 (1997), Appendix, individual opinion of Committee member Fausto Pocar. The decisions of the majority and the minority in *Bickaroo* were virtually identical to that in *LaVende*, other than the curious fact that six members appear to have signed the *Bickaroo* minority opinion while five signed the *LaVende* minority opinion.

[40] *Clement Francis v Jamaica*, Communication No 606/1994, UN Doc CCPR/C/54/D/606/1994 (1995), para 9.1.

[41] Schabas (n 4) 149. The Zimbabwean Supreme Court in *Catholic Commission* questioned this approach, arguing that it penalized a hardy and strong prisoner. It, therefore, suggested that the likely effect upon the ordinary individual ought to be assessed rather than the actual effect.

[42] *Nathaniel Williams v Jamaica*, Communication No 609/1995, UN Doc CCPR/C/61/D/609/1995 (1997), para 6.5.

compelling circumstances' in addition to the 15 months on death row and found a violation of Article 7.[43]

In *Francis*, in addition to the mental health deterioration after 12 years on death row, due in part to the failure of the Jamaican court of appeal to issue a written judgment, the HRC also recognized the conditions in 'death cells'—special cells where prisoners are kept in their final hours or days.[44] The lawyer alleged that in the five days in the death cells—adjacent to the gallows—the prisoner was subjected to round the clock surveillance, weighing to calculate the length of 'drop' required, taunting by the executioner about how long it would take for him to die. Furthermore, he could hear the gallows being tested. The lawyer added that the strain of the five days in the death cell was such that the prisoner was unable to eat and it left him in a shaken, disturbed state for a long period of time. The allegations about regular beatings inflicted by warders as well as ridicule and strain to which the prisoner was subjected during five days he spent in the death cell awaiting execution in February 1988 were taken into account by the HRC in finding a violation under Articles 7 and 10(1) of the ICCPR.

In cases where the physical health of the prisoner was a significant factor, the HRC has found violations, irrespective of the length of the detention on death row. In *Henry and Douglas*, the prisoners had been on death row for over 10 years and suffered severe mental distress. The HRC, however, virtually ignored the above, focusing solely on the health aspects and concluded:[45]

> [T]he conditions of incarceration under which Mr. Henry continued to be held until his death, even after the prison authorities were aware of his terminal illness, and the lack of medical attention, for the gunshot wounds, received by Mr. Douglas, reveal a violation of articles 7, and 10 paragraph 1, of the Covenant.

In *Brown*, the prisoner had alleged that he was 'locked up in his cell for 23 hours a day, that he has no mattress or other bedding, no adequate sanitation, ventilation or electric lighting, and that he is denied exercise as well as medical treatment, adequate nutrition and clean drinking water'.[46] In addition, the prisoner also claimed that his belongings, including an asthma pump and other medication, were destroyed by the warders, and that he has been denied prompt assistance in case of an asthma-attack. The HRC found violations of Articles 7 and 10(1) of the ICCPR. Similarly in *Whyte*, allergy to dust and the paint used in the prison provoking attacks of asthma and burning eyes in the one year spent on death row, along with two beatings received by the prisoner were found sufficient to constitute a violation of Articles 7 and 10(1).[47]

[43] *Albert Wilson v Philippines*, Communication No 868/1999, UN Doc CCPR/C/79/D/868/1999 (2003), para 7.4.

[44] *Francis* (n 40).

[45] *Eustace Henry and Everald Douglas v Jamaica*, Communication No 571/1994, UN Doc CCPR/C/57/D/571/1994 (1996), para 9.5.

[46] *Brown v Jamaica*, Communication No 775/1997, UN Doc CCPR/C/65/D/775/1997 (1999), para 3.10.

[47] *Beresford Whyte v Jamaica*, Communication No 732/1997, UN Doc CCPR/C/63/D/732/1997 (1998).

A puzzling area of the HRC's case-law with respect to death row is the issue of conditions of detention on death row—an area where Articles 7 and 10(1) overlap neatly. In *Francis*, 'specific conditions of imprisonment in the particular penitentiary'[48] was noted as a factor for case-by-case assessment. The complementary relationship of the two provisions of the ICCPR is well illustrated in *Edwards*. The HRC noted 'the deplorable conditions of detention'—a cell measuring 6 feet by 14 feet, prisoner let out only for three-and-a-half hours a day, no recreational facilities, and no books—and held that keeping a prisoner in such conditions of detention constituted 'not only a violation of article 10, paragraph 1, but, because of the length of time in which the author was kept in these conditions [10 years], also a violation of article 7'.[49]

In *Patrick Taylor*, a period of 28 months on death row was deemed insufficient by the HRC to amount to a violation of any Covenant right, but the 'appalling and insalubrious' conditions of detention, including 'being confined in the cell for 23 hours each day, no provision of mattress or bedding for the concrete bunk, no integral sanitation, inadequate ventilation and no natural lighting' along with the general poor conditions of the prison were sufficient for a finding of Article 10(1) being violated.[50] Similarly, in *Desmond Taylor* the 'particularly bad and insalubrious conditions on death row' were sufficient for the HRC to find a violation of Article 10(1), but the conditions were not tested as 'further compelling circumstances' to add to the three-and-a-half years on death row.[51]

In *Dierdrick*, the prisoner was held in conditions virtually identical to those in *Patrick Taylor* and *Desmond Taylor* above—all the prisoners were on the same death row at St Catherine's District Prison, Jamaica. A significant difference here was the length however—over eight years on death row as compared to 28 months and 42 months in the other cases. Instead of adopting its previous complementary approach in *Edwards* a year earlier and considering the conditions 'further compelling circumstances', the HRC rejected the death row phenomenon challenge at the admissibility stage itself, but eventually found violations of Article 10(1) and Article 7 solely on the conditions of detention.[52]

Subsequently the HRC has repeatedly held that 'compelling circumstances' are not the same as deplorable or terrible conditions of detention on death row.[53]

[48] *Francis* (n 40).

[49] *Hervin Edwards v Jamaica*, Communication No 529/1993, UN Doc CCPR/C/60/D/529/1993 (1997), para 8.3.

[50] *Patrick Taylor v Jamaica*, Communication No 707/1996, UN Doc CCPR/C/60/D/707/1996 (1997), para 3.7.

[51] *Desmond Taylor v Jamaica*, Communication No 705/1996, UN Doc CCPR/C/62/D/705/1996 (1998), para 7.4.

[52] *Fray Deidrick v Jamaica*, Communication No 619/1995 UN Doc CCPR/C/62/D/619/1995 (1998), para 9.3. A similar approach is visible in another case where over five years on death row were ignored by the HRC, see *Silbert Daley v Jamaica*, Communication No 750/1997, UN Doc CCPR/C/63/D/750/1997 (1998).

[53] See *Levy v Jamaica*, Communication No 719/1996, UN Doc CCPR/C/64/D/719/1996 (1998); *Morgan and Williams v Jamaica*, Communication No 720/1996, UN Doc CCPR/C/64/D/720/1996/Rev.1 (1998); and *Clarence Marshall v Jamaica*, Communication No 730/1996, UN Doc CCPR/C/64/D/730/1996 (1998). All of them, however, rather inaccurately cite *Desmond Taylor*, instead of *Dierdrick* as a precedent.

Schabas is correct in noting that the legal significance of this point is difficult to grasp.[54] The pragmatic significance, however, is that it allows the HRC to further marginalize the death row phenomenon Article 7 challenge.

The tendency of the HRC to avoid the death row phenomenon is also evident in subsequent cases where it refused to examine a possible violation of Article 7 once a violation of Article 10(1) was found.[55] In a number of cases the HRC appears to be going out of its way to avoid recognizing a violation of Article 7 due to the death row phenomenon. In *Pennant*, the HRC found that an unexplained two weeks' stay in a death cell was incompatible with Article 7; the deplorable conditions of detention were in violation of Article 10(1) but instead of viewing these as further compelling circumstances in addition to the seven years on death row, it instead reiterated that the seven years on death row was not *per se* a violation of the ICCPR.[56]

Similarly, in a recent decision, *Munguwambuto Kabwe Peter Mwamba*, the HRC accepted the prisoner's claim that his detention on death row for over eight years for the hearing of his appeal affected his physical and mental health and raised issues under Article 7.[57] It further recorded the prisoner's claims of stress and depression he developed due to the inhuman conditions of detention 'amounting to sleeping in a dirty public toilet: cells are 3 by 3 metres; they accommodate several prisoners and have no toilet facilities, so they must avail of small tins to relieve themselves; TB, malaria and HIV/AIDS, are all prevalent in the prison'.[58] It, however, proceeded to make no finding on these issues and based its finding of Article 7 violation instead on unfair trial grounds.

Ghandhi is sympathetic to the HRC's approach; terming it as 'different' rather than less radical or progressive than regional and national courts and stressing the fact that the HRC needs to take a wider global view.[59] However, given the disagreements amongst members on this issue—the most on any issue within the HRC—Ghandhi also concluded in 2003 that a change in the position was likely in the future.

Since then, the death row phenomenon has become less visible in HRC case law with the end of petitions from death-row inmates from Jamaica, Guyana, and Trinidad and Tobago who have withdrawn or made reservation to the First Optional Protocol to the ICCPR—virtually the entire HRC jurisprudence on this issue was built upon cases from these states.[60] In its decision in *Raymond*

[54] Schabas (n 4) 148.

[55] *Lloyd Reece v Jamaica*, Communication No 796/1998, UN Doc CCPR/C/78/D/796/1998 (2003). See also *Dennis Lobban v Jamaica*, Communication No 797/1998 UN Doc CCPR/C/80/D/797/1998 (2004) and *Sandy Sextus v Trinidad and Tobago*, Communication No 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001).

[56] *Wilfred Pennant v Jamaica*, Communication No 647/1995, UN Doc CCPR/C/64/D/647/1995 (1998).

[57] *Munguwambuto Kabwe Peter Mwamba v Zambia*, Communication No 1520/2006, UN Doc CCPR/C/98/D/1520/2006 (2010).

[58] UN Doc CCPR/C/98/D/1520/2006 (2010), para 2.5.

[59] Ghandhi (n 28) 65.

[60] Jamaica announced its denouncement of the First Optional Protocol of the ICCPR in 1997 thereby disallowing its citizens the possibility of approaching the HRC. Guyana also denounced in 1999, but re-acceded with a reservation to exclude cases where persons were sentenced to death for murder and treason. Trinidad and Tobago denounced in 1998, re-acceded with a reservation to exclude all death sentence cases but denounced again in 2000.

Persaud and Rampersaud in 2006—where the prisoner had been on death row for 15 years—the HRC indicated that it was indeed reconsidering its views on the death row phenomenon, but it did not go as far as to take the plunge and change its position. The HRC stated:[61]

> [T]he Committee would be prepared to consider that the prolonged detention of the author on death row constitutes a violation of article 7. However, having also found a violation of article 6, paragraph 1, it does not consider it necessary in the present case to review and reconsider its jurisprudence that prolonged detention on death row, in itself and in the absence of other compelling circumstances, does not constitute a violation of article 7.

3. Death Row and 'Delay' Jurisprudence in India

> . . . the agony and horror that a condemned prisoner undergoes every day . . . In addition to the solitary confinement and lack of privacy with respect to even the daily ablutions, the rattle on the cell door heralding the arrival of the Jailor with the prospect as the harbinger of bad news, a condemned prisoner lives a life of uncertainty and defeat. In one particular prison, the horror was exacerbated as the gallows could be seen over the wall from the condemned cells.
>
> Justice Harjit Singh Bedi, *Jagdish v State of MP*, 18 September 2009[62]

With a criminal justice system plagued with backlog and delays and a gridlocked death row, the death row phenomenon has great relevance in India. As early as 1950, the Supreme Court acquitted a prisoner holding that although it would typically order a retrial in such case, this would 'be unfair to ordinary and settled practice seeing that the appellant has been in a state of suspense over his sentence of death for more than a year'.[63] This is a far cry from the current situation in India where no execution appears possible without at least a decade on death row.

In 1983—much before the ECtHR, the Privy Council and the HRC—the Indian Supreme Court had ruled that delay in execution would entitle condemned prisoners to a commutation. The 1970s also saw attention paid to conditions in prison including for prisoners under sentence of death. Yet the Indian jurisprudence on this issue has been limited to delay alone, without any serious attention to the conditions on death row for condemned prisoners. There are further significant differences when compared to the ECtHR, Privy Council, and HRC jurisprudence. This part of the chapter examines the jurisprudence in India and places it within current context on the death penalty in India.

[61] *Raymond Persaud and Rampersaud v Guyana*, Communication No 812/1998, UN Doc CCPR/C/86/D/812/1998 (2006), para 7.3. A minority opinion by two members found that the prisoner's 15 years on death row constituted CID treatment in violation of Art 7 of the ICCPR.

[62] *Jagdish v State of MP* MANU/SC/1673/2009, para 15.

[63] *Mohinder Singh v The State* [1950] 1 SCR 821, 833.

Early development of the 'delay' factor

The Indian constitution does not prohibit the death penalty. Article 21 states, 'No person shall be deprived of his life or personal liberty except according to procedure established by law'. Although there is no explicit prohibition against cruel, inhuman, or degrading treatment, this was initially introduced through the judgment in 1978 which held that procedures implicating the rights to life and liberty in Article 21 must be 'right and just and fair and not arbitrary, fanciful or oppressive'.[64] In *Sunil Batra*, a landmark judgment relating to solitary confinement of condemned prisoners, Justice Krishna Iyer further expanded: 'For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary'.[65]

There is no dispute anymore that Article 21 prohibits cruel, inhuman, or degrading treatment or punishment. Yet even before this was commonly accepted, the court had shown concern about delayed executions. In 1971, a five-judge constitutional bench in *Vivian Rodrick* had found that a prisoner who had been sentenced to death six years ago and whose case was still ongoing had suffered 'unimaginable mental agony'.[66] It commuted the death sentence and ruled that 'extremely excessive delay in the disposal of the case of the appellant would *by itself* be sufficient for imposing a lesser sentence.'[67]

Unfortunately the clear position on delay was diluted by the subsequent judgment in *Shanker*, where the Supreme Court held that delay in hearing in conjunction with other circumstances may be sufficient for commutation but this was not an absolute rule.[68] The lack of clarity was evident in the application of 'delay' in the Supreme Court's appellate judgments later in the decade. In a number of cases the Court did not consider delays up to six years as sufficient to direct a commutation of the death sentence, in others they did so where the delay had been half of that.[69] The discussion of other circumstances too was sporadic and unclear in these judgments.[70]

[64] This was a judgment of a seven-judge bench in *Maneka Gandhi v Union of India and Another* (1978) 1 SCC 248, para 14.

[65] *Sunil Batra v Delhi Administration and Others* AIR 1978 SC 1675; 1979 SCR (1) 392, 428.

[66] *Vivian Rodrick v The State of West Bengal* (1971) 1 SCC 468, 1971 SCR (3) 546, 549.

[67] *Vivian Rodrick* (n 66), 549. Other benches appeared to share the view. In *Ediga Anamma v State of Andhra Pradesh* AIR 1974 SC 799 and *Bhoor Singh and Another v State of Punjab* (1974) 4 SCC 754, the judgments referred to the 'brooding horror of hanging' haunting the prisoners, while in *Neti Sreeramulu v State of Andhra Pradesh* (1974) 3 SCC 314, the Supreme Court referred to the 'agonising consciousness and feeling of being under the sentence of death [that] must have constantly haunted the appellant'.

[68] *Shanker v State of UP* AIR 1975 SC 757.

[69] Cases where delay was rejected included *Mohinder Singh v State of Punjab* AIR 1976 SC 2299 (six years); *Balak Ram v State of UP* AIR 1977 SC 1095 (approximately six years); *Joseph Peter v State of Goa, Daman and Diu* (1977) 3 SCC 280 (six years). Cases where the Court did commute the sentence included *Bhagwan Bux Singh and Another v State of Uttar Pradesh* (1978) 1 SCC 214 (two-and-a-half years); *Sadhu Singh alias Surya Pratap Singh v State of UP* AIR 1978 SC 1506 (three-and-a-half years); *Guruswamy v State of Tamil Nadu* AIR 1979 SC 1177 (six years); and *Ram Adhar v State of UP* (1979) 3 SCC 774 (six years).

[70] For more on the arbitrariness of the application of the delay principle, see Amnesty International India and PUCL-Tamil Nadu, *Lethal Lottery: The Death Penalty in India* (Delhi, Amnesty International 2008).

Nonetheless, *Sunil Batra* represented where the court was going—the post-emergency Indian Supreme Court was concerned about liberty and human rights and innovations on a number of fronts including public interest litigation. Soon after, in *Rajendra Prasad*, Justice Iyer, writing for the majority, referred to the six-year period under sentence of death virtually making the prisoner a vegetable and argued, 'the excruciation of long pendency of the death sentence with the prisoner languishing near-solitary suffering all the time, may make the death sentence unconstitutionally cruel and agonising'.[71]

The 1970s had also seen the Supreme Court engaging much more with the broader question of the constitutionality of the death penalty.[72] Eventually by the start of the new decade, in *Bachan Singh*, it limited the scope for the award of the death penalty. Although the Supreme Court found capital punishment constitutionally valid, it concluded: 'A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed'.[73] The minority judgment by Justice Bhagwati went much further in finding the death penalty 'barbaric and inhuman in its effect, mental and physical upon the condemned man and is positively cruel'.[74] He quoted extensively from wide-ranging literature before concluding that the cruelty in the process itself also led to 'the utter depravity and inhumanity' of the death penalty.[75]

The Supreme Court of the mid-1970s and the early 1980s was divided on the question of capital punishment with judges staking their positions strongly.[76] The divide also showed on the question of delay. In *TV Vatheeswaran* in February 1983—where the prisoner had been under sentence of death (and solitary confinement) for eight years—Justices Chinappa Reddy and Misra built upon *Vivian Rodrick* and *Sunil Batra*, asserting that delay in executing the death sentence was cruel and inhuman and therefore violative of the Constitution.[77] The judgment declared:[78]

> [T]he dehumanising factor of prolonged delay in the execution of a sentence of death has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way as to offend the constitutional guarantee that no person shall be deprived of his life or personal liberty except according to procedure established by law.

In *Vatheeswaran*, the Supreme Court specifically noted that the cause of the delay was not a factor. They went further in also addressing the 'ticklish question' of how long was too long and laid down a guideline that where there was a delay of

[71] *Rajendra Prasad v State of Uttar Pradesh* AIR 1979 SC 916; 1979 SCR (3) 78, 117.
[72] See Amnesty International India (n 70).
[73] *Bachan Singh v State of Punjab* AIR 1980 SC 898, para 207.
[74] *Bachan Singh v State of Punjab* 1983 SCR (1) 145 at 284.
[75] *Bachan Singh* (n 74) at 287.
[76] Some judges, concerned that *Bachan Singh* had virtually abolished the death penalty, sought to regain lost ground by expanding the scope in a crafty 'clarification' of the 'rarest of the rare' formulation. See *Machhi Singh and Others v State of Punjab* (1983) 3 SCC 470.
[77] *TV Vatheeswaran v The State of Tamil Nadu* AIR 1983 SC 361; 1983 SCR (2) 348.
[78] *TV Vatheeswaran* (n 77) 359–60 (of SCR).

two years between the initial sentence of death and the hearing of the case by the Supreme Court, such death sentence would be quashed. But setting a cut-off date was a step too far, and barely a month later, *Vatheeswaran* was overruled by another bench in *Sher Singh*.

The judges in *Sher Singh* agreed with *Vatheeswaran* that extended periods of 'living death' on death row would be inhuman, observing, '[t]he prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman and degrading punishment in circumstances of a given case'.[79] They disagreed, however, on the two-year limit imposed by *Vatheeswaran*, terming it unrealistic and declaring that 'no hard and fast rule can be laid down'. *Sher Singh* also overruled the stance taken in *Vatheeswaran* that the cause of the delay was irrelevant. Although it reiterated the importance of legitimate appeals by death row prisoners, the judges in *Sher Singh* stressed that it would be relevant to consider whether the litigation was frivolous and embarked upon solely to defeat 'the ends of justice' and therefore 'no absolute or unqualified rule can be laid down that in every case in which there is a long delay in the execution of a death sentence, the sentence must be substituted by the sentence of life imprisonment'.[80]

Sher Singh also introduced the requirement that factors including the nature of the offence motive, impact upon society be considered by the Court in determining whether the judgment ought to be commuted on the grounds of delay. While *Sher Singh*'s overruling of the two-year rule and the stress on frivolous appeals from death row is understandable, its requirement for motive, nature of offence etc in the decision to commute on grounds of delay is puzzling. These were all factors that were, of course, relevant in sentencing and appeals, but if the extended 'living death' rendered the death sentence an inhuman or degrading punishment, how was it relevant what the nature of the case or the motive was? By bringing these factors into the equation, the bench in *Sher Singh* appeared to be questioning the absoluteness of the prohibition of cruel, inhuman or degrading treatment.

Sher Singh's impact can be seen in the few judgments that followed: for instance, in *Munawar Harun Shah*, a plea for commutation was rejected despite five years on death row.[81] However, a more sympathetic bench (including Justice Chinappa Reddy who had authored *Vatheeswaran*) directed commutation in *Javed Ahmed Abdul Hamid Pawala* and *Chandra Nath Banik* where lengths of death row were shorter, albeit dressed with other factors as well.[82]

In *Javed Ahmed Abdul Hamid Pawala*, the bench of Justices Chinappa Reddy and Venkataramiah also questioned the technical correctness of a three-judge bench in *Sher Singh* overruling the decision of a two-judge bench in *Vatheeswaran*.[83] With a

[79] *Sher Singh and Others v State of Punjab* AIR 1983 SC 465; 1983 SCR (2) 582, 591.
[80] *Sher Singh and Others* (n 79), 595.
[81] *Munawar Harun Shah v State of Maharashtra* AIR 1983 SC 585.
[82] *Javed Ahmed Abdul Hamid Pawala v State of Maharashtra* (1985) 1 SCC 275 (two years nine months); *Chandra Nath Banik v State of West Bengal* 1987 Supp SCC 468 (two years).
[83] *Triveniben v State of Gujarat* (1988) 4 SCC 574.

number of cases on delayed execution coming to the Supreme Court and confusion over the exact legal position, the Chief Justice designated a five-judge Constitutional bench to settle the issue—the result was the decision on a group of petitions from death row, in *Triveniben*.

Triveniben and the constitutional position

In a brief order in *Triveniben* in October 1988, a five-judge bench laid down the law on the question of delay in execution and lengthy death row stays, in the following terms:[84]

- 'Undue long delay' in execution of the death sentence of death entitled the prisoner to file a petition to the Supreme Court.
- The Court would only examine the nature of delay caused after sentence was finally confirmed by the judicial process and would have no jurisdiction to re-open the conclusion reached by the Court while finally maintaining the sentence of death.
- The Supreme Court *may* consider the question of 'inordinate delay' in the light of *all circumstances of the case* to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life.
- No fixed period of delay could be laid down as a cut-off.

In the battle between the judges in *Vatheeswaran* and *Sher Singh*, the former undoubtedly prevailed. But *Triveniben* was even more conservative than *Sher Singh* in that it completely rejected the notion that delays in the judicial capital-sentencing system could lead to constitutional violations. In the detailed judgment of *Triveniben* issued in February 1989, the narrow view of the five-judge bench was further visible:[85]

> While considering the question of delay after the final verdict is pronounced, the time spent on petitions for review and repeated mercy petitions at the instance of the convicted person himself however shall not be considered. The only delay which would be material for consideration will be the delays in disposal of the mercy petitions or delay occurring at the instance of the Executive.

Unlike the international jurisprudence on the broader issue of death row phenomenon, Indian jurisprudence is thus limited to time on death row due to delay by the executive in disposal of mercy petitions. Unlike the HRC and the Privy Council that examine time on death row from the time the death sentence is awarded, the Indian Supreme Court (which is also an appellate court) only starts the clock after it has disposed of the appeal and a mercy petition has been sent to the executive.[86]

[84] *Triveniben* (n 83), para 2.

[85] *Triveniben v State of Gujarat* (1989) 1 SCC 678; 1989 SCR (1) 509, 529.

[86] The Supreme Court has, however, indicated that it might consider time on death row during judicial proceedings as a mitigating circumstance in determining whether to commute the death sentence. See *Sunder Singh v State of Uttaranchal* MANU/SC/0710/2010, where six years under sentence of death was found insufficient in the light of other aggravating factors. Yet in *Ramesh v State of Rajasthan* (2011) 3 SCC 685, the Supreme Court in February 2011 commuted a death sentence

Unlike the HRC, there is no strict requirement that delay requires additional 'compelling circumstances'. In this respect the Indian position is closer to that of the Privy Council where excessive time on death row may in itself be sufficient ground for the Indian Supreme Court to commute the sentence. However, the broad discretion given to Indian judges to examine 'all circumstances of the case' including factors previously considered in sentencing is unprecedented and has no equivalent in the jurisprudence of any of the international or other national courts that have ruled on the death row phenomenon.

The judgment of the Supreme Court was followed by a few High Courts in the following years.[87] The focus on executive delay in disposing of mercy petitions was also maintained by the Supreme Court in *Madhu Mehta.* The prisoner in this case (Gayasi Lal) had been awaiting a decision on his mercy petition for eight years and an official report concluded: '[his] mental state is such that he might commit suicide by hanging his head on the iron grill of his cell if a decision on his petition is not taken soon'.[88] The Supreme Court commuted the death sentence on the ground of delay by the executive in deciding the mercy petition.

While the object of the Supreme Court excluding delay in the judicial process from purview in *Triveniben* may have been to ensure that trials and appeals in capital cases are not rushed through, its limited engagement with the issue of delay has meant that even cases of negligence in the judicial domain leading to prisoners spending additional years on death row can no longer be considered in the constitutional challenge. However, even the limited practice of the *Triveniben* guidelines has not been too consistent in this regard.

In 1991, the Supreme Court made an exception in *Daya Singh*.[89] This was one of the cases where a plea for commutation was rejected alongside *Triveniben* a few years ago. A second mercy petition had since been filed and was pending with the executive. The judges did not find that the delay in clemency was sufficient to commute and *Triveniben* had specifically mentioned that delay in repeat mercy petitions would not be considered. Yet the bench directed commutation on 'cumulative grounds' after taking into account the prisoner's incarceration for nearly two decades—since 1972—of which he had been under sentence of death for 13 years.

Unfortunately the Supreme Court did not make any exceptions in the case of *Dhananjoy Chatterjee*, who was executed in August 2004 after spending over 10 years on death row and 14 years in prison. Most of the 10 years were directly attributable to the negligence of the West Bengal state authorities who had not bothered to seek an end to the order of the Calcutta High Court that had temporarily held the execution in abeyance in 1994.[90] These facts were also noted by the Supreme Court in its

on appeal with one mitigating circumstance being that the accused was 'languishing in death cell for more than six years' since he had been sentenced by the trial court.

[87] *Haja Moideen and Others v Government of India and Others* 1991 Cri LJ 1325 (Madras); *Khem Chand v State* 1990 Cri LJ 2314 (Delhi); *Bhagwan Patilba Palve v State of Maharashtra* 1989 MLJ 100 (Bombay).

[88] *Madhu Mehta v Union of India and Others* AIR 1989 SC 2299; 1989 SCR(3) 774, 779.

[89] *Daya Singh v Union of India and Others* AIR 1991 SC 1548.

[90] Dhananjoy Chatterjee filed a writ petition in the Calcutta High Court in 1994 challenging the rejection of the mercy petition by the Governor. The High Court had stayed the execution, but

judgment on a petition filed by Chatterjee in 2004, where the Court directed the state government to ensure that all the facts were placed before the appropriate authorities in the mercy proceedings.[91] Both the state and the central authorities rejected the mercy petition and Chatterjee returned to seek relief from the Supreme Court. The Supreme Court refused to examine the nine-year delay in the judicial process due to the negligence of the state, limiting its engagement on facts to the mercy petition process.

Another condemned prisoner, Gurmeet Singh, remains on death row since 1996, of which seven years (1996–2003) are attributed to the administrative officials of the High Court who failed to provide the appropriate paperwork for the prisoner to appeal to the Supreme Court, despite several reminders sent through the jail authorities.[92] Disciplinary action was taken against the officials after the Supreme Court sought an explanation for the delay, but the Supreme Court refused to commute the death sentence as the delay was caused in the judicial, and not the executive mercy process.

Solitary confinement and conditions of detention

Section 30(2) of the Indian Prisons Act 1894 provides that 'prisoners under sentence of death' 'shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard'. In the 1978 judgment in *Sunil Batra*, a constitutional bench of five judges clarified that a prisoner would only be considered prisoner under sentence of death 'once sentence of death has become final, conclusive and indefeasible which cannot be annulled or avoided by any judicial or constitutional procedure'.[93] Thus, only those prisoners whose mercy petitions have been rejected and are facing imminent execution can be placed in solitary confinement.

The *Sunil Batra* ruling on solitary confinement appears to have made little difference in practice. For example, Rule 912 of the Bihar Prison Manual (1999 edition) states: 'Every prisoner sentenced to death shall from the date of his sentence and without waiting for the sentence to be confirmed by the High Court, be confined in some safe place, a cell if possible, within the jail, apart from all other prisoners'.

Unfortunately because the Indian Supreme Court limited its engagement with death row only to that of delay caused by non-disposal of the mercy petition, there has been little monitoring by the Court of actual conditions of detention, including solitary confinement. In a number of its own judgments there is a reference to the prisoners being in 'death cells' or solitary confinement immediately after being

the Government did not take any action to end the proceedings until November 2003, apparently after a newspaper reported that the Government had lost the file and highlighted the plight of the condemned prisoner.

[91] *Dhananjoy Chatterjee @ Dhana v State of West Bengal and Others* (2004) 9 SCC 751.

[92] *Gurmeet Singh v State of Uttar Pradesh* AIR 2005 SC 3611. In this particular case the accused had sought leave from the High Court to appeal to the Supreme Court (as per Art 134A of the Indian Constitution).

[93] *Sunil Batra* (n 65) 501.

sentenced to death, yet there has been no attempt to reiterate the law laid down in *Sunil Batra*, or hold the prison authorities liable for its violation.[94] In *Dharmendra Singh*, the High Court had commuted the sentence noting amongst other factors that he had been wrongly placed in the 'death cell' for three years. On appeal by the state, the Supreme Court reinstated the death sentence and even doubted whether the accused were actually in a 'death cell'.[95]

Sunil Batra also further examined other conditions on death row and clarified that:[96]

> [P]risoners under sentence of death [should] not be denied any of the community amenities including games, newspapers, books, moving around and meeting prisoners and visitors, subject to reasonable regulation of prison management . . . If the prisoner desires loneliness for reflection and remorse, for prayers and making peace with his maker, or opportunities for meeting family or friends, such facilities shall be liberally granted, having regard to the stressful spell of terrestrial farewell his soul may be passing through, the compassion society owes to him whose life it takes.

Unsurprisingly, with no continuing oversight from the Supreme Court, the directions of *Sunil Batra* remain a mere wish list.

'Capital gridlock' and the current context

Since the Supreme Court upheld his death sentence in 1999, Dharampal had spent 14 years on death row awaiting a decision on his mercy petition. He was not alone. In early 2013, there were eight other prisoners awaiting a decision on their final mercy petitions from the central government after the ordinary judicial process had been completed.[97] They were amongst the approximately 500 persons under sentence of death in India.[98]

Although executions in India had been rapidly decreasing virtually every decade since independence, they reduced to a trickle in the 1990s and virtually ended between 1997 and late 2012—only one took place in 2004. There has been no known change in India's official policy or stance on capital punishment, but various factors appear to have contributed to the lack of executions in this period.[99] Johnson and Zimring referred to this particular situation as 'capital gridlock'.[100] Dharampal and the eight others are the clearest example of the gridlock. Three of these prisoners on death row had spent approximately 15 years since being first

[94] References to death cells or solitary conferment have been made in *Ramesh* (n 86), *Vatheeswaran* (n 77), and *Vinayak Shivajirao Pol v State of Maharashtra* (1998) 2 SCC 233.

[95] *State of UP v Dharmendra Singh and Another* 1999 (6) SCALE 113.

[96] *Sunil Batra* (n 65) 488.

[97] Gurmeet Singh, Suresh Ramji, Praveen Kumar, Jafar Ali, Sonia Sanjeev, and Sundar Singh.

[98] Although the exact number is not known, at least 477 persons were under sentence of death in India at the end of 2011. See National Crime Records Bureau, *Prison Statistics 2011* (Delhi, Ministry of Home Affairs 2012). It is unclear at what stage the cases of these 477 persons are.

[99] For some possible reasons see, Bikramjeet Batra, 'Justice or Revenge?' (2010) 27(11) *Frontline*.

[100] David Ted Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford, Oxford University Press 2009).

sentenced to death; another two had spent 10–11 years while three had been on death row for eight to nine years.

One cause of the gridlock was the non-disposal of mercy petitions over the past decade. Despite a steady stream of persons being sentenced to death every year, virtually no decisions were made on mercy petitions after 1997. The reasons for this are not entirely clear, but it is absolutely certain that no single political party or individual President could have led to this situation and there has been much speculation on the reasons for such inaction.[101] In 2006, the Minister of Home Affairs told Parliament that the average time being taken by the central government to decide mercy petitions was six to seven years.[102]

The gridlock ended after the death penalty was back in the front pages post the terrorist attacks in Mumbai in November 2008. The list of pending mercy petitions was whittled down dramatically by a new Home Minister who announced a review and overhaul of the mercy petition process. A large number of mercy petitions were decided—35 persons had their death sentences commuted between November 2009 and June 2012, but five prisoners also had their petitions rejected in the summer of 2011.[103]

All five—Devender Pal Singh Bhullar, Mahendra Nath Das, Santhan, Murugan and Perarivalan (the last three being the 'Rajiv Gandhi trio')—had spent lengthy periods on death row (ranging from eight to 11 years), awaiting a decision on their mercy petitions. Despite the jurisprudence of the Supreme Court, their mercy petitions were rejected and, with no other option now remaining, they have sought to challenge their executions on the grounds of excessive delay in disposal of mercy petitions. Three different petitions were initially heard in various courts before the matter reached the Supreme Court and brought back the issue of the death row phenomenon to centre stage in the debate on the death penalty in India.

In petitions filed in the Madras High Court, co-accused Murugan and Santhan referred to the previously discussed judgments and legal position and sought commutation of the death sentence due to:[104]

> [The] unconscionably long delay of more than 11 years and 4 months in deciding my mercy petition by the office of the President of India, and the consequent mental agony and suffering undergone by me during this period when I was confined in a single cell makes the sentence excessive and inhuman.

[101] See Bikramjeet Batra, *'Court' of Last Resort: A Study of Constitutional Clemency for Capital Crimes in India* (Delhi, Jawaharlal Nehru University 2009).

[102] Express News Service, 'Can't Rush Through Afzal Petition, Patil Tells Oppn', *Indian Express* (14 December 2006), <http://www.indianexpress.com/news/cant-rush-through-afzal-petition-patil-tel/185360/> (accessed 1 January 2012).

[103] Presidents Secretariat, *Statement of Mercy Petition Cases: Disposed of*, 30 October 2012. This information was downloaded from the website of the President's Office in November 2012 and is on file with the author. It was unfortunately intentionally removed from the website in early 2013, see Press Trust of India, 'Mercy Petition Page Removed from President Office Website', *India Today* (14 February 2013), <http://indiatoday.intoday.in/story/mercy-petition-page-removed-from-president-pranab-mukherjee-office-website/1/250272.html> (accessed 3 March 2013).

[104] *V Sriharan @ Murugan v Union of India and Others*, WP 20287 of 2011 in the Madras High Court (on file with author).

In the petition Murugan also pointed out that he had been kept in 'single cell confinement for the past 12½ years' since being sentenced to death in January 1998.[105] Murugan's petition highlights the nature of life on death row:[106]

> During this long period, I have suffered excruciating mental agony and torture of a kind that is difficult to imagine or conceptualise. I have been swinging between life and death, believing every waking minute to be my last, not knowing whether I will be spared or not, and when the hangman's noose will close around my neck. Every person passing my prison cell is imagined to be the harbinger of news regarding the outcome of the mercy petition, or the date of my execution.

Co-accused Perarivalan's petition also alleged 'more than 20 years of solitary/single cell confinement' on death row. In addition to the Indian jurisprudence, it also referred to the Privy Council's decision in *Pratt and Morgan* in seeking commutation on grounds of the 'unwarranted, illegal and unconstitutional delay caused by the President and the Union of India in the disposal of the mercy petition'.[107]

A petition filed in the case of Mahendra Nath Das in the Gauhati High Court similarly claimed commutation on the grounds of 'unconscionable delay of 12 years . . . swinging between life and death for these past 15 years in solitary confinement'. The petitioner pointed out that in the over 14 years since being sentenced to death, Das 'has been kept in solitary confinement, deprived of all human companionship, with the threat of imminent death hanging over his head'. This has been described as being in 'a living hell not knowing whether he would live or die'.[108] The petition also noted that Das was 'so frustrated and traumatised by the uncertainty of his fate' during the pendency of his mercy petition, that he went on a hunger strike to protest against the delay in adjudicating his plea for mercy.[109]

In addition to the petitions filed in the Madras and Gauhati High Courts, similar issues of delayed disposal of mercy petitions and cruel and inhuman treatment were also discussed in the Supreme Court in the petitions filed by Devender Pal Singh Bhullar and his wife Navneet Kaur.

Bhullar, under sentence of death since August 2001 and awaiting disposal of his mercy petition for over eight years (at that time), approached the Supreme Court for a commutation on the grounds of delay in late May 2011.[110] In addition to raising similar concerns of 'extreme inhuman suffering and great mental torture' caused due to spending 22 hours a day in a 7 by 9 feet cell for over 10 years, the petition highlighted the impact it has had on mental and physical health of the prisoner. According to the petition, Bhullar is suffering from severe depression

[105] *V Sriharan @ Murugan* (n 104). [106] *V Sriharan @ Murugan* (n 104).

[107] *AG Perarivalan @ Arivu v Union of India and Others*, WP 20289 of 2011 in the Madras High Court (on file with author).

[108] *Mahendra Nath Das v The Union of India and Others*, Writ Petition (Crl) No 35/2011 in the Gauhati High Court (on file with author). A previous petition was also filed by the prisoner's mother Kusumbala Das but rejected on a technical ground of *locus standi*.

[109] *Mahendra Nath Das* (n 108).

[110] *Devender Pal Singh Bhullar v State of NCT of Delhi*, WP (Crl) D No 16039/2011 (on file with author).

with psychotic symptoms with suicidal risks for over six years, hyper tension for seven years and cervical spondylitis for about five years. In January 2011, a magistrate directed that Bhullar be hospitalized at the Institute of Human Behaviour and Allied Science due to his deteriorating mental health—he has reportedly attempted to commit suicide a number of times.

The Supreme Court sought a response from the government but two days after the petition was heard, Bhullar's mercy petition was rejected by the government. The Court continued to examine the claim that the delayed disposal is sufficient grounds for a judicial commutation. In addition, a petition filed by Bhullar's wife has pleaded that the 'inhuman penalty and torture on his mind' during 5,700 days spent on death row due to the delayed disposal of his mercy petition has led to her husband becoming 'mentally retarded'.

The petition states:[111]

> When the petitioner met him last time at the Institute of Human Behaviour and Allied Sciences (IHBAS), she found him to be quiet, withdrawn and unwilling to entertain any conversation except a smile. His condition has continued to deteriorate in post-conviction period since the year 2003.

In addition to seeking commutation on grounds of delay, it concludes by adding that an execution of a mentally retarded prisoner would be cruel and inhuman and prohibited under Article 21 of Constitution of India.[112]

The Indian government responded by way of similar affidavits of the Ministry of Home Affairs in all the above petitions. With respect to Bhullar, it did not contest the facts of his mental state. In all the cases, the government did not dispute the timelines that have been provided; instead they claimed that the time taken to dispose of the mercy petitions was not inordinate or undue delay and reiterated that no time limit can be laid down for such constitutional exercise of power by the President.[113]

Their approach on the question of delay being cruel and inhuman treatment is clear—they rejected any such notion outright as a 'specious argument'—arguing instead that the pendency of the mercy petition gives the prisoner 'a lease of life'.[114] Their implication that keeping prisoners on death row (in these particular cases for between 10–15 years) is in the best interest of the prisoner, reveals the fallibility of the HRC's rationale that life, however difficult, is better than death.

On 30 January 2012, the Gauhati High Court dismissed the petition filed by Mahendra Nath Das.[115] The judgment held that as per *Triveniben*, 'delay is a factor

[111] *Devender Pal Singh Bhullar* (n 110).

[112] While delay and its impact on his health are a strong argument for commutation, a finding of mental retardation appears unlikely as Bhullar's condition did not manifest before the age of 18—a requirement for such a finding. See Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford, Oxford University Press 2008) 201.

[113] See for instance the affidavit of JL Chugh, Joint Secretary (Judicial), Ministry of Home Affairs, New Delhi in *Devender Pal Singh Bhullar v State of NCT of Delhi*, WP (Crl) D No 16039/2011, 18 (on file with author).

[114] *Devender Pal Singh Bhullar* (n 113), 19.

[115] *Mahendra Nath Das v Union of India and Others*, WP (Crl) 35/2011, Gauhati High Court, Judgment dated 30 January 2012.

which has to be seen in the light of subsequent circumstances, coupled with the nature of offence and circumstances in which the offence was committed'.[116] The Court found that there was no 'subsequent circumstance showing any adverse effect' on the prisoner.[117] The judgment concluded that in such an absence and given the 'dastardly and diabolical circumstances of the crime', the plea for commutation on grounds of delay could not be upheld.[118]

This decision by the Gauhati High Court is the clearest attempt by the Indian courts to align the legal position on delay with that of the HRC by noting specifically the requirement of a 'subsequent circumstance' in addition to the delay. The High Court's claim that such a position is consistent with *Triveniben* appears tenuous. Mahendra Nath Das approached the Supreme Court and his petition along with the Rajiv Gandhi trio, whose petitions were also transferred to the Supreme Court in March 2012, was kept pending until a decision was taken in Bhullar's case.[119]

In mid-April 2013, nearly one year after final arguments were completed, the Supreme Court finally delivered its judgment on the various writ petitions filed with respect to Devender Pal Singh Bhullar.[120] While the judgment in *Devender Pal Singh Bhullar v State of NCT of Delhi* appears to recognize the deteriorating and debilitating effects of years on death row, it rejected the plea for commutation essentially on the ground that the *Triveniben* judgment would not apply to terrorism cases.

Triveniben referred to delay needing to be considered 'in the light of all circumstances of the case'. The circumstances of this case are tremendously in favour of the petitioner—sentenced solely on the basis of a retracted confession made under duress and without access to a lawyer; acquitted by the senior-judge on a three-judge appeal hearing and eventually sentenced to death by a split majority judgment.[121] However, instead of recognizing the delay in the case along with such circumstances, *Bhullar* effectively bars the applicability of *Triveniben* from all cases 'where a person is convicted for offence under TADA or similar statutes'.[122] From a constitutional perspective, the *Bhullar* judgment is arguably flawed—*Triveniben* was a judgment by five judges who formed a Constitutional Bench and the two judges who delivered *Bhullar* cannot limit when *Triveniben* would apply.

Far from appreciating the background and object of the position in *Triveniben*, the poor legal analysis of the Supreme Court judges of 2013 appears to be the

[116] *Mahendra Nath Das* (n 115), para 32.
[117] *Mahendra Nath Das* (n 115), para 32.
[118] *Mahendra Nath Das* (n 115), para 32.
[119] *Mahindra Nath Das v Union of India and Others*, Special Leave Petition (Criminal) 1105 of 2012, Supreme Court of India; *V Sriharan @ Murugan v Union of India*, Transfer case (Criminal) 1 of 2012, Supreme Court of India; *T. Suthendraraja @ Santhan v Union of India and others*, Transfer case (Criminal) 2 of 2012, Supreme Court of India; *AG Perarivlan @ Arivu v Union of India and others*, Transfer case (Criminal) 3 of 2012, Supreme Court of India.
[120] Judgment dated 12 April 2013, WP (Crl) D No 16039/2011.
[121] For more details, see 'Amnesty International Calls for Death Sentence on Devender Pal Singh Not to be Carried Out', India, ASA 20/033/2011, <http://www.amnesty.org/pt-br/library/info/ASA20/033/2011/en> (accessed 15 April 2013).
[122] *Devender Pal Singh Bhullar* (n 110), para 40.

result of the judges being swept by an ideological stance on terrorism. Much like the Supreme Court judgment which upheld the death sentence awarded to Devender Pal Singh referring to the attacks of September 2011 (in New York and Washington DC), the judges in *Bhullar*—a decade later—appear to have been deeply influenced by '[t]he monster of terrorism [which] has spread its tentacles in most of the countries'.[123]

The judges in *Bhullar* state that 'no effort was made for deciding the petitioner's case' by the office of the President from May 2005 to May 2011.[124] They further accept that the documents produced as evidence in the case 'give an indication that on account of prolonged detention in jail after his conviction and sentence to death, the petitioner has suffered physically and mentally'.[125] Yet, they do not find this sufficient to commute the death sentence even though the facts in the case would have even been sufficient to satisfy the HRC requirement of 'further compelling circumstance'.[126]

4. Conclusion—A March to the Gallows?

Despite the obvious comparisons with Gayasi Lal—who also spent eight years on death row—it appears that Devender Pal Singh Bhullar will be executed. The *Bhullar* judgment is also likely to impact the Rajiv Gandhi trio as well as a number of others whose cases may be covered by the 'terrorism exception' carved out by the judgment. The particularly strong stance on terrorism by the judges in *Bhullar* is likely to have been influenced by events outside the court, as the death penalty debate in India changed significantly in late 2012 and early 2013. The primary reason for this was the sudden and secret execution of Ajmal Kasab, the Pakistani terrorist captured after the 2008 Mumbai killings, in November 2012.

After the completion of the judicial process, the Governor of Maharashtra rejected Kasab's mercy petition on 29 September.[127] While it was later reported that the Indian Ministry of Home Affairs recommended rejection of the mercy petition on 23 October, no information was made available about the eventual rejection by the President until after the execution was carried out on the morning of 21 November 2012 at Pune. This was an unprecedented execution carried out in

[123] *Devender Pal Singh Bhullar* (n 110), para 8. Beginning with the claim that 'India is one of the worst victims of internal and external terrorism', the judges conclude their diatribe with observing, '[m]any others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights'. See also para 40.

[124] *Devender Pal Singh Bhullar* (n 110), para 45.

[125] *Devender Pal Singh Bhullar* (n 110), para 46.

[126] Curiously, while the Supreme Court judges do refer to various international precedents which were cited before them before dismissing them, the *Bhullar* judgment makes no mention of the jurisprudence of the HRC. It is unclear whether this was not brought to their notice, or whether they decided to ignore it.

[127] Kasab had originally been sentenced to death in May 2010 and the sentence was confirmed by the High Court in February 2011. The Supreme Court upheld the death sentence on 29 August 2012.

secret, with the mercy petition rejected 'out of turn'.[128] It was reported that Kasab had been informed of the impending execution on 12 November, but it is unclear whether he was advised of his rights and the legal options available to him. This is also supported by the response of the Home Minister in a television interview where he stated that the secrecy was required so that petitions in courts and NGOs and international pressure could be avoided.[129]

Secrecy was also maintained in the execution of Afzal Guru on 9 February 2013. Guru, a Kashmiri man, was sentenced to death in 2002 for being a conspirator in the attack on the Indian Parliament in 2001. Unlike Kasab, his case had been decided by the Supreme Court in 2005 but the government had not decided on his mercy petition since then.[130] Guru may have thus been able to claim commutation on the grounds of delay, or at least join the others in the Court who had made the same claim. He too had spent over 10 years since initially being sentenced to death, and over seven-and-a-half years since completing the judicial process—awaiting a decision on his mercy petition. The manner in which the process was carried out, with no announcement of the rejection of the mercy petition by the President and no information given to the media, ensured that Afzal Guru had little opportunity to approach the courts on the ground of delay. His family members were unaware of the rejection of the mercy petition, until after he was hanged and buried in Delhi's Tihar Jail.

Yet, the same practice was not carried out in other cases where President Pranab Mukherjee had rejected mercy petitions. In between the executions of Kasab and Afzal Guru, the President also rejected the mercy petition of Saibanna on 4 January 2013. Newspapers had reported the rejection on 13 January even though Saibanna's lawyers claimed that he was orally informed of the rejection on 17 January.[131] Unlike in the cases of Kasab and Guru, there appears to have been no attempt to carry out an expeditious execution. Saibanna was therefore able to appeal the rejection of his mercy petition at the Karnataka High Court where the case is pending as of March 2013. Amongst the grounds is 'the unconscionably long delay in deciding his mercy petition . . . and the consequent mental agony and suffering undergone by him during this period when he was confined in a single cell [which] makes the sentence excessive and inhuman'.[132] This is unsurprising

[128] Subsequently, the Government announced that the President had rejected the mercy petition on 5 November and the Prison authorities had fixed the date shortly thereafter.

[129] 'The Country's Top Leadership Got to Know of Ajmal Kasab's Execution on TV', *NDTV* (21 November 2012), <http://www.ndtv.com/article/india/the-country-s-top-leadership-got-to-know-of-ajmal-kasab-s-execution-on-tv-sushil-kumar-shinde-to-ndt-295369> (accessed 15 April 2013).

[130] Although the file of Afzal Guru had been pending since August 2011, it was reported that Pranab Mukherjee sent the file back to the Home Ministry in November 2012 for a fresh look. It was returned to him with the same advice on 23 January 2013, and he chose to accept the recommendation on 3 February 2013.

[131] 'Pranab Rejects Another Mercy Plea', *The Hindu* (13 January 2013), <http://www.thehindu.com/news/national/pranab-rejects-another-mercy-plea/article4302554.ece> (accessed 15 April 2013).

[132] *Saibanna s/o Ningappa Natikar v The Union of India*, Writ Petition No 3297 of 2013, Karnataka High Court (petition on file with author).

since he too has spent over 10 years in prison since first being sentenced to death, and nearly eight years awaiting a decision on his mercy petition.

Similarly, the rejection of the petition of Simon, Gnanprakasam, Madiah and Bilavendran in February 2013 was not kept quiet or followed by a hasty execution. The four men were sentenced to death for being members of a criminal gang and being involved in an ambush that killed a large number of policemen. They were sentenced to death by the Supreme Court in January 2004 and had their mercy petitions pending for nine years, until eventually rejected by the President on 12 February 2013. The four men have challenged the rejection of their petition at the Supreme Court—largely on the ground of delay. Although the Supreme Court refused to transfer this petition to the bench that had already heard the cases of Das, Bhullar, etc, they did, however, order the case adjourned until the judgment in the *Bhullar* case was announced as that would directly impact these prisoners as well.[133]

Secrecy and confusion reappeared in the latest round of mercy petitions to be rejected. The petitions of three persons (Gurmeet Singh, Suresh and Ramji) were rejected sometime in February or early March 2013, but no information about this appears to have been released.[134] In early April 2013, media houses reported a number of mercy petitions being rejected. While the rejection of Dharampal's mercy petition was confirmed by the Prison authorities, other information remains uncorroborated and it is still unclear how many and which mercy petitions have been rejected by the President in this latest round.[135] Nonetheless in urgent petitions heard by another bench of the Supreme Court on 6 April 2013, the executions of Suresh and Ramji, Gurmeet Singh and all the others who were at risk of execution were stayed.[136]

With the *Bhullar* judgment delivered only a week later, it appears unlikely that the Supreme Court will commute any of the death sentences. Although the newly-carved out terrorism exception to the 'inordinate delay' rule may not apply in all the cases, *Bhullar*'s overall impact is likely to be negative. The previous approach of the Supreme Court had already meant that the issue of death row was reduced to a technical and administrative question of delayed disposal of mercy petitions—poor conditions on death row were effectively ignored. But *Bhullar* has lowered the bar further: instead of the debate focusing on cruelty and inhumanity

[133] Order dated 20 February 2013 in *Shamik Narain and others v Union of India and others*, Writ Petition (Criminal) No 34 of 2013, Supreme Court of India (petition on file with author).

[134] A statement made by the Ministry of Home Affairs to Parliament on 6 March 2013 did not feature these names in the Pending Mercy Petitions list. The rejection of their mercy petitions was confirmed by the Ministry of Home Affairs in their reply to a RTI application on 28 March 2013 (petition on file with author).

[135] The President's Office and the Ministry of Home Affairs have remained silent on the issue and have not released any information to the general public. It is unknown whether even all the prisoners or their families have been informed. The persons at risk include Praveen Kumar, Jafar Ali, Sonia Sanjeev, and Sundar Singh.

[136] *Shatrughan Chauhan v Union of India*, WP (Crl) No 55 of 2013, Supreme Court of India; *People's Union for Democratic Rights v Union of India*, WP (Crl) D No 11248 of 2013, Supreme Court of India (orders on file with author).

of the death row phenomenon, the debate is now framed in terms of terrorism and the heinous nature of the offence.

The judgment of the Gauhati High Court in *Mahendra Nath Das* had hinted at the possibility of the Indian position on delay and death row syndrome being aligned with that of the HRC with respect to 'compelling circumstances'. While any such move would have been ironic, given that the HRC has previously indicated the likelihood of it moving away from the 'compelling circumstances' approach, it would undoubtedly have been more human-rights friendly than the approach taken in *Bhullar*.

Only a few decades ago, executions were commonplace in India with hundreds being sent to the gallows every year. Death sentences were commonly awarded, the Supreme Court rarely allowed appeals and few executions made it to the daily newspapers. With a growing (albeit small) abolitionist movement and changes in the legal system, executions had virtually come to a standstill in India. The executions of Ajmal Kasab and Afzal Guru (in late 2012 and early 2013 respectively) were major steps backward. The *Bhullar* judgment is continuing down that regrettable path and will inevitably lead to executions in the near future. Between 15 and 20 persons are now at imminent risk of execution.

In a 2009 judgment, speaking with respect to the government delaying decisions on mercy petitions, another bench of the Supreme Court bench stated: 'We must, however, say with the greatest emphasis, that human beings are not chattels [sic] and should not be used as pawns in furthering some larger political or government policy'.[137] When given an opportunity to take a clear stance in *Bhullar*, however, instead of acknowledging that the absolute prohibition against torture and other cruel, inhuman, or degrading treatment—part of the right to life in Article 21 of the Indian Constitution—applies even in the cases of 'the worst of the worst' condemned to death by the judicial system, the Indian Supreme Court disregarded its own advice and instead initiated the deadly march to the gallows.

[137] *Jagdish* (n 62), para 13.

Index

Introductory Note

References such as '178–9' indicate (not necessarily continuous) discussion of a topic across a range of pages. Wherever possible in the case of topics with many references, these have either been divided into sub-topics or only the most significant discussions of the topic are listed. Because the entire work is about 'capital punishment', the 'death penalty' and 'Asia', the use of these terms (and certain others which occur constantly throughout the book) as entry points has been restricted. Information will be found under the corresponding detailed topics.