

The Death Penalty

A Worldwide Perspective

Fifth Edition—Revised and Updated

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Introduction

1. A Short Account of the Project

This book, now in its fifth edition, began life as a report to the United Nations Committee on Crime Prevention and Control in 1988. That report was commissioned following a resolution of the Economic and Social Council of the United Nations (ECOSOC), which had called for 'a study of the question of the death penalty and new contributions of the criminal sciences in the matter'.¹ The main aim was to bring up to date the survey of world trends that had been provided, some years earlier, by two influential reports. Both of these reports, *Capital Punishment* (the Ancel Report, 1962) and *Capital Punishment: Developments 1961-1965* (the Morris Report, 1967), were based on replies to a questionnaire sent to Member States of the United Nations (as well as to certain non-Member States) by the UN Secretary-General, seeking information on the *de jure* and *de facto* status of capital punishment and the number of judicial executions carried out annually. These surveys were subsequently carried out every five years as a regular feature of UN activity in the area of capital punishment.

Since 1985, attempts have also been made to discover the extent to which countries that have yet to abolish capital punishment abide by nine *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty* which were promulgated by resolution of ECOSOC in 1984 and endorsed by the General Assembly later that year, on the understanding that 'they would not be invoked to delay or prevent the abolition of the death penalty' as laid down in Article 6(6) of the International Covenant on Civil and Political Rights (ICCPR) which had come into force in 1976 (see Appendix 3).² These Safeguards, many of which embodied the objectives of the ICCPR, can be summarized as follows: to ensure that capital punishment is only implemented for 'the most serious crimes' as in Article 6(2) of the ICCPR, but now given a more narrow definition of 'intentional crimes with *lethal* or other extremely grave consequences' (our emphasis); to protect convicted persons from retrospective applications of the death penalty and to provide for the possibility of lighter punishments; to exempt those under 18 years of age at the time of the commission of the crime, pregnant women, new mothers, and those who are or have become insane; to ensure that it is only applied when there is no possibility of wrongful conviction, and only after a fair trial with legal assistance; to provide for appeals and the possibility of a pardon or commutation of sentence and to ensure that no executions are carried out until all such procedures have been completed; and, where capital punishment does occur, to carry it out so as to inflict the minimum possible suffering.

¹ In pursuance of Economic and Social Council (ECOSOC) resolution 1986/10, s X, and resolution 1989/64.

² Economic and Social Council resolution 1984/50, Annex. General Assembly resolution 29/118, 1984.

After receiving a report (the first edition of this book), which reviewed the extent to which these Safeguards were being implemented, ECOSOC recommended in resolution 1989/64 that they should be strengthened by adding four more injunctions. These related to providing adequate time and facilities to prepare a defence against a capital charge; providing for a mandatory appeal or mandatory review with provision for clemency or pardon in all cases; establishing a maximum age beyond which no death sentences or executions may be imposed; and ensuring that no person suffering from mental retardation or extremely limited mental competence should be sentenced to death, let alone executed. The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1989, requested the Secretary-General to publicize these Safeguards widely, as well as the procedures necessary to implement them, and this was reiterated by ECOSOC in 1996. They are set out in Appendix 3, along with the text of Articles 6, 7, 10, 14, and 15 of the International Covenant on Civil and Political Rights, which incorporate nearly all these Safeguards.

The second (1996), third (2002), and the fourth editions (2008) which we wrote jointly, were based in part on the fifth, sixth, and seventh Quinquennial Surveys (the last covering the years 1999 to 2003) which Roger Hood had been commissioned to prepare for the UN Secretary-General. The Eighth Survey, covering 2004 to 2008, which was published in 2010,³ was carried out for the Secretary-General by Professor William Schabas, and this has proved to be similarly of value. But, as noted in all previous editions of this book, the amount of information that could be gleaned from these surveys was always limited by the fact that many of the countries that retained the death penalty, and especially those which made the greatest use of it and which were suspected of ignoring the Safeguards, simply did not respond, or if they did, provided very inadequate data (see, for example, the Introduction to the 4th edition).

Thus a much wider variety of literature and statistical evidence has been surveyed, as will be apparent from the references and Bibliography (which brings together the articles, books, and reports cited in both the fourth and fifth editions). Nevertheless we have found it difficult to obtain accurate data about some retentionist countries from other sources because several of them publish no regular official statistical returns of death sentences or executions or, even if they do, they may be unobtainable outside the country in question. And although Amnesty International keeps a tally of reported death sentences and executions gathered by its representatives in countries around the world, and publishes the figures in its Annual Report, there is no way by which it can ensure that these data are always accurate and up to date. It will be impossible to present an accurate picture of capital punishment until all retentionist states take seriously their obligation to collect statistical data on this subject systematically and to report their practice, as requested, to the United Nations. Indeed, whether or not they report it to the UN, they have a duty to their citizens to publish such data so that the use of capital punishment is made transparent and those that administer it are held accountable—an issue discussed in Chapter 4.

³ UN doc E/2010/10.

We have relied on information obtained from many reports by international organizations, governmental commissions, non-governmental bodies, and academic sources. Of particular value have been the reports of the UN Special Rapporteur on Extra-judicial, Summary, or Arbitrary Executions; the reports of and submissions to the UN Human Rights Committee; the reports of the Secretary-General to the UN Commission on Human Rights; the reports made by governments under the Universal Periodic Review to the UN Human Rights Council; and reports by international and national Human Rights Commissions. In addition, we have drawn on many valuable reports published by Amnesty International and other human rights organizations, and anti-capital punishment pressure groups, such as the Death Penalty Information Center in the United States (DCPIC), the International Federation of Human Rights (FIDH), the Anti-Death Penalty Asian Network (ADPAN), Penal Reform International (PRI), The Death Penalty Project, Reprieve, the International Commission Against the Death Penalty, the World Coalition against the Death Penalty, the International Academic Network for the Abolition of Capital Punishment, and 'Hands off Cain' (HoC). The daily Newsletter sent to us by Hands off Cain has been especially valuable in enabling us to keep up to date with developments around the world, as has the indispensable website <<http://www.deathpenaltyworldwide.org>>, introduced since the fourth edition by Northwestern University Law School's Center for International Human Rights, under the direction of Professor Sandra Babcock. In addition, of course, there is the large academic literature, including many excellent empirical studies.

These sources reveal that frequently there is a disjunction between official replies on the formal state of the law and procedures, and what is discovered about the enforcement of law and the procedures adopted in practice. This means that we have been faced with the problem of veracity and objectivity where allegations of failure to abide by the Safeguards go unanswered or are flatly denied by the state. Who should one believe? The stance taken in this book is to try to make plain whenever the information has been unsubstantiated and to give, wherever possible, the source of any allegation of practices officially denied.

It also has to be recognized that information based on empirical studies of the use of the death penalty and its effects comes from only a few countries: those that have a strong tradition of such research and a body of scholars committed to challenging the legal and penological assumptions upon which support for the death penalty is often based. Empirical inquiries have been mainly conducted on the situation in the United States, especially, although not exclusively, on a few southern states which have been the most active executioners. Since the fourth edition, there have also been empirical studies of public opinion on the death penalty in China, Japan, Trinidad, and Malaysia. But as far as issues such as the deterrent impact of capital punishment are concerned, the concentration on the United States inevitably means that the findings provide a rather distorted and partial view of the death penalty looked at in its worldwide context. This is particularly so when it is recognized that the United States differs from other countries that retain the death penalty in many ways, such as: the definition of capital murder; prosecution and trial procedures; the number executed in relation to the number of homicides and per head of the population; and the complex state and federal appeal processes, let alone the racial, cultural, and political factors which shape criminal policies in those states of the United States that execute offenders.

We have tried to bring the information as up to date as possible; we have included any changes in the status and use of the death penalty worldwide made up to the end of April 2014 and have been able to include some other significant news up to the end of May 2014.

A word must be said about a related issue which could not be covered by this book but which cannot be ignored by anyone concerned with the protection of human rights. We refer to the very regrettable fact that abolition of judicial capital punishment has not always guaranteed that state forces, whether military or police, have respected the rule of law and the right to life in enforcing the law. All too often governments—even abolitionist governments—have resorted to extrajudicial killing on a scale which far exceeds the impact of judicial executions. In recent times, this has become a policy that is in danger of becoming legitimized as a means of dealing with those defined as ‘terrorists’. It requires just as much vigilance and just as much study as the death penalty itself. In this regard, the excellent reports of the United Nations Special Rapporteur on Extra-judicial, Summary, or Arbitrary Executions and the Special Rapporteur on Torture and other Cruel Inhuman or Degrading Treatment or Punishment should be consulted. The relationship between the existence or not of the death penalty and extrajudicial executions has now been recognized as an important subject of study. Regrettably, it is too large an issue to be dealt with in this book. We would be delighted to see more work, leading to a greater understanding of the nexus between legal and extra-legal executions.⁴ However, it is our view that the abolition of capital punishment in all countries of the world will ensure that the killing of citizens by the state will no longer have any legitimacy and so further marginalize and stigmatize extrajudicial executions even more.

Readers should note that each chapter may be read separately depending on interest, such as death row, deterrence, public opinion, or life imprisonment without the possibility of parole. This has meant that we have had to repeat certain information necessary to understand the context of the issue discussed in the chapter, although we have employed cross-references wherever this might be helpful. Nevertheless, the book can, and we hope will, be read as a whole, so as to gain a broad perspective of how complex an issue the death penalty is and what needs to be faced if worldwide abolition is to be achieved.

2. Plan of the Book

Chapter 1 provides an overview of the extent to which the movement to bring about abolition of the death penalty worldwide had progressed by the end of April 2014. It shows that the number of countries that have remained ‘active retentionists’ (a term we use to describe those that have executed at least one person within the previous

⁴ On this see D T Johnson and F E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford, Oxford University Press 2009) Appendix G: Judicial and Extrajudicial Killing; also D T Miethe, H Lu, and G R Deibert, ‘Cross-National Variability in Capital Punishment Exploring the Sociopolitical Sources of Its Differential Legal Status’ (2005) 15(2) *International Criminal Justice Review* 115–30.

10 years and have not yet announced a moratorium on executions) has fallen further from the 51 recorded at the end of December 2007 to only 39 six years later at the end of April 2014. The factors that have influenced this decline, and the likelihood of further progress for the abolitionist movement, are analysed. This is followed, in Chapter 2, by an account of how the abolitionist movement got under way, especially in Europe, and why so many countries in other parts of the world have, since the end of the 1980s, come to embrace complete abolition of the death penalty. Chapter 3 deals with those countries that have not yet abolished the death penalty, assessing across the main regions of the world the current state of the debate on capital punishment and the prospects for abolition or a reduction in the use of the death penalty.

Chapter 4 provides information on the scope of capital punishment in those countries that retain it, especially with regard to their obligation under Article 6(2) of the ICCPR and UN Safeguard No 1, to reserve it solely for 'the most serious crimes', meaning those intentional crimes 'with lethal or other extremely grave consequences'. It begins by discussing the way in which this concept has been interpreted and developed, especially in light of the obligation under Article 6(6) of the ICCPR not to invoke Article 6(2) 'to delay or to prevent the abolition of capital punishment'. The chapter then proceeds to enumerate and discuss the wide range of crimes for which capital punishment may still be imposed in various countries, before moving on to consider the frequency with which retentionist countries impose death sentences and carry out executions. The message is that capital punishment is more rarely enforced than it is threatened, and furthermore that the trend in most retentionist states has been to employ executions less and less frequently.

Chapter 5 deals with the processes and practices employed in implementing capital punishment; the modes of execution—paying particular attention to the current controversy over whether lethal injection can amount to 'cruel and unusual punishment'; public executions; whether physicians should play any part in the execution process; the impact of the conditions and length of confinement for those sentenced to death but awaiting, often for many years, on 'death row' the outcome of appeals against conviction and sentence or application for clemency; and finally the effects on the family, including the children of those under sentence of death. Chapter 6 deals with the implementation of those Safeguards that are meant to protect from execution those who commit capital crimes when juveniles (under the age of 18); who are aged (70 or over); pregnant women and new mothers; and those who are insane, suffering from limited intellectual development, or are mentally ill. Chapter 7 reviews the evidence of the extent to which procedures and practices are in place to meet, at the very least, the standards laid down by the ICCPR and the UN Safeguards so as to *guarantee* a fair and impartial trial, adequate counsel for the defence of the accused, and the right to appeal and to seek pardon or clemency, so that no innocent persons (as well as others undeserving of such severe punishment) are sentenced to death and executed. It includes a discussion of the issues posed by allowing relatives of victims of murder to testify about the impact of the crime on them at the stage when the appropriate sentence—life or death—is under consideration. Chapter 8 begins with a review of the extent to which the death penalty in retentionist countries is still the mandatory punishment for murder or other serious crimes. It shows that International Tribunals

and national Constitutional Courts have continued to rule that the inflexible mandatory use of capital punishment is a cruel, inhuman, and degrading form of punishment because of its failure to take relevant individual differences in the gravity of the crime, degree of culpability, and mitigating factors into account, thus rendering it inequitable. This leads to a consideration of whether a discretionary use of capital punishment can ever be applied in an equitable and non-discriminatory manner. Legal scholarship and social science research on the US statutes that have sought to restrict and make more equitable the imposition of the death penalty are examined to see whether they have in fact been successful in eliminating arbitrariness and discrimination in the infliction of the death penalty. The conclusion drawn from Chapters 4 to 8 is that the death penalty cannot be applied in theory or practice without violating the jurisprudential requirements of fairness, equity, and proportionality in the administration of the death penalty, nor in a way that does not inevitably amount to a violation of a citizen's right under the ICCPR not to be arbitrarily deprived of life or subject to a cruel, inhuman, or degrading treatment or punishment.

Chapters 9, 10, and 11 discuss three issues which are often raised in their defence by countries that retain the death penalty, namely, that it is essential as a general deterrent to save lives of more innocent victims; that public opinion demands that the death penalty should remain in force, at least for the 'most serious' murders; and that there is no satisfactory alternative to the death penalty for the most egregious offenders. Chapter 9 discusses the concept and theory of general deterrence, the different ways in which researchers have attempted to measure whether it has a greater murder-reducing effect than the alternative punishment of life or very long imprisonment, and the methodological problems involved. In this light it reviews the findings of research, including a number of econometric studies which have been published since the fourth edition of this book was completed in 2007. It is shown why these studies have not altered our conclusion since then that 'it is not prudent to accept the hypothesis that capital punishment, as practiced in the United States, deters murder to a marginally greater extent than does the threat of the supposedly lesser punishment of life imprisonment'.

Chapter 10 analyses the role of opinion, particularly but not only public opinion, in relation to the politics of capital punishment. It includes a discussion of the ways in which public opinion may be generated, how it can be measured and assessed, the limited knowledge about the system on which opinions are based, the strength with which opinions in favour of capital punishment are held, and the significance of changing trends in opinion. These issues are illustrated by the methods and findings of opinion polls published since our fourth edition, most notably in China, Japan, Trinidad, and Malaysia. These polls and others suggest that countries that wish to abolish the death penalty on the grounds that it inevitably infringes human rights are not faced by a public so hostile that there would be a disastrous loss of confidence in criminal justice and the overall system of social control. The chapter ends by arguing that the issue of capital punishment should be settled by the application of the human rights principles discussed in earlier chapters, not 'off-the-top-of-the-head' opinions held by members of the public. In other words, the claim is that governments and law courts should lead the way in seeking a more civilized human rights culture (as the South African Constitutional

Court put it) and not simply follow such opinion. There is evidence from countries that have abandoned capital punishment that the following generations no longer *expect* it to be the maximum penalty, and come to reject it as one of the ‘barbarities of the past’. The final chapter considers what penalty or penalties are available in countries that have abolished capital punishment. It considers, in particular, the moral, humane, and practical objections to the penalty of lifetime imprisonment without the option of release on parole.

Appendices chart the changing status of capital punishment and the extent of ratification of international treaties to prohibit its imposition.

3. The Approach Taken Towards Capital Punishment

As already mentioned, this book began life as an official report, and was not intended to present an argument, as such, for the abolition of capital punishment. It was oriented instead towards assessing the extent to which the policy objective of the United Nations set out by resolution of the General Assembly in 1971 and again in 1977, was being achieved, and what impediments there appeared to be in bringing it to fruition. The resolution stated that ‘the main objective ... to be pursued’ by the UN ‘in order to fully guarantee the right to life, provided for in Article 3 of the Universal Declaration of Human Rights and Article 6 of the ICCPR’ was that ‘of progressively restricting the number of offences for which capital punishment might be imposed, *with a view to the desirability of abolishing this punishment in all countries*’ (our emphasis).⁵

Yet, one would be unlikely to embark on such a task without believing that this is a desirable goal. And, certainly, our involvement in researching this subject has convinced us of the strength of the case for abolishing judicial executions throughout the world.

The Introduction to the first edition in 1989 stated that ‘no one can embark upon a study of the death penalty without making the commonplace observation that from a philosophical and policy standpoint there appears to be nothing new to be said’. This is still largely true: the arguments remain essentially the same.⁶ Yet the balance has changed, and the nature of the debate has moved on. There can be no doubt that the greater emphasis on the ‘human rights’ perspective on the subject has added significantly to the moral force propelling the abolitionist movement. It has further ‘internationalized’ what was formerly considered an issue solely for national policy. And those who still favour capital punishment ‘in principle’ have been faced with yet more

⁵ UN General Assembly resolutions 28/57 and 32/61.

⁶ The major exception is Professor Matthew Kramer’s book *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and its Consequences* (Oxford, Oxford University Press 2011). In this work he dismisses ‘all the standard rationales [that] can justify the imposition of the death penalty’ and argues for a ‘purgative’ rationale. Capital punishment therefore ‘is appropriate when the application of it brings to an end the defilingly evil existence of someone who has committed ... extravagantly evil actions ... underlain by sadistic malice or heartlessness or extreme recklessness that is connected to severe harm in the absence of any significant extenuating circumstances’. In such cases, he argues, the community has ‘a moral obligation to resort to capital punishment’. However, he calls for a moratorium until it is clear that there is no prospect of an unfair trial which would make any purgative execution illegitimate, at 1, 8, 179–265, and 327.

convincing evidence of the abuses, discrimination, mistakes, and inhumanity that appear inevitably to accompany it in practice. Some of them have set out on the quest to find the key to a 'perfect' system in which no mistakes or injustices will occur. In our view, this quest is chimerical.

Many protagonists of abolition believe that the death penalty is a fundamental violation of the human right to life: in essence, that it is an extreme form of cruel, inhuman, and degrading punishment. For such persons, any discussion of its effectiveness as a deterrent is irrelevant. But it has to be recognized that not everyone regards this 'human rights' view as valid, especially outside Europe and the European hegemony. Indeed, many people appear to believe that (at least some) criminals who violate the right to life of others by murdering them deserve to lose their own right to life, and they parade horrifying and brutal cases in support of their contention. But usually this approach is supported by a belief that the death penalty, and execution in particular, is necessary to protect others from a similar fate. In some countries, this argument is used to justify capital punishment for other crimes which can inflict grave personal or socially injurious harms such as the sale of narcotics, sexual offences against children, and even some very large-scale cases of corruption and embezzlement. Sometimes capital punishment is said to be sanctioned by religious authority, as in Islamic countries, and sometimes by deeply embedded cultural norms or 'mindsets', as is claimed by some from Asian countries.

Thus, even where the human rights argument against capital punishment is not accepted, the case for capital punishment usually rests not only on retributive sentiments but also on assumptions about its unique deterrent effects as compared with alternative lesser punishments. If it were shown that it is unnecessary to retain the death penalty to control grave crimes, perhaps many of those who favour it would not continue to do so merely on retributive grounds to exact revenge: they might well regard it as 'useless cruelty'. The same values that proclaim the 'rights of victims' not to be murdered, or of the relatives of victims to have their pain eased by seeing the prisoner put to death, can also be invoked to protect the rights of the accused, especially when innocent persons may, whatever the safeguards, be sentenced to death or it can be shown that the system as a whole inflicts capital punishment on persons who are 'undeserving' of it, such as the mentally disabled. Nor should the rights and feelings of the family members of the condemned be put simply to one side. One suspects that many of those who favour capital punishment 'in principle' would not continue to favour it if it were shown that it was accompanied by unnecessary cruelty, or that the system for administering it produced arbitrary judgments or class or racial bias on an unacceptable scale. In other words, there remains a large gap between believing that some persons 'deserve to die' for the crimes they commit, and believing that a state system for the administration of capital punishment can be devised which meets the high ideals of equal, effective, procedurally correct, and humane justice that civilized societies seek to implement.

It is necessary, therefore, to approach the question of capital punishment from both normative (moral) and utilitarian points of view, and always with an eye to how it is applied in practice. In essence, therefore, the case for retaining the death penalty—and thus resisting the movement to make its abolition an international norm—cannot rest

solely on moral, cultural, or religious arguments. It would also have to be shown that it is useful and that it can be applied fairly, without mistakes, and without any degree of arbitrariness or cruelty unacceptable to contemporary social and legal values. There is, as this book makes clear, sufficient evidence to indict capital punishment for failing the test of humanity on all these grounds.

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