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# THE ENIGMA OF THE 'MOST SERIOUS' OFFENCES

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***Abstract***

This paper deals with the International Covenant on Civil and Political Rights' provision that 'in countries which have not abolished the death penalty, sentences may be imposed only for the most serious crimes ….' Situating the provision in the context of its drafting, the paper clarifies that, while its ambiguity reflected a lack of consensus regarding the particular crimes for which capital punishment was prohibited, it served as a 'marker' for the policy of moving toward abolition through restriction, encouraging a subsequent process of dynamic interpretation. The paper goes on to describe how the situation as regards the scope and practice of capital punishment has changed since the provision was drafted, necessitating a constant reappraisal of the meaning that should be attached to the concept of 'most serious crimes'. The paper then traces the abolition of capital punishment in the United Kingdom and the part played by the failed attempt to define, within the crime of murder, a category of the 'most serious'. The paper concludes with a discussion of the necessity for open review, research and publication of statistics on the use of the death penalty so as to inform the public of the manifold problems of the enforcement of capital punishment within a legal structure that is seeking to embrace the concepts of the rule of law and respect for human rights.

# THE ENIGMA OF THE 'MOST SERIOUS' OFFENCES

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## Introduction

So many excellent, well-informed articles were published on international aspects of the death penalty by Chinese scholars in the publication edited by Professor Zhao Bingzhi *The Road of the Abolition of the Death Penalty in China*, that it has not been easy to find a topic for this presentation, especially without repeating my own contribution to that book. [2]

However, I thought that it might be useful to begin by placing the wording of section 6(2) of the International Covenant on Civil and Political Rights (ICCPR) – 'in countries which have not abolished the death penalty, sentence may be imposed only for the most serious crimes …' – in its historical context. I do so in the hope that this will help to explain why such a vague, relativistic and ambiguous formulation was employed at the time that the Covenant was drafted.

Secondly, I shall remind you, briefly, how the situation as regards the scope and practice of capital punishment has changed since section 6(2) was drafted and how these changes have necessitated a constant reappraisal of the meaning that should be attached to section 6(2) in the light of a 'new wave' of abolition.

Third, I want to inform you of how capital punishment came to be abolished in the United Kingdom and the part played by the failed attempt to try to define, within the crime of murder, a category of the 'most serious'. Contemporary attitudes towards capital punishment in the UK are also discussed.

Last, I want to return to a theme on which I have talked previously on my visits to China. This is the necessity for open review, research and publication of statistics so as to inform the public of the manifold problems of the enforcement of capital punishment within a

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[1] Table 1 has since been updated

[2] See Roger Hood 'From Restriction to Abolition of the Death Penalty: An Historical and Comparative Note' in Zhao Bingzhi (ed.) *The Road of the Abolition of the Death Penalty in China. Regarding the Abolition of the Non-Violent Crime at the Present Stage*, Renmin University of China, Series of Criminal Jurisprudence (44), Press of the Chinese People's Public Security University, 2004, pp. 77-82.

legal structure that is seeking to embrace the concepts of the rule of law and respect for human rights.

## Placing section 6(2) in context

One cannot appreciate how the concept 'the most serious offences' was chosen without recalling the situation as regards the extent of abolition of capital punishment at the time section 6(2) was drafted. As William Schabas informs us, the procedure for drafting the ICCPR began in a Drafting Committee of the United Nations Commission for Human Rights as long ago as the spring of 1947. Seven years were spent by the Committee in drafting the Covenant before it was sent to the General Assembly by way of the Economic and Social Council in 1954 and a further 12 years passed before it was adopted by the General Assembly of the United Nations in 1966. As Schabas goes on to explain, it was not Article 6 that held up the proceedings – the wording had been agreed in 1957 and was not subsequently amended. What took the time was the thornier question of whether the Covenant should include under 'the right to life' the complete abolition of capital punishment.[3]

Several countries, led by South American nations, supported abolition but in 1957, the year section 6 was finally approved, abolitionist countries accounted for only a minority of the then 82 United Nations member States. A mere 10 countries had abolished capital punishment for all crimes in all circumstances: seven of them being in South America, with (West) Germany (which did not become a member state of the UN until 1973) being the only large European State that had done so.[4] In addition a further nine western European countries had abolished capital punishment for murder and other 'ordinary' crimes in peacetime.[5]. By 1966, the year that the Covenant was approved by the United Nations General Assembly, there were still only 24 abolitionist states. And, as is well-known, it was to be another 10 years before the ICCPR came into force on 23 March 1976.

Although the number of countries that had achieved abolition was relatively small, it cannot be denied that there was a wider sympathy for the idea that abolition should be the goal of all countries that supported the concept of human rights. Thus, the Chairman of the Working Party on the drafting of Article 6 stated: "it is interesting to note that the expression: 'in countries which have not abolished the death penalty' was intended to show *the direction* (my emphasis) in which the drafters of the Covenant hoped that the situation would develop," as was the addition of Article 6(6), namely that 'Nothing in this

[3] William A. Schabas, *The Abolition of the Death Penalty in International Law*, Cambridge University Press, 3rd ed. 2002, 45-77.

[4] Venezuela (1863), San Marino (1865), Costa Rica (1877), Ecuador (1906) Uruguay (1907), Colombia (1910), Panama (1922), Iceland (1928), Federal Republic of Germany (1949), Honduras (1956)

[5] Portugal (1867), Netherlands (1870), Norway (1905), Sweden (1921), Denmark (1933) Switzerland (1942), Italy (1947), Finland (1949), Austria (1950). Plus nine states of the USA, two in Australia and 24 in Mexico. Switzerland was not a member state of the UN in 1957, it became one in 2002.

article shall be invoked to delay or prevent the abolition of capital punishment by any State party to the present Covenant.'[6]

Yet the belief that capital punishment might be necessary in certain circumstances was still strongly held. Indeed, Marc Ancel, the distinguished French jurist, had stated in 1962, as if it were not to be doubted:

"Even the most convinced abolitionists realise that there may be special circumstances, or particularly troublous times, which justify the introduction of the death penalty for a limited period."[7]

In these circumstances, it was hardly surprising that in seeking a consensus from countries, most of which still retained capital punishment, it was not possible to define more precisely those offences for which capital punishment could be retained. Certainly some countries would have preferred a clearer enumeration of the crimes for which it would remain permissible to impose the death penalty instead of relying on the concept of 'most serious'.[8] This is probably because they recognised that 'most serious' could be interpreted differently according to national culture, tradition and political complexion – the very antithesis of the notion of an attempt to create a *universal* declaration and definition of human rights.

It seems to me therefore, that it is not sensible to try to look to the wording of section 6(2) for any help in interpreting the offences to which capital punishment might still be applied in countries that have not abolished it. The term is a product only of its time. It was a 'marker' for the policy of moving towards abolition through restriction, nothing more specific than that. Indeed, it was long after section 6(2) had been drafted in 1957 that the General Assembly of the United Nations in Resolution 2857 of 1971 for the first time called specifically for 'the progressive restriction of the number of offences for which the death penalty might be imposed, with a view to its abolition.' It is noteworthy too that the resolution had to be repeated – reinforced – in 1977.

The very notion of 'progressive restriction' makes it clear that the degree of 'seriousness' that would justify the death penalty would need to be evaluated and re-evaluated always in a narrowing of definition until abolition was eventually achieved. In reaching judgements about what would be an acceptable use of the death penalty reference would need to be made not only to changes in the practices of nations as they affected the norms that defined acceptable forms and levels of state punishments, but also to the development of the concept of human rights itself. Just as an almost universally agreed norm has developed that juveniles should be exempted from capital punishment other norms are in process of being established – for example, that where the death penalty is enforced it should never be mandatory, allowing discretion for the circumstances of the case to be considered. Thus, the Human Rights Committee in *Carpo v The Philippines*

[6] Schabas, n. 2, p. 68.

[7] Marc Ancel, *The Death Penalty in European Countries. Report.* Council of Europe, 1962, p. 3.

[8] Schabas, n. 2 p. 105

(No. 1077/2002) held that the mandatory imposition of the death penalty for the broadly defined offence of murder by Article 48 of the Revised Penal Code of the Philippines violated Article 6 of the ICCPR.[9] The same process of dynamic interpretation must be followed in the interpretation of the concept of 'most serious'.

As you know, in 1984, the Economic and Social Council of the UN published 'Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty'. Safeguard 1 stipulated that the scope of the 'most serious crimes' 'should not go beyond intentional crimes with lethal or other extremely grave consequences'. While this was some improvement it hardly went very far, as might be expected when the majority of countries still retained capital punishment at that time. The term 'other extremely grave consequences' was particularly open to broad interpretation. The Human Rights Committee of the UN has, of course, stated that this 'must be read restrictively to mean that the death penalty should be a *quite exceptional measure*' and in line with this has, in resolutions and judgments called for it not to be used for non-violent financial crimes, non-violent religious practices or expressions of conscience, for sexual relations between consenting adults, drug related offences, illicit sex, vague categories of offences relating to internal and external security and aggravated robbery where no death ensued.[10] Recently, the Human Rights Committee with respect to Vietnam noted that, "notwithstanding the reduction of the number of crimes that carry the death penalty from 44 to 29" it could be imposed for "opposition to order and national security violations", both of which "are excessively vague and inconsistent with Article 6(2) of the Covenant".[11]

My own view is that countries that retain the death penalty should move to restrict it to the most serious offences of murder and thus I have recommended that Safeguard 1 should now read:

*In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious offences of culpable homicide (murder), but it may not be mandatory for such crimes.*[12]

But this, of course, should not be a justification for retaining capital punishment for murder.

## The new abolition dynamic

Between the drafting of the ICCPR and the present day there has been an enormous change in attitudes towards and state practices as regards capital punishment**.** Between 1957 and the end of March 2005 the number of abolitionist countries had increased from

[9] Views adopted 28 March 2003

[10] Schabas, n. 2, pp. 106-111.

[11] UN doc. A/57/40 Vol.1, 2002, 82(7), p. 68. A/54/40/, Para 128

[12] Roger Hood, *The Death Penalty. A Worldwide Perspective.* Oxford University Press, 3rd edition, 2002, p. 77.

19 to 94. Eighty-five of them (90 per cent) had abolished it completely for all offences in all circumstances, in peacetime and wartime, in civil and in military life. At least another 39 countries may be counted as abolitionist de facto (ADF), having not executed any persons for 10 years or more or having committed themselves more recently to cease executions, such as the Russian Federation, Kazakhstan and Kyrgyzstan. Altogether at least 24 – more than half – of these 39 countries appear fully committed never to carry out executions again, even though the death penalty remains for the time-being on their statute books. There were only 61 countries that were known to have executed any persons at all in the past 10 years and have not proclaimed a moratorium on executions – those that might be called 'actively retentionist'. The pace of this change in recent years has been remarkable, as can be seen in the Table below, which compares the situation at the end of 1988, 1999 and March 2005. In just 16 years the proportion of actively retentionist countries has fallen from 56 to 31 per cent and the abolitionists increased from 28 per cent to 49 per cent.

**Status of the death penalty at the end of 1988, 1998 and March 2005**

| | Completely abolitionist | Abolitionist for ordinary crimes | Retentionist but ADF | Actively retentionist |
|---|---|---|---|---|
| 31 December 1988 (180 countries) | 35 (19%) | 17 (9%) | 27 (15%) | 101 (56%) |
| 31st December 1998 (193 countries) | 70 (36%) | 11 (6%) | 34 (18%) | 78 (40%) |
| 31 March 2005 (194 countries) | 85 (44%) | 9 (5%) | 39 (20%) | 61 (31%) |

But even amongst those that remain 'actively retentionist' no more than 43 have executed anyone within the last five years. And, as far as can be ascertained, some 16 of these countries executed no more than 10 people (an average of no more than two a year). According to the figures published by Amnesty International, only 18 countries are known to have carried out 20 or more judicial executions within the past five years and only eight are known to have executed at least a 100 (an average of 20 persons a year): China, Democratic Republic of the Congo, Iran, Saudi Arabia, Singapore, USA, Vietnam and Yemen.

Furthermore, almost every country has shown a falling rate of executions in recent years.[13] To take some examples: the number of executions in Belarus fell from 29 in 1999 to five in 2002 and one in 2003. In China, during the 'strike hard' campaign against criminality in 2001, Amnesty International recorded news of 2,468 executions, but

[13] Vietnam appears to be an exception, although no official figures have been published.

recorded only 763 executions in 2003. We know, of course, that these are not the real totals, but they may reflect a downward trend. Forty-one executions were carried out in the province of Taiwan in 1999 and 2000, but only 7 in 2003. The figures for Singapore show a similar trend – 43 in 1999 to 19 in 2003. In the USA the number declined from a peak of 98 in 1999 to 65 in 2003. Executions are now confined to a relatively few US states. Over the five years 1999 to 2003 just 25 of the 38 states with the death penalty carried out an execution and only 11 of them did so in 2003. Indeed, two-thirds of all executions in the USA have taken place in six states, one third of them in Texas. The common picture of the USA as a whole supporting capital punishment is thus rather misleading.

Thus, there is evidence to suggest that where the abolitionist movement has not persuaded retentionist countries to abandon capital punishment it has had the effect of modifying the frequency with which they have recourse to executions.

In line with the aspiration of United Nations policy, several countries have restricted the scope of capital punishment in recent years, often as a prelude to – or in conjunction with – a moratorium on executions, with a view to moving towards complete abolition.[14] For example, in Uzbekistan, the death penalty is now available for only two crimes – murder with aggravated circumstances and terrorism – compared with 13 as recently as 1998.[15]. The new Belarus Criminal Code of 1999 appointed the death penalty for 15 fewer offences (in 14 rather than 29 Articles) than had the Code of 1960, and can now only be imposed 'when it is dictated by special aggravating circumstances as well as an exceptional danger posed by the offender.[16] In 2001, the Human Rights Committee, on receiving the report from the Democratic People's Republic of Korea welcomed the reduction of capital offences from 33 to 5 "as well as the readiness … confirmed by the delegation, further to review the issue of capital punishment with a view to its abolition".[17]

Thus, it appears that further progress has been made with reducing the range of offences subject to capital punishment and in the further elimination of mandatory capital statutes.

Another useful index is whether countries that had abolished the death penalty reintroduced it. This has not happened since the Philippines did do in 1993 and the

[14] General Assembly Resolution 2857 (XXVI) and 32/61

[15] In 2001 Uzbekistan abolished capital punishment for treason, criminal conspiracy, illegal sale of large quantities of narcotics, and rape of a female less than 14 years of age; in 2003 for aggression against another state and genocide. See Organisation for Security and Co-operation in Europe (OSCE) *The Death Penalty in the OSCE Area*, Background Paper 2004/1, p. 44.

[16] UN doc.E/CN. 4/2003/106, Annex II.3

[17] The death penalty was retained for conspiracy against state power; high treason; terrorism; anti national treachery and intentional murder. However, the Committee was concerned that four of these were essentially political offences which were couched in such broad terms that a subjective interpretation of them might lead to the death penalty not being confined to 'the most serious crimes', UN doc./56/40 Vol. 1 (2000-2001) pp. 99-10

American States of Kansas and New York in 1994 and 1995 respectively.[18] It is also highly significant that the death penalty was excluded as a punishment by the UN Security Council when it established the International Criminal Tribunal for the Former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994. Nor is it available as a sanction for genocide, other grave crimes against humanity and war crimes in the Statute of the International Criminal Court established in 1998.

Of particular significance was the adoption, in Vilnius on 3rd May 2002 of Protocol No 13 to the European Convention for the Protection of Human Rights (ECHR): "Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings" the member states resolved "to take the final step to abolish the death penalty in all circumstances, including acts committed in time of war or the imminent threat of war". By February 2005, 30 countries had ratified the protocol and a further 13 had signed it. The only States so far not to have acceded to this treaty are Armenia, Azerbaijan and Russia. Altogether, by the end of 2004, 74 countries had ratified one or other of the international treaties or conventions which bars the imposition of capital punishment.[19]

The overall conclusion must be not only of a decline in the numbers of countries with the death penalty on their statute books, but even in the countries that have retained it, a decline in the frequency with which they have recourse to executions. In all but a handful of countries judicial executions take place only rarely. It is clear that the concept of 'the most serious' must be interpreted in the light of this movement towards a customary international legal culture that either opposes the death penalty completely or regards it as a sanction to be used only extremely rarely.

## An Inevitably Slow Process? – Lessons to be learned from the British experience

As I pointed out in my contribution to Renmin University's recent publication *The Road to Abolition,* Chinese commentators have often noted that several European countries reached the stage of abolition through a process of gradually reducing the scope of crimes for which the death penalty was appointed until it remained solely for murder, and then further reduced the kinds of murder to which capital punishment could apply until total

[18] In neither state has there been an execution. In 2004 the Kansas Supreme Court invalidated a provision of the death penalty relating to the way that juries were instructed and in the same year the New York Court of Appeals also invalidated a provision relating to jury instruction of that state's death penalty law. See the report of The Committee on Capital Punishment of the Association of the Bar of the City of New York, *Empire State Injustice … How New York's Death Penalty System Fails to Meet Standards for Accuracy and Fairness,* January 2005. Available at www.deathpenaltyinfo.org In both Kansas and New York the death penalty may therefore not be imposed until there has been a reconsideration of the law.

[19] Either Protocol No 2 to the ICCPR, Protocol No 6 or No 13 to the ECHR, the Protocol to the American Convention on Human Rights, or (having already abolished the death penalty) the American Convention on Human Rights – Article 4(3) of which forbids them to reintroduce it.

abolition was achieved. Here they were following the analysis of Marc Ancel, who in his 1962 report had stated that 'the process of abolishing capital punishment has gone through much the same stages [i.e. the stages mentioned above] everywhere.' Nevertheless, Ancel was wise enough, perhaps it would be better to say sufficiently prescient, to add that there was no 'uniform rule in this connection'.

How right he was. I shall not repeat the evidence published in my earlier article: but there are plenty of examples in recent times where abolition has been achieved at a remarkably swift pace without going through all these stages, or even if they have been gone through, the whole process has been achieved within a relatively few years, not the century or so it took the first European abolitionist countries to reach this goal.

The experience of the United Kingdom is especially relevant to the issue of how difficult it is to try to retain capital punishment by defining a special category of crimes that are so serious that capital punishment is justified for them, without introducing anomalies and injustices that undermine public confidence in the administration of criminal justice.

By the early 1840s murder had become in practice the only crime for which people in England and Wales were executed. With the gradual establishment of a modern form of bureaucratic government and the expansion of democracy, the old 'bloody code' of criminal justice based on haphazard and random enforcement backed up by the terror of capital punishment was being replaced by a system of policing to try to ensure more certainty of punishment, proportionate to the crime committed. By 1861 capital punishment had been abolished in law for all crimes save murder and crimes against the state – treason, piracy and arson in Her Majesty's dockyards – which were only in practice enforced (and then very rarely) in wartime.

But murder (for which the death penalty was mandatory) could, of course take many forms and soon efforts were being made to define more precisely which types of murder, in what circumstances and by what types of perpetrators, merited capital punishment. Attempts made in the 1860s and 1870s to redefine in a more restricted way the common law of murder or to divide murders into those that were 'capital' and those that were not, proved to be futile. No agreement could be reached on how this could be done.[20] Nor did the judges wish to be given the power to exercise discretion, for as the Lord Chancellor put it, the sentence of death would "become the sentence of the Judge and not of the law … [this] would place the judges in a position of very considerable embarrassment, and perhaps impair the respect in which they are held." It was thus clear that the judiciary recognised that public opinion did not always favour capital punishment.[21] So, in order to restrict the death penalty to "real murder", the system of clemency known as the Royal Prerogative of Mercy, exercised in practice by the Home Secretary [the nearest English equivalent to the Minister of Justice], was widely employed. Between 1900 and 1949

[20] See Leon Radzinowicz and Roger Hood, *A History of English Criminal Law*, vol. 5, *The Emergence of Penal Policy*, London: Stevens, 1986, pp. 661-671.

[21] *Ibid*. p. 677.

1,080 males and 130 females were sentenced to death of whom 461 males (43%) and 117 females (90%) were reprieved and their sentences commuted to life imprisonment.[22]

After attempts had been made to abolish capital punishment in the first half of the twentieth century a compromise was again suggested whereby only the most serious types of murder should be classified as 'capital'. But there was no agreement on how this could be achieved. The problem was that there were competing criteria for deciding which crimes should be capital. Should they be 'the most serious' as defined by the degree of moral outrage and disgust they evoked? Or should they be those that could be deterred by the threat of execution – murders carried out by calculating criminals? It was soon realised that many crimes that were morally outrageous were committed in circumstances where thought of the punitive consequences were far from the perpetrator's mind, whereas many that might be deterred were not crimes that evoked the greatest outrage. Wherever the line was drawn there were bound to be anomalies that were morally and legally unsupportable.

In an attempt to find a solution the Labour government established a Royal Commission in 1949 to review not whether capital punishment should be abolished completely, but whether 'liability to suffer capital punishment for murder … should be limited or modified, and if so, to what extent and by what means".[23] After lengthy consideration of a great deal of evidence the Commission, when it reported in 1953, rejected the idea that it was possible to define in statute those murders that were 'death worthy' and those that were not. In a telling passage the Commission stated:

"it is impracticable to frame a statutory definition of murder which would effectively limit the scope of capital punishment and would not have over-riding disadvantages in other respects … the quest is chimerical and must be abandoned"[24]

The Commission concluded that the only workable solution would be to leave the decision to the discretion of the jury. But recognizing that many would find this 'unBritish' solution unpalatable and unworkable, it stated boldly:

"If this view were to prevail, the conclusion to our mind would be inescapable that in this country a stage has been reached where little more can be done effectively to limit the liability to suffer the death penalty and that the real issue is now whether capital punishment should be retained or abolished".

A Conservative government was then in power. Ignoring the Commission's warnings it went ahead with legislation – the Homicide Act of 1957 – which aimed to define a narrow group of mandatory 'capital murders'. This 'most serious' group consisted of

[22] *Report of the Royal Commission on Capital Punishment 1949-1953* (Cmd. 8932, 1953), p. 9.

[23] For an excellent and well-told account of the issues faced by the Royal Commission by an insider member, see Sir Leon Radzinowicz, *Adventures in Criminology*, London: Routledge, 1998, chapter 10 at p. 252.

[24] See n. 22, para 483, p. 167 and Conclusion 39 p. 278.

murders committed in the course or furtherance of theft or robbery, by using firearms or explosives, of police or prison officers, or multiple murders. These were the type of murders which it was believed would be likely to be committed by 'professional criminals' – not as a result of emotional turmoil or sudden loss of control but as a result of premeditated intent. Under this formula, most killers of young children for sexual purposes were spared, as were most who committed violent crimes, unless they committed theft before or afterwards; those who shot their lovers committed capital murder but not those who strangled, bludgeoned or poisoned them to death. So many anomalies occurred that considerable public sympathy welled up for some of those who had committed crimes that were subject to capital punishment yet were less heinous than those committed by others whose offences did not fall under the definition of 'capital murder'. There was the infamous cases of Ruth Ellis executed for a crime *passionel* because she used a pistol rather than another instrument, and Derek Bentley, a young man of limited intelligence who was later exonerated, who was executed as an accessory to a shooting of a policeman even though he was in police custody at the time and his accomplice who shot the policeman was too young to be hanged. These and other cases, combined with concerns about the possible execution of an innocent man, Timothy Evans (who was in fact later exonerated), produced a healthy parliamentary majority –the Labour Party was in power – for abolishing the death penalty for murder in 1965 for a trial period of five years, even in the conservative dominated House of Lords. Abolition was confirmed in December 1969.[25]

Over the following 30 years some Conservative members of parliament tried repeatedly – 13 times in all – to persuade the House of Commons to reintroduce the death penalty for certain categories of murder. such as causing death through terrorist acts in 1982 and 1983 or the murder of a child in 1987. They were defeated for the same reasons that the homicide act was scrapped; namely that to pick one or two classes of murder out as deserving of death, when there might be equally heinous offences committed in categories of murder not subject to capital punishment, would inevitably produce anomalies and a sense of injustice. But what put an end to these debates was a shocking spate of wrongful and unsafe convictions for just such offences. The most notable were the cases of the 'Birmingham Six', the 'Guildford Four' and the Price Sisters, all wrongfully convicted of murder through 'terrorist bombings', and Stefan Kisko, a man of limited intelligence, wrongfully convicted of a child sex murder. All would certainly have attracted the death penalty had it been available. This persuaded many who had previously supported the reintroduction of capital punishment to change their minds: most prominent among them was the then Conservative Home Secretary, Michael Howard, now the leader of the Conservative Party. On the last occasion – 10 years ago in 1994 – that the question of the reintroduction of capital punishment was debated in the British Parliament the motion was defeated by a very large majority.[26] Subsequently, an amendment to criminal justice legislation in 1998 abolished capital punishment for piracy

[25] By 343 votes to 185. See Leon Radzinowicz (1999), n. 23, pp. 245-279 at 272-3.

[26] See Gavin Drewry, 'The Politics of Capital Punishment' in G. Drewry, G. and C. Blake (eds), *Law and the Spirit of Inquiry* (1999), pp. 137 at 151 and 154. Also, Lord Windlesham, *Responses to Crime,* vol 3 (1996), pp. 60-61.

for which it had remained unused for very many years as well as for treason.[27] This was followed in the same year by abolition for all offences under military law. It should be stressed however, that de facto abolition had been achieved in 1965, the last execution in the United Kingdom having been carried out 40 years ago in 1964.

The United Kingdom has now ratified Protocols No. 6 and 13 of the European Convention of Human Rights and the Second Optional Protocol to the ICCPR, confirming its commitment not to reintroduce the death penalty for any offences. There is now no serious or major support for reintroduction in Parliament or in the Press, nor is the cry for the return of the death penalty frequently heard from the families of victims of murder, even after notorious murders. All the judges who appeared as witnesses before the Royal Commission of 1949-53 were in favour of retaining the death penalty as the mandatory punishment for murder. I do not know of even one High Court judge who would hold this view nowadays. The subject appears to have passed into history.

It has become clear that there would always be an unbridgeable gap between those who believe that 'some persons may deserve to die' for the crimes they commit, and those who believe, on good grounds, that a state system for the administration of capital punishment cannot be devised which would meet the high ideals of equal, effective, procedurally correct and humane justice that civilized democratic societies seek to implement.

Does China need to go through all the stages of this painful process? For it is not, as sometimes suggested, a 'necessary' process. Rather should not those countries yet to abolish the death penalty learn from the lessons of those who began the process towards abolition much earlier? And, in any case, is the experience of those countries which abolished the death penalty within the context of an 'internal' debate about the reform of the criminal justice system really relevant? The 'new wave' of abolition has a different basis – the recognition of universal principles of human rights that take precedence over utilitarian considerations and out-trump 'public opinion'. It is this recognition of the need to build and reinforce what the South African Constitutional Court called a 'human rights culture' that has been the dynamic force behind the unprecedented speed with which countries have embraced the abolition of capital punishment over the last 15 to 20 years.

## The power of information

After reviewing the evidence relating to the influence of data on public opinion in my book *The Death Penalty: a World-wide Perspective* (3rd ed. 2002), I came to the conclusion that the better citizens were informed about the nature, use and consequences of capital punishment the more they were likely to prefer alternatives to it. I therefore concluded that "governments have a duty to make sure that all their citizens have the opportunity to base their views about the death penalty on a rational appreciation of the facts". Furthermore, it seems axiomatic to me that information on the way in which a

[27] The last person executed for treason was the wartime propagandist for Germany 'Lord Haw Haw' who was hanged in 1946.

criminal justice system operates, and in particular the outcomes of its operations, should be made available to the public which the system serves. The system should be accountable and its operation as transparent as possible. Only if the public, as well as policy makers and academic commentators, are well-informed will it be possible to judge how justice is in practice being administered and whether what is observed can be justified. This seems to me incontrovertible, especially when human life is at stake.

It cannot be regarded as satisfactory that no one knows – at least officially –how many citizens of a country are sentenced to death and how many of them are executed and how practices vary in relation to different offences and in different parts of a country. In none of the persuasive articles on the case for abolishing the death penalty for various categories of economic crime published in *The Road of Abolition of the Death Penalty in China* have the authors been able to provide any information on how many people are actually sentenced to death and executed for such crimes. Surely it would help to know if the numbers are large or small, whether the practice is based on consistent criteria or, as one suspects from studies in other countries, entirely arbitrary and discriminatory. If that were shown, it would undoubtedly influence the debate.

In conducting a review for the United Nations I was faced with estimates of the number of executions which varied enormously. According to the NGO 'Hands Off Cain', there were at least 3,138 executions in China in 2002 but Amnesty International through its search of newspaper reports had recorded only a third as many – 1,060. Hands Off Cain reported, on the basis of information emanating from 'a judicial source' in China, that at least 5,000 people were executed in 2003, whereas Amnesty's figure was 763. This is an extraordinary state of affairs. How can one pursue a rational debate without data that can be relied upon?

Furthermore, without properly complied information it is not possible to ascertain, for each category of crime, how many death sentences of an 'immediate' kind are reduced to a suspended death sentence at the trial of second instance (the appeal stage). Nor, if I may say so, is the method of reporting and counting crimes very helpful when it comes to classifying crimes in a way that can be compared with international trends. The method of counting by motive rather than result is especially problematic in understanding the use of capital punishment. In Europe and America a robbery resulting in death would be classified as a homicide, a rape resulting in death as a homicide, whereas in China they would be counted as robbery and rape. Even if statistics were published, this method would not allow one to calculate how many people were executed for crimes that did or did not result in a homicide.

Thus, it is once more necessary to state how important it is for countries to take heed of and to implement Resolution 1989/64 of the Economic and Social Council so as to ensure the annual (if possible) publication for each category of offence for which the death penalty is authorized, 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 had been granted.

This should be backed up by a far greater willingness of the authorities to allow researchers to investigate in more detail than any official statistics could provide, for what specific criminal events, for what types of offender and in what circumstances, capital punishment is being employed in practice. The fact that researchers are beginning to uncover how capital punishment is enforced in China is to be greatly welcomed and I am confident that their findings will prove to be of immense value to decision makers in government as China proceeds along *The Road to Abolition.*