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THE DEATH PENALTY : A
CRUEL AND UNUSUAL
PUNISHMENT?

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Introduction

[1] Any treatise on the death penalty invariably throws up for consideration an assortment of internationally recognised human rights: fundamentally, the right to life and, in addition, the right not to be subjected to inhuman or degrading treatment and the right to freedom from cruel or unusual punishments. These are issues of intense – and topical – interest to every member of society. They do not belong to the sole province of human rights lawyers or organisations. Rather, this subject engages the attention of politicians, sociologists, theologians, philosophers and many other disciplines. Furthermore, this topic is increasingly linked to other subjects of pressing interest and concern – in particular abortion, euthanasia and so-called “mercy” killing. None of these individual topics is, of course, a mirror image of any of the others. Each is separated by significant distinctions. However, it may be said that the single, central and unifying theme common to all is the sanctity of human life. Thus no serious debate about the death penalty can be properly transacted in isolation from some or all of these other issues. In short, the death penalty is not a subject belonging to some hermetically sealed compartment. The labels with which we are all familiar – such as “state authorised killing” – are not confined to the death penalty. Rather, they extend to every type of killing permitted by the laws of the state concerned: where the necessary legal pedigree exists, the killing in question is authorised by the state.

[2] It is also appropriate to bear in mind that every act of killing entails the deprivation of life of a human being. In contemporary times, there is a noticeable shift from the use of the verb “to kill” and its derivations. Softer language is frequently employed in a variety of contexts and for a range of differing reasons. In many such contexts, it is commonplace to avoid the essential bluntness of words such as **kill** and **killing**. Those with a genuine interest in this subject will, of course, be continually alert to the spin, packaging and camouflage which have become all too prevalent in contemporary vocabulary in this sphere and others.

[3] The death penalty for murder was largely abolished in the United Kingdom in 1965.¹ However, the abolition was not absolute. Rather, the same statute preserved the penalty of death for the offences of treason, piracy with violence and certain military crimes. It is probably a little known fact that the death penalty remained available in the United Kingdom for these offences until its eventual abolition just over ten years ago.² Appropriately, the statutory measure which ultimately abolished the remnants of the death penalty was the Human Rights Act 1998.³ It is of no little significance that, in a changing world, the abolition of the death penalty has not quelled public

¹ See the Murder (Abolition of Death Penalty) Act 1965.

² See Section 36, Crime and Disorder Act 1998 and Section 21(5) Human Rights Act 1998.

³ Section 21(5), with effect from 9th November 1998.

debate in this sphere. As I have already observed, the reach of this debate is ever more expansive and, in the internet age, the participants and contributors are better informed than ever.

[4] Let us not forget that in the United Kingdom, there were three executions for murder in 1963 and two in 1964. The last execution for treason was carried out in 1946. During the decades in question, Northern Ireland was, constitutionally, a part of the United Kingdom and courts here imposed the death penalty from time to time, with resulting executions. The last such execution was carried out within the precincts of the (then) Crumlin Road prison, on 20th December 1961. It was carried out by a professional hangman whose duties extended throughout the United Kingdom. This event occurred less than fifty years ago and there are those still alive today who can provide testimonials to what occurred before, during and in the aftermath of the killing. Robert McGladdery, aged twenty-five, was convicted of the murder of a nineteen year old girl who had been battered, strangled and stabbed. At his trial he contested the charge. He was convicted and sentenced to death. It is alleged that he made a full confession the evening prior to his execution. The hanging was performed in the Crumlin Road Jail, where the gallows have been redundant ever since. The final power of decision making lay with the Minister of Home Affairs, Brian Faulkner, who decreed, memorably :

“Let justice take its course”.

The Death of Roger Casement

[5] Roger Casement is a towering figure in Irish history. I am prompted to share some reflections relating to him for two quite contrasting reasons. The first is the little publicised fact that he was a veritable human rights champion. The second is the notorious fact that he was killed by hanging. Interestingly, Roger Casement had close associations with this part of Northern Ireland. Though born in Dublin, an important part of his education unfolded close to here, in the Ballymena Diocesan School. Both The Adair Arms Hotel and Galgorm Castle have close connections with this phase of his life. He frequented Ballycastle, Cushendun and Cushendall. His credentials as a human rights champion, impeccable and admirable, emerged when employed as a British Consul. He made two gruelling journeys, one to the Belgian Congo and the other to the Peruvian Amazon. These journeys culminated in reports by Casement to the British Government exposing and denouncing the horrors of colonialism. He was profoundly shocked and saddened to discover how undeveloped, unhealthy and ignorant the indigenous populations were. Amongst other things, he exposed the scandal of the working conditions of the indigenous population. The Congo Free State had been a possession of Belgium since 1885.⁴ During the following two decades, its natural resources (mostly rubber) were mercilessly exploited by King Leopold II as a private entrepreneur. Roger Casement’s report, published in 1904, was instrumental

⁴ When ceded by the Berlin Conference.

in the subsequent relinquishment of King Leopold's personal holdings in Africa. Roger Casement's commission in Peru was to investigate reports of the exploitation and murder of rubber plantation slaves by the British registered Peruvian Amazon Company. In his ensuing reports he uncovered, *inter alia*, the punishment of slaves by the use of stocks. He reported:

“Men, women and children were confined in them for days, weeks and often months ...

Whole families were imprisoned – fathers, mothers and children and many cases were reported of parents dying thus, either from starvation or from wounds caused by flogging, while their offspring were attached alongside of them to watch in misery themselves the dying agonies of their parents.”

Following his return to Britain, Roger Casement organised Anti-Slavery Society and mission interventions in the region. Some of the perpetrators of the cruelty were prosecuted or fled. He was hailed as the saviour of the Putumayo Indians and received a knighthood for his efforts. In compiling these reports, he visited the most inhospitable terrains and the poorest of villages, at great personal sacrifice. What he exposed, fundamentally, was the scandal and scourge of slavery.

[6] Just before the 1916 Easter Rising, Roger Casement landed in South West Ireland and was arrested. He was subsequently convicted of high treason. His trial was heavily publicised and was marked by moments of drama. One of the most memorable was Casement's speech from the dock immediately following his conviction. In eloquent terms, he protested the jurisdiction of the court and attacked the ancient English law, the 1351 statute under which he had been prosecuted. Notably, for present purposes, he spoke of “*judicial assassination*” of Irishmen. In one of the great public speeches in history, he condemned English rule and laws in Ireland as deriving from coercive conquest which, he said, “*exists over the body ... [but] ... fails over the mind.*” He was convicted of high treason on 29th June 1916, following a trial of four days' duration and was instantly sentenced to death. He was hanged at Pentonville Prison on 3rd August 1916. His courage in the moment of death was recognised by all, including the executioner.⁵

[7] The recently published Nobel Prize winning novel “The Dream of the Celt”⁶ leaves the reader with a number of abiding impressions and sombre thoughts about the hanging of Roger Casement. For example, one is inevitably struck by the protracted nature of the execution process which, from the sentence of the court to the actual killing, was of lengthy duration, a period during which determined efforts by influential friends and supporters almost succeeded in saving Roger Casement's life. What an agonising time this must have been for him. One is also struck by the intensive ceremonial

⁵ Albert Ellis.

⁶ “ El Sueno del Celta “.The author is a Peruvian writer , Mario Vargas Llosa.

formalities attendant upon the execution of the sentence. In addition, one of the instructions which the certifying doctor faithfully obeyed was to conduct an examination of the deceased designed to prove that he had engaged in the so-called “perverse practices” of which he had been suspected by the British Government and which probably precluded his pardon. This was, therefore, no simple hanging. It was followed by the ignominious physical invasion of a lifeless body. How ironic that Roger Casement, champion of the defenceless victims of unscrupulous colonialism, should end his life so exposed and vulnerable. Alas, state execution by hanging was no novelty. This is captured in the chillingly simple words of W. B. Yeats:

*“I say that Roger Casement
did what he had to do.
He died upon the gallows,
but that is nothing new.”*

The Right to Life

[8] No discourse on the death penalty could ever be complete without some detailed scrutiny of the right to life. Protection of the right to life has found expression in constitutions and international treaties throughout the world. It was first recognised in the Fifth Amendment to the US Constitution, which promulgated that no person shall be deprived of life **without due process of law**. One pauses immediately to observe that, from its first inception in history, the right to life has never been absolute. In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights⁷ which proclaimed, *inter alia*:

“Everyone has the right to life, liberty and security of person.”

Notably, the right to life does not occupy the position of foremost prominence in this instrument. Rather, it makes its appearance in Article 3. Article 1 is occupied by the following text:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Article 2 sets forth the right to enjoy all of the rights and freedoms enshrined in the Declaration without discrimination of any kind. International Human Rights Day is now celebrated on the date when the UN Declaration was promulgated, 10th December.

[9] In the same year, 1948, certain Latin American States promulgated the American Declaration of the Rights and Duties of Man, being the Final Act of

⁷ UN Doc A/811.

the Ninth International Conference of American States in Columbia. This does not have the status of a binding international treaty. Furthermore, most states who subscribed to it were, and have remained, enmeshed in a store of contradictions in matters of human rights. Article 1 proclaimed:

“Every human being has the right to life, liberty and the security of his person”.

The model of this Declaration is noteworthy for, inter alia, one particular reason. It contains, in Chapter 1, a list of rights. Chapter 2, in contrast, prescribes a series of individual duties. While this Declaration was, by its very nature, an intrinsically frail instrument of human rights protection it was, nonetheless, the genesis for the substantially stronger model established by the American Convention on Human Rights (1969). The Inter - American Court of Human Rights⁸ and the Inter-American Commission on Human Rights form the human rights protection system of the Organisation of American States. The USA is one of the signatories of the Convention but, regrettably, has never ratified it. The Court has been recognised by 21 states. Notably, on 26th May 1998, Trinidad and Tobago suspended its ratification on account of the death penalty issue.⁹ Strikingly, the American Convention on Human Rights speaks of the right to life and the death penalty in virtually the same breath:¹⁰

“1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be re-established in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offences or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under eighteen years of age or over seventy

⁸ Inaugurated on 3rd September 1979, with its seat in Costa Rica.

⁹ See paragraphs [20]-[21], *infra*.

¹⁰ Article 4.

years of age; nor shall it be applied to pregnant women.

6. 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. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."

This is arguably the most comprehensive prescription of the inter-related subjects of the right to life and the death penalty. The efficacy of this particular international protection of human rights regime is illustrated in the notorious "**Barrios Altos**" case, which concerned the murder of fifteen Peruvians perpetrated by members of the state sponsored "Colina Group" a death squad, which had a membership of serving soldiers. Amongst the remedies ordered by the Court were substantial damages, the repeal of certain controversial amnesty laws and the introduction of the offence of extra judicial killing in the domestic law of Peru.

[10] In our country, Northern Ireland, the right to life does not belong to some distant international plane. Rather, it is one of the rights protected by the European Convention on Human Rights and Fundamental Freedoms ("*the ECHR*"), which came into operation almost sixty years ago, on 3rd September 1953. This was the work of the Council of Europe, a body established in 1949 as a kind of social and ideological counterpart to the military aspects of the European co-operation represented in the North Atlantic Treaty Organisation. It is conventionally considered that the Council of Europe was created by two driving forces. The first was the fledgling notion of European unity, inspired by the ravages of two recent world wars. The second was the political desire for solidarity in countering the ideology of Communism. By dint of the Human Rights Act 1998 ("*HRA 1998*") the ECHR now forms part of the domestic laws of the United Kingdom.

[11] Under the deceptively simple banner "Right to Life", Article 2 ECHR states:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) *in action lawfully taken for the purpose of quelling a riot or insurrection*".

It is appropriate to recall that Article 2 has been repeatedly described as basic, fundamental and supreme. In the language of the European Court, Article 2 "... enshrines one of the basic values of the democratic societies making up the Council of Europe".¹¹ Comparable pronouncements are found in the texts of the UN Human Rights Committee and the Inter-American Commission on Human Rights. Long before the advent of HRA 1998, the common law had recognised a person's right to life as "*the most fundamental of all rights*".¹² In the specific context of Article 2, the European Court has emphasized the well established principle that given the object and purpose of the Convention as an instrument for the protection of individual persons, it must be interpreted and applied in a manner which renders its safeguards practical and effective.¹³ In equally uncompromising language, the European Court has stated that the circumstances in which the deprivation of life may be justified [per Article 2/2] must be strictly construed, given the fundamental nature of the right in play and the consideration that no derogation from Article 2 is permissible in peace time.¹⁴ In the jurisprudence of the European Court of Human Rights, Article 2 has been repeatedly and consistently interpreted as imposing on Council of Europe Member States:

- (a) A substantive obligation not to take life without justification; and
- (b) An associated obligation to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.¹⁵

Cruel and Unusual Punishment

[12] Debates about the propriety, availability and legality of the death penalty are frequently played out under the banner of ***cruel and unusual treatment or punishment***. Historically, the protection against such treatment dates from the Bill of Rights Act 1688, which established a series of individual rights and freedoms. In particular, it declared¹⁶

¹¹ *McCann -v- United Kingdom* [1995] 21 EHRR 97, paragraph 147.

¹² *Bugdaycay -v- Secretary of State for the Home Environment* [1987] AC 514, at p. 531, per Lord Bridge.

¹³ *McCann*, paragraph 146.

¹⁴ See Article 15(2), permitting derogation in respect of deaths resulting from lawful acts of war. Notably, in *Ocalan -v- Turkey* [2005] 41 EHRR 45, the European Court held that the arbitrary deprivation of life pursuant to capital punishment laws *or* the deprivation of life pursuant to the execution of a sentence of a court which is not independent and impartial in the Article 6 ECHR sense would contravene Article 2: see paragraph 166.

¹⁵ See, for example, *Keenan -v- United Kingdom* [2001] 33 EHRR 38, paragraphs 88-89, a case concerning the suicide of a mentally ill prisoner.

¹⁶ Per Article 10.

“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”.¹⁷

This protection was later reflected in the Eighth Amendment to the US Constitution. In the European context, Article 3 ECHR provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

The European Court of Human Rights has consistently held that this prohibition is absolute. Thus it cannot be qualified or diluted in any way by the conduct of the individual.¹⁸ Article 3 ECHR is mirrored in many other international human rights treaties, bills of rights and constitutions. In a rapidly changing world, phrases such as *inhuman treatment*, *degrading treatment* and *cruel and unusual punishment* are not susceptible of clear and comprehensive definition. This has stimulated debates and dilemmas throughout the world, arising particularly in relation to the imposition of the death sentence and delays in the execution thereof – and in other kindred fields such as prison conditions and corporal punishment.

[13] In the developed world, one of the leading decisions was provided by the Constitutional Court of South Africa at a critical stage in the recent history of this country. The decision was made at a time when South Africa was operating under an *interim* constitution. This instrument was silent on the death penalty. It guaranteed the right to life for every person and prohibited “*cruel, inhuman or degrading treatment or punishment*”.¹⁹ In ***State –v- Makwanyane***²⁰ the two appellants were sentenced to death, having been convicted on four counts of murder. Notably, before the Constitutional Court the South African Government conceded that the death penalty should be declared unconstitutional: this, however, was opposed by the Attorney General and the police. The Constitutional Court held that capital punishment for murder, aggravated robbery, kidnapping, child stealing and rape was unconstitutional. It expressed no view about whether another provision of South African legislation,²¹ which authorised the death penalty for treason during wartime, was similarly unconstitutional, as this issue did not arise. In a series of powerful judgments, the members of the court stated, *inter alia*:

- The death sentence destroys life.
- It annihilates human dignity.

¹⁷ Emphasis added.

¹⁸ See *Chahal –v- United Kingdom* [1996] 23 EHRR 413, paragraph 79 and *Saadi –v- Italy* [2006] 43 EHRR 54, paragraphs 115-116A, Grand Chamber.

¹⁹ Per Sections 9 and 11(2).

²⁰ [1995] 1 LRC 269.

²¹ Section 277(1)(b) of the Criminal Procedure Act

- Its enforcement is arbitrary and unequal as the law is applied differently throughout the country and most accused persons are unable through poverty and related factors to secure competent legal advice and representation.
- In cases where justice miscarries, the imposition of the death penalty is irremediable.
- While the balance of public opinion may still favour retention of the death penalty, this cannot be determinative.
- Weight must be given to the Draconian nature of an alternative punishment in the form of life imprisonment.

The South African Constitutional Court emphasized that it was entitled, in construing the new Constitution, to adopt a generous and purposive interpretation, taking into account both its legislative and historical background. A constitution is no ordinary statute: it is the source of legislative and executive authority, it determines how the country is to be governed and how legislation is to be enacted; it defines the powers of the different organs of state; and it prescribes the fundamental rights of every person which must be respected in the exercise of such powers. The court noted that the interim South African Constitution was the product of negotiations conducted in a multi-party negotiating forum, advised by technical committees and, in final draft form, largely adopted by Parliament. Examination of the *travaux preparatoires* confirmed that the lack of authorisation for the death penalty in the Constitution was not accidental.

[14] Strikingly, in a neighbouring African country, a similar challenge to the constitutionality of the death penalty, decided around the same time as *Makwanyane*, was unsuccessful. In Tanzania, the Constitution contained guarantees against the infliction of torture or cruel, inhuman or degrading treatment or punishment. In *Mbushuu –v- Republic*²², the reasoning of the Tanzanian Court of Appeal was that while the right to life was protected by the Constitution, it was not absolute but qualified, being subject to due process of law. The relevant statutory law authorising the death penalty satisfied two basic requirements: first, it was not arbitrary; second, it was in conformity with the principle of proportionality. Notably, the court reasoned further that the death penalty *was reasonably necessary to protect the right to life*. The Constitution itself provided for derogation from fundamental rights in the public interest²³ and this provided the ultimate justification for the measure of legislation under challenge and, hence, the legality of the death penalty.

[15] Cases involving delay in executing the death sentence have also given rise to constitutionality challenges in a number of countries. A notable

²² [1995] 1 LRC 216.

²³ Per Article 30(2).

example is found in Zimbabwe²⁴ in a case where four condemned prisoners were, by ministerial proclamation, to be hanged having spent between four and six years on death row in Harare Central Prison, following judicial sentence. The question for the court was whether the delay in executing the death sentences, coupled with the harsh conditions in which the prisoners had been detained for several years, gave rise to inhuman or degrading treatment in contravention of Section 15(1) of the Constitution of Zimbabwe. The Supreme Court held that the Constitution had been infringed, setting aside the death sentences and substituting sentences of life imprisonment. In thus concluding, the court further held that the cause of delay in executing a death sentence was immaterial, the only relevant consideration being the likely effect of delay on the condemned prisoner. The court acknowledged that the delays had subjected the prisoners to prolonged mental suffering and were inordinate in the circumstances. Finally, the court emphasized the need for legal representation throughout the entirety of the judicial process and recommended that decisions on whether to exercise the prerogative of mercy be taken by the Cabinet within a maximum period of three months dating from the final judicial decision.

The Caribbean Cases and the Privy Council

[16] The Supreme Court of the United Kingdom and the judges who make up its membership have received a blaze of publicity during recent years. Less well known is a judicial organ of undeniable importance, known as the Judicial Committee of the Privy Council. This is a court which, by virtue of its jurisdiction, has a certain international character. Its basic membership is drawn from that of the ranks of the Supreme Court. The Privy Council is the highest court of appeal for many current and former Commonwealth countries and the overseas territories, Crown dependencies and military sovereign base areas of the United Kingdom. It also has jurisdiction in certain domestic appeals. In the category of Commonwealth appeals, permission to appeal must be granted by either the local court or the Privy Council itself. An appeal as of right exists in very few cases. In all of these cases the Privy Council is the final court of appeal.

[17] During recent years, cases involving the death sentence have featured prominently amongst the appeals heard and determined by the Privy Council. The active involvement of the Privy Council is graphically illustrated by the decision in ***Pratt –v- Attorney General for Jamaica***²⁵, where the two Defendants were convicted of murder in Jamaica and sentenced to death in consequence. Almost two years later, the Jamaican Court of Appeal refused permission to appeal, with reasons to be given subsequently. Reasons were not given until almost four years later. The next level in the domestic legal system was the Jamaican Privy Council, which advised the Governor General that the death sentences should not be commuted. At this stage, seven years had elapsed from the imposition of the death sentence. Next, the Inter-

²⁴ *Catholic Commission for Justice and Peace in Zimbabwe –v- Attorney General* [1993] 2LRC 279.

²⁵[1994] 2 AC 1 and [1993] 2 LRC 349.

American Commission on Human Rights requested, unsuccessfully, the commutation of the sentences on humanitarian grounds. In 1989, the United Nations Human Rights Committee decided that the failure of the Court of Appeal to deliver reasons during a period of almost four years infringed the Appellants' human rights and recommended commutation of the death sentence. Further negative decisions by the Jamaican Privy Council and the Governor General ensued. Twelve years following the completion of their trial, the Appellants sought constitutional redress in the Supreme Court of Jamaica, asserting "*inhuman ... punishment or other treatment*" in breach of the Jamaican Constitution.²⁶ These proceedings were dismissed over one year later. Ultimately, the Privy Council became seised of the Appellants' appeal.

[18] In a landmark decision, the Privy Council held that prolonged delay in carrying out a sentence of death could amount to inhuman punishment or other treatment in contravention of the Jamaican Constitution. It reasoned that a state that wished to retain capital punishment had to accept the responsibility of ensuring that execution followed as swiftly as practicable after sentence, making due allowance for a reasonable time for appeal and any pardon or reprieve procedures. Conduct such as escape from custody or frivolous and time wasting resort to legal process would not count in the reckoning of unacceptable delay. The appeal was allowed and the sentences were commuted to life imprisonment. Notably, the Privy Council took the opportunity to promulgate a general rule: in any case where execution has not taken place within five years following imposition of the death sentence, there will be strong grounds for concluding that such delay constitutes inhuman or degrading punishment or other treatment. It is notable that, in reaching this decision, the Privy Council took into account the aforementioned decision of the Zimbabwean Supreme Court, the jurisprudence of the European Court of Human Rights²⁷ and that of the Indian Supreme Court.²⁸ The judgment states clearly that structural or endemic delays in appeal procedures will be to the benefit of the accused, rather than the state. In the words of Lord Griffiths:

*"If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. **Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.**"*²⁹

²⁶ Section 17(1).

²⁷ *Soering -v- United Kingdom* [1989] 11 EHRR 439.

²⁸ *Datheeswaran -v- State of Tamil Nadu* [1983] 2 SCR 348, at p. 353 especially and *Sher Singh -v- State of Punjab* [1983] 2 SCR 582.

²⁹ Emphasis added.

[19] A substantial body of Privy Council jurisprudence in death sentence cases has developed during the past two decades. These cases have usually concerned appeals from a variety of Caribbean states – Trinidad and Tobago, Belize, Jamaica and The Bahamas, amongst others. These decisions have developed a familiar pattern, involving the determination of whether the imposition or execution of the death sentence is unconstitutional in the context of the country concerned. A notable example is provided by **Reyes –v- R**³⁰ where the death sentence was imposed on the Appellant after he had been convicted of two counts of murder by shooting. His appeal to the Privy Council invoked three provisions of the Constitution of Belize protecting the right to life and freedom from inhuman or degrading treatment or punishment.³¹ The key to this successful appeal was the mandatory nature of the death sentence imposed in the particular case. The Privy Council held that this infringed Section 7 of the Constitution as it required the sentence of death to be imposed without any judicial consideration of the humanity or proportionality of this penalty. This infringed the basic humanity which Section 7 existed to protect. With reference to the judicial task of interpreting constitutions, Lord Bingham said, memorably:

*“[26] ... the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charter party. **A generous and purposive interpretation is to be given to constitutional provisions protecting human rights.** The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right **in the light of evolving standards of decency that mark the progress of a maturing society**”.*³²

Notably, Lord Bingham added that it is not the task of the court “*to evaluate and give effect to public opinion ...*”, echoing the approach of the South African Constitutional Court in **Makwanyane**.³³

[20] In the case of **Reyes**, the Privy Council also formulated the following governing principle:

“[27] ... the requirement of humanity has been read as incorporating the precept that consideration of the culpability of the offender and of any potentially mitigating circumstances of the offence and the

³⁰ [2002] 2 AC 235 and [2002] UKPC 11.

³¹ Sections 3, 4 and 7.

³² Emphasis added.

³³ See paragraph [12], *supra*.

*individual offender should be regarded as a **sine qua non** of the humane imposition of capital punishment”.*

Although **Reyes** involved the Constitution of the state of Belize, the judgment of the Privy Council is noteworthy for the primacy which it accorded to ECHR:

“[28] In interpreting the Constitution of Belize it is also relevant to recall that for twenty-eight years preceding independence the country was covered by the European Convention, the provisions of which were in large measure incorporated into ... the Constitution: it could scarcely be thought that it was intended, in adopting and giving primacy to these rights in the new constitution, to diminish rights which people had previously been entitled to enjoy.”

Continuing, Lord Bingham added:

“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.”

The Privy Council noted the differing terminologies in international instruments and national constitutions – “*cruel and unusual treatment or punishment*”, “*cruel and unusual punishments*” and “*inhuman or degrading treatment or punishment*”. It considered the differences between these expressions to be purely semantic³⁴ and cited with approval the statement of Lamer J in a decision of the Canadian Supreme Court:

*“The criterion which must be applied in order to determine whether a punishment is cruel and unusual ... is ... whether the punishment prescribed is so excessive as to outrage standards of decency”.*³⁵

In deciding the case of **Reyes**, the Privy Council acknowledged the social evil of the use of firearms by dangerous and aggressive criminals and the possibility that murders by shooting could justify the death penalty. Notwithstanding these considerations, the court reasoned:

“... there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death

³⁴ See paragraph [30].

³⁵ **R -v- Smith** [1987] 1 SCR 1045, at p. 1072.

penalty would be plainly excessive and disproportionate.”³⁶

This short passage merges two of the most prominent principles in this sphere, those of proportionality and humanity.

[21] Trinidad and Tobago is an example of one of several Caribbean states which, prior to securing independence, was subject to ECHR (and, hence, Article 3) without any reservation. This applied to Trinidad and Tobago from 25th October 1953 until 31st August 1962. Upon independence, Trinidad and Tobago became a member of the United Nations. As a result, it had to observe Article 5 of the UN Declaration, which prohibits cruel, inhuman or degrading treatment or punishment. Later, in 1978, the State acceded to the International Covenant for Civil and Political Rights which, in Article 7, contains the same prohibition. Trinidad and Tobago was also a member of the Organisation of American States and, in such capacity, bound to uphold the rights enshrined in the American Charter and Declaration, which contained a similar prohibition. These considerations featured in certain appeals where the Privy Council had to decide on the compatibility of the mandatory death sentence with the country’s Constitution. In a remarkable sequence of two decisions, separated by less than a year, the Privy Council reached diametrically conclusions on this issue.

[22] In *Roodal –v- State of Trinidad and Tobago*³⁷ a majority of the Privy Council held that a combination of the State Constitution and international norms impelled to an interpretation of the relevant provision of domestic legislation – Section 4 of the Offences Against the Person Act 1925 – as imposing a penalty of a discretionary life sentence, rather than the death penalty. Within less than a year, an enlarged board of the Privy Council overruled this decision, in *Matthew –v- the State*.³⁸ On this occasion, the essence of the reasoning of the majority was that while the Constitution protected the right of the individual to life and outlawed the imposition of any cruel or unusual treatment or punishment, it also stated, explicitly, that neither of the aforementioned provisions “... shall invalidate ... an existing law”: these latter words encompassed the law decreeing the mandatory death penalty. The majority considered the language and purpose of Section 6(1) to be clear and, having anxiously considered whether some other possible construction of the Constitution was available, concluded that there was none. Though the effect of this was that Trinidad and Tobago was in breach of a number of its international treaty obligations, this was considered to be of no moment. As the leading member of the minority, Lord Bingham was at pains to stress:

“[34] In recent years the Privy Council has generally shown itself to be an enlightened and forward looking tribunal. It has of course recognised that the provisions of any constitution must be interpreted with

³⁶ See paragraph [43].

³⁷ [2005] 1 AC 328 and [2003] UKPC 78.

³⁸ [2005] 1 AC 433

care and respect, paying close attention to the terms of the constitution in question. But it has also brought to its task of constitutional adjudication a broader vision, recognising that a legalistic and over-literal approach to interpretation may be quite inappropriate when seeking to give effects to the rights, values and standards expressed in a constitution as these evolve over time."

Lord Nicholls, for his part, noted the broad acceptance of mandatory death sentences until comparatively recently.³⁹ He continued:

"[66] Times have changed. Human rights values set higher standards today. The common endeavour, to rid the world of man's inhumanity to man, has not ceased. Conduct, once tolerated, is no longer acceptable. Murder can be committed in all manner of circumstances. In some the death penalty will plainly be excessive and disproportionate ...

To condemn every person convicted of murder to death regardless of the circumstances is a form of inhumane punishment. A sentence of death which lacks proportionality lacks humanity".⁴⁰

Once again, the juxtaposition of humanity and proportionality is striking.

[23] Judicial decision making in this sphere, alas, no matter how courageous and enlightened, can be overwritten by a democratically elected legislature. In 2002, the Constitution of Barbados was amended by the Constitution (Amendment) Act, which was solely designed to counter the decisions of the Privy Council in the cases of **Pratt** and **Reyes**.⁴¹ This statutory measure amended the Constitution so as to reverse the effect of the judicial decisions in question. It did so by enacting that, as regards the future, the conduct declared unconstitutional by these decisions would not be held to contravene Section 15 of the Constitution. In **Matthews**, this prompted Lord Nicholls to observe:

*"All courts of Barbados, including their Lordships' Board, when sitting as the Supreme Court of Barbados, must of course give effect to this change in the Constitution of Barbados. If the requisite legislative support for a change in the Constitution is forthcoming, a deliberate departure from fundamental human rights may be made, profoundly regrettable though this may be. That is the prerogative of the legislature."*⁴²

³⁹ See paragraph [65].

⁴⁰ Emphasis added.

⁴¹ *Supra*. See also *Lewis -v- Attorney General of Jamaica* [2001] 2 AC 50.

⁴² *Supra*, paragraph [38].

A sovereign parliament, elected by truly free and fair elections and legislating in a real democracy is, of course, one thing. Sadly these attributes are not shared by every parliament in the modern world.

[24] In the evolving jurisprudence of the Privy Council, two cardinal principles to be applied by a sentencing court in deciding whether the death penalty is appropriate have been developed. The first is that the death penalty should be reserved for those cases which are the most extreme and exceptional, “*the worst of the worst*” or “*the rarest of the rare*”. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment cannot be achieved by any means other than the ultimate sentence of death. In every case, the court must take into account all relevant circumstances and may properly compare the individual case with other murder cases, rather than ordinary civilised behaviour.⁴³ Very recently, the Privy Council has stated:

*“Epithets such as ‘the worst of the worst’ and ‘the rarest of the rare’ can give rise to conceptual difficulties as to which cases will qualify. Murder is always a heinous crime. But it is clear that a death sentence, the ultimate and final sentence – must be reserved for the wholly exceptional category of cases within this most serious class of offence.”*⁴⁴

In that case, the victim was a young lady aged sixteen years. She had been induced by the Appellant, by a telephone call, to leave her home late at night and meet him. Some hours later her dead body was found in a quarry pit. She had suffered severe head injuries and her body had been set on fire. The head injuries were attributed to attack by a hard object or the wheels of a vehicle. There were indications of sexual contact but no evidence of rape. The Privy Council acknowledged that this was a brutal murder, a dreadful crime. However, in its judgment, it stated –

*“... it is not a case that can be placed alongside the most horrific murders of which, sadly, human beings are capable”*⁴⁵

The court noted that there was no evidence that the murder had been planned and no clear evidence that it had been accompanied by purely gratuitous violence. The appeal against the death sentence was allowed.

[25] It is perhaps an understatement to say that in the matter of the death penalty the Privy Council wields significant influence. This is illustrated by the notably different culture which now surrounds the imposition of the death penalty in the State of Belize. It was necessary for the Supreme Court of this

⁴³ *Trimmingham -v- The Queen* [2009] UKPC 25, paragraphs [20] – [21], per Lord Carswell.

⁴⁴ *Maxo Tido -v- The Bahamas* [2011] UKPC 16 at paragraph [36], per Lord Kerr.

⁴⁵ *Ibid.*

country to give effect to the decision of the Privy Council in the case of **Reyes**.⁴⁶ In the judgment which followed, the Belize Supreme Court stated, *inter alia*, that the discretion to impose the penalty of death should be informed and guided by factors such as the gravity of the offence, the character and record of the offender, any subjective factors which might have influenced the conduct in question, the design and manner of execution of the offence and the possibility of reform of the offender. The court further emphasized the need to consider and determine each case within the overarching constitutional requirement of humanity stipulated in Section 7 of the Constitution of Belize, which would include consideration of the culpability of the offender and any potentially mitigating circumstances of the offence and the offender. The judgment also contains the following notable statement:

*“It is the imposition of the death penalty rather than its non-imposition for murder that requires justification”.*⁴⁷

The philosophical shift is unmistakable. Moreover, the inexorable march of enlightenment continues. Most recently, the Privy Council has suggested that since the possibility of rehabilitation of the offender is one of the factors which must be weighed by the court in deciding whether to impose the death penalty, this will require appropriate professional advice. Thus the court must equip itself with report or reports prepared by an expert or experts in appropriate disciplines – such as psychiatry or psychology.⁴⁸ This has been the approach of the Eastern Caribbean Court of Appeal for some considerable time.⁴⁹ The indispensable need for this type of pre-sentence enquiry was reiterated by the Privy Council in **White –v- The Queen**, in July 2010.⁵⁰

[26] The continuing workload of the Privy Council is a reflection of the currency which the death penalty continues to hold in many countries of the world. Judgment is presently awaited in the case of **Benjamin and Ganga –v- Trinidad and Tobago**.⁵¹ In this case, two of the grounds of appeal relate to the trial itself (misdirection of the jury and fitness to plead). The third ground of appeal is the now familiar one of whether the imposition of the death sentence amounted to a cruel and unusual punishment. Notably, the Appellants’ convictions were made in July 2003 and the dismissal of their appeals by the Court of Appeal occurred in July 2008. Thus there may be potential for securing the quashing of their death sentences on the ground of the passage of time alone. The outcome is awaited with interest.

Due Process

⁴⁶ See paragraph [18], *supra*.

⁴⁷ See paragraph [20].

⁴⁸ See Maxo Tido, *ibid*, paragraph [38].

⁴⁹ See **Mitcham –v- The Queen**, 3rd November 2003 and **Moise –v- The Queen**, 15th July 2005.

⁵⁰ [2010] UKPC 22, paragraphs [26] – [28].

⁵¹ JCPC – 2009/0113.

[27] Any discourse on the death penalty would be incomplete without some reflection on due process of law. In virtually every civilised country where the death penalty is possible, deprivation of life can occur only where preceded and encircled by due process of law. This is expressed pithily in Article 21 of the Indian Constitution:

“No person shall be deprived of his life or personal liberty except according to procedure established by law”.

The jurisprudence of the Indian Supreme Court has interpreted the right to life expansively. It has been held, for example, that it embraces both citizens and non-citizens.⁵² Other decisions of the Indian Supreme Court have recognised that the right to life incorporates various rights of an environmental and economic nature. One of the subtexts of the Privy Council jurisprudence may be viewed as the acknowledgment of a principle that the imposition of the death penalty is justified only following rigorous inquiry by the court, taking into account all relevant facts and circumstances. This may properly be seen as an aspect of due process. Furthermore, due process of law does not exist in isolation. Rather, it is an integral facet of the rule of law. In the sphere of criminal offences, this finds clearest expression in international treaty provisions such as Article 6 ECHR. The fundamental right protected is a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This is followed by a menu of “*minimum rights*”.

[28] On the international plane, the rule of law has been further strengthened by the establishment of bodies such as the International Criminal Court. This is not some recent novelty. Rather, ample precedent is found in, for example, the Nuremburg Trials. Let it not be forgotten that the captured Nazi leaders were not summarily executed: they were, rather, tried by due process of law and punished accordingly. In the interests of stimulating reflection and debate, I highlight one notorious recent example. For many years, Osama Bin Laden was suspected of having been instrumental in some abhorrent crimes. He successfully avoided detection and apprehension until the day when he was summarily executed by US soldiers in his home, in the presence of family members. I wonder whether every member of an allegedly advanced and enlightened society can be comfortable with this. Was there any element of due process in this killing? Was mere suspicion, unsubstantiated by any scrutiny or finding by an independent and impartial tribunal, sufficient to justify this deprivation of life? Or was there any other justification acceptable under international law? In considering these questions, one is reminded that the right to due process of law is an international norm both widely accepted and of longstanding. One might ask further why there was no role for the International Criminal Court, an organ to which the United States claims to subscribe? This court has convened to adjudicate on the guilt or innocence of certain notorious alleged

⁵² *Chairman, Railway Board -v- Chandrima Das* [2000] 2 LRI 273.

perpetrators of genocide. Have its standing and credibility been undermined in consequence?

[29] The deaths of certain dictators also spring readily to mind – Nicolau Ceausceau and Colonel Gaddafi. Some answering these questions or contributing to this debate may have recourse to and seek solace in concepts such as “justice” and “the interests of justice”. However, I would sound a cautionary note. Justice is a subjective, elusive concept, which does not exist in some kind of vacuum and has no universally recognised definition. Judges and courts do not exist to decide disputes by applying their own personal values, their subjective or idiosyncratic sense of right, good or justice. Rather, they exist *to apply the law, independently and impartially* – and, of course, as humanely and compassionately as possible. This is one of the foundations of the rule of law. The recent summary military execution of a suspected Afghan terrorist should, I suggest, be the impetus for reflection on the fundamental values and principles which every civilised society claims to espouse and cherish. I raise these questions without offering any personal answers or views.

Conclusion

[30] Ultimately, the rule of law is the foundation of every democratic and humane society. No debate on the death penalty can properly proceed in the absence of profound reflection on the doctrine of the rule of law and its constituent elements. I finish with the *ipsissima verba* of Lord Bingham:

*“The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war”.*⁵³

The recent history of the world shows that inhumanities of this kind continue and, indeed, have been perpetrated close to home. Would Lord Bingham have added to this list the summary execution of an Afghan suspected of mass murder ?

[31] Lord Bingham suggested that In furtherance of the rule of law -

*“Better to put up with some choleric judges and greedy lawyers”.*⁵⁴

I hope that most would say amen to this, even with some tinge of reservation.

⁵³ Tom Bingham, *The Rule of Law*, p. 9.

⁵⁴ *Ibid.*