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STRIVING TO ABOLISH THE DEATH PENALTY

SOME PERSONAL REFLECTIONS ON OXFORD'S CRIMINOLOGICAL CONTRIBUTION TO HUMAN RIGHTS

ROGER HOOD

Introduction

Sometimes one enters a field of research by chance. Out of the blue, in June 1987, the author was approached by Eric Prokosch, the leader of Amnesty International's campaign for worldwide abolition of the death penalty. He had been asked by the United Nations Secretariat to help locate a criminologist who would be prepared to undertake research for a report requested by the UN Economic and Social Council (ECOSOC) 'on the question of the death penalty *and new contributions of the criminal sciences in the matter* (my emphasis)'. The previous surveys, carried out for the UN by Marc Ancel and Norval Morris were now outdated, taking the account of developments only so far as 1965.[1] In the United Kingdom very little interest was taken by academic criminologists in the issue of the death penalty in its international context once capital punishment for murder had been abolished in the United Kingdom in 1965 and confirmed in 1969. In the United States, where the vast bulk of empirical criminological research on the death penalty was carried out, the focus was almost entirely on the situation in that country and its own constitution, not with the issue of abolition of capital punishment as a universal human rights goal.[2]

After the report had been presented and favourably received at the UN it was published as *The Death Penalty: A Worldwide Perspective* (Hood 1989). Following this, the author was appointed as consultant on three occasions by the UN to design the questionnaire, analyse the returns and prepare the draft for the Secretary-General's fifth, sixth, and seventh quinquennial surveys of *Capital Punishment and the Implementation of the Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty,* covering the years up to 2004. Further extensive research from international, governmental, non-governmental, and academic sources led to the publication of the second and third editions, and, with Carolyn Hoyle, the fourth and

[1] United Nations (1962, 1967).

[2] An exception had been *Capital Punishment and the American Agenda* by Franklin Zimring and Gordon Hawkins (1987), which began with the consideration of international developments and recognized 'The human rights linkage' (p. 23).

fifth.[3] The second edition was translated into Japanese, the third and fourth editions into Chinese, the fourth edition also into Farsi, and the fifth into Spanish.

These publications led to productive collaboration with a number of other inter-governmental bodies, such as the Council of Europe,[4] with NGOs and academic institutions both as a consultant and to carry out empirical research, in particular with the Great Britain-China Centre, the Max Planck Institute for Foreign and International Criminal Law in Freiburg Germany, and most frequently with the Death Penalty Project in London.[5] The UK Foreign and Commonwealth Office (FCO) and the European Union supported studies on how the mandatory death penalty was administered in Trinidad and Tobago and what surveys of public and professional opinion would reveal about the claim made by China, Trinidad, Malaysia, and Taiwan that abolition of capital punishment was not possible to achieve because a large majority of their citizens strongly supported it.

As requested by the editors, this chapter reflects on the achievements and disappointments in carrying out this body of research. Any reader interested in following the wider debates about abolition of the death penalty is referred to the fifth edition of Hood and Hoyle (2015). Nevertheless it may prove helpful to place this essay in context by sketching the main changes that have taken place internationally in the approach towards and the application of capital punishment.

Setting the scene

The Universal Declaration of Human Rights (UDHR), adopted in 1948, made no mention of capital punishment in Article 3, which declared that 'every human being has an inherent right to life'. And when the European Convention on Human Rights (ECHR) was adopted in 1950, Article 2(1) stated that 'everyone's right to life shall be protected', but made an exception where capital punishment was provided by law.[6] The International Covenant on Civil and Political Rights (ICCPR), which was

[3] Hood (1996, 2002); Hood and Hoyle (2008, 2015). The fifth edition also made use of the eighth and ninth UN Surveys, prepared by Professor William Schabas. Various editions benefitted from the assistance of Sarah Cohen, Lucia Zedner, Timothy Besley, Anja Spindler, Jessica Skinns, Martina Feilzer, Lucy Tulloch, Ravinder Thukral, William Berry III, Sophie Palmer, Chloe Deambrogio, Michelle Miao, Daniel Pascoe, Sylvia Rich, Marion Vannier, and Gabrielle Watson.

[4] In editing and writing the Introduction to *The Death Penalty: Abolition in Europe* (Hood 1999, 2003).

[5] Including assisting the Executive Directors of the DPP, Saul Lehrfreund and Parvais Jabbar, by writing an Affidavit on the mandatory death penalty in the case of Lennox Boyce and others before the Inter-American Court of Human Rights (Case 12.480 in 2007), which found it to be a violation of the convention; a submission to the Ghana Constitutional Review Commission whose report recommended complete abolition of the death penalty; and submissions to the Constitutional Review Commission of Grenada and to the Prime Minister of St Vincent and the Grenadines. Also speaking at conferences organized by The Death Penalty Project in several countries, including Barbados, Trinidad, Malaysia, Japan, Taiwan, China, and Uganda.

[6] Marc Ancel, the distinguished French jurist felt justified in 1962, in his report for the Council of Europe, to write that 'even the most convinced abolitionists realize that there may be special circumstances or particularly troublous times, which justify the introduction of the death penalty for a limited period'. See Ancel (1962: 3).

approved by the UN General Assembly (UNGA) in 1966,[7] had also not excluded capital punishment. Rather, it had restricted it: the 'inherent right to life' proclaimed in Article 6(1) had been qualified with the words, 'No one shall be *arbitrarily* deprived of his life', and Article 6(2)—which began with the words 'In countries that have not abolished the death penalty'—restricted its infliction to an undefined and therefore disputed category of 'most serious crimes'.[8] Article 7 banned 'torture or . . . cruel, inhuman and degrading treatment or punishment', but there was nothing to indicate that the death penalty would be so defined. There was simply insufficient support for abolition. In 1953, when Article 6 had been agreed by the drafting committee, only nine countries had abolished the death penalty completely, in peacetime and wartime and another 10 had abolished it for murder: a total of 19. However, Article 6(6) of the ICCPR had indicated the direction that the drafters of the Covenant wished to move. It declared: 'Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party'. In support, the UN General Assembly declared by Resolution in 1971, which was repeated in 1977, that its ultimate objective was the 'desirability of abolishing this punishment in all countries'.[9] The *Declaration of Stockholm*, issued following a conference convened by Amnesty International in 1977, was a milestone. It declared unambiguously that 'The death penalty is the ultimate, cruel, inhuman and degrading punishment and violates the right to life' and called on the UN to state unambiguously that 'the death penalty is contrary to international law'.[10]

Although the death penalty has yet to be declared unlawful throughout the world, concern for protecting human rights has become a powerful dynamic over the past quarter of a century since the Berlin Wall came down and the UN added Protocol Number 2 to the ICCPR, which banned the death penalty and committed ratifying states not to reintroduce it.[11] This 'new dynamic'[12] challenged the view that each nation has the sovereign right to retain the death penalty as a repressive tool of criminal justice on the grounds of its purported deterrent utility or the cultural preferences and expectations of its citizens. Instead it aimed to persuade retentionist countries that a system of capital punishment inevitably, and however administered, is prone to error including conviction of the innocent, and punishment which is arbitrary, cruel, and inhumane, all of which violate the rights of all human beings.

At year-end 2015, 108 nations had abolished the death penalty: 102 of them completely, so that only six retained it solely for crimes against the state and in time of war: an extraordinary change since 1966. A further 50 countries retained capital punishment in law and although most of them still imposed death sentences, they had not carried out an execution for at least 10 years, and often for much longer. Only 39

[7] The ICCPR came into force in 1976.
[8] 'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women'.
[9] UN Resolutions 28/57 and 32/61.
[10] Appendix A to *The Death Penalty: Amnesty International Report* 1979. See the Preface by Thomas Hammarberg.
[11] Hood (1996: 10).
[12] Hood and Hoyle (2009).

of 196 nations had executed anyone within the past decade and most of these had done so infrequently and sporadically. There were only seven or maybe eight countries that had enforced death sentences by execution every year over the past decade: in Asia, China and probably North Korea; in the Middle East and North Africa, Iran, Saudi Arabia, Iraq, Somalia, and Yemen; and in the West solely the USA, although recently at a much reduced rate and confined to fewer and fewer states.[13] However, while capital punishment still exists in law there is always the possibility that states that appeared to be moving towards at least abolition de facto may come under pressure to increase executions in response to acts of violence resulting from political conflict and the employment of terrorist methods—witness Pakistan and Egypt.

It has needed political leadership on a trans-national scale to create and sustain the movement to abolish capital punishment in all countries. Since 2007 abolitionist countries have gained majority acceptance of a resolution at the UN General Assembly (UNGA) in favour of establishing a moratorium on death sentences and executions throughout the world. The number of countries supporting the resolution increased from 54% in 2007 to 61% in 2014, when only 20% voted against—the others abstaining. Perhaps even more significant was the decline from 57 to 27 countries over the same period that signed a *Note Verbale* to the UN Secretary-General protesting that the vote had been an interference with their sovereign right over their system of criminal justice and insisting that capital punishment was not a matter of human rights.[14] Instead of abolitionists being on the weaker flank, as they were until the late 1980s, constantly being called upon to justify their position, now the retentionists are on the defensive.[15]

The global surveys

The report prepared in Oxford for the UN in 1987 set out to analyse which countries, in relation to the major regions of the world, had abolished capital punishment in the previous 25 years and the factors that appeared to have influenced the change in policy; to chart the extent to which executions had been carried out in retentionist nations and for which crimes; to try to investigate whether the *Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty*—established by a resolution of ECOSOC without dissent in 1984—were being implemented; and to review the relevant legal and criminological literature relating to arbitrariness and discrimination in enforcement of the death penalty; any evidence relating to its disputed general deterrent effect; and the influence of public opinion.

[13] Those readers who would like to follow these developments in more detail in relation to different areas of the world are referred to: Garland (2010) on the USA; Johnson and Zimring (2009) on Asia; Karimunda (2015) on Africa. Also Scherdin (ed. 2014) more generally.
[14] UN Doc A/ 69/993. 21 of the 27 were among the 39 'actively retentionist' nations that had executed within the past 10 years.
[15] See Schabas (2014).

There was clearly an issue of establishing authenticity. Thus, while Amnesty International would be the source of much factual information, the review would only be taken seriously by all nations if it were presented as an independent 'academic assessment' and not as an 'abolitionist tract' written by a member of Amnesty, to which several nations were hostile. Yet the work was 'naturally orientated' towards assessing the extent to which the abolitionist policy objective of the United Nations Resolutions of 1971 and 1977 was being achieved and what impediments there were to bring it to fruition. As the work progressed it became clear that a 'factual' approach would not suffice. The changes in the orientation of countries towards capital punishment also needed to be interpreted within a normative framework.

The first 1989 edition of *The Death Penalty: A Worldwide Perspective* put forward the view that 'no one can embark upon a study of the death penalty without making the commonplace observation that from a philosophical and policy standpoint there appears to be nothing new to be said'.[16] However, as indicated above, by the third edition (2002) the 'nature of the debate had moved on'. It was argued that the human rights perspective had 'added greatly to the moral force propelling the abolitionist movement . . . the case for retaining the death penalty – and thus resisting the movement to make its abolition an international norm – cannot rest solely on moral, cultural or religious arguments'. Countries that still favoured capital punishment were being faced with more and more convincing evidence of the abuses, arbitrariness, discrimination, mistakes, and inhumanity that 'appear inevitably to accompany it in practice'.[17]

As regards methodology, successive editions revealed a major problem in trying to assess international trends and practices by seeking information from governments though a questionnaire distributed by the United Nations. The majority of countries that retained the death penalty and continued to carry out executions did not respond, and among those that did, information on the number of death sentences and executions was not always supplied, nor on the outcome of appeals or clemency petitions. Answers to questions seeking information on conformity to the safeguards were more likely to be a reflection of the official position as regards criminal procedure, rather than the reality of law enforcement practices, and this was often strongly contradicted by information from NGOs. The first and subsequent editions of *The Death Penalty* therefore recommended that all countries should provide Annual Returns of death sentences imposed and executions carried out and the UN responded with Resolution 1989/64, which urged member states to publish this information.[18] Regrettably the true scale of death sentences and executions remains unknown in many countries, even to Amnesty International and the recently established Cornell University website (www.deathpenaltyworldwide.org), because of state secrecy or inadequate data collection and analysis. This includes many of those suspected of executing the most prisoners.

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[16] Hood (1989: 6).
[17] Hood (2002: 8); Hood and Hoyle (2015: 9).
[18] Hood (1989: 55–56); Hood and Hoyle (2015: 174–176).

The first report to the UN in 1988 had revealed that since 1965 progress towards global abolition had been disappointing. The number of completely abolitionist countries had increased on average by about one a year: at that rate it would take 150 years for all nations to be totally abolitionist. The book concluded pessimistically that 'In many regions of the world there is little sign that abolition will occur soon'.[19] No nations in continental Africa or in the Middle East or Far East had shown signs of responding to the UN resolutions calling for abolition. In at least 54 retentionist countries there had, in fact, been an expansion in the number of crimes subject to the death penalty, most notably for drug trafficking and offences against state security. Indeed the definition of 'most serious crimes', which both the ICCPR and the UN Safeguards intended to restrict the scope of capital punishment until it was abolished, had yet to make its mark. It had become clear that the wording of Safeguard 1, which referred to 'crimes with lethal or other extremely grave consequences', was open to be interpreted as if to permit different national and cultural interpretations. The third and subsequent editions therefore recommended that the wording should be changed so as to make it clear that pending abolition it could only be imposed 'for the most serious offences of culpable homicide (murder), but it may not be mandatory for such crimes' (Hood 2002: 77).[20]

On the criminological front, each edition of *The Death Penalty* brought to international attention research that supported the abolitionist agenda. For instance, the value of the research by David Baldus and others which demonstrated the failure of the new statutes enacted in 1976 in the United States to eliminate the arbitrariness and discrimination that the Supreme Court had found to be unconstitutional in the famous *Furman* decision in 1972.[21] The first edition also demonstrated that it would not be prudent to accept the 'findings', widely quoted at the time, on the basis of Isaac Ehrlich's econometric analysis, that each execution for murder 'saved lives' through its general deterrent effect, and that 'such proof is unlikely to be forthcoming'. This assessment has stood the test of time, as subsequent editions have reviewed yet further attempts to prove a marginally greater deterrent effect of execution over life imprisonment.[22] Failure to prove that the death penalty deters more than a life sentence has been widely referred to by Amnesty International, by the United Nations, the Council of Europe, and other bodies as an authoritative argument against its retention. Another positive outcome was the evidence provided of wide-scale disregard or failure to implement effectively the fair trial Safeguards established to protect persons under threat of conviction and execution. As a result, ECOSOC introduced several further safeguards in 1989 and again in 1996: to provide for counsel 'at every stage of the proceedings, above and beyond the protection afforded

[19] Hood (1989: 159).
[20] It was encouraging to note that the UN Special Rapporteur, Philip Alston, came to a similar conclusion in 2007, recommending that capital punishment where still practiced should be available only where it could be proved that there was an 'intention to kill which resulted in loss of life'. See Hood and Hoyle (2008: 132).
[21] The research by Baldus and his colleagues, as well as other similar—mostly US-based studies—is reviewed in Hood (1989: 98–116) and Hood and Hoyle (2015: ch. 8).
[22] Hood (1989: 98–116); Hood and Hoyle (2015: 389–425).

in non-capital cases'; for *mandatory* appeals against or review of death sentences and provisions for clemency and or pardon in all cases; and to eliminate the death penalty 'for persons suffering from mental retardation (as it was then called) or extremely limited mental competence, whether at the stage of sentence or execution'. One of the other contributions was to chart throughout the series of surveys the general decline in the number of judicial executions carried out worldwide and the number of countries that continued to execute regularly each year at a substantial level. It became obvious that this data would only have some meaning if it were to be related at least to the size of population. Bringing this to light seemed to have had a marked effect, as regards Singapore, where, during the period covered by the sixth survey (1994–98) the average rate of executions had been 13.57 per million of its population, by far the highest in the world. This data was subsequently used by Amnesty International in 2004 to castigate Singapore. The negative image it conveyed of this thriving city state may well have been the reason why the annual rate of executions fell to 1.2 per million in the following years.[23] The fourth and fifth editions added new perspectives brought about by the expansion of research on the issue of public opinion (see below) and on the implications of abolition for penal systems, especially the implications of the expansion of sentences of 'life imprisonment without parole', or 'whole life sentences' as they are called in the UK.

The importance of dissemination

For books to have an impact, authors need allies among the institutions which wish to use the evidence provided, sufficient resources to travel, and the goodwill and interest of the authorities and non-governmental and academic bodies in the countries to which the evidence and arguments are to be conveyed. As an 'outsider', particularly one from a former imperial power, it was vital to obtain the confidence due to an expert in the field, especially to diffuse the accusation that one was seeking to interfere in an 'internal affair'. Very rarely was there a hostile reaction when explaining how the abolition of capital punishment has come to be regarded as an international human rights goal and to encourage retentionist countries to recognize that their objections and concerns regarding abolition have been overcome by so many nations of the world. Beginning with Moscow, Kiev, and the USA in the 1990s, the opportunities for disseminating this message spread from 2001 onwards to China, the Philippines, Barbados, Trinidad, Taiwan, Japan, India, Uganda, Malaysia, Vietnam, and Pakistan, and at meetings of various international bodies and conferences.[24]

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[23] Hor (2013: 159–163). In 2012 Singapore also made the application of the death penalty for drug trafficking discretionary rather than mandatory for persons who could convince the authorities that they had been mere couriers and had 'substantially assisted' the prosecutions. The scope of the mandatory death penalty for murder was also restricted. See Hood and Hoyle (2015: 347–348). See also Zimring, Fagan and Johnson (2010).

[24] Such as Amnesty International USA (Hood 1996); EU-China human rights seminars; as consultant to the European Parliament on Asia (Hood 2013); at the Commonwealth Lawyers Conference in

The opportunity to disseminate the outcome of the surveys with the Chinese government and academics first arose in 1999 when the Chinese delegation to the UK-China human rights dialogue in London agreed that a small group from the Foreign Secretary's Death Penalty Panel should be invited to make a presentation. Such was the scepticism of the leader of the Chinese delegation on hearing my views on abolition that he proclaimed that whatever I knew about other countries, I knew nothing about conditions in China or its culture or the reasons why it must retain capital punishment. We needed to be properly informed. As a result, in 2001 a visit was arranged by the Chinese Ministry of Justice with the FCO and the British Embassy in Beijing for me to go to Beijing with Peter Hodgkinson, Director of the Centre for Capital Punishment Studies at Westminster University, and Saul Lehrfreund, Executive Director of the Death Penalty Project. A series of polite, frank but non-confrontational, meetings with officials, lawyers, and academics left us in no doubt that although abolition was perhaps a long-term goal, it was not considered desirable or possible in China while public opinion demanded the death penalty and while it was regarded as a necessary deterrent to control crime during a period of rapid socio-economic change. We were reminded that the process of abolition in the UK had taken over 100 years. On our part we concentrated on two issues: the necessity to remove the barrier of state secrecy from data about the scope and frequency of the application of capital punishment; and the need to ensure that all the procedures for applying the death penalty from arrest to final appeal should be carried out in conformity with the standards for fair trial enshrined in the UN Safeguards and the ICCPR, which China had signed in 1997, but as yet has not ratified. The visit was regarded as a success by officials from both sides and although a subsequent proposal for a joint research project with the Chinese Academy of Social Sciences did not come to fruition, in 2003, Liu Renwen, a young professor at the Chinese Academy was able to spend three months in Oxford, supported by the Foreign Office, to study the issue of the death penalty. Not only did he undertake the Chinese translation of the third edition of *The Death Penalty* and arrange for its publication by the People's Security University Press, he has since become, as the Director of the Criminal Law Division of the Chinese Academy, one of the most outspoken figures in the movement to reform China's death penalty practices.[25]

The ice had been cracked. Invitations followed to contribute an article to a forward-looking Chinese publication with the optimistic title *The Road of The Abolition of the Death Penalty in China;*[26] and to speak, along with Saul Lehrfreund, (as the only 'Anglos') at an 'Anglo/China seminar' on the death penalty at Renmin University in 2005. We were astonished to find that the agenda had been transformed from the former emphasis on defensive justification for China's policy to a much

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Jamaica (Hood 2008); at meetings of the International Commission against the Death Penalty; at meetings organized by the Office of the UN High Commission on Human Rights in China and in New York (Hoyle and Hood 2015); at World Congresses Against the Death Penalty; and in widely read publications (see Hood 2004, 2007, 2009; Hood and Hoyle 2008, and Hood and Deva 2013).

[25] Liu (2013). See also Liang and Lu (eds. 2015).

[26] Hood (2004).

more open investigation of how China might learn from other countries and proceed to eventual abolition.

In 2007 the opportunity to have a more significant impact on the developing reformist debate in China arose through an invitation to be the consultant to a major project funded by the EU and led by the Great-Britain China Centre in London (which had built up a bank of good will with the Chinese authorities). Under the title, *The Death Penalty: Moving the Debate Forward*, it was carried out in partnership with the Max-Plank Institute for Foreign and Comparative Criminal Law in Freiburg Germany which, through its Director Hans-Jörg Albrecht had established a research partnership with the Chinese Academy[27] and which now was to be responsible for conducting the first major public opinion survey on capital punishment in China; the Irish Centre for Human Rights, whose Director at the time, William Schabas, is a leading authority on international human rights law and the death penalty;[28] and the Death Penalty Project, which had a track record of training judges and lawyers and for very successful litigation on behalf of death row inmates in the Caribbean. The essential ingredient to make this project viable was the enthusiastic collaboration of Beijing Normal University College of Criminal Law Science and Wuhan University School of Law, under the direction of Professor Zhao Bingzhi and Professor Mo Hongxian respectively.

A major aim of this project was to inform Chinese scholars, legislators, and Supreme Court Justices, through conferences and workshops, of the advances in death penalty reform throughout the world. One important task was to diffuse the argument that reform must go slowly in stages by demonstrating that the pace of reform had, since the end of the 1980s, advanced swiftly elsewhere from executions to complete abolition within a few years. We also emphasized that reform of capital punishment procedures would never be sufficient because the evidence demonstrated that the death penalty could not be administered without it being imposed arbitrarily and prone to error and thus in violation of the right not to be arbitrarily deprived of life and the right not to be subjected to an inhuman or degrading form of punishment. These ideas were communicated to a wider audience at a Public Forum held in the cities of Dalian and Wuhan, and papers given by the European contributors at the project seminars were published in the conference papers by Beijing Normal University, thus helping to open up a debate that had been so long repressed and ill-informed.

It was of great significance that reforms to China's death penalty procedures had begun to take root at this time, most notably the return of review of all death sentences to the Supreme People's Court in 2007 in order to restrict and bring more uniformity to the infliction of executions.[29] Regrettably no statistics have yet been published but informed academics have reported a substantial decline since this time. Perhaps even more significant was the fearless endorsement by Professor Zhao Bingzhi, the most politically influential Chinese academic criminal lawyer, of the

[27] Published in Albrecht (2006).
[28] See for example Schabas (2002).
[29] Liu (2013).

major message that we had sought to convey through our presentations and publications based on our international surveys of the changes in practices and ideas that had fuelled the abolitionist movement worldwide:[30]

> The fast headway of abolition in the globe is amazing and exciting. These latest changes present a clear signal to us: abolition is an inevitable international tide and trend as well as a signal showing the broad-mindedness of civilised countries . . . it is now an international obligation.

In several of the other countries mentioned above, there is reason to believe that the academic input has also had an impact in helping to overcome some initial resistance to consideration of reform. For example, in 2001 the author was invited by the Free Legal Assistance Group (FLAG) to the Philippines, with the support of the British Embassy and the Philippines Coalition against the Death Penalty, to help, through a series of presentations, to 'kick-start' FLAG's campaign to return the Philippines to its former abolitionist status. With only a few exceptions, the response was very positive and when complete abolition was achieved in 2006 FLAG graciously acknowledged my contribution to their campaign. The response in India was also very positive at a conference held in Delhi in 2011 by the O.P. Jindal Global University, attended by Supreme Court Justices, Senior Counsel, and human rights advocates. Four years later, the Chair of the Law Commission of India, in preparation for the finalization of its Report Number 262 on *The Death Penalty* (the first since 1967), invited the author to Delhi to give a public lecture on the theme 'World-wide Abolition of Capital Punishment: a Human Rights Imperative', under the joint auspices of The O.P. Jindal Global University and the National Law University in Delhi, and to attend (as the only foreigner) the Law Commission's national consultation with judges, lawyers, and parliamentarians. In August 2015 the Law Commission recommended the abolition of the death penalty for all 'ordinary' crimes such as murder, as the first step to the complete abolition of the death penalty.[31] The fifth edition of *The Death Penalty* was frequently cited in the report. In Vietnam a speech on the same topic at the invitation of the National University and the Norwegian government in September 2014 apparently assisted the reformers in obtaining a further restriction of the number of capital crimes during 2015. As a result of the public opinion research undertaken in Malaysia (see below), I was appointed consultant by the Attorney-General to the study-group he established, at the request of the Cabinet, to make a comprehensive review of the death penalty in that country.

Empirical research

[30] Bingzhi and Shuiming (2009: 37).
[31] See also Batra (forthcoming 2016).

The absence of empirical criminological and socio-legal research in all but a very few retentionist jurisdictions other than the United States has been a serious impediment to greater knowledge about how the death penalty is administered.

In 2003 the author was commissioned by The Death Penalty Project to undertake an empirical study of the use of the death penalty in Trinidad and Tobago (T&T), a country with an exceptionally high homicide rate which still retained the mandatory death penalty for murder, despite the fact that the Judicial Committee of the Privy Council had held this to be a cruel, inhuman, and degrading punishment.[32] Financial support was forthcoming from the EU and the UK FCO, and the Faculty of Law of the University of the West Indies took the study under its auspices. Without local sponsorship such research by foreigners, especially those from the former colonial power, could not have hoped to make progress. A further advantage was that the fieldwork was carried out by a Trinidadian citizen, Dr Florence Seemungal, a former research officer and then an Associate of the Oxford Centre.

The T&T research followed-up 633 incidents recorded by the police as murder over the five-year period to the end of 2002, and 297 persons who had been committed for trial over the same period. The findings were striking. The proportion of all reports of murder that led to a conviction for murder and a mandatory death sentence was only 5% and none were subsequently executed, the last executions having taken place in 2000. Furthermore, the conviction rate for ‘gang and drug-related’ murders and those where the body was found ‘dumped’, the category of murder that had increased the fastest over the five-year period, was extremely low. By the end of 2005, only two of the 208 recorded murders of this kind had resulted in a conviction for murder and two for manslaughter—2% altogether, although they had made up 33% of the recorded killings. By contrast, 16% of murders committed in the domestic situation, the easiest to detect but the most likely to have mitigating factors, resulted in a conviction for murder. Such a low certainty of punishment proved that the mandatory death penalty was not only very unlikely to be an effective general deterrent, it was also arbitrarily inflicted and only rarely on the ‘worst of the worst’ cases. Furthermore, murder charges were more likely to result in a verdict of manslaughter because the prosecutor was willing to accept a guilty plea; witnesses were unwilling to provide testimony and jurors unwilling to convict persons of murder when the only punishment would be death. The report was given an appropriate title: *A Rare and Arbitrary Fate*.[33] This was followed by a survey of the experiences and perceptions of sentencing under a mandatory system among the judges, prosecutors, and counsel in T&T, which confirmed that hardly any of them (only 4 of 51) supported the status quo.[34] Yet despite the strong evidence bringing to light the realities of the infliction of capital punishment, the findings in relation to the arbitrariness of the mandatory death penalty were ignored by the government and their significance not appreciated by the press, which concentrated on reporting the failure to bring so many murderers to justice.

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[32] Hood (2007, 2010).
[33] Hood and Seemungal (2006).
[34] Hood, Seemungal, Mendes, and Fagan (2009).

What stood in the way in Trinidad was the argument that public opinion was so strongly opposed to abolition of the mandatory death penalty that it would be politically impossible to abolish it. Building upon the experience and findings of the public opinion survey conducted in China by the Max-Planck Institute, in collaboration with the Peking University Research Centre for Contemporary China and Wuhan University (see above), which had revealed that public opinion was not so strongly committed to capital punishment as those in authority had assumed,[35] public opinion surveys, focusing on the mandatory death penalty, were carried out for the Death Penalty Project in Trinidad,[36] and in Malaysia, with the strong support locally of the Malaysian Bar Council and the Human Rights Commission of Malaysia.[37] Opinion surveys have also been conducted recently in Taiwan and Ghana, both after consultation with the Oxford Centre.[38] In every country it has been essential to employ survey agencies of high repute to undertake the fieldwork.[39]

The Trinidad and Malaysia surveys, as in China, found that only a small minority of respondents were very well informed about the death penalty (see also on Japan, Sato 2011); that while a high proportion of the population in Trinidad and Malaysia (around 90%) said they were in favour of the death penalty, when presented with scenarios where there were mitigating circumstances less than half chose death as the appropriate punishment. As regards the mandatory death penalty only a small minority chose the death penalty for *all* the case scenarios they judged. In China, Trinidad, and Malaysia when respondents were asked whether they would still favour the death penalty if it were proven to their satisfaction that an innocent person had been executed, the proportion changing their minds was such as to bring the total favouring the death penalty down from 58% to 25% in China, in Trinidad from 89% to 35%, in Malaysia from 91% to 33% for murder, and from 75% to 26% for drug trafficking. This was extraordinarily consistent proof that support for the death penalty rested on a belief that the system will and can be administered without error. Furthermore when respondents were asked in T&T and Malaysia to say which of five social and criminal justice policies were the 'most likely to reduce very violent crimes leading to death', greater number of executions was ranked last. Indeed, taken as a whole, this body of research on public opinion in retentionist countries suggested that the argument that the death penalty cannot be abolished because of public demand for it and opposition to its abolition is so strong is very likely to be a myth.[40]

The response to and impact of empirical research has been very different in the countries concerned, depending on whether powerful organizations have been willing to use the findings as a platform for reform. Despite the strong support for the public

[35] For details see Oberwittler and Qi (2009); Hood (2009) and Baaken (2013).
[36] Hood and Seemungal (2011).
[37] Hood (2013).
[38] TAEDP (2015); Tankebe et al. (2015).
[39] In Trinidad by Market Facts and Opinions Ltd., and in Malaysia by IPSOS Malaysia, in both cases using a questionnaire designed by Roger Hood. No criticism was received of the survey instrument or of the sample.
[40] For instance, when asked whether they thought that China should 'speedup' towards abolition of the death penalty, only 53% were opposed to this view.

opinion survey in China by the local universities concerned, the findings have been treated with much scepticism by the authorities and with only lukewarm support by other Chinese scholars, probably because of the high media profile of 'netizens' who publish 'online' objections when death sentences are not imposed in certain high profile cases, often, but not only, those involving high-ranking 'officials' charged with corruption.[41] The research in Trinidad has so far made no impact in moving either government or opposition parties towards abolition of the mandatory death penalty. The finding that, at the most, only about a quarter of respondents approved of the mandatory death penalty, and that it had almost no support among judges, prosecutors, and criminal lawyers was largely ignored. The lack of a Human Rights Commission and only a small Criminal Bar has not helped. In contrast, the strong support for the research in Malaysia from the Bar Council and human rights bodies has brought the findings to the fore in political debate on the abolition of the mandatory death penalty.

In conclusion

The point has been reached where there is now a decreasing number of countries that defy the majority view that the death penalty cannot be practiced without a breach of the principles embraced by almost all nations after the second world war; namely that states should protect the right to life and human dignity of all persons and ensure that their criminal justice systems are free from torture and cruel, inhuman, and degrading punishments. Fewer and fewer countries now seek to stigmatize the abolitionist movement as a product of western imperialist culture. Only a minority now claim that retention of capital punishment can be justified because it is demanded by religious precepts as interpreted by clerical authority or because it is contingent on popularly supported cultural norms and values that demand 'a life for a life'. In particular, the argument that capital punishment is a 'domestic criminal justice issue' not a 'human rights issue' is based on a false antithesis. Whatever system of criminal justice a country may choose there must be limits to the power that the state can be permitted to exercise over persons accused of and convicted of crimes, however serious: limits defined by universal human rights principles which apply to all human beings. One key contribution of criminologists and lawyers has been to show that the death penalty cannot be administered in a way that meets the standards of humanity consistent with these principles and that states should not defer to public opinion. In the end, the abolition of capital punishment is decided in the political arena. Although there appears to be no possibility of acceptance of the abolitionist message in those countries that remain committed to Sharia law in the Middle East while political power continues to lie with clerically dominated regimes that are hostile to the concept of universal human rights,[42] abolition of the cruel and inhumane punishment

[41] Even though the public opinion survey had shown that only a minority favoured the death penalty for corruption.
[42] See page 00 above, also Scherdin (2014).

of death has now become the litmus test in all countries that purport to respect international human rights norms.

The research briefly described above, conducted over almost 30 years in collaboration with human rights and criminal justice organizations, as well as the continuing efforts of Carolyn Hoyle with her colleagues and students at the Oxford Centre for Criminology, hopefully has demonstrated that academic criminologists can have a valuable contribution to make to the global abolitionist movement.

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