

BILBAO ACCEPTANCE SPEECH

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1. Introduction

As a student of criminology at the LSE in the mid-1950s, I first studied the death penalty under the tutelage of that great European criminologist Dr Hermann Mannheim at a time when legislative changes were being proposed not to abolish it for murder but to limit its scope to those who appeared to be professional criminals. I was among those opposed to this compromise on the grounds that whatever attempts were made to define in legislation a category of murder for which the death penalty was claimed to be justified, it would inevitably be arbitrary in its application, liable to error, unnecessary as an extra deterrent and incompatible with a British criminal justice system that should be made more humane in keeping with a civilised welfare state. As I recall it, the idea that capital punishment is fundamentally a violation of inherent universal human rights that should not be denied even to a convicted murderer was simply not on the Agenda. Amnesty International had yet to be founded. How things have changed since then. I want to explain briefly how and why.

As you may know, there was no mention of the death penalty when article 3 the Universal Declaration of Human Rights ('every person has an inherent right to life') was promulgated in 1948. It was explicitly made an exception to the right to life when the European Convention on Human Rights was established in 1950. By 1966, the year that the International Covenant on Civil and Political Rights (ICCPR) was approved by the United Nations General Assembly there were still only 26 abolitionist countries, and only 12 had abolished it for all crimes, in peacetime and wartime, in civil and military law – West Germany being the only large European country among them. So Article 6(1) of the ICCPR, which guarantees an inherent right to life so far as a person is not

arbitrarily deprived of it, also did not ban the death penalty. All that could be achieved (in Article 6(2)) was to attempt to restrict the scope of the death penalty in countries that retained it to ‘the most serious crimes’, an exceptionally vague, relative and potentially elastic concept. Nevertheless, the direction that policy ought to take was indicated by Article 6(6) which stated that ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the ...Covenant’. Perhaps even more important was Article 7 to which there were no exceptions: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Forty one years ago, in 1971, a resolution of the United Nations General Assembly emphasised ‘the desirability of abolishing this [capital] punishment *in all countries*’.

Although my first report to the UN in 1988 had noted that there had been steady progress towards the UN goal in Western Europe and South America and several small former dependent island territories, such that 52 (29 per cent) of UN member states had abolished the death penalty for murder, only 35– less than one fifth of all nations – had eliminated capital punishment altogether from their penal and military codes. I had to conclude that there was ‘little sign that abolition will occur soon.’ Indeed the United Nations *Crime Prevention and Criminal Justice Newsletter* of 1986 on the subject of Capital Punishment had also stated that “it would appear that the goal of the abolition of capital punishment throughout the world remains remote”.

2. A new dynamic

What has happened since then to reverse such pessimism? Over the past 22 years, since the political changes heralded by the fall of the Berlin wall in 1989, a ‘new dynamic’ has been at work: one which has sought to move the debate about capital punishment beyond the view that each nation has, if it wishes, the

sovereign right to retain the death penalty as a repressive tool of its domestic criminal justice system on the grounds of its purported deterrent utility or the cultural preferences and expectations of its citizens, and instead to persuade countries that retain the death penalty that it inevitably, and however administered, violates universally accepted human rights: namely, the right to life and the right not to be subjected to a cruel, inhuman or degrading treatment or punishment.

Since 1989, the number, proportion and regional-political spread of abolitionist nations have all changed dramatically. Now, 106 of the 196 – that is over half - of UN member states have abolished the death penalty, 98 of them have rejected it completely in all circumstances– an enormous increase from the 12 countries that had done so by 1966. A new pattern has been set. The majority of countries since the end of the 1980s have moved swiftly from executions to complete abolition: for example, Turkmenistan abolished capital punishment in 1999, just two years after the last execution; South Africa in 1995 just four years after; Mongolia in 2012 just two years after the President had announced a moratorium. Furthermore, the majority (85%) of those who abolished the death penalty for the first time since 1989 did so completely in ‘one go’, so to speak, unlike earlier abolitionist countries, such as the Netherlands, Italy and the UK, that first abolished it for ordinary crimes before extending it to crimes against the state and military offences often many years later.

Among the 90 countries that retain the death penalty in law, less than half (44) have executed anyone within the past 10 years and not yet announced a moratorium – less than a quarter of all nations and Amnesty International regards 33 of the remaining 46 as truly ‘abolitionist in practice.’ Thus 71 per cent (139/196) of states no longer inflict or apparently intend to inflict the ultimate penalty. At the UN General Assembly in December 2010, 109 of the

185 taking part voted in favour of a resolution calling for a world-wide moratorium on death sentences and executions, another 35 abstained and only 41 (22 per cent) voted against. Furthermore, practice has changed among those who do retain capital punishment: More and more retentionist countries are coming to accept that executions, prior to complete abolition, can only be justified on a discretionary basis for the 'worst of the worst' cases of murder. Although 67 countries imposed at least one death sentence in 2011 only 20 carried out an execution compared with 40 in 1997. Singapore which 10 years ago was revealed to have had in the mid-1990s the world's highest execution rate per head of population - as many as 74 executions in 1994 - has responded by cutting executions drastically: only one person in 2009 and three in 2011 for murder and drug trafficking, and now proposes to amend its strict mandatory death penalty laws. Meanwhile the number of reported murders in Singapore has not risen but fallen - to only 16 last year in a population of over five million. In fact only nine countries regularly execute more than 10 persons a year: China, Iran, Iraq, Saudi Arabia, North Korea, Vietnam, Somalia, Yemen and the USA.

At the international level, it is highly significant that the death penalty is not available as a sanction for genocide, other grave crimes against humanity and war crimes in the Statute of the International Criminal Court established in 1998. This has provided a powerful argument: If it is not available for these atrocious crimes why should it be the punishment for lesser crimes?

3. Factors generating the 'new dynamic'

Foremost among the influences has been the political changes that have in so many societies generated a call for social, educational, minority, gender and other human rights and freedoms. In over half the countries that have joined the

abolitionist camp since the end of 1988, the death penalty has been specifically banned in their democratically inspired constitutions or by their Constitutional Courts as in South Africa. Beginning in Europe in 1983 regional protocols banning the death penalty were added to Human Rights Conventions, and then to the ICCPR in 1989. By 2002 the ECHR had a further protocol (number 13) banning it for all crimes in peacetime and wartime.

It has needed political leadership on a trans-national scale to bring about abolition, particularly from the Council of Europe and the EU both of which in the 1990s made membership conditional on abolition of the death penalty, and which have acted as missionaries for the human rights argument, both at the UN and individually in retentionist countries through the media of EU human rights dialogues. They have been backed up by NGOs, especially but not only Amnesty International. New international bodies have developed such as the World Coalition against the Death Penalty and the International Commission, composed of former heads of State. Again, European countries and European ideas have been in the driving seat. In moving from retention to abolition, political will has been the key and political discourse has raised concern in retentionist states for their political reputation as civilized nations that respect their treaty obligations to uphold human rights.

Capital punishment has come more and more to be regarded as a violation of basic human rights on the number of grounds. Abolitionists reject the most persistent of justifications for capital punishment: retribution and the need to denounce, expiate and eliminate through execution those whose crimes shock society by their brutality. They hold that all human beings have a right to be able to redeem themselves, that a State has no right to take the life of a captive citizen. They also reject the utilitarian justification that nothing less severe can

act as a sufficient deterrent to those who contemplate committing capital crimes. This is not only because the social science evidence does not support the claims either that executions do or do not have a deterrent impact on the rate of homicide – a finding endorsed in 1978 and again after a further spate of research in 2012 by the American National Academy of Sciences – but because even if it could have a marginal deterrent effect, this could only be achieved by high rates of execution, mandatorily and speedily enforced. This, abolitionists assert, would increase the probability of innocent or wrongfully convicted persons being executed and also lead to the execution of people who, because of the mitigating circumstances in which their crimes were committed, do not deserve to die. Finally, and just as important, they point to all the cruelties and disparities that haunt the administration of the death penalty and therefore inevitable breach article 7 of the ICCPR that protects all citizens from cruel and inhuman punishment.

Many retentionist countries – Japan and the USA come to mind – justify the retention of capital punishment on the grounds that it is a democratically demanded criminal sanction by a large majority of the population that can only be ignored by politicians at their peril, or, as in China, that without its enforcement there would be a breakdown of order and the criminal justice system and government would lose legitimacy. Abolitionists accept that public opinion cannot be entirely ignored but argue that a state concerned for human rights should not merely accept popular opinion as a reason for retaining the death penalty – especially when it may be based on misconceptions about the assumed deterrent effect of capital punishment, the fairness rather than the arbitrariness of its application, absence of error rather than evidence of mistakes, and other human rights considerations. From China to Trinidad public opinion surveys in which I have been recently involved have found that when citizens were asked whether they would support capital punishment if it were

proven that innocent people had been executed, the level of support plummeted: in Trinidad from 89 to 35 per cent, and in China only 25 per cent remained definitely in favour. It needs to be remembered that no countries have abolished the death penalty because of popular demand as reflected in opinion polls, and that as a new generation grows up in a society with no death penalty it comes to be regarded by the majority as a ‘cruelty of the past’. It was of great significance that in post-apartheid South Africa, the newly created Constitutional Court abolished the death penalty in 1995, in face of public opinion in its favour so as to reinforce ‘a human rights culture’ which would “protect the rights of minorities and others who cannot protect their rights adequately through the democratic process”.

The influence exerted by the weight of numbers as more and more countries have embraced abolition has itself strengthened the normative legitimacy of the case against capital punishment. This is well illustrated by the change in the decisions reached regarding extradition of prisoners charged with murder from Canada to US states that retain the death penalty. In 1991 the Canadian Supreme Court held that there was no bar to extradition from Canada to Pennsylvania because there was no international consensus on the issue of capital punishment. Yet 10 years later the Court changed its mind. It would not sanction extradition to Washington State without a commitment that the person would not be sentenced to death and executed because of “the significant movement towards acceptance internationally of a principle of fundamental justice ... namely the abolition of capital punishment.”

4. Globalization of the movement

The impact of the new human rights dynamic has been remarkable. Abolition has been embraced across the globe by many different political systems, peoples

and cultures. The changes have been remarkable in Africa. At the end of 1988, when I published my first report to the UN, only Seychelles and Cape Verde had abolished capital punishment, whereas 16 countries are now completely abolitionist (the most recent being Burundi, Togo, Gabon and Benin, soon to be followed perhaps by Ghana where the Constitutional Review Commission has recommended that the new Constitution should prohibit the death penalty). Another 19 have not executed anyone for at least 10 years and two others last year declared a moratorium – Sierra Leone and Nigeria. The only set-back has been in Gambia where executions resumed in August 2012 after 27 years. Nine prisoners on death row were shot and President Jammeh announced that he would clear death row of the other 37 inmates. This action was widely condemned, perhaps most significantly by the African Union, following which on 15th September the President announced that he was responding to ‘numerous appeals’ by suspending executions.

Although all countries in the Middle East and North Africa where Islam is the dominant religion retain the death penalty, three of them – Tunisia (1991), Algeria (1993) and Morocco (1993) – have not carried out any judicial executions for 18 years and the new government of Tunisia has promised to ratify the Protocol to the ICCPR abolishing the death penalty. Abolition has also been under consideration in Jordan and Lebanon and executions have sharply declined in Egypt. Pakistan which had executed 34 people in 2008 has not executed any person since. In fact several secular states with large Muslim majorities have already joined the abolitionist movement: such as Albania, Azerbaijan, Turkmenistan and Senegal. Only four retentionist Muslim countries now make regular and large scale use of capital punishment as a crime control measure, all in the Middle East: Iran, Saudi Arabia, Iraq (under highly stressful conditions) and Yemen. Overall, the prospects for a steady movement towards abolition in the Muslim world are not nearly as bleak as some may imagine.

There are now five Asian abolitionist states (Nepal, Bhutan, Cambodia, Philippines and Mongolia). Six others are now abolitionist *de facto*, including most recently South Korea. In India – with the second largest population in the world – the normal punishment for murder is life imprisonment and the death penalty is in principle to be imposed in only the ‘rarest of rare’ cases. Indeed, according to the prison statistics 97 death sentences were imposed at the trial courts in 2010 out of 20,659 persons convicted of murder: 0.5 per cent. The last execution took place in 2004, the first since 1997. It appears that the only persons now likely to be under a real threat of execution are those who were involved in politically motivated assassinations – such as the killing of Rajiv Gandhi and the Mumbai massacre, the sole surviving gunman (Mohammed Kasab) having recently had his death sentence confirmed by the Indian Supreme Court.

What about China, the country with the greatest population, the largest number of crimes subject to the death penalty, and by far the greatest number of executions? In 2007 the Chinese delegate at the UN Human Rights Council declared: ‘The death penalty’s scope of application was to be reviewed shortly ... with the final aim of abolishment’. Thus the debate in China is no longer stuck on the question of whether or not the death penalty should be abolished: it is about how abolition might be achieved and at what pace reforms should be introduced. The programme adopted is one of gradualism, aimed at making step-by-step reforms in criminal procedure to reach international standards for fair trials; by reducing the scope of the death penalty in the criminal code, beginning in 2011 with abolition for 13 non-violent crimes; and regulating and moderating sentencing practices to reduce disparities and the total number of executions by ensuring since 2007 that all cases sentenced to immediate death

are reviewed by the Supreme People's Court. Although no one expects complete abolition to be reached for some time the path appears to have been set. It is claimed that the influence exercised by the SPC, directly by its own decisions in overturning immediate death sentences and substituting suspended death sentences, and indirectly by changing the sentencing culture of the lower courts, has reduced the annual number of persons executed by at least a half of what the number had been in 2005: possibly from around 8,000 per annum to around 4,000. Furthermore, a recent public opinion survey by the Max Planck Institute has shown that only 53 per cent of the population was definitely opposed to China speeding up the process to abolish the death penalty.

So a vigorous debate on the 'reform' of the scope of the death penalty is now underway. There is no doubt that the normative pressure of the world-wide abolitionist movement has played a major part. As one prominent and influential senior scholar, Professor Zhao Bingzhi of Beijing Normal University put it recently at an international meeting: 'Abolition is an inevitable international tide and trend as well as a signal showing the broad-mindedness of civilized countries ... [abolition] is now an international obligation'. I could not have imagined that anyone would have said this publicly a decade ago when I first went to China to discuss the death penalty. The abolitionist cause is also now gathering force in Japan.

The position taken by the United States – to be specific by the retentionist States and the United States Supreme Court – is in my opinion crucial to achieving the goal of world-wide abolition. So what, briefly, are the prospects that the USA as a whole will abandon capital punishment? As in most of the rest of the world the death penalty in the US is in decline and distributed unevenly in frequency of use. Five states have recently abolished it and the Governor of Oregon has announced a moratorium. California will hold a plebiscite in November. Only

12 of the 51 US state jurisdictions actually executed anyone in 2011 and only seven of them more than one person. Texas alone accounted for 13 of the 43 executions. Indeed only 10 states have on average executed at least one person a year since executions were permitted to resume in 1976, eight of them in the old south plus Oklahoma and Ohio. The number of death sentences imposed annually in the US has fallen from 315 in 1996 to only 78 in 2011. Meanwhile the annual number of recorded murders has not increased but declined from around 20,000 to 13,000.

In 2009 the influential American Law Institute decided that it would withdraw its support for the death penalty “in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.” Indeed, the growing acceptance of the fact that no ‘perfect, no fault or error’ system can be devised; that in practice the death penalty cannot be administered fairly, evenly and without discrimination; that attempts to create a ‘super due process’ system entail very high costs to the state as cases wind for years through state and federal appeals processes with a very low probability that an execution will eventually occur; the revelation that even lethal injection cannot be guaranteed to result in a non-tortuous death; the terrible plight of prisoners on death row for many years combined with the incontrovertible evidence that 140 innocent people sentenced to death in 26 states have been exonerated since 1973, may well persuade yet more states to follow those that have already banned capital punishment. The impression often given, that in America there is enthusiasm everywhere for executions is now wide of the mark. Public support has fallen from 80 per cent in 1994 to 61 per cent in 2011. Those who campaign for abolition worldwide can hope that it will not be many years before the US Supreme Court will be able to find that the majority of States, in line with a majority of countries worldwide, do not support the death penalty for anyone, and therefore rule that ‘emerging

standards of decency’ - in other words that capital punishment *per se* infringes constitutional protection of human rights - will no longer tolerate the use of this cruel and unusual punishment for any crime in any part of the USA.

6. In Conclusion

There can be no doubt that the emphasis on universal ‘human rights’ has added greatly to the normative, moral, force propelling the abolitionist movement. The number of countries remaining resistant to it is steadily declining. Their claim that the death penalty is a ‘domestic criminal justice issue’ not a ‘human rights issue’, as if it is one, it cannot also be the other cannot be sustained, for it is 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 citizens of the world.

The road ahead is still rocky and no end is clearly in sight, but the scales have tipped decisively against retentionist states. Abolition of capital punishment is clearly becoming the litmus test for all countries that purport to respect international human rights norms. Those states that still retain it in law and use it in practice will become more and more isolated and stigmatized. They will come under increasing pressure to protect the human rights of all their citizens, even the worst behaved among them, and to accept as an international human rights norm that the death penalty is an outmoded, cruel and dehumanizing punishment. In my view it is incumbent on all states party to the ICCPR to recognize that they should feel morally bound by the universalistic goal of that Treaty to fulfill their obligation under Article 6(6) to do nothing to delay or prevent the final abolition of capital punishment.

At my age I may not see the end of capital punishment but I believe that many of you will.