

# The Death Penalty: an overview of the issues

Von Peter Hodgkinson, London\*

I intend to raise a number of issues, which I believe are neglected in the generic debate about capital punishment one of which is the fallacy perpetuated by many that capital punishment is one-dimensional. It is far from that as it touches on many aspects that have an impact on civil society some of which I will refer to later.

I have never been entirely convinced by the arguments of those who declare themselves as being 'against' capital punishment or that it is immoral and that those who support it are 'bad' and those opposed are 'good'. Questions need to be asked of those that declare themselves as abolitionists, such as what it is about capital punishment to which they are opposed. Is it for example the mode of execution, the execution of the mentally ill and mentally impaired, the execution of juveniles, the inadequacy of legal representation or any other of the usual suspects that comprise the artillery of abolitionists? For example, what would be their position if one or all of the above flaws in the administration of the death penalty were to be corrected? I touch on this now but will develop my thinking on the significance of this later on when I come to discuss moratorium strategies.

## I. The Usual Suspects

Those of us who claim to know something about capital punishment have invariably been educated and influenced by the scholarship and experience of its application in the United States of America and furthermore this has shaped abolitionist strategies not only in the USA but also throughout the world. Ease of access to the data and the reliability of such data have tended to make us complacent to the extent that we accept it as having universal relevance.

The 'usual suspects' such as deterrence, race, mental illness, mental retardation, prosecutorial bias, juveniles, wrongful convictions, inadequate legal defence, public opinion, etc. have dominated and shaped the literature and subsequently the agenda of the debate about capital punishment in the USA and therefore inevitably the wider world. This list of flaws in the administration of capital punishment in the USA provides those opposed in principle to abolition opportunities to concede the need to improve the system, however it also provides those sailing under the flag of convenience of abolition to disguise their true position.<sup>1</sup>

In the centre's international work over the years we have gradually retreated from the view that the US experience is omniscient but continue to refer to the annual and powerfully compelling evidence of the fundamental flaws in its admini-

stration of capital punishment. This is helpful in dispelling many myths about the USA, which we build on by inviting our target countries to consider if the most richly resourced country in the world perpetuates such flaws then there is an inevitability that the manner in which their death penalty is administered must too be suspect. We emphasise that this is expressly not an invitation to squander scarce resources in what will be a failed attempt to 'improve' their system but an encouragement to abandon the entire panoply of capital punishment and concentrate their resources on the establishment of an effective, proportionate and humane penal policy.

## II. Public Opinion – v – Public Education

The opinion of the public sought and found is a very crude indicator, as it invariably requires little more than a "yes" or "no" response but despite the evidence of the shortcomings of most surveys of public opinion there is little doubt that these findings influence politicians and policy-makers. There is also evidence that despite the majority of such polls strongly supporting the death penalty most countries that have abolished it have done so in the teeth of such opposition with no obvious ill effects, either to the rate of crime or to those who took the decisions.<sup>2</sup> The different perspectives of the source and role of authority determine the extent to which governments are influenced by popular opinion. Representative democracies such as the UK believe that it is the responsibility of Parliamentarians to exercise their judgement and conscience when passing legislation, whereas a populist delegate democracy such as the USA seems to act as a conduit for popular opinion arguing, "it is the will of the people."

In my experience without exception, governments and others in positions of influence refer to strong public support for the death penalty as one of the justifications for retaining it. I have never found it particularly helpful in light of the above, when consulting with governments in death penalty States to dwell too long on this issue preferring instead to stress the importance of raising public knowledge and understanding about capital punishment. A penalty on which it has come to rely and, moreover, one it has reason to assume is effective in reducing serious crime. An exercise in informing and reassuring is going to be far more effective and honest than responding to the inevitable majorities supporting the death penalty by perpetuating the illusion that the death penalty is the solution.

The approach of 'consulting' with the public in addition to having access to public opinion polls is not a new one but perhaps one that has fallen into disuse during the modern debate about capital punishment. It is an approach utilised by a number of commissions in the 1950s and '60s when Ceylon [now Sri Lanka] and the United Kingdom conducted rigorous examinations into the death penalty of both these nations. The Ceylon enquiry referred to the debate on abolition in the

---

\* Peter Hodgkinson is Director of the Centre for Capital Punishment Studies at Westminster University Law School in London. The Centre is very grateful to the European Commission who continues to fund and support its activities.

<sup>1</sup> Parts of this presentation are informed by extracts from Chapter One [Capital Punishment: improve it or remove it?] in *Capital Punishment: strategies for abolition*, edited by Hodgkinson & Schabas, 2004.

---

<sup>2</sup> *Zimring/Hawkins, Capital Punishment and the American Agenda*, 1986.

House of Commons in July 1948 when the Attorney-General of Great Britain cautioned reliance on public opinion urging that any reliance must be founded on the confidence that the public opinion under consideration is 'well informed and instructed'. Their view was that whilst politicians might be faced with the dilemma of political practicality and/or social wisdom of a course of action it was the duty of members of a Commission of Enquiry to concentrate on the social wisdom. This is an approach that can be adopted not just with the general public but also with those pivotal agencies that comprise the 'machinery of death'.

Dr. Dobryninas<sup>3</sup> devised a useful model for informing/consulting/reassuring in the early stages of the discussion to replace the death penalty, which was subsequently adapted for use in Albania and now informs the work we do on this topic. Briefly, it involves the collation of authoritative information about capital punishment from the literature made available in an objective way – not as an abolitionist tract. Informed by the above it is important to identify very carefully the groups and individuals whose views are important to the debate. The concerns of the general public and those of the 'elites' are equally important though the progress of the objective to replace capital punishment will be considerably enhanced if the 'elites' are persuaded by the data and the arguments. The 'elites' are in effect in a pivotal position to 'change the hearts and minds' of the general public, their respective constituencies and crucially decision makers.

Our advice would be to target the materials and the consultation exercises at the following constituencies:<sup>4</sup>

1. Parliamentarians/Politicians
2. General public
3. Community Groups
4. Judiciary
5. Police officers and managers
6. Victim groups
7. School pupils and teachers
8. University students and lecturers
9. Religious leaders
10. Media
11. NGOs
12. Prison officers and managers
13. Lawyers
14. Medical profession

It is essential that such materials include country relevant information and crucially the experience, if available, of neighbouring countries that have successfully gone through this process having faced similar concerns and resistances.

---

<sup>3</sup> *Dobryninas*, The experience of Lithuania's journey to abolition, in *Capital Punishment: strategies for abolition*, edited by Hodgkinson & Schabas, 2004.

<sup>4</sup> The full materials, strategy papers and social surveys in use in the Malawi and Philippines projects are available from the CCPS.

Another approach to the issue of 'beliefs' and the death penalty is to ascertain what measures 'the public' considers effective in the battle against serious crime. An example of such an approach is a recent analysis undertaken by Market and Opinion Research International [MORI] of four social surveys conducted in 1994, 1996, 2000 and 2001 in the UK. Subjects were asked: 'Which two or three of the following [measures] do you think would do most to reduce crime in Britain?' In the first three surveys, the police were ranked as the most important (51%, 58%, 54%). In 2001, 'better parenting' was considered the most important measure with 55% support. Capital punishment for murder was rated third with 38% support in 1994 and third with 35% support in 1996. By 2000, capital punishment was tied for fourth place with tougher institutions for young offenders, at 25%, and in 2001 it had fallen to seventh place with 20%.

Public support for the death penalty does not justify delaying moves to abolition and is invoked more as an excuse for inaction especially when one considers that little or no attempt has generally been made by governments that rely on such arguments to employ thorough public information campaigns. Governments should lead, not follow or hide behind, public opinion especially as they have the advantage of being advised by reliable authorities and research.

### III. Alternatives to capital punishment<sup>5</sup>

The debate about alternatives – more correctly its absence – is all too characteristic of mainstream abolitionists, which in my view represents a fundamental omission equalled only by their failure to explicitly address the issue of crime victims. Pre-eminent among abolitionist organisations is Amnesty International (AI), which takes no active position on either victims or alternatives, and as recently as 2002 AI sections rejected the recommendations of its own review of death penalty strategies. To quote: 'The classic AI position has been that the organisation does not advocate any specific alternative penalty but that any such alternative must not constitute cruel, inhuman or degrading punishment. Amnesty's unwillingness to recommend [or oppose] specific substitute punishments may undermine the credibility of its overall argument for abolition.'

The temptation to substitute draconian prison terms or whole of life imprisonment in the belief that this is necessary to 'buy' the support of a public generally opposed to abolishing the death penalty, maybe understandable politically but it needs to be avoided. This is the moment when rational penal policy should prevail over expediency and compromise. The UK experience illustrates how easily the best of intentions at the time of abolition can saddle governments with long-term problems. In 2004, the UK and N. Ireland had in prison more

---

<sup>5</sup> Extracted from *Hodgkinson*, Alternatives to the death penalty – The United Kingdom experience, in *Death Penalty – Beyond Abolition*, the Council of Europe, 2004.

life sentenced prisoners than the total of number of lifers in the other 44 member states of the Council of Europe.<sup>6</sup>

The term 'life imprisonment' is itself a source of much confusion and judging by the responses to the enquiries the CCPS have been making of Council of Europe member states this confusion is widespread.<sup>7</sup> From the evidence so far received most states have a form of life imprisonment as the alternative though few intend that those sentenced will in fact remain in prison for the whole of their lives. The process of selecting the alternative penalty appears not to have been the subject of much discussion other than, we suspect, the decision to choose a harsh alternative as the only measure that a public hostile to abolition will accept.

Our information thus far indicates that there is a wide variation of procedures relating to periods of imprisonment to be served before release to the community is considered. In Austria 22 years is the average term served; 20-40 years in Croatia; maximum of 20 years in Denmark; in Estonia a minimum of 30 years of a life sentence; in Finland an average of between 10-15 years is served and release is in the gift of the President of the Republic; Hungary has no special alternative but on average between 20 and 30 years of a life sentence is served; Latvia has a mandatory life sentence and sentences served are between 6 months and a maximum of 15 years though occasionally for especially serious crimes a maximum of twenty years is the norm; Germany is one of few countries that have a mandatory life sentence but in fact 15 years is the maximum term served prior to consideration for release; Luxembourg has life imprisonment with a minimum of 15 years to be served before parole is considered; in Poland there is a life sentence of which a minimum of 25 years are to be served prior to consideration for release. From the data so far available Sweden and Bulgaria are the only countries that have whole of life imprisonment – in Sweden it is possible to petition the Parliament for a Pardon as it is in Bulgaria to petition the President. The Ukraine has whole of life imprisonment but provides an opportunity at fifteen years to petition the President – no information has been made available to us about the grounds for such an appeal or the outcome.

One of the few nations that does set out to incarcerate its citizens for their natural lives is the USA achieving this through a combination of determinate sentences of Hollywood dimensions, whole of life sentences as an option for capital crimes and as part of the 'three strikes and you are out' policy.

Commentators in the USA see no end to the year on year growth of the LWOP with all the demands that this aging population will make on the exchequers of the states concerned let alone the questionable evidence on which such a penal philosophy is based. In fact what evidence there is

points in the opposite direction as *Marquart*<sup>8</sup> and more recently *Cunningham* in the USA have demonstrated just how difficult it is predicting future dangerousness on the basis of a past murder.<sup>9</sup> A key piece of research on this issue in the UK was carried out by *Hood and Shute*<sup>10</sup> and included a detailed examination of the decision making processes of the Parole Board and whether the balance between the need to reintegrate prisoners back into society and public protection was correct. Valuable research into the decision-making processes of the Discretionary Lifer Panels has been carried out by *Padfield, Liebling and Arnold*.<sup>11</sup>

The US experience of the implementation of whole of life imprisonment should serve as a warning to abolitionists worldwide that it is irresponsible not to engage in the discussion about alternative penalties and that the acceptance of a whole of life alternative is a compromise too far. Regrettably and in the face of the evidence the former UK Home Secretary, *David Blunkett* has introduced legislation permitting whole of life imprisonment into the English and Welsh prison system. Motivated more by his very public serial frustration of the judiciary whose judgments have often found his policies wanting, than a rational evidence based analysis of penal policy with respect to sentencing for murder. The Lord Chief Justice in his recent advice to the judiciary recommended the entry point for life sentenced prisoners should be 14 years to meet the needs of retribution and deterrence [the punishment phase] prior to consideration for release [the risk phase] - this compares with the Home Secretary's whole of life, thirty years and fifteen years entry points. Neither the UN nor Council of Europe guidelines for life and long-term imprisonment concede the possibility of whole of life sentences though both acknowledge that following regular and rigorous review some life sentenced prisoners may never be deemed safe to release.

It is crucial to engage with the prison department at the earliest possible opportunity to harness their experience in prison management and to solicit their support for proportionate and reviewable prison sentences as the alternative to the death penalty. In my experience many prison managers who have already begun to contemplate the prospect of working with prisoners who have had their death sentences commuted and have understandable concerns about their future management. In the absence of the 'ultimate' penalty they are concerned about the most effective strategies to

---

<sup>6</sup> Annual Statistics for the Council of Europe, 2001 Enquiry, European Committee on Crime Problems, PC-CP 1 Rev, 2002.

<sup>7</sup> Ongoing research being conducted by the Centre for Capital Punishment Studies concerning the replacement penalties for capital punishment amongst member states of the Council of Europe.

---

<sup>8</sup> *Marquart/Sorensen*, A national study of the Furman-commuted inmates: assessing the threat to society from capital offenders, in *The Death Penalty in America – current controversies*, edited by Bedau, 1997.

<sup>9</sup> *Cunningham*, et alia., Integrating Base Rate data in violent risk Assessments at capital sentencing, 16 *Behavioural Sciences and the Law*, 1998, 71, 85.

<sup>10</sup> *Hood/Shute/Wilcox*, The Parole System at work: a study of risk based decision-making, Home Office Research Study, 2000, 202.

<sup>11</sup> *Padfield/Liebling/Arnold*, An exploration of decision-making at Discretionary Lifer Panels, Home Office Research Study, 2000, 213.

adopt for working with people who have been sentenced to whole of life imprisonment and how to provide a regime that is constructive to the prisoners and the staff yet still ensures the safety of both groups. With no prospect of release what incentives are available to ensure the cooperation and compliance of prisoners who have neither hope nor anything to lose – there has to be light at the end of the tunnel. Every Minister of Justice and prison manager I have had the benefit of meeting start from the position that separate prisons have to be built to house those previously sentenced to death overlooking in many instances that they have been adequately managing death sentenced prisoners in buildings within existing general prisons. An important lesson to be taken from the British experience is that subject to the need to make some special provisions for life sentenced prisoners at all stages of their sentence integration with the determinate prison population has benefits for all prisoners and staff, in whose experience life sentence prisoners provide a calming influence. This is certainly true of those subject to reviewable life imprisonment as they have demonstrable goals to be achieved before they can be considered for release on licence to the community.

Already the 45 member states of the Council of Europe forbid extradition to countries without extracting assurances that the death penalty will not be used. The potential for challenges to the whole of life sentence placing limits on extradition treaties has to be taken seriously. Evidence for this is provided by Mexico which will not extradite suspects to the USA without securing an undertaking both that the death penalty will not be imposed and more recently that undertakings are given that whole of life sentences will not be imposed.<sup>12</sup> Another recent example is provided by Uruguay who attached conditions to its recent decision to extradite Mohammed Ali Hassan Mukhlis, a suspected Al Qaida follower for his part in the 1997 attack at a temple, which led to the deaths of 58 foreign tourists in Egypt. Uruguay had agreed to extradite Mukhlis only after receiving guarantees from Egypt that he would not receive the death penalty or a life sentence. Uruguay had also sought guarantees that he would not be tried in a military court and that his lawyer would be allowed to attend.<sup>13</sup>

The European Court of Human Rights has thus far not ruled on whether whole of life sentences violate the prohibition on inhuman and degrading treatment or punishment as expressed in Article 3 of the European Convention on Human Rights however there is no doubt that such challenges will be brought before the courts in England & Wales in the very near future.

---

<sup>12</sup> Chicago Tribune, June 14<sup>th</sup> 2002.

<sup>13</sup> Reuters, July 12<sup>th</sup> 2003.

#### **IV. Victims' needs and rights. Need to distinguish between victims' needs and the punishment of criminals<sup>14</sup>**

Crime victims are too often ignored and when remembered too often exploited in the interest of political expediency. They are a constituency almost universally overlooked by the traditional abolitionist movement which I believe has proved a significant obstacle to the process of replacing the death penalty. Politicians the world over justify the retention of the death penalty, in part, because of their concerns about crime victims though frequently, in my experience, little or no provision for them has been made by the state. Only two countries, Taiwan and Jamaica, of the many with whom we have worked have formal state resourced victims' services in place.

In common with the bulk of materials published about capital punishment much of the information that has developed around victims and the death penalty is based on the scholarship and experience of the USA. It is especially important therefore when evaluating the experience of the USA with regard to victims that one takes care to distinguish between what does and does not 'work' and its relevance or otherwise to influencing victim services' models worldwide.

Victims' issues are crucial to any debate about capital punishment though paradoxically the attention given to this topic and therefore to homicide victims and their families frequently exacerbates the anger, hurt and confusion felt by many who have been victimised. Where victim initiatives exist they seem increasingly to manifest themselves as lobbyists for procedural rights and harsher penalties at the expense of the more traditional needs based origins. The most vociferous of these are to be found in the USA where such groups have made considerable inroads into shaping the agenda in legal and penal policy.

Groups like Justice for All<sup>15</sup> and Parents of Murdered Children<sup>16</sup> characterise the pro-punishment victim movement in the US and both enjoy considerable political support. Of the two, Houston based Justice for All a comparative newcomer adopts a particularly virulent line on punishment especially the death penalty. Their views represent a failure of the political system to responsibly address the legitimate feelings of pain and anger many crime victims and their families' experience. There is of course the possibility that it suits populist politicians to have such aggressive emotions aired as

---

<sup>14</sup> Hodgkinson, *Capital Punishment: the families of the homicide victims and the condemned*, Chapter 15, in *Capital Punishment: strategies for Abolition*, Edited by Hodgkinson & Schabas, 2004.

<sup>15</sup> Justice for All announces on its website that it is a Criminal Justice Reform Organisation that 'shall act as an advocate for change in a criminal justice system that is inadequate in protecting the lives and property of law-abiding citizens.' [www.jfa.net](http://www.jfa.net) [revised 19/10/2002] Other sites supported by Justice for All – [www.prodeathpenalty.com](http://www.prodeathpenalty.com) [revised 02/01/03] and [www.murdervictims.com](http://www.murdervictims.com) [revised 30/09/02].

<sup>16</sup> National Organisation of Parents of Murdered Children, Incorporated [www.pomc.com](http://www.pomc.com) [revised 13/12/2002].

it provides ammunition for their platform on the extremes of law and order policy.

A case could be made for saying that there is no need or place for a separate victim service as the state prosecutes not on behalf of individuals but of society as a whole and the 'victim' loss or suffering is already calculated into the decision to prosecute and the sentence. Whilst this may be an argument for not including the victim's perspective into the trial process it should not replace the development of services to meet the material and psychological needs of individuals who are primary or secondary victims of crime.

The core effects, identified by research, that are experienced by the families of homicide victims include fear of crime,<sup>17</sup> fear of strangers,<sup>18</sup> over-protectiveness of their other children,<sup>19</sup> anger,<sup>20</sup> and isolation.<sup>21</sup>

At the extremes there are victims who's suffering is so intense as to be disabling both physically and psychologically on occasions amounting to a clinical condition. There is evidence, too, that such bereavement effects members of the same family in different ways and that family members may adopt different coping or survival mechanisms. According to some claims in the USA as many as 70% of the families of murdered children end in separation of some form or other and *Paul Rock*<sup>22</sup> recalls the views of a number of family members; 'we've split into two now and there are three or four daughters that I don't see and seven grand children because we were too close and because our opinions varied so much – "hang them", "don't hang them", and all things around it.' [member of Survivors of Murder and Manslaugh-

<sup>17</sup> *Murray-Parkes*, Psychiatric problems following bereavement after Homicide, *British Journal of Psychiatry* 993, Vol. 162.

<sup>18</sup> *Kilroy-Silk*, The suffering continues, *Police Review*, 20<sup>th</sup> May 1988; Burgess, Family reactions to Homicide' *American Journal of Orthopsychiatry*, April 1975, Vol. 45, No. 3.

<sup>19</sup> *Vaughan*, Death by Murder, in *Rock*, After Homicide – Practical and Political Responses to Bereavement, 1998, quotes an extract from this personal paper written by the mother of a murdered child, "A certain fear envelopes you. You become paranoid over your surviving children going out and wait anxiously for their return. You become fearful of facing people and to hear someone walking behind you fills you with dread."

<sup>20</sup> 'I was so angry I sometimes didn't know what to do with myself, I used to take the car out into Derbyshire, drive into some remote area and scream. I would hear this terrible demented screaming like a madwoman or someone possessed and realised that it was me.' Quote in *Rock* from Ivison, *Fiona's Story*, 1997 pp. 270-1.

<sup>21</sup> 'Everyone expects you to be "all right", but you feel that you will never be "normal" again. The world goes on much the same as before, while inside you feel alone, isolated and no-one really understands the pain, emptiness and anger, which you are suffering.' Quoted in *Paul Rock* from a Support After Murder and Manslaughter [SAMM] leaflet, Merseyside.

<sup>22</sup> See *Rock*, Fn. 22 at p.46.

ter, SAMM]. Another member of SAMM said, 'I mean I couldn't even look at my husband for three years. I hated him, I didn't want him near me because I couldn't cope with his ... I couldn't recognise his pain. It was only me that was in pain. I didn't even want my other son. All I wanted was ...'. If this incomplete catalogue of 'effects' teaches us anything it is that there is one myth that needs debunking immediately and that is the perception among some researchers and policy makers that victims of crime are a homogeneous group with identical needs susceptible to similar solutions.

The Founder of US based group Murder Victims Family for Reconciliation *Marie Deans* believes that, 'After a murder, victims' families face two things: a death and a crime. At these times, families need help to cope with their grief and loss, and support to heal their hearts and rebuild their lives. From experience, we know that revenge is not the answer. The answer lies in reducing violence, not causing more death. The answer lies in supporting those who grieve for their lost loved ones, not creating more grieving families. It is time we break the cycle of violence. To those who say society must take a life for a life, we say: "not in our name".'

Closure is a term imported into this debate from the world of psychiatry especially from the world of practice in the USA. It appears to have a fluid definition and application in the way it is applied to the issue of victims and the death penalty and provides yet another illustration of politicians' duplicity in offering painful and largely fictional solutions to the friends and families of homicide victims gained through witnessing the execution of 'their' offender. If what is meant by 'closure' is an end to pain and suffering then no victims' family I have talked to or authorities I have read can confirm such an outcome. In fact, 'closure' as a means of 'getting over it' is not recommended by bereavement counsellors such as *Deborah Spurgeon*.<sup>23</sup>

In the view of some observers an essential ingredient of 'closure' is forgiveness and as discussed earlier this issue is very difficult to confront for many secondary victims. *Spurgeon's* views on the issue of victim-offender mediation are, 'the co-victim's acceptance of the notion of forgiveness for the defendant should not be made a prerequisite for participation. It may happen at a later time, or it may never happen. The decision to forgive or not forgive the defendant must always be the co-victims' choice. Achieving a sense of self-forgiveness, often an important issue for co-victims may be a surprising and beneficial outcome for the co-victim.'

The balance that has to be achieved is to give recognition to the victim in a respectful and dignified manner whilst still maintaining objectivity in the legal process. The trial is not the place to consider the very legitimate needs and rights of the families and friends of the victim; there should in effect be a separate Victim Justice System.<sup>24</sup> Here again the main-

<sup>23</sup> *Spurgeon*, Homicide: the hidden victims – a guide for professionals, *Interpersonal Violence: the Practice Series*, 1998.

<sup>24</sup> See *Howard League* proposals in their briefing paper 'Victims of Crime' available from the League's offices 708 Hol-loway Road, London N19 3NL.

stream victim movement in the UK differs from its counterparts in the US – Dame *Helen Reeves*, Chief Executive of the National Association of Victim Support Schemes [NAVSS] laid out its position with respect to the victim impact debate. Dame Helen's plans are, 'to ensure that victims have a voice and that the legitimate interests of the victim can be taken into account and acted upon by the Police, the Prosecution Service, and the Courts. She argues that the best interests of victims are not met by involving them directly in the sentencing process, or by raising expectations that their views will impact on the level of punishment of the offender, in fact, she believes that raising such expectations and involving the victim directly in the sentencing process can work against the best interests of the victims concerned.'<sup>25</sup>

Whilst the intellectual argument challenging the purpose and the effect of the death penalty has long been favourable to those opposed to capital punishment, as has the moral argument so far as international human rights treaties and the mainstream religious groups, save Islam and the Mormon Church. The emotional argument however, about the needs and rights of victims and their families and friends is definitely with the pro-punishment lobby – the emotional appeal is very compelling and even more compelling when it appears even to neutral observers that abolitionists and other penal reform groups are only concerned about the needs and rights of offenders.

Reform groups have to counter the advances made by the pro-punishment victim lobby and it is not enough for them to rely on the intellectual and academic argument that the death penalty serves no useful purpose or that it is a vehicle for a multitude of abuses of due process and human rights. Whilst all this has some bearing on the debate it fails to address the needs of even the moderate victim lobby and it is this failure historically that has led to the birth of the angry, frustrated and pro-punishment victims groups in the USA.

Abolition of the death penalty and penal reform in general is not to be gained at the expense of the inherent needs and rights of crime victims. The simple analysis provided by some politicians that money spent on offenders is money denied to victim services is a fallacy. Victims' needs and rights should not be met at the expense of humane, effective and proportional responses to offenders and their needs should not be confused with or influence the treatment of offenders.'

#### **V. The moratorium movement – progress or procrastination?**<sup>26</sup>

The focus of abolitionist activity in recent years has been the push for a moratorium on executions. Some abolitionists believe that a period without capital punishment will show its folly, or that it is unnecessary, or that it bears unnecessary political and financial costs. Retentionists, on the other hand, hope to use the moratorium period to 'fix' capital punish-

ment's flaws. The US moratorium movement brought together some rather unlikely bedfellows in the persons of Sister Helen Prejean and the Christian Coalition. That the two sides have found some common ground presents those who seek the replacement of the death penalty with both opportunity and danger. Is there really evidence for the premise that abolition will follow such a period of review?

Many countries go through periods when executions are suspended before they proceed to eliminate it from their statute books though to describe the status of such countries as *de facto* abolitionist is a little misleading, it would be more correct to describe their status as having suspended executions because invariably the rest of the panoply of death penalty legislation continues. A current example of this is Malawi where there have been no executions for over a decade because the President has declared that he will not sign death warrants but in the meantime capital punishment continues with people being charged with capital crimes and remanded into custody awaiting trial. One consequence of this is a tendency for the legal process to move very slowly as there is a perception that there is no urgency, which leads to the development of backlogs, an earlier backlog of some 700 cases was finally dealt with through a task force of two lawyers who reduced the list to between 70-90 capital cases. This could be characterised as a formal moratorium on executions whereas in Jamaica where there have been no executions for over 15 years the hiatus in executions is not the result of any official decision to suspend executions even though the indications are that the decision makers are lukewarm about capital punishment.

Is there really evidence for the premise that abolition will follow a period of review? A recent celebrated 'moratorium' was that imposed by Governor Ryan of Illinois in the USA. Governor Ryan of Illinois, a conservative Republican and strong supporter of the death penalty, was finally satisfied that all was not well with the administration of the death penalty in his state when confronted with the harsh reality that between 1990 and 2000 ten executions had been carried out and that during the same period thirteen prisoners were released from their death sentences for a variety of reasons. On 31 January 2000 he imposed a moratorium on any further executions until a thorough review of the administration of the death penalty had been conducted.<sup>27</sup> He was quoted as saying that '[t]he Illinois capital punishment system is so fraught with error and has come so close to the ultimate nightmare, the state's taking of an innocent life.'

A number of other states of the USA launched similar studies, and still in 2005 there continue to be widespread calls for similar action. Governor Ryan's Commission presented its findings in April 2002, making eighty-five recommendations, all with the objective of correcting the flaws and weaknesses identified in the Illinois system. While not part of the Commission's brief, a narrow majority of its members were inclined to the position that the death penalty should be

---

<sup>25</sup> *Reeves/Erez*, Kent State University, USA debate the issue of the Victim Impact Statement. 10<sup>th</sup> International Symposium on Victimology, Montreal, Canada, 2000.

<sup>26</sup> Extracted from Chapter One, Fn. 2.

---

<sup>27</sup> Report of the Governor's Commission on Capital Punishment, April 2002. Available at the website of the Death Penalty Information Centre – [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org).

replaced believing that the system was incapable of correction. Yet those who favour the death penalty in Illinois and elsewhere view the experience of Illinois as a measure of the rigour of the capital punishment process. In August of 2005 under a Democratic governor there have still been no further executions but it is only a matter of time as most of the recommendations Ryan's enquiry made have been implemented. A clear case I would suggest of 'improving not removing'.

I remain very sceptical of the moratorium as a sole strategy of abolition as I sense that the reason to call for one usually follows a failure to move directly to abolition so is adopted as an interim/delaying measure [procrastination] or as in the US a compromise to appease those who support the death penalty. These types of suspension should only be considered as a very last resort as politicians are already past masters at the art of delay and prevarication and one should avoid providing formal opportunities to justify further delay. Most commentators on this issue are agreed that it is important that the moratorium, not become a goal in itself, and that it be continually presented – by abolitionists, at any rate – as a step towards total, permanent replacement of capital punishment.

Even more desirable, where possible, would be to obtain the suspension of the entirety of the death penalty process while the raft of changes to legislation and infrastructure is put in place to prepare society for a life without capital punishment. This in essence is the approach the Council of Europe institutes in those states seeking membership.

## VI. Concluding comments

There are a number of commentators that believe that the US is key to the success of abolitionist campaigns worldwide thus justifying the embarrassment of resources ploughed into activities there the theory being that once the death penalty has been removed from the US the rest of the death penalty countries will follow suit – the pack of cards theory.<sup>28</sup>

This analysis is problematic in at least two ways: firstly, there is little evidence that significant progress in replacing the death penalty in the US has been achieved given the huge resources available to the abolitionist cause and secondly, the focus on the US has been made at the expense of progress in more receptive countries worldwide, an approach compounded by the fact that it is not only the resources of US activists being utilised but the resources of most death penalty activities worldwide.

This seems to me to be an inexcusable use of scarce resources. Since the death penalty in the USA was restored through *Gregg* in 1976 seventy plus countries worldwide have removed the death penalty from their statutes and the stance of the United States of America has never been an obstacle to certain 'improvements' in capital punishment, for example the virtual elimination of execution of juveniles everywhere else in the world.

*Hugo Adam Bedau*, arguably the most influential thinker and activist in the abolitionist debate in the United States of

America, has for many years cautioned the abolitionist movement about the inherent danger in the 'fix it' approach to abolition.

The questions he raises are fundamental to the development of abolitionist strategies. They are important pointers to the premise on which individuals and groups base their opposition to capital punishment. It is often suggested that support for the death penalty is a kilometre wide and a centimetre deep. I believe a similar assessment can be made of 'abolitionists'. A very recent example from the USA, which illustrates this point, was the execution of Timothy McVeigh for his part in the Oklahoma City bombing.<sup>29</sup> If the opinion polls conducted at the time among populations of professed abolitionists are to be believed, many supported his execution on the grounds that this was an 'exceptional' case and an 'exceptional' offence.<sup>30</sup> This type of abolitionism is perhaps an inevitable product when opposition to the death penalty is restricted to some injustice in its administration, usually characterised by such concerns as prosecutorial bias, ineffective assistance of counsel, race, mental illness, mental impairment, youth, physician participation, mode of execution. The 'abolition' activities concentrate on a particular concern and once corrected, cease.

Can one really describe such an approach as abolitionist? My view is that we cannot. Professor *Bedau's* point, that there is an inherent danger to such an approach, in that it runs the risk of consolidating what remains as satisfying a general consensus of acceptance, if only by default, has much validity. Whilst *Bedau* believes that the 'rump' death penalty that remains after this incremental erosion greatly weakens any support for it on the grounds of deterrence and retribution, there is the greater danger that such an approach could considerably delay the process of replacing the death penalty for all crimes in all circumstances and is in any event achieved at the expense of unacceptable compromises. Such a piecemeal approach offers governments a timetable for delay in confronting the total removal of the death penalty.

Another issue that activists have to consider is whether a predominantly litigation based strategy is the most effective approach. One assumes that there is no dissent from the proposition that decisions to remove the death penalty need to be enshrined in legislation, be that in Criminal Codes or the

---

<sup>29</sup> For details, see *Jeffery*, 'The Execution of Timothy McVeigh', *The Guardian*, 11<sup>th</sup> June 2001. Timothy McVeigh was convicted and sentenced to death in 1997 for the murder of 168 people in the 1995 bombing of the Alfred P. Murrah federal building in Oklahoma City. He was executed by lethal injection on 11<sup>th</sup> June 2001. The Opinion Editorial, 'Should America Kill the Oklahoma Bomber?' *The Economist*, 10<sup>th</sup> May 2001, argues that McVeigh has caused many abolitionists to support his execution by subsequently showing no remorse for the victims and referring to the 19 children under six years who were killed as 'collateral damage', and that McVeigh's case 'might have been designed to test the faith of abolitionists everywhere.'

<sup>30</sup> Chancellor, 'Paying the Penalty', *The Guardian*, May 18<sup>th</sup> 2001.

---

<sup>28</sup> *Hood*, *Capital Punishment: a global perspective*, *Punishment & Society*, Vol. 3 [3], 343-344.

Constitution and that the strength of the intention to move towards abolition can be demonstrated by one's adherence to the limitations and protections offered by international law. The challenge for those opposed to capital punishment is how to support and encourage governments moving to this position.

For several decades lawyers from the UK have been actively involved in capital litigation in the British Commonwealth Caribbean through representation in the Judicial Committee of the Privy Council and supporting local lawyers with challenges in the domestic courts. A consequence of these 'victories', which secured fundamental protections for their clients, has been to attract considerable hostility from all sectors of Caribbean society. Against this background and in a climate of endless litigation it was only a matter of time before the region raised the stakes and this is precisely what happened in Belize, Barbados, Trinidad & Tobago and Jamaica all of whom began the process of amending their Constitutions in such a way as to overturn the fundamental protections secured by the domestic and UK legal communities. The 'retaliatory' nature of their responses even found their way into the discussions about the recently established Caribbean Court of Justice, which is being described as a 'hanging' court one of whose purposes is to restore 'justice' and the 'will of the people' to the region though the framers refute this. To date Belize and Barbados have amended their Constitutions and T&T is in the process of drafting amendments.

In Jamaica without the two-thirds support needed in Parliament for constitutional amendments such plans had been shelved though today's debate even within the opposition party indicates a fresh momentum. The Jamaican debate takes place against a backdrop of an alarming number of homicides and other violent crimes pressing the political imperative of being seen to do something, anything. Jamaica has not carried out an execution for over 15 years thus sits very comfortably in the *de facto* abolition statistics.

The example of Jamaica provides an interesting challenge for abolitionists. To begin with why have there been no executions for over 15 years, when neighbouring countries have been active executioners, and what brings about periodic resurgences of political will to resume executions, apart from the obvious electoral benefits that flow from the adoption of a populist draconian law and order platform including capital punishment? How does Prime Minister Patterson effectively respond to a truly enormous problem of serious crime, as I am confident that he is only too aware that resuming executions will have no discernible effect on combating serious violent crime in Jamaica, and by the same token can abolitionists assure him that removing the death penalty will solve his crime problem?<sup>31</sup> I doubt it.

Finally, my position is that merely being 'against' the death penalty is neither helpful nor constructive. The death penalty makes no constructive contribution to reducing the incidence of the crimes for which it is traditionally reserved and merely exacerbates and perpetuates the pain and anger experienced by homicide victims' families and those employed to administer the process – simply put it is bad penal policy. Capital punishment should be removed but this will not happen in a vacuum – much work needs to be done during a full moratorium to put in place the necessary infrastructure changes to ensure the incoming penal policy is effective, humane and proportionate. Retentionist governments should be reassured by the experiences of those countries that have rid themselves of the death penalty without any insurmountable negative consequences, and some in the traditional abolitionist community need to consider whether looking down on this debate from the moral high ground can sometimes impair their view and vision.

---

<sup>31</sup> The figures for December 2002 show that nearly 1000 murders had been committed thus far in 2002 and that some 230 of these are suspected to be vigilante in origin. Additionally some 150 killings of suspects by police officers had been recorded by the end of November 2002. [www.wmin.ac.uk/ccps](http://www.wmin.ac.uk/ccps).