

LEGAL STUDIES: *HUMAN RIGHTS*

Capital Punishment

Investigate and write a report (1000-1200 words) on a contemporary issue which illustrates the promotion and enforcement of human rights.

The report should address the following

1. What is the nature of the issue?
2. What are the domestic and international responses to the issue (legal and non-legal)?
3. How effective are the domestic and international responses in addressing the human rights issues?

Definition:

“The term ‘capital punishment’... originally referred to death by decapitation, but now applies generally to state-sanctioned executions.” Australian Institute of Criminology, 1987.

“Capital punishment refers to an offender being sentenced to execution by state officials as punishment for a crime.” Maise Cunningham, 2012.

Nature of the Issue:

Many nations still retain the death penalty, illustrating the debate that continues around the controversial issue. Those against the death penalty argue four main points: lives cannot be retrieved if someone is later found to be innocent, it is expensive, it can discriminate against minorities and the poor, and that it violates the inherent right to life. Supporters argue that it is an appropriate punishment for the wrongs caused, that life imprisonment isn't a strong enough deterrent, and that the death penalty actually does support the right to life as it punishes those who violate the lives of others.

Usage of capital punishment is generally categorised into four sections:

1. Those that maintain it both in law and practice; (58 countries, 29%).
2. Those that have completely abolished it; (97 countries, 50%).
3. Those that retain it for crimes committed only in exceptional circumstances, such as war; (8 countries, 4%).
4. Those that permit its use, but haven't employed the practice for at least ten years; (33 countries, 17%).

Around the globe, capital punishment is generally reserved for murder, espionage, military crimes (desertion, mutiny, cowardice) and treason. In some countries, sexual crimes, drug trafficking and human trafficking are also punishable by death. In Islamic nations, religious crimes (such as apostasy) carry the death penalty, as well.

Australia – Legal Measures

There have been a number of pieces of legislation in regards to the use of the death penalty within Australia. Possibly the most important is the Death Penalty Abolition Act 1973 (Cwlth), which abolished capital punishment for all federal offences and its use in territories. Each state and territory of Australia has also established their own legislation, affirming the abolition of the death penalty.

These were further cemented by the Crimes Legislation Amendment (Torture Prohibited and Death Penalty Abolition) Act 2010 (Cwlth), prohibiting it from being reintroduced by any state or territory.

However, as George Williams explores in his article “No Death Penalty, No Shades of Grey”, unless the Australian government moves to amend the constitution, then its alleged infinite abolition does not hold.

Finally, the Extradition Act 1988 (Cwlth) states that the federal Attorney-General has the power to decide who is extradited from Australia, provided that the extradition country promises that the death penalty will not be imposed upon the person. The case of *McCrea v. Minister for Customs and Justice* (2004) tested this law. It highlighted the lack of power of the court system, affirming that it was the decision of the Attorney-General and that Australia cannot inquire about the sovereign state’s intent, or otherwise, on honouring their promise.

Additionally, Australia is a signatory to and has ratified most, if not all, of the international documents against capital punishment. It has also been involved in numerous international movements, including the UN General Assembly’s resolution calling for a global moratorium on the death penalty, in which Australia voted positively in 2007.

Australia – Non-Legal Measures

While capital punishment has already been eradicated from Australian society, the nation continues to employ non-legal measures to assist the global community in its struggle to abolish this particular human rights issue. Australia has at least four NGOs dedicated to this cause. While they each employ particular methods, one thing that remains in common is their constant advocacy and their attempts to educate the public.

The first is Reprieve Australia, an organisation solely working towards the abolition of the death penalty and the humane treatment of those facing it. It offers both legal and humanitarian assistance in the form of volunteer lawyers, organises and partakes in campaigns, and helps to raise awareness through such mediums as the theatre.

Similarly, The Australian Coalition Against Death Penalty (ACADP) aims for the total abolition of the death penalty worldwide. The ACADP’s main function is developing correspondence with political leaders worldwide, human rights activists, and the media, conducting research, and campaigning.

NSW Council for Civil Liberties’ (NSWCCL) aim is to uphold the human rights and civil liberties of all people and limit the abuse or excessive use of power by the government against its people. The NSWCCL influences public debate and government policy, ensuring that legislation entirely respects human rights. It also hears individual complaints and tries to assist these people through submissions to the government and the conduction of court cases.

Like the NSWCCL, the Law Council of Australia (LCA) is not focused solely on the abolition of the death penalty, but the remedy of all human rights issues. It plays a significant role in the lobbying of the Australian government, ensuring that it continues to abide by its international agreements. It is also willing to lobby foreign governments to outlaw capital punishment if it deems it appropriate.

The Australian government is dedicated to the condemnation of the death penalty worldwide; another non-legal response. A recent example is Nguyen Tuong Van, an Australian man who was threatened with the death penalty in Singapore in 2005 for drug trafficking. The Australian government publicly denounced the punishment and engaged in diplomatic talks with Singaporean leaders. However, Singapore used its sovereignty when it executed Tuong Van in December that year.

International – Legal Measures

Internationally, there are several treaties specifically relating to the abolition of the death penalty.

At the core of these documents is the Universal Declaration of Human Rights, which recognises a person's right to life, stating that "Everyone has the right to life, liberty and security of person" (Article 3) and "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Article 5). Capital punishment constitutes a threat to both.

The International Covenant on Civil and Political Rights (ICCPR) repeats, in Article 6, the "...inherent right to life" and states that "No one shall be arbitrarily deprived of his life", which the death penalty denies for one faction of society: criminals. It also recognises that the removal of capital punishment from all nations is a large and difficult task, and so, it establishes regulations on who can receive the death penalty, and how, that state members are obliged to follow. However, it does emphasise its desire to rid the world of capital punishment.

The Second Optional Protocol to the ICCPR also recognises the human rights abuse and aims for its abolition. In its preamble it states that "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights." It requires signatories to totally abolish the death penalty, but allows them to retain it in time of war, provided that they make a reservation that supports this upon either ratifying or acceding to the protocol.

Other documents outline limitations on the use of the death penalty, acknowledging those nation states that have decided to retain capital punishment, but attempting to somewhat protect the human rights of their citizens. A notable example is the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. It poses a number of restrictions: capital punishment can only be used in the most serious of crimes; the criminal cannot be under 18 years of age, pregnant, a new mother, or someone suffering from insanity; it must only be imposed after a fair trial at a competent court; and the conduct of capital punishment must inflict the minimum amount of suffering. Another is the Convention on the Rights of the Child, which states that "Neither capital punishment... shall be imposed for offences committed by persons below eighteen years of age." This is in Article 37.

As well as these documents, the international response extends to the judiciary. The International Criminal Court, under Article 77 of the Rome Statute, cannot impose the death penalty as punishment, even though it has jurisdiction over exceptionally serious crimes. The same applies for tribunals established ad hoc by the UN Security Council, as was the case for the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

International – Non-Legal Measures

Amnesty International considers capital punishment "the ultimate denial of human rights". As such, it has played a significantly active role in the international movement towards the global abolition of the death penalty. Firstly, it sends written appeals to countries that have people on death row in an attempt to prevent their execution. Secondly, it campaigns in countries that are yet to completely abolish the death penalty. Thirdly, it monitors the developments of the world, creating reports, and thus educating the people about the issue and its prevalence.

Amnesty International was also responsible for the establishment of the World Coalition Against the Death Penalty. The Coalition unites all organisations committed to establish an abolitionist world so as to provide a single, solid front. It consists of over 100 bar associations, human rights organisations, unions, and regional associations and governments. The member organisations meet annually to establish their strategy, before elected members make the necessary decisions to employ the strategy.

The International Committee Against the Death Penalty (ICDP) is another group that aims to rid all nations of capital punishment. The ICDP, with its broad geographical representation, conducts a number of different types of activities to meet its aim. It performs "missions" in order to meet political representatives to promote the abolition of capital punishment, partakes in conferences and seminars, holds campaigns, distributes information and research, and so on.

How Effective are the Domestic Responses?

In Australia, the effect is large. Not only has capital punishment been completely outlawed by both levels of government, but legally enforceable commitments have been made that it will not be reintroduced. This ensures a nation free of this particular human rights issue; a nation that values the lives of all its citizens. However, Australia has little power, due to the notion of state sovereignty, for crimes committed abroad. Despite continued confrontations with the leaders of overseas governments, there have been many examples where a citizen of Australia has lost their life, and, legally, the Australian government has no control over this.

Australia must continue to actively oppose the use of capital punishment and to express its opposition if its current efficacy is to be maintained. However, political leaders must also be mindful to uphold this stance regardless of the crime or the criminal, and adopt the view that the human rights standard remains the same for all. This has not been demonstrated in the past, and has resulted in a diminished opinion on the nation's integrity and equity by the international community.

How Effective are the International Responses?

Capital punishment remains a concern in the international community, with approximately half the countries of the world still using it in some form, and will continue to be a human rights issue until the entire world has abolished it.

However, there is no doubt that the issue has improved. As the statistics illustrate, there have been decreasing rates of use. It is believed by Amnesty International that in 1977, only 16 countries had abolished the death penalty; thirty years later and the figure had increased to 90; even a short four years after that and it's now up to 97. We can only assume that this is, in part, due to the combined response of the international community. There have also been increasing restrictions on those nations who are inclined to retain it, showing that the international community is willing to slowly approach its aim of complete abolition, step by step.

State sovereignty poses a problem to enforcing the abolition of capital punishment. While China and the USA are signatories to and have ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, they still continue to employ the death penalty on an annual basis and to significant degrees. This highlights the inefficiency that international instruments pose, in that, while a nation can agree to do something, there exists no enforcement agency if they do not follow through with their declaration.

It will only be with continued and persistent political pressure, education and time that these sovereign states will reconsider their position. Only then will the world be free of this human rights issue.

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