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Human rights, capital punishment and the Commonwealth: still behind the curve

*Professor William Schabas OC MRIA**

In this *Opinion*, Professor Schabas argues that the Commonwealth is behind the curve of the international trend towards the abolition of the death penalty. He analyses the status and use of capital punishment in Commonwealth countries, as compared to all UN member states more broadly. He argues that there is a great irony that a justice system, said by Winston Churchill to be imbued with 'the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world' is also characterised by brutal forms of criminal sanction that are increasingly being abandoned across the globe. Notwithstanding this, he notes that if the international trend continues, the world could be globally abolitionist in a decade or so. Professor Schabas calls on the Commonwealth to show leadership among its members and also externally, and to use the collective embarrassment of a lingering remnant of colonial barbarism to make it so.

In his famous post-war Fulton, Missouri speech, Churchill said 'we must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world'. Churchill often expressed his satisfaction with the legal legacy of the 'English-speaking world'. There was a sense that this was one of the great gifts of colonisation. The common law was viewed as a progressive, civilising influence, like electricity and penicillin. By the 1940s, somewhat smug imperialist formulations had given way to a discourse that was more friendly to emerging notions of human rights that had emerged as a result of documents like the Atlantic Charter of August 1941 and the Joint Declaration by United Nations of January 1942.

The lineage of the 'great principles of freedom and the rights of man' to which Churchill was referring can be traced from Magna Carta through the habeas corpus acts and the Bill of Rights of 1688. By the 18th century, these principles were being absorbed and repackaged by revolutionaries in America and France, this time entrenched in constitutional provisions to ensure they could not be easily derogated from by impetuous parliamentarians. Eventually, they served as the foundation upon which rests the seminal international instrument for the protection of human rights, the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948.

Many residents of what we today call the 'global South' who were then under British jurisdiction might well have questioned whether they were included in the 'joint inheritance of the English-speaking world' of which Churchill had boasted. But even in the North, the noble tradition was not without exceptions. Barely a year before Churchill's visit to Fulton, Missouri, Sir Alexander Cadogan, who was then Permanent Undersecretary to the Foreign Office, presented the United States government with an aide-mémoire taking issue with the American and Soviet proposals to hold an international war crimes trial of Nazi officials:

> It being conceded that these leaders must suffer death, the question arises whether they should be tried by some form of tribunal claiming to exercise judicial functions, or whether the decision taken by the Allies should be reached and enforced without the machinery of a trial. H.M.G. thoroughly appreciate the arguments which have been advanced in favour of some form of preliminary trial But H.M.G. are also deeply impressed with the dangers and difficulties of this course, and they wish to put before their principal Allies, in a connected form, the arguments which have led them to think that execution without trial is the preferable course.[2]

Ultimately, the British gave up ground and agreed upon execution but only following a trial! A dozen Nazi leaders were sentenced to death by the International Military Tribunal on 1 October 1946 and a few weeks later ten of them were actually executed, by an experienced English hangman.

Emergence of an international trend

Soon, capital punishment was beginning to disappear within the Commonwealth. A Royal Commission that

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reported in 1953 did not call for an end to the death penalty although its chair, Sir Ernest Gowers, made it clear that in the course of studying the matter he had come to favour abolition.[3] Canada's last execution was in 1962, and Britain's in 1964. The first quinquennial report of the United Nations Secretary-General on capital punishment, published in 1975, reported that Australia was 'divided on the issue', while New Zealand, Nepal and Malta were 'abolitionist by law for ordinary crimes only'.[4] But the rest of the Commonwealth was described as 'retentionist', a label that was also applied to the vast majority of United Nations member states. Of 134 states listed in the 1975 study, only 29 or slightly more than 20 per cent were deemed abolitionist in law, abolitionist in law for ordinary crimes or abolitionist in practice.

A decade later, when the third report was issued in 1985, the United Nations was still reluctant to conclude that statistics on use of capital punishment in the world indicated a tendency in either direction.[5] At the time, countries such as Canada, the United Kingdom and New Zealand retained the death penalty in legislation, although it was only to be applied in the exceptional circumstances of wartime or for crimes such as treason. Legislative housekeeping dealt with such anachronisms. Since then, on average two or three states every year put capital punishment in the past. Today, nobody would dispute the claim that there is a global trend towards the abolition of capital punishment and, for states that still retain it, a significant reduction in its use. It is now about as safe to say this as to observe that the ice in Greenland is melting.

Approximately half of United Nations member states have now abolished the death penalty in law, yet the same can be said of only one-third of member states of the Commonwealth. The joint inheritance of the English-speaking world, to return to Churchill's words, seems afflicted with a peculiar attachment to harsh punishment, especially its most absolute manifestation.

In one of its seminal rulings, the South African Constitutional Court declared capital punishment to be in breach of the country's new interim constitution. Justice Albie Sachs penned an individual opinion that suggested the death penalty was a colonial importation, imposed upon an indigenous justice system that was inherently more humane.[6] He may have overstated things slightly, as a recent doctoral thesis demonstrates.[7] But there is no doubt that colonial criminal justice systems left their mark, and it was not always a positive one, despite Churchill's fine words. It is intriguing to compare post-colonial policies with reference to the colonising power. For example, Portugal's former colonies all abolished capital punishment in law by the early 1990s. Portugal was a leader in Europe in this respect, having eliminated the death penalty as early as 1867. Many former French and Belgian colonies remained more attached to capital punishment, but it is now a thing of the past in virtually all of them. It is primarily in the former British colonies, be they in the Caribbean, Africa or South Asia, where the death penalty continues to linger.

One bizarre manifestation of this has been the litigation of important legal questions relating to imposition of capital punishment in London, before the Judicial Committee of the Privy Council. Several important rulings, of international significance and influence, have been delivered over the past two decades by this judicial vestige of imperial origins. Dedicated barristers and solicitors, most of them based in London, have taken up the cause, often on a *pro bono* basis.

Importance of abolition in practice if not in law

According to the eighth quinquennial report of the United Nations Secretary-General on the status of capital punishment, issued in 2010, there has been a measurable international trend towards abolition of capital punishment for at least three decades. In fact, it appears to have accelerated in recent years. As of 31 December 2008, 97 countries had abolished the death penalty altogether, while another eight had abolished it for 'ordinary crimes', retaining the possibility of capital punishment in cases of treason and war-related offences. A further 46 States were abolitionist *de facto*, meaning that they had not carried out a death sentence for more than a decade. Only 47 States of the total of 198 were described as retentionist.[8] Among these are nine Commonwealth member states: Bangladesh, Botswana, India, Malaysia, Nigeria, Pakistan, St Kitts and Nevis, Singapore and Uganda.

Amnesty International is somewhat less generous because it treats the category of de facto abolition more restrictively than the United Nations. To the requirement that no execution should have been conducted for

a decade, it adds a subjective element: there must be evidence of a policy or established practice of not carrying out executions. As a consequence, Amnesty International includes several other Commonwealth states within the 58 retentionist countries on its list: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Guyana, Jamaica, Lesotho, Saint Lucia, Saint Vincent and the Grenadines, Sierra Leone and Trinidad and Tobago. According to Amnesty International's assessment, Commonwealth member states account for 38 per cent of the world's retentionists.[9]

Amnesty International indicates that in 2010, some 23 States carried out executions. Among them were four Commonwealth members: Bangladesh, Botswana, Malaysia and Singapore. In most of the Commonwealth states, however, only one execution was conducted during the year. Bangladesh stands as the exception, with nine. Significantly, Pakistan apparently conducted none in 2010. In the past, it led the Commonwealth in executions. In 2008, 36 people were put to death there, more than the rest of the Commonwealth put together.[10]

The Commonwealth sets itself apart from the overall international pattern in the size of the category of States that are abolitionist in practice or de facto. Approximately half of the Commonwealth membership belongs to this category. In the past, this described Commonwealth members like Canada and the United Kingdom. Later, of course, the law caught up with the practice and capital punishment was removed from the statute books. To an extent, the particularities of English criminal law account for the phenomenon. In the 19th century, after a jury pronounced a guilty verdict for murder, judges had no discretion except to impose sentence of death. There were various rituals associated with what was really a foregone result. In Canada, for example, judges donned a black tricorne and gloves.

Whether the de facto abolitionist category is a meaningful indicator of trends has often been questioned. Certainly many of those in the de facto abolitionist category would insist that their failure to carry out executions for a decade or more does not manifest any change in policy. For example, in its report to the Human Rights Council, Barbados insisted that no moratorium on capital punishment was in place despite the fact there had been no executions in recent years.[11] For this reason, Amnesty International would consider Barbados to be retentionist whereas it is deemed de facto abolitionist in the United Nations study.

In some cases, however, States in the de facto abolitionist group formally indicated that a moratorium is indeed in place, and that a policy decision is responsible for the lack of executions over a ten-year period. In its report to the Human Rights Council in the context of the universal periodic review process, Sri Lanka said this was the case.[12] Cameroon said 'it may not be an over statement to say executions have been suspended de facto in Cameroon'.[13] Kenya's second periodic report to the United Nations Human Rights Committee said a de facto moratorium has been in place since 1996.[14] Zambia made a similar declaration in its third periodic report.[15]

But in some states where execution appears to have stopped, officials often deny that this is actually the case, or that a moratorium is in place. Twelve Commonwealth Member States in the de facto abolitionist category registered their opposition to General Assembly resolution 62/149, entitled 'Moratorium on the use of the death penalty', by including their names in a ***note verbale*** addressed to the Secretary-General of the United Nations.[16]

Assessing the significance of de facto abolition is further complicated by the fact that courts continue to pronounce sentence of death in some states where a moratorium is apparently in place. In 2010, death sentences were pronounced in the following Commonwealth states: Bahamas, Bangladesh, Barbados, Brunei Darussalam, Cameroon, Gambia, Ghana, Guyana, India, Jamaica, Kenya, Malaysia, Malawi, Maldives, Nigeria, Pakistan, Sierra Leone, Singapore, Sri Lanka, Tanzania, Trinidad and Tobago, Uganda and Zambia. But there is little likelihood that it will actually be carried out in many of them.

The recent United Nations survey concludes that the de facto abolitionist classification is a very good indicator of trends towards abolition de jure. During the 2004–2008 quinquennium, no State in the de facto abolitionist category resumed executions. The United Nations study examined patterns over a 40-year period, and concluded: 'When the de facto abolitionist category is looked at over a longer time horizon, it appears to provide useful confirmation of the hypothesis that most

States that have stopped using the death penalty for ten years will remain in that category or proceed to de jure abolition… In conclusion, de facto abolition appears to be a useful indicator of future behaviour, and a valuable concept to assist in understanding trends with respect to capital punishment in both practice and law.'[17] This seems to be true even where a country insists that there is no moratorium in place.

Promoting the issue at the political level

In 2007, 2008 and 2010, the United Nations General Assembly adopted resolutions calling for a moratorium on the use of the death penalty. A similar initiative is scheduled for the 2012 session of the General Assembly. Previous attempts at adoption of such a resolution in the General Assembly, in 1994 and 1999, had not been successful. The 2010 resolution was adopted by a majority of 109 to 41, with 35 abstentions. Among Commonwealth States, only 19 voted in favour while 22 voted against, with 12 abstentions. In other words, while 59 per cent of United Nations Member States that voted were in favour of the resolution, only 36 per cent of Commonwealth States that voted were in favour. More than half of the United Nations Member States that voted against the resolution were members of the Commonwealth. Over the 2007 to 2010 period, there has been a slight increase in the majority and in the abstentions, and a slight decline in the number of states voting against. This tendency is reflected in the behaviour of Commonwealth States.

The international trend towards abolition of the death penalty is also reflected in the willingness of States to accept international legal obligations that prohibit the use of capital punishment. More than 80 States are now party to a series of specialised treaties on the issue of the death penalty adopted by the United Nations, the Council of Europe and the Organization of American States. The most important of these, if only because of its universal application, is the Second Optional Protocol to the International Covenant on Civil and Political Rights.[18] This imposes two primary obligations upon States parties: not to execute anyone within their jurisdiction and to 'take all necessary measures to abolish the death penalty' within their jurisdiction. It is possible for a State to make a reservation at the time of ratification in order to exclude application of the Protocol with respect to 'application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime', although this option has rarely been invoked.

The Second Optional Protocol was adopted by the United Nations General Assembly in 1989. It entered into force in 1991, following the tenth ratification or accession. The Protocol can only be ratified by States that are already party to the International Covenant on Civil and Political Rights. The Second Optional Protocol has been ratified by 72 of the 165 States that have ratified the Covenant itself, or about 44 per cent. By comparison, only 11 of the 40 Commonwealth members that are parties to the Covenant, or about 27 per cent, have also ratified the Second Optional Protocol. Put another way, 37 per cent of United Nations Member States have ratified the Protocol but only 20 per cent of Commonwealth members have done this.

Three members of the Commonwealth – Mauritius, Samoa and Vanuatu – have ratified the International Covenant on Civil and Political Rights and have abolished the death penalty, but have not ratified or acceded to the Second Optional Protocol. There is no legal impediment to ratification or accession for these countries. Three other Commonwealth States – Kiribati, Solomon Islands and Tuvalu – abolished the death penalty back in the 1970s, but have not ratified the Second Optional Protocol. However, they cannot take this step until they ratify the International Covenant on Civil and Political Rights. A non-member of the United Nations may accede to or ratify the Covenant if so invited by the United Nations General Assembly;[19] such a general invitation has already been made.[20] In 2009, Tuvalu reported to the United Nations Human Rights Council that it had 'no objection to the substance of the International Covenant on Civil and Political Rights [but that] the Government did not have the resources required to report on or implement these and many other international conventions. If provided with resources, the ratification would be a matter of course.'[21] Subsequently, Switzerland offered to provide such technical assistance.[22]

Conclusions

Teachers of human rights generally divide the international mechanisms for their promotion and protection into 'universal' and 'regional' categories. The

United Nations sits at the centre of the universal systems, whereas the regional ones consist of institutions like the Council of Europe, the Organization of American States and the African Union. Only as somewhat of an afterthought are bodies like the Commonwealth or the Francophonie considered. Yet they are significant elements in the international protection of human rights.

The classic shortcoming of the universal systems is the need for them to seek a low common denominator. Norms must be acceptable to a broad range of cultural traditions and levels of economic development. Thus, the universal systems will comfortably tackle racial discrimination. But they proceed more gingerly in the area of gender equality, and barely at all when it comes to lesbian, gay, bisexual and transgender people. On the other hand, the regional systems have their own drawbacks: they tend to reflect cultural biases, setting high standards in some areas but scandalously low ones in others. In this respect, the Commonwealth is neither fish nor foul. It is universal in its application to a range of cultures and traditions, spanning the globe, but also 'regional' in its fealty to a single legal and political tradition, dictated by history.

Many features of human rights can be examined in this context, and the abolition of capital punishment is only one. Certainly there are related matters that we can also associate with a particularly harsh approach to criminal justice, especially in the imposition of punishment. It remains a great irony that a justice system imbued with 'the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world' is also characterised by brutal forms of criminal sanction that are increasingly being abandoned across the globe.

The Commonwealth is somewhat behind the curve here, although probably not all that far behind. Its performance in terms of treaty participation and political initiative within the United Nations is relatively poor, as a group. While the death penalty lingers on in many Commonwealth states, it is increasingly being abandoned as one member after another passes a decade without executions. Political leaders within many states continue to claim that while in apparent disuse, capital punishment is actually alive and well. Experience suggests that these are the last gasps of populist politicians, and that facts speak louder than words.

At an institutional level, the Commonwealth offers a place for leadership among its members and also externally. It could do much more in this respect. At the 2011 Commonwealth Law Ministers meeting, held in Sydney, the best it could come up with was a statement taking note of 'the differing views within the Commonwealth on the death penalty'.[23] Collective embarrassment at this anachronistic form of punishment, and possibly shame that it is a lingering remnant of colonial barbarism, might help the process advance. If the general international trend continues – and there is no good reason to think it will not – the whole business should be done and dusted within a decade or so, as the world, with the possible exception of a few rogue states, becomes globally abolitionist. Although deservingly acknowledged for its contribution to many important components of our contemporary human rights framework, when it comes to universal abolition of the death penalty 'the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world' will not be able to take much credit.

About the author

Professor William A. Schabas is professor of international law at Middlesex University in London. He is also emeritus professor of human rights law and chairman of the Irish Centre for Human Rights.

Professor Schabas holds BA and MA degrees in history from the University of Toronto and LLB, LLM and LLD degrees from the University of Montreal, as well as honorary doctorates in law from Dalhousie University, Case Western Reserve University and Northwestern University. He is the author of more than twenty books dealing in whole or in part with international human rights law, including *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, 2010), *Introduction to the International Criminal Court* (Cambridge, 2011), *Genocide in International Law* (Cambridge, 2009) and *The Abolition of the Death Penalty in International Law* (Cambridge, 2003). Professor Schabas drafted the 2010 report of the Secretary-General on the status of the death penalty (UN Doc. E/2010/10).

Professor Schabas was named an Officer of the Order of Canada in 2006. He was elected a member of the Royal Irish Academy in 2007.

Ratification of Treaties by Commonwealth Member States and Status with Regard to Capital Punishment

	Party to the International Covenant on Civil and Political Rights	Party to the Second Optional Protocol to the International Covenant	Abolitionist de jure	Abolitionist de facto	Retentionist
Antigua and Barbuda				X (1989)	
Australia	X	X	X		
Bangladesh	X				X (2009)
Barbados	X			X (1984)	
Belize	X			X (1986)	
Botswana	X				X (2009)
Brunei Darussalem				X (1857)	
Cameroon	X			X (1997)	
Canada	X	X	X		
Cyprus	X	X	X		
Dominica	X			X (1986)	
Fiji Islands			X[A]		
Ghana	X			X (1993)	
Grenada	X			X (1978)	
Guyana	X			X (1997)	
India	X				X (2004)
Jamaica	X			X (1988)	
Kenya	X			X (1987)	
Kiribati			X		
Lesotho	X			X (1995)	
Malawi	X			X (1992)	
Malaysia					X (2009)
Maldives	X			X (1952)	
Malta	X	X	X		
Mauritius	X		X		
Mozambique	X	X	X		
Namibia	X	X	X		
Nauru	SIGNATORY			X (1968)	
New Zealand	X	X	X		
Nigeria	X				X (2002)
Pakistan	X				X (2008)
Papua New Guinea	X			X (1950)	

Rwanda	X	X	X		
Samoa	X		X		
Seychelles	X	X	X		
Sierra Leone	X			X (1998)	
Singapore					X (2009)
Solomon Islands			X		
South Africa	X	X	X		
Saint Kitts and Nevis					X (2008)
Saint Lucia				X (1995)	
Saint Vincent and the Grenadines	X			X (1995)	
Sri Lanka	X			X (1976)	
Swaziland	X			X (1989)	
The Bahamas	X			X (2000)	
The Gambia	X			X (1981)	
Tonga				X (1982)	
Trinidad and Tobago	X			X (1999)	
Tuvalu			X		
Uganda	X				X (2006)
United Kingdom	X	X	X		
United Republic of Tanzania	X			X (1994)	
Vanuatu	X		X		
Zambia	X			X (1997)	
Total	**40**	**11**	**18**	**26**	**10**

Vote on General Assembly Resolution 65/206, Moratorium on the Use of the Death Penalty (21 December 2010)

	In favour	Against	Abstain	Change in position vis à vis previous years
Antigua and Barbuda		X		
Australia	X			
Bangladesh		X		
Barbados		X		
Belize		X		
Botswana		X		
Brunei Darussalem		X		
Cameroon			X	
Canada	X			
Cyprus	X			
Dominica			X	Voted against in 2007 and 2008.
Fiji Islands			X[a]	
Ghana			X	
Grenada		X		
Guyana		X		
India		X		
Jamaica		X		
Kenya			X	
Kiribati	X			
Lesotho			X	
Malawi			X	
Malaysia		X		
Maldives	X			
Malta	X			
Mauritius				
Mozambique	X			
Namibia	X			
Nauru	X			
New Zealand	X			
Nigeria			X	Voted against in 2007 and 2008.
Pakistan		X		
Papua New Guinea		X		
Rwanda	X			
Samoa	X			

Seychelles				
Sierra Leone			X	
Singapore		X		
Solomon Islands			X	
South Africa	X			
Saint Kitts and Nevis		X		
Saint Lucia		X		
Saint Vincent and the Grenadines	X	X		
Sri Lanka	X			
Swaziland		X		Abstained in 2007, voted against in 2008.
The Bahamas		X		
The Gambia	X			Àbstained in 2007 and 2008.
Tonga		X		
Trinidad and Tobago		X		
Tuvalu	X			
Uganda		X		
United Kingdom	X			
United Republic of Tanzania			X	
Vanuatu	X			
Zambia			X	
Total	**19**	**22**	**12**	

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17 UN Doc. A/RES/44/128, annex.
18 International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art. 48(1).
19 GA Res. 3270 (XXIX).
20 UN Doc. A/HRC/10/84, para. 14; also paras. 55, 67(1), (2).
21 *Ibid*., para. 22.
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[a] For ordinary crimes only.

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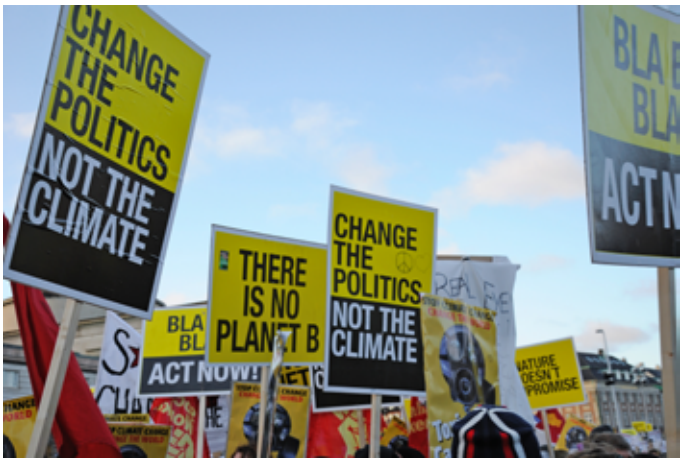

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The Commonwealth Advisory Bureau is the independent think-tank and advisory service for the modern Commonwealth of fifty-four nations and nearly two billion citizens. We specialise in issues of Commonwealth policy including globalisation, democracy, civil society and human rights.

Part of the Institute of Commonwealth Studies, University of London, we run projects in countries across the Commonwealth. We produce quality policy-relevant reports and briefings to inform and influence policy makers in over a quarter of the world's countries. We seek to put the policy choices before the Commonwealth into sharper focus, exploring options and suggesting new directions. CA/B projects are changing the way people think on issues such as making elections fairer, recognising the needs of indigenous peoples and assisting development in small island states. We are committed to continuing our work to inform and improve policy and decision making across the Commonwealth.

We also offer confidential and impartial advice to countries interested in applying to join the Commonwealth, and can help existing member countries make the most of Commonwealth membership for maximum impact at home and abroad.

About the Opinions Series

CA/B Opinions are authored opinion pieces and do not necessarily reflect the views of the CA/B. The purpose of the publication series is to stimulate debate and dialogue around some of the most pressing issues in the Commonwealth.