

CROSS-CITATION IN DEATH PENALTY CASES
AND
THE INTERNATIONALISATION OF HUMAN RIGHTS

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ABSTRACT

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This thesis examines why courts in the United States of America (US), India and South Africa refer to foreign law in death penalty cases. To gain an understanding of what drives the apex courts of the US, India and South Africa to cite foreign law when considering domestic death penalty issues, this thesis proposes a three-part matrix to both assess the relevant case law and to analyse the academic literature on cross-citation. Firstly, it will be demonstrated that judges in national courts cross-cite comparative law out of a primary interest in constitutional interpretation. Cross-citation is used in this manner to assist judges in their domestic interpretative tasks. Secondly, it will be illustrated how courts that engage in the citation of foreign law also seek guidance from other jurisdictions as to the content of shared values, such as what type of punishment does not fundamentally and unlawfully violate the right to human dignity. Finally, this thesis assesses to what degree courts from the three selected jurisdictions are additionally referencing or applying a customary international law norm when citing foreign sources. The argument is made that the domestic courts under examination engage with comparative law in the context of a broader transnational normative project, taking the international human rights framework that developed after the Second World War as a key reference point. In doing so, this thesis argues that these courts are at times recognising and developing emerging customary norms, and at other times giving effect to and enforcing applicable international human rights law.

Thesis Word Count: 95,365

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TABLE OF ABBREVIATIONS

CJ	Chief Justice
ECHR	European Convention of Human Rights
EU	European Union
HRC	United Nations Human Rights Committee
IACHR	Inter American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
J	Justice
JP	Judge President
SA	South Africa
UK	United Kingdom
UN	United Nations
UNDHR	United Nations Declaration of Human Rights
US	United States of America

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CHAPTER I: INTRODUCTION

1.1. INTRODUCTION

Just as the topic of the continuous use of the death penalty in the US seems exhausted, it makes headlines again. The recent sentencing to death of Dzhokhar Tsarnaev, for the horrific Boston marathon bombing, is the first federal death penalty case since 2003.¹ The refusal by foreign suppliers to deliver anaesthetics for lethal injections, led to the Supreme Court being confronted with the question of the lawfulness of capital punishment once more.² These developments have occurred against a backdrop of incremental shifts towards abolition at a state level in the US, such as the latest ban on the death penalty implemented in Nebraska.³

This gradual trend in the US away from capital punishment can be contrasted with a more accelerated global movement towards abolition. More than three quarters of the world has now abolished the death penalty legally or in practice. This worldwide retraction of capital punishment resulted in part from the adoption of international treaties, as well as from domestic legislative and

¹ T Winter 'Date Set for Tsarnaev's Official Death Sentence in Boston Bombing' *NBC News* (25 June 2015) <<http://www.nbcnews.com/storyline/boston-bombing-trial/date-set-tsarnaevs-official-death-sentence-boston-bombing-n366016>> accessed 3 November 2015. Louis Jones Junior was executed on 18 March 2003: 'US Executes Gulf War Veteran Who Raped and Killed a Soldier' *New York Times* (19 March 2003) <<http://www.nytimes.com/2003/03/19/us/us-executes-gulf-war-veteran-who-raped-and-killed-a-soldier.html>> accessed 3 November 2015. Timothy McVeigh was the third last person to be executed, which took place in 2001 and which was the first federal execution since 1963.

² *Glossip v Gross* 576 US No. 14-7955 (2015).

³ J Bosman 'Nebraska Bans Death Penalty, Defying a Veto' *New York Times* (27 May 2015) <http://www.nytimes.com/2015/05/28/us/nebraska-abolishes-death-penalty.html?_r=0> accessed 3 November 2015. Since 2007, six other states have abolished the death penalty: Maryland, Connecticut, Illinois, New Mexico and New Jersey.

executive policy choices. The death penalty has also come before the judiciaries of numerous states, including India and South Africa.⁴ This thesis focuses on the phenomenon of the cross-citation of comparative law by these national courts in domestic death penalty cases.⁵ Some writers have referred to this judicial practice as 'comparative international law'.⁶ This thesis analyses this citation of foreign law by national courts through the prism of three explanatory factors: textual interpretation, shared values and international law. In doing so, it will demonstrate that 'international law and the constitutional systems of the world are interdependent; each has a stake in the success of the other.'⁷ Domestic judicial references to foreign law are bound up with the development and application of international law.

1.2. SCOPE OF THE THESIS

Capital punishment offers more than four decades of jurisprudence, in the context of a consistent pattern of norm convergence.⁸ Within this broad pool of death penalty cases, this thesis limits its focus to three jurisdictions, the US, India and South Africa. This thesis describes how the US Supreme Court, Indian Supreme Court and South African Constitutional Court refer to foreign judicial decisions and other foreign law sources, and where relevant international law, in capital punishment cases. The primary concern of the thesis is what these cases reveal

⁴ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1; *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC).

⁵ Where reference is made to 'cross-citation' in this thesis, this includes the citation by domestic courts of all types of foreign law, including judicial decisions and legislation.

⁶ S Cleveland 'Our International Constitution' (2006) 31(1) *Yale Journal of International Law* 1, 88.

⁷ V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010) 273.

⁸ *ibid* 79.

about the role that cross-citation plays in domestic human rights cases, and in the broader development of human rights law. It has been said that death penalty jurisprudence provides one of the most dramatic examples of a synergy between international and domestic human rights law.⁹

Capital punishment cases since the early 1970's show that so-called 'transjudicial communication' is not only in evidence, but is gathering momentum. The reference by courts to comparative law is not a new judicial technique, but the global use of comparative material is growing.¹⁰ Initial analyses of these cross-jurisdictional interactions were descriptive in nature. They focused on the growing phenomenon *per se* of national apex courts referring to sources from foreign jurisdictions.¹¹ This acceleration in the cross-citation of foreign sources has been attributed to the emergence of new domestic tribunals, the litigation of novel rights issues in these courts, the development of international human rights after the Second World War, and the birth of independent legal systems with shared backgrounds.¹²

⁹ See P Hodgkinson and A Rutherford *Capital Punishment* (Waterford Press Hampshire 1996) 25, who also state that this is a 'source of 'soft law', as well as a significant reference in the evolution of international custom.'

¹⁰ C McCrudden 'A common law of human rights?: Transnational Judicial Conversations on Constitutional Rights' in O'Donovan, K and Rubin, G (edd) *A Festschrift in Honour of Brian Simpson* (Oxford University Press Oxford 2000) 2; S Choudry 'Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819, 820-1. Citation of foreign material by the US Supreme Court has increased materially since 1980. See RC Black and L Epstein, '(Re)-setting the Scholarly Agenda on Transjudicial Communication' (2007) 32(3) *Law & Social Inquiry* 791, 801.

¹¹ See MA Slaughter 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99; D Nelken 'Disclosing / Invoking Legal Culture: An Introduction,' (1995) 4 *Social and Legal Studies* 435; MA Glendon *Rights Talk: The Impoverishment of Political Discourse* (Free Press New York 1991).

¹² S Cleveland 'Our International Constitution' (2006) 31(1) *Yale Journal of International Law* 1, 5.

What transjudicial communication has lacked is an overarching theory that both explains why judges increasingly cite foreign sources, and also acts as a basis for justifying the exercise.¹³ The US Supreme Court has been criticised for failing to articulate ‘a general theory of the citation and authority of foreign law.’¹⁴ Accusations have been made that the absence of an explanation of the relative relevance of domestic case law when weighed against foreign precedents, results in ambiguous judicial reasoning.¹⁵ The practice of cross-citation has also been equated with the ‘cherry picking’ of favourable precedents.¹⁶

Waldron’s law of nations approach is arguably the most comprehensive analysis of references to comparative law. One of the gaps in his theory however is that it only takes the US into its ambit. When viewed in more than a US context, it is apparent that judges are not merely using foreign law as persuasive sources for interpretation, or as touchstones for articulating shared constitutional values. Even the US Supreme Court, which is the subject of Waldron’s focus, assesses wider patterns in international state practice. When the court struck down the juvenile death penalty in *Roper*, the normative congruence in international law and

¹³ RP Alford ‘In Search of a Theory for Constitutional Comparativism’ (2005) 52 UCLA Law Review 639, 641. Alford argues that what he labels ‘constitutional comparativism’ should ideally be explained in terms of existing theories of constitutional interpretation (641). Bateup describes this as the search for a satisfactory theory that legitimises judicial review. See C Bateup ‘The Dialogic Promise: Assessing the normative potential of theories of constitutional dialogue’ (2006) 71 Brooke Law Review 1109, 1118.

¹⁴ J Waldron ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 Harvard Law Review 129.

¹⁵ S Simon ‘Rights without a base: the troubling ambiguity at the heart of constitutional law’ (2012) 57 Saint Louis University Law Journal 101, 151. Levinsohn observes that the US Supreme Court appears to use foreign materials to support views it has already arrived at, but fails to provide any explanation for why they are being referred to. S Levinsohn ‘Looking abroad when interpreting the US Constitution: Some Reflections’ (2004) 39 Texas International Law Journal 353, 363.

¹⁶ E Turner ‘The relevancy of foreign law as persuasive authority and Congress’ response to its use: a pre-emptive attack on the Constitution Restoration Act’ (2006) 23 Georgia State University Law Review 455, 470.

comparative practice weighed heavily with the court. Kennedy J concluded that ‘it is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.’¹⁷ The Indian Supreme Court similarly upheld a ban on the juvenile death penalty, whilst referring to treaty law and global normative convergence.¹⁸ The South African Constitutional Court has adopted the same approach in an extradition context.¹⁹ These cases demonstrate the material connection between international human rights law and comparative engagement. According to the doctrine of sources of international law, widespread state practice including in the form of judgments, can in certain circumstances constitute customary international law.²⁰ This thesis argues that the endorsement of comparative norms, by domestic judges, effectively renders national courts developers and enforcers of international custom.

1.3. STRUCTURE OF THE THESIS

Chapter two provides a more detailed explanation of the methodology to be used in the thesis. The chapter explains the three considerations that are used to analyse the case law. The first involves an assessment of references to foreign law as an act of textual interpretation. The second consideration is how an engagement with comparative law reflects a sharing of constitutional values. The final factor concerns an analysis of cross-citation as a form of development and enforcement

¹⁷ *Roper v Simmons* 543 US 551, 125 S.Ct. 1183 (2005) 578.

¹⁸ *Santosh Kumar Satishbhushan v State Of Maharashtra* (2009) 6 SCC 498.

¹⁹ *S v Makwanyane* 1995 (3) SA 391 (CC).

²⁰ Article 38(1) of the Statute of the International Court of Justice, annexure to The United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

of international human rights law. The chapter further explains the choice of the three jurisdictions of the US, India and South Africa. It also justifies the selection of the death penalty as the substantive subject matter of this thesis.

Chapter three provides an overview of the literature concerning cross-citation. The literature is analysed using the same set of three considerations as will be used to assess the case law. The chapter discusses theorists such as Parrish, who treat cross-citation as an exercise in interpretation. Secondly, the chapter will consider the work of Carozza, Waldron and Calabresi, who each describe cross-citation as a reflection of an international common law. Finally, this chapter considers those writers who regard the citation of foreign law as an act in customary international law.

Chapter four examines the degree to which cross-citation is merely an exercise in textual interpretation. Courts in the three selected jurisdictions refer to the persuasive utility in assessing how constitutional issues arising from similarly worded textual provisions have been dealt with by courts in other countries. Here the overarching patterns of state practice are less interesting to a judge, compared with the qualitative contribution that specific judgments offer to the resolution of a question of domestic interpretation.

Chapter five considers how courts refer to evolving comparative values as support for a domestic ruling. The chapter shows that courts draw on foreign precedents in order to articulate shared values that underpin bill of rights provisions,

especially where the right is framed in vague terms. The chapter reflects the body of jurisprudence from the three selected jurisdictions in a new light. Courts here consider foreign law in an evolutive rather than literalist interpretative guise.

Chapter six presents an historical overview of how capital punishment norms have developed in international law, and in the domestic laws of various countries. From 1948 onwards, as the death penalty became the subject of international treaty law, abolition marched in tandem with a rapid growth in constitutional democracies and international human rights law. The shift towards abolition in the international arena established a platform for the progressive treatment of the death penalty by national courts.

The context is set for the final substantive chapter in which an international law prism is applied to the subject case law. Chapter seven observes how domestic courts have shifted over the past several decades to a role of sometimes developing emerging customary international law. At other times domestic courts enforce applicable international law. In both instances, an examination of the case law demonstrates how 'constitutional law and customary international norms tend to develop in an interactive relationship.'²¹ In this manner, international human rights law has an interconnected relationship with domestic human rights law, realised in part through national judiciaries. The chapter concludes that all three modes of cross-citation – interpretation-focused, value-oriented, and internationalist – are evidenced in each of the three subject jurisdictions. But the

²¹ V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010) 262.

most compelling explanation of cross-citation, in the jurisprudence under examination, lies in an understanding of the vital role that domestic courts play in advancing and applying international legal custom.

CHAPTER 2: METHODOLOGY

2.1. INTRODUCTION

The core research question raised in this thesis is why courts in the US, India and South Africa cite foreign law in death penalty cases. This citation of foreign law will be referred to, for convenience, as 'cross-citation'. The focus will be on references to foreign judicial precedents, but also examine the citing of other types of foreign law such as constitutions and statutes, as well as discussions of *de facto* policy. References to international law will also be dealt with where relevant.

This thesis will demonstrate, firstly, that judges in national courts cross-cite foreign law out of a primary interest in domestic textual interpretation. The citation of comparative law used in this way is a tool of interpretation that assists judges in their domestic interpretative tasks. Secondly, it will be illustrated that courts that engage in cross-citation also seek guidance from other jurisdictions as to the content of abstract values, such as what type of punishment unlawfully violates human dignity.

This thesis will analyse, thirdly, how courts, or least certain judges, also (sometimes inadvertently) have regard to international human rights norms when citing foreign law. In doing so, this thesis will argue that courts are expressly, or implicitly, at times recognising and developing a norm which is simultaneously national and international in character, due to 'the international character of human

rights'.²² This type of norm could be described in the manner envisaged by Waldron's law of nations theory, but occasionally is accorded status closer to customary international law. Sometimes the developing norm falls short an international legal rule, but shapes the progression of the right under consideration, whilst at other times the norm is enforced as a matter of international law.

The following section will explain further the reason for focusing on death penalty cases in this thesis. The chapter will then set the parameters and rationales for what is to be canvassed in the thesis with respect to choice of jurisdictions and subject matter, whilst also explaining what is to be excluded from the analysis. Finally, the chapter will describe the specific methodology to be adopted in the thesis, in relation to how the case law in the three focus jurisdictions will be analysed.

2.2. CHOICE OF TOPIC: CAPITAL PUNISHMENT

A possible explanation for the prevalence of cross citation in death penalty cases is 'the divisive nature of the moral questions at issue in these particular cases'.²³ The tendency of capital punishment to divide opinion is certainly stark in the US Supreme Court. Perhaps precisely because these cases can split the bench so frequently, they offer the most fertile ground for comparing why courts in the US and other countries refer to each other's decisions.

²² *Alexander v Minister of Justice* 2010 (1) NR 328 (SC).

²³ Saunders 'The use and misuse of comparative constitutional law' (2006) 13 *Indiana Journal of Global Legal Studies* 37, 40.

One of the primary reasons to focus on death penalty case law, for the purposes of this thesis, is that it is one of the starkest aspects in which US constitutional law is uniquely different from the constitutional law of other developed countries.²⁴ Relatedly, from 2004 to date, 72% of the cases in which the US Supreme Court has dealt with foreign law have been cases dealing with human rights and the death penalty.²⁵ Calabresi actually suggests that references to foreign law by US courts should be limited only to Eighth Amendment cruel and unusual punishment jurisprudence.²⁶

The consideration by the US Supreme Court of foreign law in death penalty cases therefore constitutes a disproportionate share of its transjudicial jurisprudence. Although its death penalty jurisprudence makes up a large portion of the US Supreme Court's cross-citation references, it must be noted that its general usage of foreign law constitutes a negligible portion of its overall precedential usage. This is in contrast to jurisdictions such as South Africa where 52% of the decisions of the Constitutional Court since its establishment have cited foreign cases. High rates of cross citation are also seen in Namibia, Ireland, India, Australia, Canada and Israel.²⁷ However, since this thesis sets up the US as the

²⁴ SG Calabresi "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' (2006) 86 Boston University Law Review 1335, 1405.

²⁵ A Sperti 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart, Oregon 2013) 405.

²⁶ SG Calabresi "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' (2006) 86 Boston University Law Review 1335, 1413.

²⁷ A Sperti 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart, Oregon 2013) 411-412.

base case for its analysis, it follows that the focus should fall on the area in which the Supreme Court has wrestled the most with the issue of citing foreign law.

A second reason for focusing on death penalty cases is that the abundance of comparative law (and international law) concerning the death penalty broadens the scope for the inter-judicial interaction. The death penalty is an issue that is formally framed in international treaty law, as much as it is embedded in right to life and cruel and unusual punishment clauses in national constitutions.²⁸ The interplay between courts interpreting the equivalent domestic provisions plays a twin role in normative development at both a local and international level. In death penalty cases, Schabas considers the relationship between national and international norms to be particularly acute:

There is a rich and unique interplay of comparative and international law. Most of the recent judicial decisions make frequent reference to the judgments of courts in other jurisdictions that are based on other legal instruments and systems. This is in itself rather remarkable, because comparative law has traditionally been the preserve of academics rather than judges. In addition, there is much to be learned about the debate surrounding cultural relativism from this discussion, for here is a core civil rights norm, the prohibition of cruel and unusual punishment, which is conditioned by such a culturally loaded adjective.²⁹

²⁸ C Steiker 'Capital Punishment and American Exceptionalism' (2002) 81 Oregon Law Review 97, 112.

²⁹ WA Schabas *The Death Penalty as Cruel Treatment and Torture* (Northeastern University Press Boston 1996) 12. See PG Carozza "My Friend is a Stranger": The Death Penalty and the Global lus Commune of Human Rights' (2003) 81 Texas Law Review 1031, 1044-1045; PG Carozza 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' EJIL Vol. 19 No. 5 (2008) 931, 938; U Bentele 'Mining for gold: The Constitutional Court of South Africa's experience with comparative Constitutional Law' (2009) 37 Georgia Journal of International and Comparative Law 219, 221.

There is a 'synergy between national and international courts that has come to characterise contemporary human rights law', where these courts wrestle 'with similar facts and essentially identical norms.'³⁰ This synergy would appear to be particularly acute with respect to capital punishment. Similarly, Hodgkinson states that international law is used in death penalty cases 'to assist in interpreting the scope of constitutional norms which have usually been inspired by the international instruments.'³¹

The third reason for concentrating on death penalty jurisprudence is the distinctive shape in which the legality of capital punishment has been directed in the past several decades. Schabas states that 'the trend in both comparative and international law clearly favours the progressive limitation and ultimate abolition of the death penalty. Law makes an important, although not exclusive, contribution to this process.'³² This abolitionist trajectory, which has largely occurred since World War II, has seen abolition become the norm rather than the exception. It is a path that reveals a normative progression that in turn provides a clear test for whether transjudicial communication is part of a larger normative project leading to the development of international human rights norms, or merely resorted to by judges on an *ad hoc* basis and mainly for enhanced domestic interpretation purposes. The following section will explain why this thesis focuses on the US, India and South

³⁰ WA Schabas *The Death Penalty as Cruel Treatment and Torture* (Northeastern University Press Boston 1996) 202.

³¹ See P Hodgkinson and A Rutherford *Capital Punishment* (Waterford Press Hampshire 1996) 25, who also state that this is a 'source of 'soft law', as well as a significant reference in the evolution of international custom.'

³² WA Schabas, *The Death Penalty as Cruel Treatment and Torture* (Northeastern University Press Boston 1996) 12.

Africa, as three jurisdictions where this transjudicial process has been evidenced in their respective capital punishment case law.

2.3. CHOICE OF JURISDICTIONS

The basis for the selection of courts whose jurisprudence will be analysed will be further explained in this section. The thesis focuses on the common law jurisdictions of the US, India and South Africa, as this avoids the variables that would be introduced by comparing civil law and common law jurisdictions, such as the distinctly precedent-based judging in common law systems.³³

The issue of the relationship between national and international law in each domestic system is a complex one, which will be canvassed in more depth in the chapters that deal with the jurisdictions that are the focus of this thesis. The three selected jurisdictions have mixed monist and dualist systems, which avoids comparisons between monist and dualist states.³⁴ In broad terms, in these intermediate systems, an international treaty forms a part of the national legal system only upon ratification by the domestic legislature, but customary

³³ M Reimann and R Zimmermann *The Oxford Handbook of Comparative Law* (OUP Oxford 2006) 558. It must be noted that the South African legal system is not wholly a common law system, but has been described as a hybrid or mixed system. It draws on both Roman-Dutch origins that favour codified laws as a primary source of law, and simultaneously on the English common-law that is judicial precedent oriented. See LM Du Plessis 'Statute Law and Interpretation' in *Law of South Africa* (Lexis-Nexis South Africa 2015 2nd ed) Volume 25(1) paragraph 291.

³⁴ J Crawford *Brownlie's Principles of Public International Law* (OUP Oxford 2012) 48-50.

international law forms part of national law unless inconsistent with the local constitution.³⁵

Three jurisdictions are also an appropriate number of legal systems to sufficiently master, whilst offering a diverse enough survey to allow for meaningful analysis. Comparisons between the US, India and South Africa allows for three legal systems with an English legal heritage to be analysed, which again reduces the variables at play. However, the dates when the three respective constitutions were enacted differ significantly. This creates an opportunity to compare how courts in both older and newer democracies have engaged with the death penalty, especially by way of cross-citation. The courts in these states have all been actively engaged with capital punishment, but over different yet overlapping timeframes.

2.3.1. The United States of America

The first jurisdiction to be considered is the US. The US Constitution was adopted in 1789 and has been amended only 27 times. The most important amendments are the first ten amendments that constitute the Bill of Rights.³⁶ The US constitutional system involves an elected House of Representatives and a Senate, an independently elected President, and the Supreme Court. The court has nine judges at any time, who serve life terms. The court has no express power of

³⁵ *ibid* 57. See *Jose Ernesto Medellin v Texas* 552 US 491, 128 S.Ct 1346 (2008), where the US Supreme Court introduced a dualist flavor to the US approach to international law.

³⁶ M Tushnet 'The United States: Eclecticism in the Service of Pragmatism' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 8.

judicial review, but has been compelled to rule on several important aspects of the constitutional system due to the abstract language of the constitution.³⁷ Although the US Supreme Court has engaged in limited resort to cross-citation, the practice has been relatively more pronounced in human rights cases, and particular where capital punishment has been at issue.³⁸

The extensive death penalty case law in the US offers a body of jurisprudence which ranges from cases dealing with the constitutionality of the death penalty itself, to more recent cases which have involved more specific attacks on elements of capital punishment, such as its application to minors or the mentally handicapped. The timeframe of these decisions commences with the key decisions of *Furman* and *Gregg* in the 1970's, through to its more recent decisions in the last decade, including *Atkins*, *Roper* and *Hall*. US case law will be used as a control jurisdiction, as the largest body of death penalty case law exists in the US. Further, the issue of cross-citation has attracted the greatest controversy in the US, and this has in turn led to a significant increase in literature on transjudicial communication in the past decade, particularly in the US.³⁹

³⁷ *ibid* 14-17. Tushnet comments that this role in part led to the accusations of judicial activism that are dealt with in more detail in chapter four.

³⁸ A Sperti 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Oregon 2013) 405.

³⁹ V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010); J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012); A Sperti 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Oregon 2013) 424; B Flanagan and S Ahern 'Survey of Common Law Supreme Court Judges' Attitude to Transnational law' (2011) 60 *International and Comparative Law Quarterly* 1; SG Calabresi 'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' (2006) 86 *Boston University Law Review* 1335; H Koh 'International Law as Part of Our Law' (2004) 98 *American Journal of International Law* 43; M Tushnet 'When is Knowing Less Better Than Knowing More?'

Although the significant number of death penalty cases in the US makes it somewhat of an outlier, this does not reduce its relevance. The US is one of the oldest democracies in the world, which gives its jurisprudence a unique history and context. The entire international human rights framework owes many of its provisions to the US Constitution.⁴⁰ This places the US in a fundamentally different position to India and South Africa, whose constitutions both were enacted after the adoption of the Universal Declaration of Human Rights in 1948. The US Supreme Court has interacted with the question of the constitutionality of the death penalty regularly during the past five decades. This timespan allows for an analysis of how a domestic court has dealt with an evolving and increasingly abolitionist international law context.

2.3.2. India

The second jurisdiction to be examined is India, whose constitution entered into force on 26 January 1950. The Indian Constitution was influenced by the constitutional systems of various jurisdictions. It contains the Westminster parliamentary model from the UK.⁴¹ On the other hand, rather than creating a special constitutional court, the judicial system was adopted from the Supreme

Unpacking the Controversy of the Supreme Court Reference to non-US law' (2006) 90 Minnesota Law Review 1275.

⁴⁰ C Booth and M du Plessis 'Home Alone? The US Supreme Court and International and Transnational Judicial Learning' (2005) European Human Rights Law Review 127.

⁴¹ VR Scotti 'India: A "Critical" Use of Foreign Precedents in Constitutional Adjudication' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Oregon 2013) 73-74.

Court model of the US.⁴² The executive role of a President, and a written constitution with a Bill of Rights, was also taken from the US.⁴³

The Indian constitutional system has many of the same English structures and practices that were adopted in the US. But its Supreme Court is a much newer institution than the US Supreme Court. Although the right to life provision in the Indian Constitution is similar to that in the US, the prohibition on cruel and unusual punishment was 'read in' by the Indian Supreme Court. This type of activism has been a feature of the court during various phases of its history, where it has been comfortable with adopting an opposing stance to the legislature.⁴⁴ This is perhaps reflected in the much higher rates of cross-citation used by the court from inception to 2010.⁴⁵

An analysis will be undertaken of the early decisions of the Indian Supreme Court in the late 1970's that largely followed the retentionist path of the US, as well as more recent cases such as *Chauhan* and *Satishbhusan*, where the death

⁴² *ibid* 75. The Indian Supreme Court comprises a Chief Justice and 25 judges, which presumably results in more variables in judicial interpretation and cross-citation practices than with a smaller court such as the US Supreme Court that has 9 judges.

⁴³ SP Sathé 'India: From Positivism to Structuralism' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 217-218.

⁴⁴ VR Scotti 'India: A "Critical" Use of Foreign Precedents in Constitutional Adjudication' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Oregon 2013) 80, 95; SP Sathé 'India: From Positivism to Structuralism' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 261-265. This can be contrasted with the US where the court has been more sensitive to criticisms that it has not at times sufficiently respected the separation of powers doctrine.

⁴⁵ *ibid* 85. Scotti reports that close to 10% of judgments handed down by the Indian Supreme Court between 1950 and 2010 contained references to foreign precedents, although she notes that generally the references are neutral in attitude. The US Supreme Court on the other hand has had an overall cross-citation rate between 1986 and 2010 of less than 1%. See A Sperti 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Oregon 2013) 405-406.

penalty has been significantly restricted. Although there are textual barriers to the judicial abolition of the death penalty in India, similar to the US, the Indian Supreme Court is starting to show signs of falling in line with the normative trends pertaining to the death penalty. This generally involves references to standards that fall short of being an international legal rule, but standards that retain enough weight to be discrete considerations in the final analysis of whether to reduce the scope of the death penalty. The Indian Supreme Court has also recently accorded direct weight to international law itself, especially treaty law and India's membership of international organisations such as the UN. A similar progression is therefore seen to the US, from an initial narrow textual focus to a taking account of the international context, from a retentionist judicial majority to a gradual chipping away at capital punishment.

2.3.3. South Africa

The third jurisdiction to be assessed is South Africa, which adopted its Final Constitution in 1995, and its first democratic constitution in 1993. It therefore offers an opportunity to consider a newer court in a fairly recently established democracy dealing with the same issues, but with less overt textual barriers and different historical factors at play in the background. South Africa has had a Westminster parliamentary system since the time the Union of South Africa came to be in 1910.⁴⁶ A Bill of Rights and judicial review were only brought into the South African

⁴⁶ C Rautenbach 'South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010)' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Oregon 2013) 191.

constitutional system when the country transitioned out of apartheid in the early 1990's. The specialist Constitutional Court created by the new constitution comprises eleven judges that are appointed for a non-renewable period of 12 years.⁴⁷ Whilst the court has handed down numerous landmark decisions, it has treaded a 'careful, yet innovative path' in order not to impose unsustainable burdens on other organs of state.⁴⁸ Due to South Africa's late coming of age as a constitutional democracy, there were substantial comparative influences on the final text of the constitution itself.⁴⁹ This has no doubt contributed to the leading role that the Constitutional Court has taken in citing foreign law.⁵⁰

The focus will be on South African Constitutional Court's decision in *Makwanyane*, which struck down the death penalty as unconstitutional in 1995.⁵¹ Two more recent extradition cases where capital punishment is implicated, *Mahomed* and *Tsebe*, will also be considered.⁵² Free from certain of the cultural, political, social and structural issues that face the US Supreme Court, it is more open for the Constitutional Court to engage with foreign and international human rights law. In later cases such as *Mahomed*, the court has explicitly drawn on international norms as a discrete consideration.

⁴⁷ Section 176 of the Constitution of the Republic of South Africa 1996.

⁴⁸ H Klug 'South Africa: From Constitutional Promise to Social Transformation' in J Goldworthy *Interpreting Constitutions* (OUP Oxford 2006) 320. The approach adopted by the Constitutional Court has been described as an exercise in 'judicial self-restraint'. DW Freedman 'Constitutional Structures and Government' in *The Law of South Africa* (Lexis-Nexis Johannesburg 2012) Vol 5(3) para 3.

⁴⁹ *ibid* 192. Germany and Canada in particular influenced its structural provisions and Bill of Rights.

⁵⁰ *ibid* 194. Rautenbach notes that the court has an average cross-citation rate of 52% in the cases it has heard between 1995 and 2010.

⁵¹ Parliament abolished the death penalty for all crimes in 1997, and South Africa acceded to the Second Optional Protocol to the ICCPR in 2002. See Criminal Law Amendment Act 1997.

⁵² *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC); *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC).

This section will now mention which courts and jurisdictions will not be the focus of this thesis, Other common law courts which have dealt with the death penalty will be briefly touched on where appropriate, especially Canada, the Privy Council and sub-Saharan Africa.⁵³ These cases will generally be excluded from specific analysis, except to the degree decisions from these jurisdictions have been referred to in the three focus jurisdictions.

Although Western Europe was in the vanguard of the abolition of the death penalty, no European jurisdictions will be the focus of this thesis. This avoids both language challenges with available texts, and the additional complexities of comparing civil law with common law countries. In addition, the dramatic move towards abolition in Europe was achieved largely at a legislative and executive level, and not through apex courts in Europe. This thesis will therefore broadly not deal with ECHR case law in depth, such as *Soering v The United Kingdom*.⁵⁴ These decisions will only be considered insofar as they have been referred to by courts in the three focus jurisdictions. The few national European cases, where the death penalty was before courts in Central and Eastern Europe, will be briefly

⁵³ *Abbott v Attorney General of Trinidad and Tobago* (1979) 1 WLR 1342; *Pratt and Another v Attorney-General for Jamaica* (1993) 98 ILR 335 (PC); *Guerra v Baptiste* [1995] 4 All ER 583; *Neville Lewis v The Attorney General of Jamaica* (2000) 57 WIR 275; *Catholic Commission for Justice, v A-G, Zimbabwe* 1993 (4) SA 239 (ZS); *Republic v Mbushuu* [1994] 2 LRC 335; *Patrick Reyes v The Queen* [2002] 2 AC 235; *Kindler v Canada* [1991] 2 SCR 779; *United States v Burns* [2001] 1 SCR 283.

⁵⁴ *Soering v United Kingdom* (1989) 11 EHRR 439.

mentioned in chapter six, which deals with the historical development of capital punishment norms.⁵⁵

This thesis will also not generally focus on precedents from international tribunals, such as the ICJ and the UN Human Rights Committee.⁵⁶ International tribunals are fundamentally differently placed to national courts. These tribunals must give effect to international legal instruments and international law, not a country specific constitution. International tribunal decisions will largely only be discussed where courts in the three focus jurisdictions refer to these decisions, as this reflects an engagement with international law sources. The exception will be the IACHR, as this tribunal provides two important case studies of the express consideration of the death penalty in customary international law terms.

2.3.4. Case law sources

A Table of the main cases that are dealt with in depth in this thesis is included as Appendix I. The cases were sourced primarily through a combination of published

⁵⁵ *Alkotmhnybirshg* [Hungarian Constitutional Court], No. 23/1990 (X.3 1) AB (24 October 1990), translated in 1 E Eur Case Rep Const L 177 (1994); *Valstybes Zinios* (Lithuanian Constitutional Court) No. 109-3004 (11 December 1998), translation available at <http://www.lrkt.lt/1998/n8a1209a.htm>; *Ophitsiynyi Visnyk Ukrayiny* (Constitutional Court of Ukraine) No. 1 I-rp99 4/2000 (29 December 1999), translation available at <http://codices.coe.int>; *Fletorja Zyrtare* (Albanian Constitutional Court) 33, 1301 (12 December 1999), translation available at <http://codices.coe.int>.

⁵⁶ *Ng v Canada* (Communication No 469/1991) 98 ILR 479; *Kindler v Canada* (Communication No 470/1991) 98 ILR 426; *Cox v Canada* (Communication No 539/1993) (1994) 15 HRLJ 410; *Pratt and Morgan v Jamaica* (Communications No's 210/1986 and 25/1987) 98 ILR 322; *Reid v Jamaica* (Communication No. 250/1987) (1990) 11 HRLJ 319; *Vienna Convention on Consular Relations (Paraguay v. United States of America)* [1998] ICJ Rep 258; *LaGrand (Germany v United States of America)* [1999] ICJ Rep 9; *Ocalan v Turkey* (Application no. 46221/99) ECHR 2003; *Roach and Pinkerton v The United States* (1987) Inter American Commission on Human Rights Resolution No. 3/87, case 9647 (United States).

law reports and online databases. The citations were checked against the literature on capital punishment and cross-citation in the three jurisdictions, in order to ensure that the main cases had been correctly identified. For the US, cases were sourced from the United States Reports and the Supreme Court Reporter, www.westlaw.com, <https://casetext.com>, and <https://supreme.justia.com/>. For India, sources were obtained from the All India Reporter and Supreme Court Cases. Online searches were undertaken on both www.sconline.com and <http://supremecourtfindia.nic.in/>. South African cases were sourced from the South African Law Reports and the online database www.jutalaw.co.za.

2.4. TYPES OF BORROWED LAW

This section discusses the type of foreign law and international law, referred to by national courts, which forms the subject of this thesis. The focus is on the citation of foreign judicial precedents by the apex courts of the three chosen jurisdictions. This includes all foreign precedents from any other national jurisdiction, both in respect of judicial outputs and judicial reasoning. This thesis will also consider decisions where courts refer to the legal position in other countries without reference to a foreign judicial precedent, as this has a bearing on how courts have regard to comparative state practice as a customary international law exercise. This includes foreign legal positions achieved by way of legislative enactment,

amendment or repeal.⁵⁷ Foreign academic opinion will not be considered, as this thesis is mainly interested in interactions between states.

In addition, although the decisions of international tribunals will be given less consideration, such jurisprudence will be considered in relation to its role in the development of international law, where the courts in the three focus jurisdictions refer to these decisions. For example, the South African Constitutional Court referred to a decision by the UN Human Rights Committee in *Makwanyane*.⁵⁸ The treatment of both international treaty law and customary international law by the courts will also be assessed, as this has a bearing on the key consideration of whether cross-citation is a purely domestic interpretation exercise, or whether it aims to draw on and impact the international human rights normative arena.

2.5. RIGHTS UNDER CONSIDERATION

This section will now further discuss which human rights are implicated in death penalty cases, and which rights will therefore be the subject matter of this thesis. Although the citation of comparative law is used in other areas of law, that usage is beyond the scope of this thesis, which focuses only on cross-citation in a capital punishment context. The death penalty is a violation of the right to life, but other

⁵⁷ Other studies focus specifically on references to judicial precedents only. See T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart, Oregon 2013) 5.

⁵⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) 473.

rights are implicated by capital punishment.⁵⁹ Since human rights instruments frequently qualify the right to life and thereby allow for the death penalty, judges have drawn on the prohibition against cruel and unusual punishment as the basis for testing the validity of the death penalty. The death penalty is therefore 'associated with two fundamental human rights norms.'⁶⁰ But judges have also extensively referred to the right to dignity as a further consideration in death penalty cases.

2.5.1. The right to life and the role of dignity

It is generally agreed that the 'issue of the death penalty is at the core of the right to life.'⁶¹ The right to life is a fundamental right, in the sense that it underpins other rights. Herndl argues that of 'all the norms of international law, the right to life must surely rank as the most basic and fundamental, a primordial right which inspires and informs all other rights.'⁶² Ramcharan writes similarly that 'the right to life is an imperative norm of international law which should inspire and influence all other human rights.'⁶³

⁵⁹ Prezetacznik states that '(h)uman rights are now recognised as universal rights both as regards *ratione personae* (subject-matters) and *ratione materiae* (personal scope).' See F Prezetacznik 'The right to life as a basic human right' (1976) IX Human Rights Journal 585, 587.

⁶⁰ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 1993) 18.

⁶¹ *ibid* 9.

⁶² K Herndl in BG Ramcharan (ed) *The right to life in international law* (Martinus Nijhoff Leiden 1985) xi. Prezetacznik states that a 'basic human right is the right to life, from which all other human rights stem' (F Prezetacznik 'The right to life as a basic human right' (1976) IX Human Rights Journal 585, 589).

⁶³ BG Ramcharan (ed) *The right to life in international law* (Martinus Nijhoff Leiden 1985) 6.

The relationship between the right to life and other rights can be viewed to be one of dependency. Dinstein states that

the right to life is 'incontestably the most important of all human rights. Civilized society cannot exist without legal protection of human life. The inviolability or sanctity of life is, perhaps, the most basic value of modern civilization. In the final analysis, if there were no right to life, there would be no point in the other human rights.'⁶⁴

The protection of the right to life is tied up with respecting the dignity of persons, as human rights 'aim at promoting and protecting the dignity and integrity of every individual human being.'⁶⁵

2.5.2. The prohibition of cruel and unusual punishment

Where the right to life authorises capital punishment, there is a tension with the prohibition on cruel and unusual punishment, as the latter potentially prohibits the death penalty.⁶⁶ Cruel and unusual punishment provisions have consequently been used to attack the death penalty indirectly, since international treaty law on the right to life appears to authorise capital punishment.⁶⁷ The cruel and unusual punishment clauses of the various international instruments are largely similar in

⁶⁴ Y Dinstein 'The right to life, physical integrity and liberty' in L Henkin (ed) *The International Bill of Human Rights* (Columbia U Press New York 1990) 114.

⁶⁵ *ibid* 114.

⁶⁶ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 1993) 17.

⁶⁷ *ibid* 21.

wording.⁶⁸ Minimum standards have been developed in in terms of this international treaty law, together with customary international law, under the ‘cruel and unusual punishment’ umbrella, which have had the effect of restricting the scope of the death penalty.⁶⁹

The implicit limitation of capital punishment by cruel and unusual punishment provisions is particularly relevant to courts or tribunals that adopt a ‘dynamic and “evolutive” construction’ of national and international texts.⁷⁰ Cruel and unusual punishment is an evolving standard that takes into account changes in community mores, thus allowing for changing attitudes to the death penalty, in the same manner as an open and flexible right to life provision.⁷¹ This evolutive aspect of cruel and unusual punishment clauses has become a common theme in death penalty case law, where courts interpret similarly worded clauses that ‘essentially enunciate the same principles.’⁷² The cruel and unusual punishment norm is important then in assessing the role of courts in contributing towards capital punishment norms ‘evolving’ towards abolition, in part by way of referring to how other courts have engaged with the same prohibition.⁷³

⁶⁸ Article 7 of the ICCPR states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 3 of the ECHR states; “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Article 5 (2) of the IACHR states: “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”

⁶⁹ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 1993) 21.

⁷⁰ *ibid* 7.

⁷¹ P Hodgkinson and A Rutherford, *Capital Punishment* (Waterside Press Hampshire 1996) 21.

⁷² WA Schabas *The Death Penalty as Cruel Treatment and Torture* (Northeastern University Press Boston 1996) 3-4.

⁷³ *ibid* 9.

The following section will explain in more detail the precise methodology to be used in this thesis. To gain an understanding of what drives the apex courts of the US, India and South Africa to draw on foreign law, this requires a comprehensive analysis of the death penalty case law in these three chosen jurisdictions. As stated above, this thesis will use a three-part matrix to assess this jurisprudence.

2.6. MATRIX OF CONSIDERATIONS

The matrix used in this thesis was ultimately derived from a reading of the case law, as the primary source material under examination. However, the process was initially guided by a thorough assessment of secondary sources, in order to establish themes into which the academic analysis could be grouped. It was apparent from a reading of the critical literature that the theoretical explanations of cross-citation could be grouped broadly into three categories. These groups entail the view of comparative citation, firstly, as a constitutional interpretation technique, secondly, as driven by a consideration of soft values underpinning text, and finally as an exercise in the development and application of international law.

The capital punishment case law from the three focus jurisdictions was then analysed in this light. The conclusion was reached that the jurisprudence can be understood through these same three prisms. The three categories are not discrete, and there is some overlap between all three. At times a value-oriented understanding of cross-referencing will resemble more liberal interpretation

approaches, and a values approach may also appear similar to an international law analysis, as it also takes in comparative state practice. However, the matrix discussed further in detail below offers a viable methodology to assess the case law, whilst also allowing for coherence with the literature. This model commences firstly with a consideration of the role of the text in constitutional interpretation.

2.6.1. Text and Interpretation

No matter what interpretative approach or philosophy is adopted by a court, the starting point for the court will always be to look at the textual provision under consideration. The predominant approach to constitutional interpretation in the US has focused on the literal meaning of the text and the original intention of the constitutional drafters, rather than using a more purposive methodology.⁷⁴ Those judges that are wedded to this approach place a paramount importance on the text

⁷⁴ M Tushnet 'The United States: Eclecticism in the Service of Pragmatism' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 47. It is beyond the scope of this thesis to deal with constitutional interpretation theory in detail, suffice to mention that the literalist and purposive approaches represent an important dichotomy in debates about constitutional interpretation. Sathe states that '(t)here are basically two models of constitutional interpretation. One is legal positivism, 'which holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else' ... In the second model, which we shall call structuralism, the Constitution is interpreted liberally, as a totality, in the light of the spirit pervading it and philosophy underlying it.' Positivism or literalism 'strictly speaking, does not permit the use of external aids to interpretation such as foreign law, whereas a more structuralist approach adopts a more liberal attitude to external sources. SP Sathe 'India: From Positivism to Structuralism' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 226 and 232. Just as India gradually progressed to a more purposive or structuralist methodology as noted by Sathe, South Africa emerged from a positivist legal culture during apartheid to a style of generous and purposive interpretation under the new Constitutional Court. H Klug 'South Africa: From Constitutional Promise to Social Transformation' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 292-293. On the other hand, an originalist approach, focused on the intentions of the constitutional originators, continues to be held in high regard in the US Supreme Court. This focus typically shies away from any comparative references. K Lane Scheppelle 'Jack Balkin is an American' 2013 Yale Journal of Law and the Humanities 25(1) 23, 24-25 and 38-41. See further on the divide between the literalist and purposive approaches: A Barak *Purposive Interpretation in Law* (Princeton University Press Princeton 2005) 86-88, where Barak contrasts subjective and objective purpose; LH Tribe *The Invisible Constitution* (OUP Oxford 2008) 8.

of the constitution, and the court's core challenge is to ascertain and elucidate the meaning of this text. In death penalty cases, this means an assessment of the meaning of more than two century-old constitutional amendments that contain a limited right to life and a ban on cruel and unusual punishment. A traditional approach to finding the limits to the breadth and depth of these constitutional restrictions on state policy narrows analyses to domestic precedent and textual elucidation.⁷⁵ The decisions of foreign courts and other organs of state are highly unlikely to be seen as necessary and appropriate to the interpretative process.

Furman v Georgia, decided in the US in 1972, was a watershed decision where the US Supreme Court declared the death penalty unconstitutional.⁷⁶ The court found that the death penalty, in the manner it was being applied at the time, infringed the Eighth and Fourteenth Amendments to the Constitution. Chief Justice Burger, in his dissent in *Furman*, was not enthused about using foreign law, when he stated that the global movement towards abolition worldwide of capital punishment 'hardly points the way to a judicial solution in this country under a written Constitution.'⁷⁷ The constitutional problem must therefore be solved by judges having regard to what is contained in the Constitution, without reference to comparative law.

Justice Scalia in the US has been one of the loudest judicial voices in favour of conservative approaches to interpretation. Scalia J has emphasised the primacy

⁷⁵ M Tushnet 'The United States: Eclecticism in the Service of Pragmatism' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 47.

⁷⁶ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972).

⁷⁷ *ibid* 2811.

of the US constitutional text, whilst dismissing the relevance of the normative choices of other countries.⁷⁸ Scalia J stated in his concurrence in *Callins* that there was no room for Eighth Amendment arguments in death penalty cases, in light of the Fifth Amendment clearly permitting the death penalty.⁷⁹ He believed that arguments against the death penalty refer too frequently to subjective and personal considerations, and not 'the text and tradition of the constitution.'⁸⁰

Similar to the Fifth Amendment in the US, article 21 of the Indian Constitution contains express wording that makes allowance for capital punishment. The prohibition of cruel and unusual punishment is not articulated in India's constitution, but was read in later by the Supreme Court.⁸¹ But the explicit contemplation of the death penalty in the constitutional text places the Indian Supreme Court in a comparable situation to the US Supreme Court. The trajectory of its jurisprudence has likewise travelled a correlative path to the US, at least from 1976 onwards when the US Supreme Court reversed *Furman* in *Gregg v Georgia*.⁸²

In 1980 the Supreme Court of India, when asked to consider the constitutionality of section 302 of the Penal Code, which provided for the death penalty, in terms of articles 19 and 21 of the Constitution, conclusively upheld the death penalty, although limited its application to only the 'rarest of the rare cases'.⁸³

⁷⁸ *Thompson v Oklahoma* 487 US 815, 108 S.Ct. 2687 (1988).

⁷⁹ *Callins v Collins* 510 US 1141, 114 S.Ct. 1127 (1994) 1141.

⁸⁰ *ibid.*

⁸¹ *Francis Coralie Mullin v Administrator Union Territory of India* AIR 1981 SC 746.

⁸² *Gregg v Georgia* 428 US 153, 96 S.Ct. 2909 (1976).

⁸³ *Bachan Singh v State of Punjab* AIR 1980 SC 898.

Sarkaria J held that in light of the express language in article 21, it is impossible to say that the death penalty either *per se* or because it involves execution by hanging, constitutes unreasonable, cruel or unusual punishment.⁸⁴ Later in 1992, Jagannatha Shetty J in *Triveniben* cited *Furman* regarding constitutional text being paramount to judicial opinion.⁸⁵

In South Africa, the third jurisdiction under consideration, its new democratic constitution entered into force initially as an interim constitution in 1993, and in its final form in 1995. The first case before the newly created Constitutional Court, *S v Makwanyane*, concerned the constitutionality of the death penalty. Although the new constitution contained an open-ended right to life provision with no reference to capital punishment, the court was at pains to emphasise the primacy of the domestic constitution as the starting point for its analysis. Chaskalson, Judge President of the court, referred in this regard to the potential inapplicability of foreign precedents, when he stated that comparative law would be important in the initial period of the court's work, but with the caveat that it may 'not necessarily offer a safe guide to the interpretation of chap 3 of our Constitution.'⁸⁶ Chaskalson JP then elaborated on the differences that may exist in foreign legal systems, which would be important to bear in mind in South African constitutional interpretation. These included the internal text and architecture of the constitution, as well as external systemic, historical and contextual factors.⁸⁷

⁸⁴ *ibid* 930.

⁸⁵ *Triveniben v State of Gujarat* (1992) LRC (Const) 425, 442.

⁸⁶ *S v Makwanyane* 1995 (3) SA 391 (CC) 414-415; cf *Mistry v INMDC* 1998 (4) SALR 1127 (CC) 1133.

⁸⁷ *ibid* 415.

This preference for a more literal approach to constitutional wording is usually tied to an appeal for judicial restraint in deference to the legislature. Rather than drawing on broader values or principles to understand a constitutional provision, judges are encouraged to acknowledge their more limited interpretative role, rather than step into the policy arena. Powell J in his dissent in *Furman* was concerned that the court was encroaching upon an area that is the historic prerogative of the legislature.⁸⁸ Rehnquist J in his dissent also critiqued the court for overstepping the mark of legitimacy, commenting that the court should not ignore its responsibility of self-restraint merely because the court was given the final say regarding constitutionality.⁸⁹ This deferential approach inevitably orients a judge towards a more narrow and domestic field of vision. The constitutional task is concentrated on what the legislature originally intended when enacting legislation, or in a line of US cases, the current predominating normative position of domestic state legislatures.

The Indian Supreme Court has generally also been deferential to the legislature in this area, at least partly due to the phrasing of article 21 of the Indian Constitution. Sen J in the minority judgment in *Rajendra Prasad* argued that the substantive merits of death penalty are for parliament to decide, and asserted that the court could not redefine the Penal Code to *de facto* abolish the death penalty.⁹⁰ Sarkaria J for the majority in the *Bachan Singh* case articulated the broad proposition that sentencing discretion is a policy matter best left to the legislature.⁹¹

⁸⁸ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 2818.

⁸⁹ *ibid* 2842.

⁹⁰ *Rajendra Prasad v State of U.P.* AIR 1979 SC 916, 946 and 957.

⁹¹ *Bachan Singh v State of Punjab* AIR 1980 SC 898, 938.

The majority of the court confirmed later in *Triveniben* that, similar to the US, the Indian legislature was aware of contemporary social needs, and therefore enacted legislation allowing for and regulating the death penalty.⁹²

Notwithstanding that text is occasionally a barrier to cross-citation, it can also be seen as the gateway to considerations of foreign law, as courts seek to flesh out the meaning of open-ended rights provisions. Since the right to life and the right not to be subjected to cruel and unusual punishment are so broadly worded, and consequently open to interpretation, it is perhaps unsurprising that this is an area of rights litigation which has witnessed the greatest amount of activity around cross-citation. Whilst certain judges regard cross-citation as an affront to traditional more literal approaches to interpretation, other judges pursue a more purposive style of interpretation that involves a search for lessons from other jurisdictions in like cases, especially when faced with widely framed rights provisions. For many of these borrowing judges, drawing on foreign cases remains merely a tool of constitutional interpretation that assists with the key task of ascertaining the meaning of legal wording. Here comparative law offers examples of how other territories have solved the same constitutional problem that is faced by the borrowing court. The foundations for drawing on foreign cases are particularly appropriate where similar text reveals that a constitution received comparative exposure at a drafting stage.⁹³ Even the US Supreme Court, in a

⁹² *Triveniben v State of Gujarat* (1992) LRC (Const) 425, 445.

⁹³ M Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163.

jurisdiction where cross-citation has been most contentious, has been favourably disposed to the experiences of English courts for this reason.⁹⁴

In South Africa, a clear willingness to engage with comparative material was demonstrated in *S v Makwanyane*.⁹⁵ Chaskalson JP observed that foreign authorities are valuable because they allow for a consideration of the different points of view adopted in similar difficult cases in other jurisdictions.⁹⁶ This is a simple statement of the significant value of solving problems by analogy. The resolution of complex questions is made easier through a consideration of how other jurisdictions have dealt with similar questions. Mahomed J commented that the court would consider foreign cases 'relevant to the resolution of the problem both in South Africa and abroad', together with public international law that would inform the resolution of the question before the court.⁹⁷ These South African judges clearly view the task of the court as solving the same problem that has been faced elsewhere.

In *Mohamed*, the South African Constitutional Court relied more heavily on the right to life than in *Makwanyane*.⁹⁸ The Constitutional Court also highlighted the differences between the South African and Canadian Bill of Rights texts.⁹⁹ Whereas section 7 in the Canadian Charter has an internal limitation clause, the

⁹⁴ DJ Seipp, 'Our Law, Their Law, History, and the Citation of Foreign Law' (2006) 86 Boston University Law Review 1417, 1424.

⁹⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) 401-453.

⁹⁶ *ibid* 413.

⁹⁷ *ibid* 489.

⁹⁸ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC)

⁹⁹ *ibid* 912-914.

South African Constitution is not limited in the same manner, as there are no qualifications or exceptions to the open phrasing of section 10. Here the court engaged with foreign case law in order to unpack the meaning of the South African provision, but without treating this as a matter of normative comparison beyond the interpretative task at hand.

In conclusion, the US and India demonstrate that it is difficult to declare the death penalty unconstitutional *per se* in the face of clear language in a constitution permitting capital punishment. However, it will be seen shortly that the courts in India and the US have manoeuvred around restrictive provisions, where judges have declared aspects of the administration of the death penalty to be unconstitutional. Openly worded provisions on the other hand, such as in South Africa, play an enabling role, allowing courts to more easily engage with foreign precedents. However, it is evident that this use of comparative law is oriented towards a defined task of judicial problem solving. The foreign case merely assists the borrowing judge in clarifying the meaning of the domestic text, in order to solve the constitutional problem in the case before the court. On the other hand, the second prong of the matrix of considerations to be applied to the case law, is the degree to which courts are engaging in a search for shared values when having regard to foreign law.

2.6.2. Values and Standards

Due to the broad phrasing of the right to life and the prohibition on cruel and unusual punishment, courts inevitably do not find ready answers to a constitutional problem in the text itself. In addition, when the problem is a novel one, domestic judicial precedents are of reduced value. Courts may then appeal to more principle-based considerations that involve a consideration of the values underpinning the constitutional text. On the one hand this motivates for an analysis of the current values of a community or society. But it can also trigger a comparative survey, especially when courts in other countries have previously conducted their own assessments of the same values or standards.

Stewart J in *Furman* supported the applicability of a value standard, by stating that the death penalty is ‘morally unacceptable’ to the people of the United States.¹⁰⁰ This is a value judgment that pushes the constitutional considerations by the court beyond textual interpretation, to wider deliberations of what society considers tolerable state conduct. The US Supreme Court frequently refers in this regard to ‘contemporary standards’, especially in relation to cases concerning cruel and unusual punishment. In *Trop*, the court held that the cruel and unusual punishment clause must be interpreted by referring to the ‘evolving standards of decency that marks the progress of a maturing society.’¹⁰¹ The court stressed that

¹⁰⁰ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 2788. Stewart J stated further at 2789 that it is not a matter of an opinion poll, but of assessing what people would think were all the information available. On the basis of this material, he concluded that the American people would conclude that the death penalty is immoral, and therefore unconstitutional.

¹⁰¹ *Trop v Dulles* 356 US 86, 78 S.Ct. 590 (1958) 598. The Supreme Court referred to *Weems v United States* 217 US 349, 30 S.Ct. 544 (1910), 378, where it was stated that the words of the

this does not involve an assessment of public opinion, but a notion of enduring yet evolving values. Brennan J in his concurrence in the *Furman* case stated that a severe punishment must not be unacceptable to contemporary society.¹⁰² Recently the Supreme Court referred to the standard of a 'civilised world' in *Hall*.¹⁰³ The latter is a more explicit endorsement of having regard to values and principles outside of the US, not as applicable legal norms but more in the way of evaluative guidelines.

The *Trop* court placed the value of dignity at the core of cruel and unusual punishment considerations, when it was held that the concept underlying the clause is 'nothing less than the dignity of man.'¹⁰⁴ Stevens J, in his dissent in *Stanford*, emphasised considerations of decency when he stated that executing juveniles was inconsistent with 'evolving standards of decency in a civil society.'¹⁰⁵ In 2002, Stevens J in *Atkins* made the association between decency and dignity, in holding that 'dignity is a matter of evolving standards of decency in a maturing society.'¹⁰⁶ Dignity was integral to evaluations of whether the death penalty satisfies the due process requirement that prohibits cruel and unusual punishment. An emphasis on the constitutional value of dignity is shared with India and South Africa, but in the US and India this appears to be limited to the cruel and unusual punishment clause. In South Africa on the other hand, the value of dignity is

Eighth Amendment are not static, nor precise, and that the constitutional prohibition against cruel and unusual punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'

¹⁰² *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 2746.

¹⁰³ *Hall v Florida* 572 US (2014) 22.

¹⁰⁴ *Trop v Dulles* 356 US 86, 78 S.Ct. 590 (1958) 597.

¹⁰⁵ *Kevin Nigel Stanford* 537 US (2002) 6.

¹⁰⁶ *Atkins v Virginia* 536 US 304, 122 S.Ct. 2242 (2002) 310.

regarded as a fundamental value underpinning the entire Bill of Rights.¹⁰⁷ This differential weighting accorded to dignity affects the role that comparative law plays in each jurisdiction, and potentially explains the varied outcomes in the death penalty normative positions in the three jurisdictions. Notwithstanding a common commitment to human dignity, the articulation of the precise outcomes of that commitment, when faced with a specific normative proposition such as the legitimacy of capital punishment, ranges the full gamut from abolition to approval.

Stevens J in *Thompson* earlier had found that his conclusion that the execution of a person less than sixteen years of age would offend civilized standards of decency had been expressed 'by other nations that share our Anglo-American heritage, and by the leading members of the Western European Community.'¹⁰⁸ Stevens J made the connection between an abstract standard of a civilized society, and an assessment of how other deemed civilized societies were treating the same issue of the juvenile death penalty. This way of solving a constitutional death penalty case transcends a narrower focus on textual meaning, or judicial problem solving, in favour of a much broader search for both the purpose of a provision and a contemporary value outside of the text that informs its meaning. The current standard is determined by reference to both domestic and international reference points.

¹⁰⁷ It is a foundational value mentioned first in section 1 of The Constitution of the Republic of South Africa 1996.

¹⁰⁸ *Thompson v Oklahoma* 487 US 815, 108 S.Ct. 2687 (1988) 2696.

Justice Scalia has been scathing about what he regards as a less accountable form of judicial encroachment on the legislature's mandate. In *Thompson*, he stated that 'the plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries, ... is totally inappropriate as a means of establishing the fundamental beliefs of this Nation.'¹⁰⁹ So the fundamental beliefs of the US are relevant, but Scalia J rejects the relevance of the extra-textual value choices made by other states.

In India, similar references have been made to societal standards. Sarkaria J referred in *Bachan Singh* to the fact that India is party to the ICCPR, which represents the 'evolving attitudes and standards of decency in a maturing world.'¹¹⁰ He recognised however that article 6 does not prohibit the death penalty, but rather that the requirement is that it must not be imposed arbitrarily, in a manner similar to article 21 of the Indian Constitution.¹¹¹ Sarkaria J concluded that India's international commitment does not therefore go beyond what is provided for in the Indian Constitution, and that most of the countries that are party to the ICCPR have retained the death penalty (at least at the time of the decision in 1980).¹¹² The court in *Macchi Singh* framed the constitutionality of capital punishment as an issue to be determined by the standard of 'the collective conscience of the community'.¹¹³ Shetty J referred in *Triveniben* to the *Trop* test of evolving standards of decency, and concluded that the court could 'learn from the history of

¹⁰⁹ *ibid* footnote 4 of Scalia J's judgment.

¹¹⁰ *Bachan Singh v State of Punjab* AIR 1980 SC 898, 930.

¹¹¹ *ibid* 930-931.

¹¹² *ibid*.

¹¹³ *Allauddin Main v State of Bihar* AIR 1989 SC 1456, 1467.

every country.¹¹⁴ The relevance of the history of other countries appears to be the value judgments made in other countries, as much as the normative legal positions in those countries.

Bhagwati J in his dissent in the *Bachan Singh* case, similarly to the US, placed the value of dignity front and centre of his analysis, when he stated that the Indian Constitution as a whole 'recognises and upholds the dignity of man'.¹¹⁵ The majority in the *Rajendra Prasad* case pleaded for abolition, and referred to a 'world order voicing the worth of the human person'.¹¹⁶ The court observed that:

Maybe the fuller and finer flow of the constitutional stream of human dignity and social justice will shape the provision more reformatively. Suffice it to say that the battle against death penalty (sic) by parliamentary action is gaining ground and those who do live in the ivory tower – and Judges, hopefully, do not – will take cognizance of this compassionate trend.¹¹⁷

In South Africa, Mahomed J was of the view in *Makwanyane* that to hold that the death penalty is cruel and unusual is a value judgment legitimised in part by being consistent with the attitudes of the rest of the world to what is tolerable punishment in a 'civilised community'.¹¹⁸ Mahomed J focused on a convergence of

¹¹⁴ *Triveniben v State of Gujarat* (1992) LRC (Const) 425, 443.

¹¹⁵ *Bachan Singh v State of Punjab* AIR 1980 SC 898.

¹¹⁶ *Rajendra Prasad v State of U.P.* AIR 1979 SC 916, 925.

¹¹⁷ *ibid* 928.

¹¹⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) 487. Mokgoro J on the other hand stressed the importance of traditional values: 'Section 35 seems to acknowledge the paucity of home-grown judicial precedent upholding human rights, which is not surprising considering the repressive nature of the past legal order. It requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and internationally accepted values in the cultivation of a human rights jurisprudence for South Africa. However, I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality. These

domestic and international values in the clearest expression that the task of the court and the purpose of comparative analysis pivoted on considerations of the degree of convergence of values in 'civilised societies'.

The South African constitution itself, in the interpretation clause contained in section 39, refers to the court being guided by the values of open and democratic societies. There is therefore an express constitutional reference to what is presumably a universal set of values involving notions of freedom and democracy. Kentridge J stated that most countries one would naturally include in the category of open and democratic societies have abolished the death penalty, either through legislation or disuse.¹¹⁹

Similar to the US and India, the South African Constitutional Court has tied this type of value analysis to considerations of dignity. The right to dignity is an enumerated right in section 10 of the Final Constitution. Mokgoro J also stated in *Makwanyane* that the traditional African value of *ubuntu* is an important thread in the constitution that translates as 'humaneness.'¹²⁰ She argued that the notion of dignity articulated in the United States, Hungary and in the ICCPR, is consistent with this traditional value pertaining to humaneness and respect for life before concluding that 'life and dignity are two sides of the same coin.'¹²¹ In the later case

enduring values are not the same as fluctuating public opinion. They are values that should be drawn from the domestic arena' (499).

¹¹⁹ *ibid* 472. Kentridge J noted that the exceptions are the 'great democracies of India and the United States.'

¹²⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) 501.

¹²¹ *ibid* 502.

of *Mahomed*, the court reiterated this link between the rights to life and dignity as the primary focus of its decision.¹²²

All three jurisdictions demonstrate that courts do not limit themselves to cross-citation as a matter of narrow textual interpretation and judicial problem solving. The enquiry shifts to a consideration of the values underpinning right to life and cruel and unusual punishment norms, which in turn leads to an engagement with foreign precedents in a different manner to offering *ad hoc* textual interpretation assistance. However, courts that assess the value choices made in other specific jurisdictions are not looking to the 'binding-ness' of these precedents or the overall patterns across a wide array of territories. A more quantitative assessment of comparative norms typifies a more internationalist approach that will be considered in the next section.

2.6.3. State Practice and International Norms

The final consideration, in terms of which the case law of the three selected jurisdictions will be examined, assesses whether courts intend to develop or enforce an international norm when citing foreign law. Whereas the appeal by judges to contemporary standards or values invites a qualitative comparative value assessment, the type of cross-citation examined here typically invokes a more measured survey of the normative position in other countries with respect to the death penalty. Likewise, whereas a consideration of evolving values may permit a

¹²² *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) 910.

more limited analysis of certain jurisdictions that are particularly suited from a historical or cultural perspective, an internationalist approach demands consideration of a broad group of jurisdictions. In addition, domestic courts here also refer to developments in international law.

Breyer J, in his dissenting judgment in *Knight*, reviewed case law from Jamaica (Privy Council), India, Zimbabwe, and the European Court of Human Rights, as courts that struck down the death penalty on the basis of excessive delay.¹²³ He stated that a ‘growing number of courts outside the United States - courts that accept or assume the lawfulness of the death penalty - have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel.’¹²⁴ Breyer J added that ‘(w)illingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a “decent respect to the opinions of mankind.”’¹²⁵

Here the court is not looking to the value choices made in other countries, but the wider practices of other courts dealing with the question of the delayed implementation of a death penalty sentence. Although Justice Breyer describes the legal value of these comparable cases as the ‘opinions’ of other jurisdictions, this is tantamount to a consideration of the comparable legal position in these countries. In a similar manner, Stevens J referred in *Thompson* to various jurisdictions in

¹²³ *Knight v Florida* 528 US 990, 120 S.Ct. 459 (1999) 461-464.

¹²⁴ *ibid* 463.

¹²⁵ *ibid* 464. See *Coker v Georgia* 433 US 584, 97 S.Ct. 286 (1977) footnote 10, which assesses how many nations retain the death penalty for rape.

which the death penalty has been abolished.¹²⁶ Stevens J emphasised that the Supreme Court had on a prior occasion embarked on such a course of comparative survey, when he stated the court had ‘previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.’¹²⁷ Once again, the legal position in other countries is described as a viewpoint, but in the context of the decision amounts to a consideration of the normative situation in foreign jurisdictions, as opposed to underlying values.

Stevens J has also identified trends towards the abolition of capital punishment, by referring to a ‘national consensus’¹²⁸ and an ‘apparent consensus in the United States and globally against the execution of juveniles.’¹²⁹ He further mentioned in *Atkins* the ‘consistency of direction of change’ in eliminating the death penalty for the mentally handicapped.¹³⁰ Although the policies of the world community were ‘by no means dispositive’, this collective policy lent support to the Court’s ‘conclusion that there is a consensus among those who have addressed the issue.’¹³¹ Breyer J similarly in *Ring* noted that most other countries have abandoned the death penalty and that the United States was one of the four frequent users of capital punishment, but that only 3% of the counties in the United States imposed 50% of death penalties carried out.¹³² Sessions J stated in a

¹²⁶ *Thompson v Oklahoma* 487 US 815, 108 S.Ct. 2687 (1988) 830.

¹²⁷ *ibid* footnote 31, where Stevens J refers to *Trop v Dulles*; *Coker v Georgia*; *Edmund v Florida*.

¹²⁸ *Kevin Nigel Stanford* 537 US (2002) 5; *Atkins v Virginia* 536 US 304 (2002) 315.

¹²⁹ *Toronto Patterson v Texas* 536 US 1811, 123 S.Ct. 24 (2002).

¹³⁰ *Atkins v Virginia* 536 US 304, 122 S.Ct. 2242 (2002) 315.

¹³¹ *ibid* 317.

¹³² *Ring v Arizona* 536 US 584, 122 S.Ct. 2428 (2002) 5.

Vermont decision that ‘capital punishment is under siege.’¹³³ All of these instances are considerations of not merely isolated foreign cases, but the legal position around the world insofar as specific death penalty issues are concerned, such as juvenile capital punishment. The incidence of a consensus, and a trend towards a consensus, is important enough for judges in different cases to have expressly mentioned it as an independent consideration. It is apparent that the consensus amongst states was a factor in the decisions that referred to these trends.

The relevance of an international consensus has been met with disdain by other Supreme Court Justices. In *Atkins*, Rehnquist CJ in his dissent stated that the majority’s assessment of the legislative view was a ‘post hoc rationalization for the majority’s subjectively preferred result.’¹³⁴ There was ‘little support in precedents for this methodology’ and it was ‘antithetical to considerations of federalism.’¹³⁵ Rehnquist CJ failed to see how the views of other countries could ‘provide any support’ and concluded that a national consensus was important, whereas the views of other countries is ‘just not relevant.’¹³⁶ Scalia J in his dissent was even more dramatic in his opposition to the majority’s decision. After stating that this was the ‘pinnacle of the death is different eighth amendment jurisprudence,’ he remarked that the decision should win the ‘Prize for the Court’s Most Feeble Effort to fabricate a consensus to refer to the members of the so-called world community, whose notion of justice are (thankfully) not always those of

¹³³ *United States of America v Donald Fell* 536 US 584, 122 S.Ct. 2428 (2002) 41.

¹³⁴ *Atkins v Virginia* 536 US 304, 122 S.Ct. 2242 (2002) 305.

¹³⁵ *ibid* 306.

¹³⁶ *ibid* 308-309.

our own people.¹³⁷ On this line of reasoning, any normative consensus among foreign states is of no independent value or weight to the US Supreme Court.

The reference to comparative law by the US Supreme Court has therefore remained controversial but this has not halted its usage. In 2005 in *Roper v Simmons*, the US Supreme Court was faced with the question whether the application of the death penalty to juveniles was constitutional.¹³⁸ In striking down the juvenile death penalty, the Court referred to numerous international instruments such as the United Nations Convention on the Rights of the Child, the ICCPR, the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child.¹³⁹ This was a shift from a previous consideration of foreign cases in the main, to an analysis of applicable international treaties and instruments. After referring to the ‘weight of authority ... in the international community’ against the juvenile death penalty, Justice Kennedy in the majority opinion emphasised that the ‘opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.’¹⁴⁰ Kennedy relegated foreign law to a subsidiary role, where it could only provide support for the court’s independently reached decision. However, the court for the first time used a phrase like ‘weight of authority’ to describe the foreign and international law referred to in a decision. Cross-citation on this basis would appear to have had a significant impact on the court’s reasoning.

¹³⁷ *ibid* 315.

¹³⁸ *Roper v Simmons* 543 US 551, 125 S.Ct. 1183 (2005).

¹³⁹ *ibid* 576.

¹⁴⁰ *ibid* 578.

In India, Bhagwati J in his minority opinion in *Bachan Singh* referred in various instances to the relevance of ascertaining any applicable international standards. He noted that the United Nations has also taken a great interest in the abolition of capital punishment, concluding that the

objective of the United Nations has been and that is the standard set by the world body that capital punishment should ultimately be abolished in all countries. This normative standard set by the world body must be taken into account in determining whether the death penalty can be regarded as arbitrary, excessive and unreasonable so as to be constitutionally invalid.¹⁴¹

Bhagwati J asserted that the evolving international norm and body of opinion in civilized societies is leading towards abolition. When Justice Bhagwati stated that proportionality must be judged by objective factors such as 'international standards or norms or the climate of international opinion, modern penological theories and evolving standards of human decency', this is one of the most explicit endorsements by a judge of determining a domestic constitutional question by having regard directly to an international legal norm.¹⁴²

The Indian Supreme Court has also attached importance to the global trend towards abolition. The court held in *Rajendra Prasad* that 'cultural winds of world change' were regarded as a relevant factor in interpretation.¹⁴³ Bhagwati J raised the question as to 'what is the international trend of opinion in regard to the death penalty', concluding that a large number of countries have abolished it, and that

¹⁴¹ *Bachan Singh v State of Punjab* AIR 1980 SC 898, 1336.

¹⁴² *ibid* 1354.

¹⁴³ *Rajendra Prasad v State of U.P.* AIR 1979 SC 916, 920.

most European and American countries have moved towards abolition.¹⁴⁴ As with the US Supreme Court, the attention paid to the consensus in states around the world is an engagement with the global development of norms as a distinct factor in the borrowing court's decision-making.

In 2014, the Indian Supreme Court relied in *Chauhan* on various international law human rights instruments to declare the application of the death penalty invalid in respect of mentally ill persons.¹⁴⁵ This was similar to the progression in the US over time from considerations of isolated foreign cases, to wider trends in global practice, to the direct citation of international treaties and instruments. Similarly, in *Satishbhushan* in 2009, the court had substantially restricted the three-decade old 'rarest of the rare' test, whilst referring to 'evolving constitutional sensibilities' in the US and Canada.¹⁴⁶

In South Africa, the court concluded that by 1995 the death penalty was abolished either specifically or in practice by almost half the countries of the world, including European democracies and the neighbouring countries of South Africa.¹⁴⁷ Chaskalson JP had the benefit of assessing the existence of a normative mainstream at a much later date than most other courts. For example, the Indian Supreme Court's leading decision on the death penalty, *Bachan Singh*, was decided in 1980, whereas *Makwanyane* was heard fifteen years later. At this point,

¹⁴⁴ *Bachan Singh v State of Punjab* AIR 1980 SC 898, 933.

¹⁴⁵ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1, [40].

¹⁴⁶ *Santosh Kumar Satishbhushan v State Of Maharashtra* (2009) 6 SCC 498, [80] – [81]; A Saha and PR Advani 'The Death Penalty: A New Perspective In Light Of Santosh Bariyar Case' 2 NUJS Law Review 669 (2009).

¹⁴⁷ *S v Makwanyane* 1995 (3) SA 391 (CC) 413.

all of the States in the European Convention system had abolished capital punishment, and many others around the world had taken this step, either judicially or otherwise.

Besides extensive references to foreign jurisdictions, Chaskalson JP also asserted that '(i)nternational agreements and customary international law accordingly provide a framework within which chap 3 can be evaluated and understood.'¹⁴⁸ Chaskalson JP, in referring to section 35 (1), was having regard to the interpretation clause of the Interim Constitution.¹⁴⁹ Section 39 of the Final Constitution, which is phrased in similar terms, requires the courts, when interpreting constitutional provisions, to have regard to international law and permits them to have regard to foreign law.¹⁵⁰ References to comparative and international law are therefore structured into the constitution itself. Further, section 233 of the Final Constitution requires courts to interpret domestic law in such a way so as to be consistent with international law, whilst section 232 states that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. These more monist constitutional stipulations give international law a role in constitutional cases that far surpasses that of merely providing interpretive assistance to the court.

The Constitutional Court has also used international law to identify international trends. Kentridge J stated in *Makwanyane* that although one cannot

¹⁴⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) 413-414.

¹⁴⁹ Act 200 of 1993.

¹⁵⁰ Act 108 of 1996.

say the death penalty is contrary to international law, it had been demonstrated that it is the direction in which international law is developing.¹⁵¹ In *Mahomed*, the court appeared to be far more amenable to drawing on international law itself, in the form of emerging customary international law norms. The court referred to the fact that the 'international community' does not support the death penalty, evidenced partly at least by international tribunals not being able to impose capital punishment.¹⁵² The court recognised that as it is the practice of countries that have abolished the death penalty to request assurances that extradited persons will not be sentenced to death, extraditing without obtaining assurances was unconstitutional.¹⁵³

The Constitutional Court reiterated its view that the death sentence conflicts with the constitution, but emphasised that the 'international community shares this Court's view of the death sentence.'¹⁵⁴ The court expressly noted the change in thinking in Canada in the decision-making of its Supreme Court.¹⁵⁵ Although it stated that South African constitutional standards were different, these developments in Canada clearly influenced the court in deciding that it was unconstitutional to extradite without assurances.¹⁵⁶ But it was for the most part the widespread practice amongst states militating against extraditing to a death penalty state without assurances that impacted on the court's decision. These

¹⁵¹ *S v Makwanyane* 1995 (3) SA 391 (CC) 473. In *Coetzee*, Sachs J stated similarly that 'we need to locate ourselves in the mainstream of international democratic practice.' *Coetzee v Government of the Republic of South Africa* 1995 (4) SALR 631 (CC) 659.

¹⁵² *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) 910.

¹⁵³ *ibid* 917.

¹⁵⁴ *ibid* 910.

¹⁵⁵ *ibid* 910-912.

¹⁵⁶ *ibid* 914-917.

developments appeared to embolden the court to adopt a progressive stance on an issue that intersects the law of extradition as well as capital punishment.

When judges look to trends in state practice in the manner described above, this type of analysis has clear echoes of customary international law, which is concerned with converging patterns of state practice.¹⁵⁷ The Statute of the International Court of Justice lists the international law sources that the ICJ must apply in resolving disputes brought before it.¹⁵⁸ Article 38 states that international conventions, international custom (affirmed by widespread state practice, including judicial practice) and the general principles of law recognized by civilized nations are sources of international law, and that judicial decisions of ‘the various nations’ are a subsidiary source of international law.

At times courts group foreign law sources together with international treaty law, such as in *Roper* and *Makwanyane*. Even then the courts do not expressly view foreign law in this context as binding. Yet it is possible for widespread state practice to reach the status of binding customary international law, in the sense that a court in a monist system should apply customary international law insofar as it is consistent with domestic constitutional law.¹⁵⁹ Where it falls short of this obligatory status, the norms can be considered to be emerging customary international law.

¹⁵⁷ J Crawford Brownlie’s *Principles of Public International Law* (OUP Oxford 2012) 24.

¹⁵⁸ Article 38, Statute of the International Court of Justice, annexure to The United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

¹⁵⁹ J Crawford Brownlie’s *Principles of Public International Law* (OUP Oxford 2012) 67.

This thesis will argue that the more recent and frequent references by courts to both foreign and international law sources in death penalty cases, reflects a judicial engagement with international human rights norms. This is similar to Waldron's notion of a law of nations or international common law, but closer to emerging customary international law. These customary norms can sometimes be binding, and on other occasions they have a more intermediate status when they are still in an emerging phase that falls short of widespread practice. Whereas the reasoning of a foreign court in a specific case may merely be persuasive, emerging norms appear to be accorded independent weight by domestic courts, where trends or patterns in state practice point in a clear normative direction.

The degree to which the abolition of the death penalty has achieved the status of an applicable international law, or whether it is an 'emergent international norm' in a process of development towards its establishment as a rule of international law, requires consideration.¹⁶⁰ It is important in this regard to distinguish the various kinds of (frequently overlapping) norms that may have an imperative status in international law. In particular, when courts refer to an international norm, this may be a reference to an international treaty, customary international law or *ius cogens*.

Depending on whether a domestic system is monist or dualist, an international treaty can be incorporated into domestic law when it is self-executing,

¹⁶⁰ A McGann 'Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors' (2012) 56 *International Studies Quarterly* 275.

or when a domestic legislature enacts a statute implementing the treaty.¹⁶¹ The applicability of customary international law on the other hand depends upon acceptance by the international community of its substance (*opinio juris*), and acceptance by individual states.¹⁶² The latter requirement is a quantitative assessment, representing a threshold above which a norm may pass into customary international law. It does not require consent from all states, but a substantial number.¹⁶³ State practice is therefore an important consideration in discussions of customary international law.

Ius cogens is a particular peremptory type of customary international law, where the categories of exceptions to the norm are closed.¹⁶⁴ In other words, *ius cogens* apply to states regardless of whether those norms have been codified, and irrespective of state consent to be bound.¹⁶⁵ *Ius cogens* and customary international law are not therefore interchangeable, as all *ius cogens* are customary international law, but not all customary international laws rise to the level of peremptory norms.¹⁶⁶

¹⁶¹ *Jose Ernesto Medellin v Texas* 552 US 491, 128 S.Ct 1346 (2008).

¹⁶² WP Gormley 'The right to life and the rule of non-derogability: Peremptory norms of jus cogens' in BG Ramcharan (ed) *The Right to life in international law* (Martinus Nijhoff Leiden 1985) 124.

¹⁶³ *ibid* 127.

¹⁶⁴ Ramcharan defines imperative norms as those norms 'generally recognised by the international community as norms from which no departure is permitted.' See BG Ramcharan (ed) *The right to life in international law* (Martinus Nijhoff Leiden 1985) 14. Herndl states that the right to life has a peremptory character. K Herndl in BG Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff Leiden 1985) xi.

¹⁶⁵ WP Gormley 'The right to life and the rule of non-derogability: Peremptory norms of jus cogens' in BG Ramcharan (ed) *The Right to life in international law* (Martinus Nijhoff Leiden 1985) 120-133. Rights erga omnes are rights and obligations owed to the world community at large, that pertain to substantive issues of fundamental importance. Another related concept is sacrosanct rights. This notion of inherent, inalienable rights may 'serve as an inspiration, and as legal precedent, for an emerging norm of ius cogens, particularly as to customary regional and international law.' See further P Hodgkinson and A Rutherford *Capital Punishment* (Waterside Press Hampshire 1996) 23.

¹⁶⁶ J Crawford *Brownlie's Principles of Public International Law* (OUP Oxford 2012).

Article 53 of the Vienna Convention on the Law of Treaties defines *ius cogens* as a 'peremptory norm of general law ... accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted.'¹⁶⁷ Brownlie proposes five examples of *ius cogens* norms: prohibition of aggressive war; principle of racial non-discrimination; crimes against humanity; slavery; and genocide.¹⁶⁸ The International Court of Justice made implicit reference to *ius cogens* genocide norms in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case.¹⁶⁹

Evidence of the imperative nature of the right to life is article 4 of the ICCPR, which is non-derogable.¹⁷⁰ If it does possess the status of *ius cogens*, the right to life cannot be derogated from in any circumstances, outside the specifically permitted categories. It must be borne in mind that 'what is peremptory is the right as defined in international law. In other words, the right is not an absolute one.'¹⁷¹ Although the right to life is a 'primordial right,' it is not an absolute right, and therefore exceptions are acceptable.¹⁷² Loss of life during wartime has been recognised as an exception to the right to life, although this is regulated by the United Nations Charter limitations on the use of force, as well as by international humanitarian law. Capital punishment has similarly generally been accepted to be

¹⁶⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

¹⁶⁸ J Crawford Brownlie's *Principles of Public International Law* (OUP Oxford 2012) 594 to 595; BG Ramcharan (ed) *The right to life in international law* (Martinus Nijhoff Leiden 1985) 15.

¹⁶⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case [1951] ICJ Rep 15.

¹⁷⁰ Dinstein states that the term 'inherent' may also indicate that the framers felt that the right to life is entrenched in customary international law. This article may be declaratory in nature and not attempting to create new international law. Y Dinstein 'The right to life, physical integrity and liberty' in L Henkin (ed) *The International Bill of Human Rights* (Columbia U Press New York 1990) 115.

¹⁷¹ BG Ramcharan (ed) *The right to life in international law* (Martinus Nijhoff Leiden 1985) 14-5.

¹⁷² *ibid* 12.

a specific exception to the right to life, which in the international context is 'couched in terms that express the desirability of its abolition.'¹⁷³

However, certain subordinate capital punishment norms, such as the ban on the juvenile death penalty, may have reached *ius cogens* status. The case of *Michael Domingues v United States* is an example of an international tribunal holding that a specific death penalty norm is *ius cogens* in nature.¹⁷⁴ The United States argued before the Inter-American Commission of Human Rights that there was no *ius cogens* norm that established that eighteen years is the minimum age at which an offender can receive a death sentence. However, the Commission concluded that a 'norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime.'¹⁷⁵ Although not overtly in response to the Commission's decision, the US Supreme Court cited evolving international norms in *Roper* when it struck down the juvenile death penalty.

All three types of international law – treaty, custom and *ius cogens* – are at play in domestic death penalty cases. As courts have progressively referred to international treaties and instruments in these cases, international norms have more directly been integrated into the reasoning of domestic courts. But the predominant manner in which courts have both drawn on and participated in developing international law with respect to capital punishment, is by way of

¹⁷³ P Hodgkinson and A Rutherford *Capital Punishment* (Waterside Press Hampshire 1996) 21.

¹⁷⁴ *Michael Domingues v United States* case 12.285, Report No. 62/02, Inter-American Commission on Human Rights Doc. 5 rev. 1 (2002) 913.

¹⁷⁵ *ibid* [84].

assessing comparable state practice, and therefore as developers of customary international law.

2.7. CONCLUSION

This chapter has explained why death penalty case law is the most suitable arena for a consideration of the background reasons for national courts making use of cross-citation. Death penalty cases are the widest trampled judicial area for transnational citation, and in particular in the US, which is one of the main jurisdictions of interest to this thesis. There is also a distinct and graduated path from the mid twentieth century, when the death penalty was a common penological tool of countries around the world, to the present day where only a minority of countries still carry out executions.

This thesis looks beyond the use of cross-citation in capital punishment cases as merely a tool of interpretation, to situations where judges have used comparative law to search for shared norms outside of the immediate domestic context. On occasion this has involved an assessment of a value consensus or a standard of decency. But it has also more explicitly oriented courts to quantitatively consider how many other countries have abolished the death penalty or eliminated an aspect of the administration of the death penalty. The question to be considered is the degree to which courts, in doing so, attach independent normative weight to the legal position and reasoning of other countries, an action that has ramifications in international law.

The jurisprudence of the three focus jurisdictions reveals that these courts use foreign precedents for interpretative insight, to ascertain applicable values, and to assess comparable state practice. This thesis is most interested in the third type of usage of comparative law, where it explicitly or implicitly references transnational norms. The brief excerpts from the case law referred to above demonstrate that these courts have progressively moved from a majority of the court adopting a cautious attitude to comparative law, to more recently looking to international instruments and engaging in comprehensive surveys of foreign state practice.

With regard to article 38 of the ICJ Statute, this judicial method can be viewed as an analysis of state practice as a source of international law. If a treaty obligation applies to a death penalty case, there will be little reason to look further to what other courts are doing, except to find support from custom. In effect, one aspect then of what courts are doing when they cross-cite, is gauging state practice to assess whether there is a customary obligation in the form of a transnational norm that falls outside of domestic normative considerations. Although the courts for the most part do not express their task in these terms, the potential best explanation for what courts are doing is on the one hand, the development of emerging custom, and on the other, the enforcement of binding customary international law or *ius cogens*.

This thesis considers next the various theories that attempt to offer a satisfactory explanation of why cross-citation has been used by courts. Several

candidate theories will be discussed. Firstly, interpretation and discourse oriented approaches canvassed by writers such as Jackson and Choudry. Second, theories such as those of Carozza and Waldron, which ground cross-citation in shared values and principles. Third, the approach of writers that view cross-citation in an international law context will be considered.

CHAPTER 3: THEORETICAL APPROACHES TO CROSS-CITATION

3.1. INTRODUCTION

Having discussed a matrix of case-law generated factors, this chapter will now review the relevant literature in order to assess theoretical explanations of cross-citation. These theoretical approaches will act as a mirror to the matrix of factors mentioned in chapter two, by grouping the academic analysis of the subject into three similar areas. A critique of the literature will be undertaken in the concluding section to this chapter.

The first type of analysis views cross-citation as an exercise in interpretation. Groppi proposes two ways in which courts have generally used foreign precedents in the interpretative process.¹⁷⁶ Firstly, courts are said to cite foreign cases to provide a 'guiding horizon' at the beginning of a judgment in order to set the parameters for a decision. Secondly, the court uses a foreign decision as a 'probative' argument

in which the court accepts and applies a constitutional principle or a specific interpretation of a constitutional clause from another jurisdiction. ... When referring to all liberal democracies, the approach is very similar to the definition of a 'guiding horizon', although the comparison happens at a different stage of the decision-making process, in which the interpretative reading has already been selected and must only be made persuasive. In these cases, courts refer to foreign arguments by making synthetic references, or without quoting specific precedents at all.

¹⁷⁶ T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing Oregon 2013) 424.

In other words, foreign precedents act as a guide in varying degrees to the interpretation of the borrowing court's country's constitutional text. Certain writers have referred to this practice as dialogical interpretation or a transjudicial discourse.¹⁷⁷

The second group of theoretical explanations asserts that cross-citation is a reflection of a transnational sharing of values. Carozza developed the idea that inter-judicial discourse can be explained best as courts applying the non-binding principles of an international common law of human rights.¹⁷⁸ In a similar vein, Waldron has proposed that courts are having regard to the *ius gentium* or law of nations, a body of soft principles that have application across jurisdictions.¹⁷⁹

The third type of approach to cross-citation places the practice in a wider international law context. Jackson describes a judicial attitude of convergence, where courts see themselves as operating within a larger normative project, taking the international human rights framework, which developed after the Second World

¹⁷⁷ S Choudry 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819; AL Parrish 'Storm in a teacup: The US Supreme Court's use of foreign law' (2007) *University of Illinois Law Review* 637.

¹⁷⁸ PG Carozza "My Friend is a Stranger": The Death Penalty and the Global *Ius Commune* of Human Rights' (2003) 81 *Texas Law Review* 1031. See C McCrudden 'A common law of human rights?: Transnational Judicial Conversations on Constitutional Rights' in O'Donovan, K and Rubin, G (Eds) *A Festschrift in Honour of Brian Simpson* (OUP Oxford 2000), who was one of the first writers to refer to a 'common law of human rights'. Alford describes McCrudden's thesis as agnostic as to whether cross-citation is valuable or not. See RP Alford 'Misusing International Sources to Interpret the Constitution' (2004) 98 *American Journal of International Law* 57.

¹⁷⁹ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press New Haven 2012).

War, as a departure point.¹⁸⁰ Courts in newer constitutional states are more prone to make use of comparative law where no local precedents are available at the commencement of such systems. These newer institutions are also more likely to seek coherency between international human rights norms and local constitutional rights.¹⁸¹

This thesis will argue that the courts in the three selected jurisdictions demonstrate elements of all of these three approaches when drawing on foreign law in death penalty cases. But there has been a progression towards an attitude of convergence, and in particular with an awareness of both emerging and binding international human rights norms. Foreign and international law both started to more recently make an appearance in the same judgments, as courts wrestle with the interplay between domestic law and international human rights law. Whereas the use of comparative law as an interpretive tool engages more with the reasoning of other courts, a convergent approach focuses more on normative trends in broader foreign state practice.

3.2. CROSS-CITATION AS AN INTERPRETATIVE TOOL

Parrish refers to cross-citation playing a limited role as an interpretive aid for courts, where foreign law informs the interpretation of a domestic constitutional text,

¹⁸⁰ V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010) 8.

¹⁸¹ T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing Oregon 2013) 9.

without changing the status of the decision as based on local law only.¹⁸² La Forest notes that notwithstanding the skepticism of certain judges, in the US in particular, a number of courts have concluded that comparative law aids the construction of better judgments, by exposing a court to a fresh perspective and enhancing the effectiveness and sophistication of a court.¹⁸³ But it is said that this improvement in judicial decision-making is about the quality of interpretation at a national level, not any broader transjudicial project.

Vicki Jackson describes this judicial attitude towards cross citation as an engagement approach, which is a middle ground position between resistant and convergent approaches, holding that the 'interpretation of national fundamental law can be improved by engagement with transnational norms.'¹⁸⁴ Jackson notes that this involves an engagement between foreign law and domestic law, without granting the foreign legal principles any superior or binding status.¹⁸⁵ Foreign law is used as a means to the end of good interpretation.

¹⁸² AL Parrish 'Storm in a teacup: The US Supreme Court's use of foreign law' (2007) *University of Illinois Law Review* 637, 651 and 678.

¹⁸³ GV La Forest 'The use of American precedents in Canadian Courts' (1994) 46 *Maine Law Review* 211, 216-220. See MA Glendon *Rights Talk: The Impoverishment of Political Discourse* (Free Press New York 1991) 152, regarding the potential enhancement of United States jurisprudence; MA Slaughter 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 128, regarding the enrichment and facilitation of constitutional interpretation.

¹⁸⁴ V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010) 9.

¹⁸⁵ V Jackson, 'Constitutional comparison: convergence, resistance, engagement' (2005) 119 *Harvard Law Review* 109, 114.

Sperti is of the view that judges often themselves assert that they mainly use foreign law as a resource in interpretation.¹⁸⁶ Recent research by Flanagan supports this contention, based on interviews conducted with judges across a number of apex courts, which suggests that judges don't overwhelmingly view foreign law as authoritative.¹⁸⁷ Although there is a meaningful contingent of judges who see it as important to be part of a 'global judicial yield', a large portion of these judges responded in their interviews that they use foreign law to provide support for a policy decision that they have reached any way.¹⁸⁸

Tushnet demonstrates that when US courts refer to foreign judgments, they do not do this in order to identify universal norms.¹⁸⁹ Justice Breyer remarked in a public discussion that foreign law is relevant to how to apply the US Constitution.¹⁹⁰ In other words, comparative law assists in ascertaining the meaning of a constitutional provision, and nothing more. Some theorists have attempted to elevate cross-citation practice beyond merely an interpretive exercise by describing it as a type of discourse between courts. The next section will discuss those writers who view cross-citation in these discourse terms.

¹⁸⁶ A Sperti 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing Oregon 2013) 395.

¹⁸⁷ B Flanagan and S Ahern 'Survey of Common Law Supreme Court Judges' Attitude to Transnational law' (2011) 60 *International and Comparative Law Quarterly* 1.

¹⁸⁸ *ibid.*

¹⁸⁹ M Tushnet 'When is Knowing Less Better Than Knowing More? Unpacking the Controversy of the Supreme Court Reference to non-US law' (2006) 90 *Minnesota Law Review* 1275, 1301.

¹⁹⁰ A Scalia and S Breyer "Constitutional Relevance of Foreign Court Decisions" U.S. Association of Constitutional Law Discussion, American University, Washington D.C. 13 Jan. 2005, available at <http://www.freepublic.com/focus/f-news/1352357/post>.

3.2.1. Discourse and Dialogical Interpretation

McCrudden views cross-citation as involving continuing conversations between courts regarding the meaning of common rights.¹⁹¹ Slaughter describes transjudicial discourse as an interaction with another court's jurisprudence to solve the same human rights problem.¹⁹² Courts use this form of 'collective deliberation' to solve common problems, and judges conduct the dialogue 'through mutual citation.'¹⁹³ According to La Forest, this judicial conversation is said to stem from a genuine interest in what is happening in other jurisdictions, as the cosmopolitanism of constitutional viewpoints is a 'valuable source of enrichment and greater sophistication.'¹⁹⁴ Foreign material is said to cast light on domestic principles.¹⁹⁵

Choudry describes three steps in 'dialogical' interpretation. Firstly, a court uses comparative jurisprudence to identify assumptions underlying the interpreting court's own constitutional order. Secondly, the court attempts to justify the position in its own constitutional order. Finally, the court must choose between a number of interpretative options. Choudry remarks that if the court rejects the foreign jurisprudence and affirms its own, this heightens self-awareness through 'confrontation and clarification.' If the foreign material is similar, this is a basis for

¹⁹¹ C McCrudden 'A common law of human rights?: Transnational Judicial Conversations on Constitutional Rights' in O'Donovan, K and Rubin, G (Eds) *A Festschrift in Honour of Brian Simpson* (OUP Oxford 2000) 138.

¹⁹² MA Slaughter 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, 99-101.

¹⁹³ *ibid* 119; MA Slaughter *A New World Order* (Princeton University Press Princeton 2004) 70.

¹⁹⁴ GV La Forest 'The use of American precedents in Canadian Courts' (1994) 46 *Maine Law Review* 211, 217.

¹⁹⁵ S Choudry 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819, 835.

legitimately transplanting foreign ideas.¹⁹⁶ But transplanting here, according to Choudry, involves no more than the assimilation of another court's reasoning, not the enforcement of an external norm.

In contrast to this more expansive notion of cross-citation, other theorists have argued for a more limited role for foreign law in domestic cases. It is necessary at this juncture to discuss writers who have dealt with judicial opposition to the use of comparative law by courts as an interpretive methodology for any purpose beyond corroborating domestic principles.

3.2.2. Cross-Citation as Judicial Overreach

Jackson refers to the attitude of the judges that disfavour comparative jurisprudence as 'resistance', typical of a nationalist view of constitutional law. Koh similarly distinguishes nationalist jurisprudence, which favours local sources of law for its decisions, from transnational law, which merges national and international law.¹⁹⁷ A divide between judges adopting paths of engagement as opposed to resistance can be evidenced in the US.

All nine current sitting US Supreme Court Justices have pronounced their individual views on the subject, either in cases, articles or at conferences.¹⁹⁸ Often their viewpoints converge along political party lines, with Democratic Party

¹⁹⁶ *ibid* 857-858.

¹⁹⁷ H Koh 'International Law as Part of Our Law' (2004) 98 *American Journal of International Law* 43, 53.

¹⁹⁸ RP Alford 'Misusing International Sources to Interpret the Constitution' (2004) 98 *American Journal of International Law* 57, 64.

appointed judges demonstrating a greater tendency to embrace foreign law when arguing extra-curially.¹⁹⁹ Farber describes this divide as a split between liberals and conservatives, or internationalists and constitutional nationalists.²⁰⁰ Some of the more liberal Supreme Court Justices have been enthusiastic about foreign law. Justice Breyer describes cross-citation as a jurisprudence that reveals 'common, if not universal, principles in a variety of legal areas.'²⁰¹ But the general caution of Justice Stevens has tended to dominate:

It does seem to me that there is a vast difference between, on the one hand considering the thoughtful views of other scholars and judges - whether they be Americans or foreigners and whether they be state judges, federal judges or judges sitting in other countries - before making up our own minds, and on the other hand, treating international opinion as controlling our interpretation of our own law.²⁰²

Justice Scalia has been the most ardent critic of cross citation.²⁰³ Much of Scalia J's scepticism stems from a concern regarding overly active judges asserting contemporary interpretations of the US constitution.²⁰⁴ Chief Justice Roberts went so far as to say that the practice of citing foreign law was an affront

¹⁹⁹ RC Black and L Epstein '(Re)-setting the Scholarly Agenda on Transjudicial Communication' *Law & Social Inquiry* Vol 32 Issue 3 (2007) 791, 801; RH Bork *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press Washington DC 2003) 22. For example, Justices Breyer and Ginsburg, who have been favourable to foreign law, were appointed by Democratic presidents, whereas Justices such as Thomas, Scalia, Alito and Chief Justice Roberts, who have opposed cross-citation, were appointed by Republican presidents.

²⁰⁰ DA Farber 'The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History' (2007) 95 *California Law Review* 1335, 1340.

²⁰¹ S Breyer Keynote address (2003) 97 *American Society of International Law Proc.* 265.

²⁰² JP Stevens 'Remarks, Seventh Circuit Judicial Conference Dinner' (May 23, 2005).

²⁰³ A Scalia *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press Princeton 1997).

²⁰⁴ *ibid* 47.

to democracy.²⁰⁵ In fact, there were negligible citations of foreign law during the Roberts court in the period from 2004 to 2010.²⁰⁶

Posner notes that this aversion in the US to judicial activism stems mainly from a separation of powers concern, that is, that judges are appointed to rule on legal questions and not elected to decide on policy.²⁰⁷ Calabresi explains further that moving beyond national precedents is viewed as an act of excessive judicial activism, on the basis that this involves finding an answer to a legal question in laws not ever consented to by the institutions or populace of the state at hand.²⁰⁸ Bork goes so far as to describe cross-citation as a form of 'judicial imperialism.'²⁰⁹

Seipp eloquently criticises this uproar in the US regarding references to foreign law, in noting that 'the objection to citation of foreign law is bad history because it is a new complaint (that has been made to appear old) about an old practice (that has been made to appear new).'²¹⁰ Tushnet also rejects the originalist criticism of foreign law usage, given that certain constitutional text, such as the cruel and unusual punishment wording in the Eighth Amendment, demands

²⁰⁵ R Dworkin *The Supreme Court Phalanx: The Courts New Right-Wing Block* (New York Review of Books New York 2008) 12.

²⁰⁶ A Sperti 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing Oregon 2013) 405.

²⁰⁷ R Posner 'The Supreme Court 2004 Term: Foreword: A Political Court' (2005) 119 *Harvard Law Review* 31, 88-90.

²⁰⁸ SG Calabresi "'A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' (2006) 86 *Boston University Law Review* 1335.

²⁰⁹ RH Bork *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press Washington DC 2003).

²¹⁰ DJ Seipp 'Our Law, Their Law, History, and the Citation of Foreign Law' (2006) 86 *Boston University Law Review* 1417, 1424.

a contemporary interpretation.²¹¹ One element of such a contemporary approach is a more evolutive and less literal approach to interpreting constitutional text. The following section will deal with writers who describe the use of cross-citation in this contemporaneous mode of interpretation as value-driven.

3.3. COMMON VALUES

This section will assess theories that propose a value-driven motive for cross-citation, including arguably the leading theory of cross-citation, Waldron's law of nations approach.²¹² Orucu describes the judicial awareness of normative convergence as the 'gradual "internalisation of common values" by the courts of each national legal system'.²¹³ In this view, foreign law remains a source of interpretation rather than binding law, where judges can use foreign precedents as part of the method of 'evolutive interpretation' that aids the understanding of ambiguous terms and constitutional texts.²¹⁴ Proponents of evolutive interpretation view cross-citation as a purposive style of interpretation that seeks to ascertain the background or fundamental values underpinning a constitutional provision.

²¹¹ M Tushnet 'When is Knowing Less Better Than Knowing More? Unpacking the Controversy of the Supreme Court Reference to non-US law' (2006) 90 Minnesota Law Review 1275, 1277-1279.

²¹² J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006).

²¹³ E Orucu *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law Birmingham 2003) 237.

²¹⁴ *ibid* 241.

3.3.1. A Common Law of Human Rights

Carozza proposes that cross-citation is a practice that reveals a common law of human rights or *ius commune*, grounded in the value of human dignity, where:

the interaction of different national and supranational institutions across Asia, Africa, Europe, and the Americas both creates and draws upon a common body of norms that is transnational in practice and grounded in universal principles of human dignity and that exists in an intimate and mutually beneficial relationship with local law.²¹⁵

Wary of functionalist understandings of transnational jurisprudence, Carozza's conclusion from his overview of death penalty case law is that the 'real center of gravity of the global jurisprudence is in the affirmation of the dignity of the human person and the principle that human rights law exists to protect that dignity.'²¹⁶ McCrudden also described transnational citation as 'the working out of the practical implications, in differing concrete contexts, of human dignity for the rights to life and physical integrity.'²¹⁷

Although Carozza's theory is transnational in its scope, it does not propose the unification of the laws of various jurisdictions, but sees cross-citation as a lodestar for the 'incorporation, interpretation and implementation' of human rights

²¹⁵ PG Carozza "My Friend is a Stranger": The Death Penalty and the Global *Ius Commune* of Human Rights' (2003) 81 Texas Law Review 1031, 1033.

²¹⁶ *ibid* 1079.

²¹⁷ C McCrudden 'A common law of human rights?: Transnational Judicial Conversations on Constitutional Rights' in O'Donovan, K and Rubin, G (Eds) *A Festschrift in Honour of Brian Simpson* (OUP Oxford 2000) 528.

norms.²¹⁸ It is not a system of law *per se*, but consists of a non-binding set of principles. Since the *ius commune* is, unlike international law, ‘dependent on and subordinate to local law’, Carozza states that it has no independent normative weight.²¹⁹

3.3.2. The Law of Nations

Probably the most expansive theory of cross-citation is Jeremy Waldron’s primarily US-focused application of the law of nations to transjudicial practice. Citing dicta from Justice Scalia in *Sosa v Alvarez-Machain*, Waldron postulates that the implicit theory behind the citation of foreign cases stems from the *ius gentium* or the law of nations, a ‘dense and mutually reinforced’ consensus-oriented ‘common law of mankind.’²²⁰ Whereas Carozza’s international common law of human rights is his own theoretical proposition, Waldron bases his law of nations concept on a long-standing legal doctrine.

The law of nations has its origins in Roman law, but also appears as a cause of action in Blackstone’s *Commentaries on the Laws of England*.²²¹ The US Constitution mentions the law of nations directly in the Offences Clause, which gives Congress the power to define and punish offences against the law of

²¹⁸ PG Carozza “My Friend is a Stranger”: The Death Penalty and the Global *Ius Commune* of Human Rights’ (2003) 81 *Texas Law Review* 1031, 1042.

²¹⁹ *ibid* 1082-1083.

²²⁰ *Sosa v Alvarez-Machain* 542 US 692, 124 S. Ct. 2739 (2004) 2776; J Waldron ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 *Harvard Law Review* 129, 132 and 145; J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 4.

²²¹ W Blackstone *The Commentaries on the Laws of England* (Clarendon Press Oxford 1765); J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press New Haven 2012) 25.

nations.²²² Waldron emphasises that the US Supreme Court's predisposition to the law of nations doctrine can be seen in the citation of Emmerich de Vattel over 150 times by the US Supreme Court, a writer who wrote extensively on the law of nations.²²³ Farber notes however that although the law of nations is a long established legal doctrine, particularly in the US, the 'law of nations has no exact counterpart today.'²²⁴

Waldron takes up the challenge of applying these old law of nations principles to the relatively new phenomenon of cross-citation in human rights cases. He proposes that the 'law of nations' is a system of positive law not natural law, but only law in the proper sense when the receiving court rules as such in its domestic system.²²⁵ Waldron at times appeals to the 'force and authority' of the law of nations, but his application of the law of nations consists of positive law only in the softer sense of the legal principles referred to by Dworkin.²²⁶ These are deep background principles similar to common law maxims, like 'no person should profit from their own wrong', which can be inferred from consistent decisions across multiple jurisdictions.²²⁷ The law of nations does not then itself consist of positive law, but

²²² US Constitution article I, section 8, clause 10. See further SG Calabresi and SD Zimdahl 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty' (2005) 47 William and Mary Law Review 743, 757.

²²³ DA Farber 'The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History' (2007) 95 California Law Review 1335, 1344.

²²⁴ *ibid* 1346.

²²⁵ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press New Haven 2012) 28, 43, 72.

²²⁶ *ibid* 64; See R Dworkin *Taking Rights Seriously* (Duckworth, London 1978).

²²⁷ *ibid* 64-67.

should be regarded as 'a source of normative insight grounded in the positive law of various countries and relevant to the solution of legal problems' in the US.²²⁸

Waldron suggests that courts make reference to each other's decisions on the basis that like cases should be treated alike. This stems from two principles – that it is fair for different states to treat similar cases in the same way, and that the integrity of a (transnational) legal system depends on laws being developed coherently.²²⁹ Consistency in the treatment of an issue, such as the execution of minors, importantly allows people to have expectations about legal rules. It also allows for certain fundamental issues to be 'put beyond question'.²³⁰ Waldron does not ground this need for consistency in the universality of fundamental rights. Although he makes the point that the bills of rights in various countries contain the same human rights that reflect an underlying moral universalism, it does not necessarily follow that 'all countries should follow the same solution'.²³¹ Waldron asserts that the relevant consensus to which a court may refer may be limited to certain countries, on the basis of the reference jurisdictions being 'civilised' or 'freedom-loving'.²³²

Waldron interprets the demand for harmonisation of human rights standards as one not derived from a top-down authority, but from a global community of human rights bearers. The common form of limitation clauses, in terms of which rights may be limited insofar as that can be demonstrably justified in a free and democratic

²²⁸ *ibid* 143. Waldron gives the example of *Riggs v Palmer* 22 N.E. 188 (N.Y. 1889), where the US Supreme Court referred to 'universal law administered in all civilised countries.'

²²⁹ *ibid* 112. This is predicated on the assumption of the domestic principle of integrity being applicable to Waldron's proposed transnational system.

²³⁰ *ibid* 116.

²³¹ *ibid* 117.

²³² J Waldron 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 *Harvard Law Review* 129, 145.

society, creates the license to consider what is justifiable in other free and democratic countries, on the basis of a ‘bottoms-up’ demand by people for their human rights. Waldron concludes that this idea of a people-driven demand for human rights, ‘together with the point about learning, furnishes the best explanation of what is going on when courts in one country pay attention to what courts in other countries are doing about fundamental rights.’²³³

3.3.3. Spontaneous Order

Steven Calabresi and Bradley Silverman, in a comprehensive review of Waldron’s propositions, opine that justifying cross-citation on the basis of ‘like cases being treated alike’ does not go far enough. It does not provide a sufficiently compelling reason why a court of one country should bind a court in another.²³⁴ Instead Calabresi provocatively proposes that an explanatory candidate for judicial interactions is Hayek’s idea that

spontaneous orders involving a wide array of independent decision makers, free from central planning, cause those independent decision makers to work together without necessarily realizing that they are doing so in pursuit of their own self interests, to create better and more efficient outcomes than a central planner could.²³⁵

²³³ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press New Haven 2012) 133-135.

²³⁴ SG Calabresi and B Silverman ‘Hayek and the Citation of Foreign Law’ (2013) *Northwestern Law & Econ Research Paper No. 13-23*, 17-18.

²³⁵ *ibid* 14. Here courts are aware they are citing comparative precedents, but presumably are unaware of the larger transnational project their decisions form part of.

The idea of an international common law is important to Calabresi. He relies on what Hayek said about the legitimacy of the Anglo-American common law as a body of precedential law that developed spontaneously on a case-by-case basis.²³⁶ But Calabresi distinguishes the 'common law' from 'the law of nations'. Whilst noting their shared characteristic of processing large disparate amounts of information reaching across 'broad temporal and geographic distances to capitalize on the collective wisdom of multitudes of jurists', Calabresi notes that the law of nations, as opposed to the common law, allows 'American judges to utilize knowledge from the global jurisprudential universe rather than the more limited set of knowledge within our domestic legal universe.'²³⁷ Although this expands the pool of legal sources for a domestic judge to consider, Calabresi subordinates the role of comparative precedent, in his insistence that the domestic decision must be able to stand without mention of the external foreign source.²³⁸

3.3.4. A Value-Driven Approach

Both Carozza's account of a *ius commune* and Waldron's account of the law of nations appeal to a soft body of background principles that transform into hard law only in a domestic legal system. Although the law of nations transcends the narrower notion of a discourse motivated by solving common problems, courts remain primarily in a domestic interpretation role guided by shared values, whether human dignity as

²³⁶ *ibid* 26.

²³⁷ *ibid* 47.

²³⁸ *ibid* 15 and 23.

suggested by Carozza, or common values shared between a group of similar nations as proposed by Waldron.

Notwithstanding the current constitutionality of capital punishment in the US, Waldron suggests that the 'accumulated legal wisdom' offered by the law of nations may helpfully inform various aspects of the administration of the death penalty.²³⁹ This is a reference not to hard law, such as international treaty law, but the softer notion of legal wisdom. This type of analysis supports the second consideration in the case law matrix proposed in Chapter 2, which involves courts appealing to abstract value judgments, in particular when a constitutional provision is worded in a manner that allows for or demands this, such as the Eighth Amendment in the US Constitution. The next section deals with the third group of writers who argue that cross-citation is motivated not by notions of common values but considerations of international human rights law.

3.4. THE LAW OF THE UNITED NATIONS

Jackson's proposes three modes of constitutional interpretation – differentiation, engagement or harmonisation – which are practiced along a continuum, rather than fitting neatly into any one of these baskets. The third mode of convergence entails

²³⁹ J Waldron 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 *Harvard Law Review* 129, 140.

national identification with transnational and international legal norms – a posture that might view domestic constitutional law as a site for the implementation of international legal norms, or, alternatively, as a participant in a decentralised but normatively progressive process of transnational norm convergence.²⁴⁰

Whereas the latter reference to a ‘decentralised’ value-driven approach to comparative jurisprudence approximates Waldron’s law of nations theory, Jackson’s identification of transnational jurisprudence as a means for enforcing international legal norms captures the essence of the third theoretical approach, which regards cross-citation as a key component in the development and application of international human rights law. Benvenisti notes that several recent domestic decisions ‘testify to the fact that these courts have finally begun to engage quite seriously in the interpretation and application of international law and to heed the constitutional jurisprudence of other national courts.’²⁴¹

Jackson comments that ‘having a national constitution, enforced by a court, has become part of the “script” of modernity’.²⁴² It is said that this shift to constitutionalism, defined as a system that adheres to fundamental constitutional principles limiting the authority of government, is closely tied to the parallel development of the international human rights treaty law system.²⁴³ Allan argues that this domestic move to constitutionalism was a direct result of the enactment of

²⁴⁰ V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010) 8.

²⁴¹ E Benvenisti and GW Downs ‘National Courts, Domestic Democracy and the Evolution of International Law’ 2009 (20)1 *The European Journal of International Law* 59, 60; E Benvenisti ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’ 2008 (42) 102 *American Journal of International Law* 241, 242. Benvenisti notes at 274 that this is motivated in part by domestic courts’ desire ‘to align their jurisprudence with that of other national courts.’

²⁴² *ibid* 2.

²⁴³ *Oxford Concise Dictionary* (7th Ed).

the Universal Declaration of Human Rights and the two international covenants that flowed therefrom – sometimes referred to as the International Bill of Rights. He states that it was ‘only in the last half of the twentieth century, and more particularly in the last two or three decades, that rights-based constitutionalism was widely adopted elsewhere.’²⁴⁴ Similarly, Robertson notes that the Universal Declaration of Human Rights ‘has inspired more than 200 international treaties, conventions and declarations, and the Bills of Rights found in almost every national constitution adopted since the war’.²⁴⁵

Although modern constitutional democracies at some level owe their constitutional framework to the US, Booth observes that ‘the rise of international human rights law coincides with the proliferation of countries that have adopted written constitutions and created constitutional courts.’²⁴⁶ Allan notes that the US, whose Bill of Rights has been described as old and inadequate, can be juxtaposed with these more recently established democracies, which have a conception of their constitutional structure as less majoritarian and more fundamental rights oriented.²⁴⁷ Strossen asserts that the approach of courts outside the US has consequently been more expansive, adopting an “upward-ratcheting approach” by offering the broadest protection to human rights holders.²⁴⁸

²⁴⁴ J Allan and G Huscroft ‘Constitutional Rights coming homes to roost? Rights Internationalism in American Courts’ (2006) 43 San Diego Law Reform 1, 15.

²⁴⁵ G Robertson *Crimes against Humanity* (Penguin London 2000) 24.

²⁴⁶ See C Booth and M du Plessis ‘Home Alone? The US Supreme Court and International and Transnational Judicial Learning’ (2005) European Human Rights Law Review 127, 135 and 146.

²⁴⁷ J Allan and G Huscroft ‘Constitutional Rights coming homes to roost? Rights Internationalism in American Courts’ (2006) 43 San Diego Law Reform 1, 2 and 12.

²⁴⁸ M Strossen ‘Liberty and Equality. Complementary, not competing Constitutional commitments’ *Litigating Rights: Perspectives from domestic and international law* (2002) 149, 153.

Allan concludes that these parallel developments, of international human rights law and increasing domestic constitutionalism, have acted as something of a gateway for cross-citation outside of the US.²⁴⁹ However, Justice Breyer is of the view that cross-referencing will grow as a practice in the US in the future:

The world has shrunk considerably since the Founding ... We have seen how that development, which reflects changes in technology, communications, and political organisation, as well the rise of problems that ignore national boundaries, has made it necessary for the Court ever more frequently to consider matters of international law and the laws of other nations.²⁵⁰

The next section will deal with one important enabling condition for this opening up of the domestic arena to international law, that is, the inclusion in constitutions of provisions that specifically refer to, and draw on, international human rights law.

3.4.1. Constitutional Invitations to International Human Rights Law

Whereas the US Constitution is uniquely static, many newer constitutions have had the benefit of comparative exposure at a drafting stage.²⁵¹ Allan notes that, in respect of countries with more recent constitutions, a 'rights internationalism' is embedded in their constitutional texts that refer to international law and foreign

²⁴⁹ J Allan and G Huscroft 'Constitutional Rights coming homes to roost? Rights Internationalism in American Courts' (2006) 43 San Diego Law Reform 1, 14.

²⁵⁰ S Breyer *The Court and the World: American law and the New Global Realities* (Knopf New York 2015) 7.

²⁵¹ M Versteeg 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 California Law Review 1163.

law.²⁵² The South African Constitution mandates references to international law, whilst also permitting the courts to have regard to foreign law.²⁵³

Besides comparative influences on the wording in constitutional provisions themselves, Jackson notes that many constitutions also now refer explicitly to international treaty norms.²⁵⁴ Some countries make express reference to international human rights treaties in their own constitutions, such as Argentina and India.²⁵⁵ The New Zealand Bill of Rights refers to the ICCPR.²⁵⁶ Courts of other states are often institutionally tied to a shared set of norms, such as in the regional ECHR system. The UK is an example, where the Human Rights Act commits the UK to a normative path closely aligned with the ECHR.²⁵⁷

3.4.2. International Treaty Commitments

Looking beyond the wording of domestic constitutions themselves, Saunders draws the conclusion that the increase in references to foreign sources of law by courts is no doubt also due to the 'influence of shared commitments in international law'.²⁵⁸ Jackson points to the fact that the number of states in the world has quadrupled since 1900. There were 56 states in existence when the Universal

²⁵² *ibid* 16.

²⁵³ Constitution of the Republic of South Africa 1996 s 39.

²⁵⁴ V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010) 43.

²⁵⁵ Constitution of the Argentine Nation, Chapter IV, articles 22 and 23; The Constitution of India, article 51.

²⁵⁶ New Zealand Bill of Rights Act 1990, Preamble.

²⁵⁷ The Human Rights Act 1998.

²⁵⁸ C Saunders 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37, 63.

Declaration of Human Rights was adopted, whereas as of 2015 there are 168 and 164 states signed up to the ICCPR and ICESCR respectively.²⁵⁹

Neuman notes that the growth in international human rights treaty obligations, has resulted in a connection and flow between rights in international treaties and domestically enacted constitutional rights.²⁶⁰ On this basis, Jackson states that the 'new normativity of human rights law' is reflected in the way references to other foreign law are often accompanied by references to international legal norms as well, with the consequence of the dilution of the categorisation of constitutional law and international law as separate bodies of law.²⁶¹ In addition to the impact of international treaty law on domestic constitutional law, the next section will deal with the interplay between national courts and customary international law.

3.4.3. State Practice as International Custom

Roberts places the citation of foreign law in the context of recognized customary international sources of law. Based on the ICJ statute and its definition of the sources of international law, Roberts notes that foreign law may be persuasive on its own for the purposes of constitutional interpretation, or it may be regarded as

²⁵⁹ <https://treaties.un.org>, accessed 1 September 2015; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 49; International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, article 27; V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010) 6.

²⁶⁰ GL Neuman 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863, 1884.

²⁶¹ V Jackson 'Transnational Discourse, Relational Authority, and the US Court: Gender Equality' (2004) 37 *Loyola of Los Angeles Review* 271, 309.

binding customary international law, or be entirely irrelevant.²⁶² Roberts provides the example of an Italian court that sought in *Ferrini* to contribute to an emerging customary norm regarding state immunity.²⁶³ Aleinikoff asserts that courts acting in this manner embrace the overt citation of other comparative law as part of a larger international rights system.²⁶⁴

Cleveland notes that there is some difficulty in the US in distinguishing a reliance on international law in the form of comparative state practice, despite the fact that 'evidence of State practice was, and remains, a primary indicator of the rules of international law'.²⁶⁵ When this type of international practice is invoked by the US Supreme Court, Cleveland states that 'it is the consensus of States regarding shared common values that gives the norm its force', not because it is a principle of customary international law.²⁶⁶

Roberts further remarks that national court decisions can both constitute evidence of state practice for the purposes of forming custom, and act 'as a subsidiary means of determining the existence and content of international law.'²⁶⁷

²⁶² A Roberts 'Comparative International Law? The Role of National Courts in Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 90.

²⁶³ *Ferrini v Federal Republic of Germany* (2006) 128 ILR 658. Corte di Cassazione (Sezioni Unite) (Judgment No 5044 of 6 November 2003, Registered 11 March 2004) 87 *Rivista di diritto internazionale* (2004) 539. This case was effectively overturned by the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy)* [2012] ICJ Rep 2012, 99. The Italian Constitutional Court thereafter reconsidered the issue in Decision No 238 of 22 October 2014 of the Constitutional Court (English version), Italian Constitutional Court official website www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf, holding that the legislative provisions introduced in Italy in order to comply with the ICJ judgment were unconstitutional.

²⁶⁴ TA Aleinikoff 'Thinking Outside the Sovereignty Box: Transitional Law and the U.S. Constitution' (2004) 82 *Texas Law Review* 1989.

²⁶⁵ S Cleveland 'Our International Constitution' (2006) 31(1) *Yale Journal of International Law* 1, 11.

²⁶⁶ *ibid.*

²⁶⁷ A Roberts 'Comparative International Law? The Role of National Courts in Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 62. Roberts bases

Steiker similarly argues that a domestic court, when faced with an issue that invokes international human rights considerations, is a creator and an enforcer of international norms.²⁶⁸ Courts in Europe in particular have been generators and enforcers of international norms, partly resulting from their proximity to the World Wars and the international human rights instruments that followed thereafter.²⁶⁹ Demleitner gives the analogous legislatively driven example of European states promoting, developing and enforcing a view that the death penalty violates human rights norms and human dignity.²⁷⁰

3.5. CONCLUSION

The first group of theorists considered above argue that comparative law, and foreign precedents in particular, play a supporting role in a national court's fundamental task of ascertaining the meaning of a domestic textual provision. The judicial focus here is on the capacity of foreign law to assist in solving a constitutional problem, rather than references to international law. There is no goal on the part of judges to synchronise domestic law with any broader transnational or international norm.

this view on the contents of articles 38(1)(a) and 38(1)(d) of the ICJ Statute, which refers to sources of international law; See also Booth at 141, where it is argued that cross-citation performs a dual function, consisting of 'the development of international law, and shaping international debate around common rights problems.'

²⁶⁸ C Steiker 'Capital Punishment and American Exceptionalism' (2002) 81 Oregon Law Review 97.

²⁶⁹ *ibid* 112.

²⁷⁰ NV Demlietner 'The Death Penalty: Following the European Lead?' (2002) 81 Oregon Law Review 131, 139.

References to comparative jurisprudence as an interjudicial discourse reflects a judicial exchange of ideas, but do not provide an overarching theory that moves beyond the realm of interpretation. Although this approach contemplates a more expansive interpretive technique than conventional interpretation, which seeks guidance only within a national legal system, cross-citation remains ultimately a tool for textual interpretation.²⁷¹ The reasoning of a foreign court is imported for the interpretive benefit it provides, not due to the normative weight of the borrowed precedent.

Value-oriented theories of cross-citation similarly regard courts as looking to solve national problems by way of drawing on the background reasoning and principles applied by other domestic courts. Foreign law serves the primary purpose of an interpretative guide that courts use to flesh out the meaning of their domestic constitutional provisions. If courts are using foreign law only for the learning purposes recognized by Waldron, in order to gain a better understanding of a constitutional provision, such as 'cruel and unusual punishment', and for no greater purpose than as an interpretative aid in assessing the parameters of a domestic provision, then this is closer to what Waldron labels the 'retail use' of foreign law on a case-by-case basis.²⁷²

Similarly, Calabresi's view that law is always contextual, and his insistence that decisions by American courts 'should be able to stand without the citation of

²⁷¹ S Choudry 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819, 892.

²⁷² J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press New Haven 2012) 77.

foreign law' reduces foreign law citations to a lesser role of merely offering up lessons for how similar issues have been dealt with in other countries.²⁷³ This is akin to the earlier understandings of cross-citation as a discourse, but this is even less ambitious than Waldron's law of nations.

Waldron's limitation of the comparative pool to 'civilised states' presents a departure from international human rights law, which is a normative system involving all states. Waldron's law of nations is limited to only a sub-group of states, which places it in sharp contrast to the third approach discussed above. Here the focus is on all nation states interacting normatively in an international law framework. Calabresi also restricts the ambit of the law of nations to a consideration of 'nations with reasonably similar cultures, histories, values and legal and economic systems as our own' in 'cases involving only certain provisions of the Constitution, such as the Fourth and Eighth Amendments as well as the Equal Protection Clause'.²⁷⁴ This proposition may be sustainable in explaining the workings of an integrated regional system such as the ECHR, but can be contrasted with the third group of writers who view cross-citation as reflective of a global normative regime.

In the third approach, it is said that courts engaged in cross-citation are both defining emerging international human rights standards such as cruel and unusual punishment, and also effectively enforcing those standards where they have attained the status of international legal rules. Whereas the US has a more than

²⁷³ SG Calabresi and B Silverman 'Hayek and the Citation of Foreign Law' (2013) Northwestern Law & Econ Research Paper No. 13-23, 15 and 23.

²⁷⁴ *ibid* 15-16.

two hundred year-old constitution, other countries that enacted their constitutions after 1948 are more likely to have received their constitutional principles via the medium of the international human rights framework. This has resulted in constitutional provisions that refer to international human rights law and even foreign law. This sets the orientation of a court to look outwards, not just for guidance, but also for potentially applicable international law, whether in treaty or customary form.

Domestic courts are generally obliged, even in dualist systems, to have regard to or apply international treaty commitments to which their states have ratified or acceded, where these obligations have been incorporated in domestic legislation. However, further than this, the ICJ Statute incorporates the principle that foreign law may not only offer guidance, but also constitute state practice and thereby reflect a customary international law rule. Foreign law can then be drawn on as part of a court's consideration of emerging and binding customary international law. With its pronouncement on an issue, the domestic court however also makes its own contribution to the international law normative development of that issue, as an act of judicial state practice.

Koh describes the spectrum of approaches available to courts as a 'three-part process of interaction, interpretation and norm internalisation.'²⁷⁵ The first stage contemplates a discourse for its own value, whilst the second stage involves using foreign law to aid enhanced interpretation, but primarily for domestic

²⁷⁵ H Koh 'International Law as Part of Our Law' (2004) 98 American Journal of International Law 43, 55.

purposes.²⁷⁶ This thesis will argue that courts in the three selected jurisdictions run the full gamut of this three-part process referred to by Koh. There has been a shift towards domestic courts using cross-citation to achieve coherence between national constitutional systems and international human rights law. Comparative jurisprudence, and references to international treaties by domestic courts, both contribute to and affirm the internationalisation of human rights.

²⁷⁶ MA Slaughter 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99, 136.

CHAPTER 4: CROSS-CITATION AS A TEXTUAL EXERCISE

4.1. INTRODUCTION

This chapter assesses the relationship between constitutional interpretation and cross-citation. An overview will be provided of the relevant provisions of the constitutions of the US, India and South Africa, which will reveal the similarities between their bills of rights clauses, particularly with respect to cruel and unusual punishment. Notwithstanding the overt similarities in the respective texts, the courts interpreting these provisions have often emphasised the primary role of their own domestic text, in seeking the answer to constitutional problems in death penalty cases. Nevertheless, the very nature of rights provisions in general, particularly the right to life and the prohibition on cruel and unusual punishment, lack the particularity that would render cases brought under these provisions solvable by way of simple and literal interpretation.

The generic construction of human rights clauses creates an inherent necessity to look further afield for additional interpretative sources, which in turn has led to certain judges having regard to foreign law. Some of these judges view these foreign sources as merely useful aids to their own domestic interpretation exercise.²⁷⁷ Other judges, at least impliedly, regard constitutional interpretation as

²⁷⁷ AL Parrish 'Storm in a teacup: The US Supreme Court's use of foreign law' (2007) *University of Illinois Law Review* 637, 651; A Sperti 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing Oregon 2013) 395.

an engagement with other jurisdictions in a joint task of making sense of a constitutional issue.²⁷⁸ This more ambitious understanding of cross-citation has been met with resistance, certainly in the US, where some judges view the reference to comparative norms as a matter for legislative consideration, and nothing more than evidence of the judiciary overreaching its constitutional mandate.²⁷⁹ Yet using cross-citation merely for textual interpretation purposes is a more modest conception of the role of foreign law in domestic decisions. Such a conception can be contrasted to cross-citation as a search for shared values or indeed part of the development of international law, subjects which will be canvassed in chapters five and seven.

4.2. TEXTUAL PROVISIONS UNDER CONSIDERATION

It is apposite to record the textual similarities and differences in the three focus jurisdictions. The Fifth Amendment in the United States Constitution's Bill of Rights provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

²⁷⁸ C McCrudden 'A common law of human rights?: Transnational Judicial Conversations on Constitutional Rights' in O'Donovan, K and Rubin, G (Eds) *A Festschrift in Honour of Brian Simpson* (OUP Oxford 2000) 138.

²⁷⁹ R Posner 'The Supreme Court 2004 Term: Foreword: A Political Court' (2005) 119 *Harvard Law Review* 31, 88.

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.²⁸⁰

The Fifth Amendment therefore contemplates that a person's right to life may be terminated by capital punishment if 'due process of law' is followed.²⁸¹ On the other hand, the Eighth Amendment to the United States Constitution provides that 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'²⁸² As the US Supreme Court has accepted that Fifth Amendment due process does not permit cruel and unusual punishment, litigants have attacked the death penalty via the Eighth Amendment, by raising the question whether capital punishment, in varying circumstances, is cruel and unusual.²⁸³

Article 21 of the Indian Constitution reads: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'²⁸⁴ The Supreme Court read the ban on cruel and unusual punishment into the Constitution.²⁸⁵ A similar tension between a death penalty friendly right to life clause and a limitation on cruel and unusual punishment therefore exists in both India and the US.

²⁸⁰ The first 10 amendments to the US Constitution are known as the 'Bill of Rights', ratified on December 15, 1791. The Fourteenth Amendment of 1868 made the Fifth Amendment applicable to the states.

²⁸¹ Burger CJ in *Furman* commented that the death penalty was not considered cruel in 1791, as the Fifth and Eighth Amendment were enacted on the same day that year, and the Fifth Amendment allows for the deprivation of the right to life. *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 380.

²⁸² US Constitution, 1791. It is worth noting that the wording of this clause derives from the English Bill of Rights, enacted 16 December 1689.

²⁸³ *Louisiana ex rel Francis v Resweber* 329 US 459, 67 S.Ct. 374 (1947) 463; *Robinson v California* 370 US 660, 82 S.Ct. 1417 (1962) 667.

²⁸⁴ Article 21, Constitution of India (Updated up to 86th Amendment Act).

²⁸⁵ *Francis Coralie Mullin v Administrator Union Territory of India* AIR 1981 SC 746; *Bachan Singh v State of Punjab* AIR 1980 SC 898.

In South Africa, the constitution provides in section 11 that '(e)veryone has the right to life.'²⁸⁶ There is no textual exception for due process. Section 12 grants everyone the right to freedom and security, including the right 'not to be treated in a cruel, inhuman or degrading way.'²⁸⁷ There is no mention of the qualifier 'unusual' in the provision. It is worth mentioning at this juncture that the SA constitution also contains a limitation clause in section 36, which permits rights in the Bill of Rights to be limited by laws of general application, where 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'

4.3. THE PRIMACY OF THE TEXT

With these textual provisions in mind, the status of this text before the courts will now be considered. The starting point for any court tasked with constitutional interpretation is to be guided primarily by what is written in the constitution.²⁸⁸ Certainly, the literal meaning of the constitutional text is the paramount consideration for the US Supreme Court.²⁸⁹ Scalia J emphasised in his dissenting judgment in *Thompson* that the wording of the US Constitution will always take precedence over the normative positions of other countries:

²⁸⁶ Adopted 8 May 1996 and amended by the Constitutional Court on 11 October 1996. The South African Interim Constitution (Act 200 of 1993) will be dealt with as is necessary in the analysis of the case law of the South African Constitutional Court.

²⁸⁷ Sections 9 and 11 of the Interim Constitution, which the Constitutional Court had to consider in *S v Makwanyane* 1995 (3) SA 391 (CC), encapsulated the right to life and the prohibition on cruel punishment respectively.

²⁸⁸ M Tushnet 'The United States: Eclecticism in the Service of Pragmatism' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 27.

²⁸⁹ *ibid.*

We must never forget that it is a Constitution for the United States of America that we are expounding. ... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.²⁹⁰

Scalia J couched the juvenile death penalty question as primarily one of interpretation, when he stated that:

the plurality pronounces it to be a fundamental principle of our society that no one who is as little as one day short of his 16th birthday can have sufficient maturity and moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution.²⁹¹

Scalia J later in his concurring judgment in *Callins* also stated that arguments against the death penalty refer too frequently to 'intellectual, moral and personal perceptions, but not to the text and tradition of the constitution,' concluding that it is 'the latter rather than the former that ought to control.'²⁹²

Although the US Supreme Court was a single vote away from striking down the death penalty on a fundamental basis in *Furman*, the court for the most part has assumed that capital punishment is unassailable in terms of the limited right to life provided for in the Fifth Amendment. Scalia J stated in *Callins* there was no room for Eighth Amendment arguments in death penalty cases as, in light of the Fifth Amendment clearly permitting the capital punishment, it is not one of the cruel

²⁹⁰ *Thompson v Oklahoma* 487 US 815, 108 S.Ct. 2687 (1988) 868.

²⁹¹ *ibid* 863.

²⁹² *Callins v Collins* 510 US 1141, 114 S.Ct. 1127 (1994) 1141.

and unusual punishments envisioned by the Eighth Amendment.²⁹³ The Fifth Amendment is therefore the first hurdle for death penalty cases in the US.

The Supreme Court infrequently refers in capital punishment cases to a right to life, and has instead focused on what could be described as partial attacks on the death penalty on the basis of the Eighth Amendment. In 1878, the court was faced with the question whether Utah could carry out the death penalty by way of public shooting.²⁹⁴ The court did not refer to the Fifth Amendment right to life, only to the prohibition of cruel and unusual punishment. After commenting in passing that torture would likely constitute cruel and unusual punishment, the court held that a mandatory death penalty in a first-degree murder case, carried out by way of a public shooting, is constitutional and lawful.²⁹⁵ The court later expressly affirmed that punishment by way of the death penalty is not cruel unless the method is inhumane, holding on the basis of that test, that death by electrocution was lawful.²⁹⁶

Black J in *McGautha* adopted an historical view of the Eighth Amendment, in terms of which the original intentions of the constitutional drafters in favour of capital punishment were given a great deal of weight:

The [Clause] forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the

²⁹³ *ibid.*

²⁹⁴ *Wilkerson v Utah* 99 US 130, 25 L.Ed. 345 (1878).

²⁹⁵ *ibid* 135-136.

²⁹⁶ *Kemmler, In re* 136 US 436, 10 S.Ct. 930 (1890) 447.

countries from which our ancestors came at the time the [Clause] was adopted. It is inconceivable to me that the framers intended to end capital punishment by the [Clause].²⁹⁷

Rehnquist CJ in his dissent in *Woodson* similarly preferred a more literal and narrow construction, informed by original intent, in stating that 'it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment ... was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights.'²⁹⁸ Powell J in *Furman* also returned to the intentions of the drafters of the US Constitution as a key measure for constitutional standards:

The Constitution itself poses the first obstacle to petitioners' argument that capital punishment is per se unconstitutional. The relevant provisions are the Fifth, Eighth, and Fourteenth Amendments. ...whatever punishments the Framers of the Constitution may have intended to prohibit under the "cruel and unusual" language, there cannot be the slightest doubt that they intended no absolute bar on the Government's authority to impose the death penalty.²⁹⁹

Rehnquist CJ further objected to the effect of limiting the express wording of the Fifth Amendment by way of bringing in Eighth Amendment arguments:

What the plurality opinion has actually done is to import into the Due Process Clause of the Fourteenth Amendment what it conceives to be desirable procedural guarantees where the punishment of death, concededly not cruel and unusual for the crime of which the defendant

²⁹⁷ *McGautha v. California* 402 US 183, 91 S.Ct. 1454 (1971) 226.

²⁹⁸ *Woodson v Carolina* 428 US 280, 96 S.Ct. 2978 (1976) 308.

²⁹⁹ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 419.

was convicted, is to be imposed. This is squarely contrary to McGautha, and unsupported by any other decision of this Court.³⁰⁰

On the other hand, Marshall J in *Furman* considered the historical progression of abolition in the US at length, from the late 1700's until the late 1960's, but then suggested that the time had come for the death penalty itself to be tested constitutionally in terms of the Eighth Amendment, and not particular methods or practices of capital punishment:

This is where our historical foray leads. The question now to be faced is whether American society has reached a point where abolition is not dependent on a successful grass roots movement in particular jurisdictions, but is demanded by the Eighth Amendment. To answer this question, we must first examine whether or not the death penalty is today tantamount to excessive punishment.³⁰¹

The express provision for a restricted right to life in the Fifth Amendment meant that it was accepted by the court until the 1970's that the Fifth and Eighth Amendment, read together, permitted capital punishment. It was at this juncture that judges diverged on the question as to the degree to which capital punishment could be struck down outright on the basis of the Eighth Amendment alone. The very fact that there was a departure among judges on this question is a clear indication of the limited degree to which the text alone provides answers in death penalty cases.

³⁰⁰ *Woodson v Carolina* 428 US 280, 96 S.Ct. 2978 (1976) 324.

³⁰¹ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 336.

Marshall J was determined to apply a contemporary analysis to the text of the Eighth Amendment, and the question whether the death penalty was constitutionally sustainable. Notwithstanding the emphatic endorsement of a primary role for text in constitutional adjudication, the shift to a focus on the Eighth Amendment has demonstrated the elusive nature of the task of interpretation in death penalty cases, as the meaning of words such as 'cruel' and 'unusual' is unclear. For example, to hold that the Constitution itself provides any clear guidance as to the question whether the juvenile death penalty is lawful appears to be untenable.

The Indian Supreme Court faces a comparable constitutional position to the US, with a constitution that provides expressly for the possibility of a death penalty. It has perhaps unsurprisingly chartered a similar course to the US Supreme Court. In 1980, Sarkaria J in *Bachan Singh* stated that, in light of the express language in article 21, it is impossible to say that the death penalty either on a fundamental basis, or because it involves execution by hanging, constitutes unreasonable, cruel or unusual punishment.³⁰² After the Indian Supreme Court upheld the death penalty as constitutional, much of the court's jurisprudence after that time has pertained to procedural challenges to the death penalty.³⁰³ The Supreme Court's comment in *Deena Dayal*, that 'the mandate of Art. 21 is not that the death sentence shall not be executed but that it shall not be executed in a cruel,

³⁰² *Bachan Singh v State of Punjab* AIR 1980 SC 898, 930.

³⁰³ *ibid.*

barbarous or degrading manner’, confirms that the content of the right to life provision is informed in part by the cruel and unusual restriction.³⁰⁴

In *Triveniben*, the Indian Supreme court per Shetty J cited the comments of Marshall J in *Furman* regarding constitutional text being paramount, rather than judicial opinion.³⁰⁵ The court affirmed its primary interpretative role in *Maru Ram*, remarking that the role of the judiciary is to ‘construe, not construct, to decode, not to make a code.’³⁰⁶ The court also asserted in *Deena Dayal* that the court’s role is essentially an interpretative one:

It is simply the highest Court of law and justice in a country governed by a written Constitution, which, it is its primary and exclusive function to interpret. The care which we must take is that while interpreting the laws and the Constitution, we ought not to be swayed by passing passions or by populist sentiments.³⁰⁷

The court, similarly to the US Supreme Court, has also tied this literal approach to the right to life to an original intention focus, commenting that ‘the framers of the Constitution did not consider that either the death sentence or the traditional mode of its execution prescribed by section 354(5) of the Code was a degrading punishment which would defile the dignity of the individual within the contemplation of the Constitution.’³⁰⁸ In 2009, Sinha J upheld this narrower approach in *Satishbhusha*, stating that ‘we are afraid that the Constitution does not

³⁰⁴ *Deena Dayal v Union Of India* AIR 1983 SC 1155, 44.

³⁰⁵ *Triveniben v State of Gujarat* (1992) LRC (Const) 425, 442.

³⁰⁶ *Maru Ram v Union of India* AIR 1980 SC 2147, [28].

³⁰⁷ *Deena Dayal v Union Of India* AIR 1983 SC 1155, 1984 SCA (1) 1, 28.

³⁰⁸ *ibid* 35.

permit us to take a re-look on the capital punishment policy and meet society's cry for justice through this instrument.³⁰⁹

However, Sathasivam CJ recently asserted a bolder interpretative duty for the court in *Chauhan*, declaring that the court's overarching interpretative duty is the obligation to protect the rights contained in the constitutional text:

The question of violation of Article 21, its effects and the appropriate relief is the domain of this Court. There is no question of remanding the matter for consideration because this Court is the custodian and enforcer of fundamental rights and the final interpreter of the Constitution. Further, this Court is best equipped to adjudicate the content of those rights and their requirements in a particular fact situation. This Court has always granted relief for violation of fundamental rights and has never remanded the matter.³¹⁰

In South Africa, the Constitutional Court focused on section 11 of the Constitution in *Makwanyane*, declaring the death penalty to be cruel and unusual punishment. Chaskalson JP emphasised that it would be important to place the constitution at the heart of the court's work:

In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law but we are in no way bound to follow it.³¹¹

³⁰⁹ *Santosh Kumar Satishbhushan v State Of Maharashtra* (2009) 6 SCC 498 [45]-[46].

³¹⁰ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1 [44].

³¹¹ *S v Makwanyane* 1995 (3) SA 391 (CC) 415.

Although the constitution mandates references to international law and permitted regard to foreign law, the structure and language of the SA constitution was the lodestar for the court's work. As the court later affirmed in *Tsebe*, the starting point in any rights case would be the language of the Bill of Rights:

Our Constitution is the supreme law of the Republic. Law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. ... Section 7(1) of the Constitution provides that our Bill of Rights, which covers sections 7 to 39, is a cornerstone of our democracy. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.³¹²

Chaskalson JP in *Makwanyane* referred to the potential inapplicability of foreign precedents to the court's principal task of interpreting the Bill of Rights. He stated that

comparative 'bills of rights' jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by s35 (1) that we 'may' have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of chap 3 of our Constitution.³¹³

The relevance and influence of foreign and international law would be determined then on a case-by-case basis. An analysis of international and foreign law in *Makwanyane* revealed that the texts of certain key international documents and domestic constitutions differed from the constitution wherever these texts

³¹² *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC), [27]-[28].

³¹³ *S v Makwanyane* 1995 (3) SA 391 (CC) 414-415; See *Mistry v INMDC* 1998 (4) SA 1127 (CC) 1133.

sanctioned capital punishment. Chaskalson JP averred that where challenges to capital punishment have failed in other courts, the instrument concerned has either directly sanctioned the death penalty, or the right to life in that instrument is subject to specific exceptions.³¹⁴ The court had regard to US jurisprudence, but after recognising differences in text and context, decided not to pursue the US approach. It was noted that due to the clear allowance for the death penalty in the American constitution, the focus by US courts had been on due process.³¹⁵ O'Regan J made the point that to 'the extent that the formulation of the right is different from that adopted in other jurisdictions, their jurisprudence will be of less value.'³¹⁶

The court adopted a similar attitude in *Mohamed*, where the main contention on behalf of the applicants was that the arrest, detention, and handing over by the South African authorities to the FBI agents of the complainant, and his subsequent removal by them to the US, were tantamount to an unlawful disguised extradition.³¹⁷ The court looked at the relevance of death penalty jurisprudence in both Europe and Canada. The existence of normative consistency with the ECHR system was mentioned, but ultimately the court emphasised that the domestic standard contained in the SA constitution was paramount:

³¹⁴ *S v Makwanyane* 1995 (3) SA 391 (CC) 415.

³¹⁵ *ibid* 422.

³¹⁶ *ibid* 505. However, it was acknowledged by the court that the reasoning of another court might remain persuasive despite subtle textual differences. The court itself referred to the fact that in India and the US, the courts have intervened on occasion despite the texts in those jurisdictions allowing for the death penalty (430). This demonstrated to the court the strict scrutiny employed in death penalty cases, even in countries where their constitutional provisions clearly allow for capital punishment.

³¹⁷ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) [3].

The fact that the government claims to have deported and not to have extradited Mohamed is of no relevance. European courts draw no distinction between deportation and extradition in the application of Article 3 of the European Convention on Human Rights. Nor does the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of which South Africa is a signatory and which it ratified on 10 December 1998. ... All are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. That is the standard that our Constitution demands from our government in circumstances such as those that existed in the present case.³¹⁸

In reality the wording of human rights clauses does not bear out this notion that the text overwhelmingly acts as the source of reasoning in death penalty cases. The next section will look at how judges have answered death penalty problems focusing on cruel and unusual punishment provisions, but have reached opposing conclusions, suggesting that constitutional text provides no clear answers in death penalty cases.

4.4. TEXT PROVIDES ONLY HALF AN ANSWER

As much as courts have held up constitutional text as the primary source for answers to constitutional problems, death penalty cases provide a good example of how difficult it is to resolve such cases on the basis of text alone, given the open-ended language of the implicated rights clauses. In the US, public opinion shifted in the US after the Second World War against capital punishment, to the extent that by 1965, 60% of adults were in favour of abolition.³¹⁹ There was also a decline in the application of capital punishment after the 1930's: in the 1930's, executions averaged 167 per annum; in the 1940's, the average was 128 per

³¹⁸ *ibid* [60].

³¹⁹ R Hood and C Hoyle *The Death Penalty: A Worldwide Perspective* (OUP Oxford 2008) 115.

annum; in the 1950's, it was 72 per annum; and there were 94 executions a year in the 1960's, before a moratorium on executions was put in place in 1967.³²⁰ The constitutionality of a death penalty was therefore ripe for reconsideration in *Furman* in 1972, when the Supreme Court effectively declared the death penalty unconstitutional as it was then framed in state legislation.³²¹ All nine sitting justices provided written opinions, and were divided over, amongst other issues, the meaning of the Eighth Amendment and the role of foreign law.

The court split narrowly on the question whether the Eighth Amendment rendered the death penalty unconstitutional in all circumstances. Even amongst those judges striking down the Georgia statute, there was a difference of opinion as to whether the death penalty was fundamentally constitutionally unsound or whether the statute could be salvaged in a different form. Clearly the contents of the Eighth Amendment offered no easy answer to these questions. White J in his concurrence did not rule on whether the death penalty is unconstitutional *per se*, but focused on whether the death penalty was unconstitutional in the form the statutes before the court were conceived, due to the wide discretion given to sentencing judges, and the irregularity with which the death penalty is imposed.³²² Stewart J similarly was of the view that capital punishment in its then form was an excessive and unnecessary punishment that violates the Eighth Amendment, but did not find it necessary to decide the ultimate question of the constitutionality of

³²⁰ Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930-1970, p. 8 (Aug. 1971) cited in *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 291-292.

³²¹ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972).

³²² *ibid* 311.

capital punishment.³²³ He concluded that 'these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.'³²⁴

As two judges in *Furman* did not feel it was necessary to address the question of whether the death penalty is unconstitutional in all circumstances, this left a loophole for the states to continue employing capital punishment. Since the decision did not go as far as to declare the death penalty unconstitutional in all circumstances, this led to stricter statutes being enacted that limited jury discretion. The court was faced in rapid succession with challenges to new death penalty statutes in Georgia, Florida, Texas, North Carolina and Louisiana. The primary change in the amended state statutes, which allowed for a bifurcated procedure and minimised the discretion of juries, was upheld in *Gregg* in 1976.³²⁵ Stewart J concluded that the Eighth Amendment undoubtedly permits capital punishment:

We now consider specifically whether the sentence of death for the crime of murder is a per se violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question...The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England... It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State.³²⁶

³²³ ibid 306.

³²⁴ ibid 309.

³²⁵ *Gregg v Georgia* 428 US 153, 96 S.Ct. 2909 (1976) 169.

³²⁶ ibid 176. Stewart J concluded at 206, in a starkly different approach to *Furman*, that the 'new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines

The Supreme Court had reached opposing conclusions on the constitutionality of death penalty statutes within just a four-year period, with judges varying considerably on the legal effect of the wording contained in the Eighth Amendment. *Callins* was a later case where the court again diverged on the question of the fair administration of the death penalty, and the difficulty of striking a balance between too much and too little discretion being granted to juries. Scalia J, recognising that after the *Furman* case the court imposed incompatible sets of commands, proposed that rather than give up on both approaches, one should choose one option over the other.³²⁷ Blackmun J in his dissent, however, felt that this was impossible, concluding that ‘the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.’³²⁸ Again the majority and the minority on the court reached opposite conclusions as to the requirements of the Eighth Amendment.

The courts in India have prevaricated both over the nature and application of the test to be applied in cases concerning constitutional challenges to the death penalty. In 1979, Krishna Iyer J for the majority in *Rajendra Prasad*, held that

³²⁷ *Callins v Collins* 510 US 1141, 114 S.Ct. 1127 (1994) 1127-1128.

³²⁸ *ibid* 1137. Blackmun stated famously at 1130 that ‘(f)rom this day forward, I no longer shall tinker with the machinery of death ... I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules of substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.’

capital punishment should only be imposed if the criminal was dangerous to society.³²⁹ The rights to life and the dignity of the person were infringed by the imposition of the death penalty unless 'special reasons' existed.

In 1980 in *Bachan Singh*, the court was asked to consider the constitutionality of section 302 of the Penal Code that provided for the death penalty, in terms of articles 19 and 21 of the Constitution.³³⁰ The court conclusively upheld the death penalty in terms of the limited right to life in article 21, but it applied a new benchmark of limiting capital punishment to the 'rarest of the rare' cases.³³¹ Bhagwati J on the other hand, in his dissent, concluded that judicial disagreement in the United States and Canada on this issue illustrated the complexity of the issue.³³² He was of the view that the fundamental nature of the right to life as expressed in article 21 rendered the death penalty unconstitutional.³³³ The court was therefore uncertain whether capital punishment demanded 'special reasons' or needed to be a 'rarest of the rare' case to be lawful, or indeed if article 21 allows for the death penalty or precludes it entirely.

³²⁹ *Rajendra Prasad v State of U.P.* AIR 1979 SC 916, 925. But see *Jagmohan Singh v State of U.P.* AIR 1973 SC 947, where the court held that articles 14, 19 and 21 are not violated by the death penalty.

³³⁰ *Bachan Singh v State of Punjab* AIR 1980 SC 898.

³³¹ *ibid* 930. Thakkar J in *Macchi Singh v State of Punjab* AIR 1983 SC 957-958 confirmed that the law is now the 'rarest-of-rare-cases' formula, however he went further and listed possible factors that may be taken into account: manner of commission of murder; motive; anti-social nature of the crime; magnitude of the crime, and the personality of the victim.

³³² *Bachan Singh v State of Punjab* AIR 1980 SC 898, 1332. Bhagwati J cited Pannick regarding judges' ideologies playing more of a role than constitutional texts.

³³³ Bhagwati J stated at 1343 that the 'death penalty is irrevocable; it cannot be recalled. It extinguishes the flame of life forever and is plainly destructive of the right to life, the most precious right of all, a right without which enjoyment of no other rights is possible.

This ambivalence regarding the import of article 21 continued in the decades to follow, when courts had to apply the 'rarest of the rare' test. In *Shraddananda*, the court commented on 'the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the *Machhi Singh* categories were followed uniformly and consistently', with the results that 'the overall larger picture gets asymmetric and lop-sided and presents a poor reflection of the system of criminal administration of justice.'³³⁴

Similarly, Sinha J in *Satishbhushan* remarked further on the differing opinions in the cases as to how the 'rarest of the rare' test should be applied:

While dealing with a matter as to whether death penalty should be awarded or not, although the court ordinarily would look to the precedents, but, this becomes extremely difficult, if not impossible, in the context of the cases discussed above. There is no uniformity of precedents, to say the least. In most cases, the death penalty has been affirmed or refused to be affirmed by us, without laying down any legal principle.³³⁵

The complexity of assessing the constitutionality of the death penalty based on constitutional text alone was illustrated in a different way in South Africa. Here the Constitutional Court could have held simply that the absolute wording of the right to life clause in section 11 of the Constitution rendered capital punishment unlawful on its own without the need for any further analysis. In *Mahomed*, the court had noted that it was the express intention of the drafters to not provide for a qualified right to life:

³³⁴ *Swamy Shraddananda v State of Karnataka* AIR 2008 SC 3040 [31]-[34].

³³⁵ *Santosh Kumar Satishbhushan v State Of Maharashtra* (2009) 6 SCC 498 [58].

The question whether, in the light of the decision in *Makwanyane*, an exception should be made to the right to life to allow for the death sentence to be passed in serious cases, was thoroughly debated in the course of the deliberations of the Constitutional Assembly, e.g. during the second reading debate on 7 May 1996. Among other matters, the question of a qualification to the right to life to allow for the death sentence was expressly raised and debated. Ultimately a decision was taken that this should not be done.³³⁶

This raises the question as to why the court ultimately decided *Makwanyane* not on the basis of the right to life, but relied on the prohibition of cruel and unusual punishment. Chaskalson JP stated that the right to life has been described as the most fundamental of all human rights.³³⁷ Langa J, in one of the many concurring judgments, stated that it 'is the most fundamental of all rights, the supreme human right,' which could not be limited without clear proof of the deterrence value of the death sentence being higher than a life sentence.³³⁸ O'Regan J explained the notion of the right to life being fundamental and basic, in the sense that it is the basis or source for all other rights. She stated that the 'right to life is, in one sense, antecedent to all other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise rights or to be the bearer of them.'³³⁹

³³⁶ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) footnote 28.

³³⁷ *R v Home Secretary* [1987] 1 All ER 940 (HL) AC 514, 531.

³³⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) 479. 'Langa J cited Lord Bridge in *Bugdaycay v Secretary of State for the Home Department* (1987) 1 All ER 940 (HL) 952.

³³⁹ *ibid* 506. O'Regan favoured a broader definition of the right to life, incorporating a notion of autonomy. She argued that it is not merely 'a right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.'

Nevertheless Chaskalson JP stated that the rights to life, dignity, and equality were all relevant to deciding whether the section 11 prohibition on cruel and unusual punishment was infringed.³⁴⁰ The right to life (and dignity and equality) were therefore given a subjugated role of determining the contents of the section 12 right to freedom and security. Although the court could have relied on the quite simply stated and broad right to life, the court framed the death penalty question around the more ambiguous cruel and unusual punishment clause.

In *Mohamed*, the court noted that *Makwanyane* had effectively struck down capital punishment as an unjustifiable limitation on the right to life:

Our Constitution provides that everyone has the right to life. There are no exceptions to this right. However, like all other rights in the Bill of Rights, it is subject to limitation in terms of section 36 of the Constitution. The requirements prescribed by section 36 are that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those mentioned in the section. These considerations were taken into account by this Court in *Makwanyane* in holding that capital punishment was not justifiable under the interim Constitution.³⁴¹

This begs the question why the court ostensibly decided *Makwanyane* on the basis of cruel and unusual punishment. Relying on the cruel and unusual punishment provision when the absolute terms of the right to life clause were available, demonstrates that the judicial interpretation of human rights contained in constitutions is anything but simple. Literal interpretation is insufficient, when faced with wording that is by its nature ambiguous and contingent. The cruel and unusual

³⁴⁰ *ibid* 404.

³⁴¹ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) [48].

punishment wording in particular demands a less traditional approach to judicial analysis, as constitutional solutions do not fall directly out of the text of these provisions.³⁴²

4.5. VAGUE CONSTRUCTION

Although some judges have asserted an obligation to be limited by the wording contained in a bill of rights, courts have in reality needed to adopt a more robust attitude to the text in capital punishment cases. In death penalty cases, a narrow and literal approach to the text is not straightforward. The relevant human rights clauses lack precision and are couched in open-ended terms. In part this has motivated judges to transcend more conservative approaches that pay heed to the original intentions of the constitutional drafters, and instead take cognisance of extra textual sources in order to properly assess the normative parameters of a constitutional question.

As early as 1878, the US Supreme court had recorded the difficulty in seeking 'to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.'³⁴³ The leading case of *Furman* contained comments from a number of judges regarding the lack of particularity in the Eighth Amendment. Douglas J noted that the inherent vagueness of the Eighth Amendment had been remarked upon at the First

³⁴² M Tushnet 'When is Knowing Less Better Than Knowing More? Unpacking the Controversy of the Supreme Court Reference to non-US law' (2006) 90 Minnesota Law Review 1275, 1277.

³⁴³ *Wilkerson v Utah* 99 US 130, 25 L. Ed. 345 (1878) 135-136.

Congress on the US Bill of Rights.³⁴⁴ Brennan J commented that the ‘Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition. Yet we know that the values and ideals it embodies are basic to our scheme of government.’³⁴⁵

However, this lack of clarity in the language of the constitution has also been accepted as an intentional action by constitutional drafters, aimed at encouraging judiciaries to ensure that constitutional rights norms remain relevant in contemporary decision-making. In 1910, the Court in *Weems* downplayed the historical interpretation of the Eighth Amendment, preferring a ‘more expansive and vital character to the provision ... essential [with other rights] to the rule of law and the maintenance of individual freedom.’³⁴⁶ This reference to the ‘expansive’ nature of the Eighth Amendment was an early notion of an ever-expanding and evolving normative guideline.

The *Trop* court commented less obliquely in 1958 that ‘[t]he exact scope of the constitutional phrase “cruel and unusual” has not been detailed by this Court ... the words of the [Clause] are not precise, and that their scope is not static.’³⁴⁷ Powell J in *Furman* expressly refuted the idea that cruel and unusual punishments and due process are ‘static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and to gain meaning through application to specific circumstances, many of which were not

³⁴⁴ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 244.

³⁴⁵ *ibid* 258.

³⁴⁶ *Weems v United States* 217 US 349, 30 S.Ct. 544 (1910) 376-377.

³⁴⁷ *Trop v Dulles* 356 US 86, 78 S.Ct. 590 (1958) 99, 104.

contemplated by their authors.’³⁴⁸ When the court was faced in *Stanford v Kentucky* with the question whether the death penalty was constitutional for persons 16 or 17 years of age at the time of the commission of their crime, Scalia J described the court’s approach to interpreting the Eighth Amendment as one undertaken in ‘a flexible and dynamic manner’.³⁴⁹ The Indian Supreme Court has also interpreted indeterminate provisions in a ‘broad and expansive spirit’ in order to give them meaning.³⁵⁰ The construction of certain constitutional clauses would appear then to invite courts to look further afield and outside the text for interpretative guidance.

4.6. AN INVITATION TO EXPAND SOURCES

The inherent vagueness and flexibility of cruel and unusual punishment clauses has prompted courts to look beyond the literal meaning of the words to further sources that may shed light on their ambit. Even with the narrower task of giving meaning to constitutional words, external sources become necessary when, like many constitutional provisions, the outcome can be reasoned equally effectively on both sides of a constitutional problem.

Notwithstanding the availability of domestic precedents in the US, the text itself apparently only offers a partial answer to the question whether capital

³⁴⁸ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 420.

³⁴⁹ *Stanford v Kentucky* 492 US 361, 109 S.Ct. 2969 (1989) 369.

³⁵⁰ *Francis Coralie Mullin v Administrator Union Territory of India* AIR 1981 SC 746, 618; SP Sathe ‘India: From Positivism to Structuralism’ in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 253.

punishment falls foul of the cruel and unusual standard. Stewart J commented in *Furman* that the ‘most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*.’ This was demonstrated by the fact that 35 states legislatures ‘enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.’³⁵¹ This suggestion that the contemporary policy environment had to be considered as background context for giving meaning to the text, reflected an emerging pattern in the US Supreme Court’s view that the Eighth Amendment demands extra-textual consideration in order to properly assess the requirements of this constitutional standard.³⁵²

One potential external source is foreign law. A basis on which judges have looked to foreign jurisdictions is the shared lineage of the constitutional provisions under examination. As early as the Court’s decision in *Wilkerson*, it was held that the corresponding rules in other countries were of relevance.³⁵³ Initial references to foreign laws were frequently to the law of England. Its initial contribution to the drafting of the US Constitution rendered England a jurisdiction that was widely accepted by US judges as of historical relevance in assessing the scope of the Eighth Amendment. Douglas J in *Furman* made the connection between the Eighth Amendment and the original language from which it borrowed in the English Bill of Rights, commenting that its aim was to ‘forbid arbitrary and discriminatory penalties of a severe nature.’³⁵⁴ He also made multiple references to English historical

³⁵¹ *Gregg v Georgia* 428 US 153, 96 S.Ct. 2909 (1976) 177.

³⁵² *ibid* 176.

³⁵³ *Wilkerson v Utah* 99 US 130, 25 L. Ed. 345 (1878) 134.

³⁵⁴ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 242.

treatment of the death penalty, in order to illustrate the risks of the practice being used for political motives.³⁵⁵

References by the US Supreme Court to the situation in England are something of a special case however. On the whole, the interest of US judges in foreign law has been less common than in other jurisdictions. One reason that has been cited for the discrepancy in usage is the sheer amount of domestic law available to US courts. Although the US and other countries share the tendency of common law jurisdictions to refer to a wide range of sources, the jurisprudence of the US Supreme Court remains the most frequently cited jurisdiction by other courts.³⁵⁶ On the other hand, the US has a large body of domestic constitutional law both from the Supreme Court and state courts to refer to.³⁵⁷ US courts therefore structurally have less need to look outside of the US for guidance.

The SA Constitutional Court provides a different example of a link between a court's longevity and a decrease in borrowing. In *Tsebe*, the court remarked that

In *Mohamed* this Court discussed a number of foreign cases dealing with how various courts and other tribunals have dealt with the question under consideration in this case. It is not necessary to repeat that discussion in this judgment even though parties have referred to such cases in their argument. We are not called upon to reconsider the correctness of this Court's decision in *Mohamed*. Accordingly, unless

³⁵⁵ *ibid* 254.

³⁵⁶ A Sperti 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing Oregon 2013) 418.

³⁵⁷ C Saunders 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37, 64.

the present case is distinguishable from *Mohamed* we are bound to decide it in accordance with the principle established in that case.³⁵⁸

Foreign cases were important to the court in *Makwanyane* in 1995, but were apparently less relevant twenty years later, given the existence in 2012 of an applicable domestic precedent.

Regardless of the development of domestic law, the international human rights framework continues to expand its reach. The proliferation of international instruments, and related resolutions emerging from international bodies, have been difficult for judges to ignore. Many national constitutions stem from international human rights treaty formulations. Even with older constitutions such as in the US, there is connection between the international human rights regime and the domestic bill of rights.³⁵⁹

Distinguishing human rights from constitutional rights, Waldron draws on Neuman's idea of 'dual positivization' as a description of how the same right may be concretised in an international human rights instrument and a domestic constitution. Waldron prefers the wording 'multiple positivization', which includes international, regional and national layers of rights formalisation.³⁶⁰ The relevance of this international layer will be dealt with in detail in chapter seven, but it is noteworthy at

³⁵⁸ *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC), [44].

³⁵⁹ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press New Haven 2012) 77, 122-123.

³⁶⁰ *ibid* 120; See GL Neuman 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863, 1864.

this stage that international human rights law, in addition to foreign law, has been referred to by domestic courts, even if merely for interpretative input in order to fill in the gaps.

This notion of reaching beyond the constitution to contextual sources creates no small constitutional problem for judges, because the further they search the more they are open to the accusation that the solution lies merely in the eyes of the beholder. According to Burger CJ, the Eighth Amendment is couched in unclear and challenging terms that can lead to excessive subjectivity on the part of judges:

Our constitutional inquiry, however, must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment. There is no novelty in being called upon to interpret a constitutional provision that is less than self-defining, but, of all our fundamental guarantees, the ban on "cruel and unusual punishments" is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command. Yet it is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.³⁶¹

Powell J similarly warned that '(w)hile flexibility in the application of these broad concepts is one of the hallmarks of our system of government, the Court is not free to read into the Constitution a meaning that is plainly at variance with its language.³⁶² Due to this concern with judges embarking on interpretative frolics,

³⁶¹ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 375-376.

³⁶² *ibid* 420.

the citation of foreign authority has probably been one of the most controversial recent issues in constitutional interpretation, particularly in the US.

4.7. JUDICIAL OVERREACH

The following sections will consider the occasionally strong strands of resistance amongst judges to look beyond their own shores for guidance.

4.7.1. Too much discretion

The notion of judges using extrinsic sources to solve constitutional problems has been criticised most heavily in the US.³⁶³ Burger CJ in *Furman* connected the open phrasing of the Eighth Amendment with the potential for judges to exceed their constitutional mandate, when he stated that 'where ... the language of the applicable provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great.'³⁶⁴ Similarly, in *Swamy Shraddananda*, the Indian Supreme court warned that the handing down of a sentence of death

³⁶³ See SG Calabresi "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' (2006) 86 Boston University Law Review 1335; SG Calabresi and B Silverman 'Hayek and the Citation of Foreign Law' (2013) Northwestern Law & Econ Research Paper No. 13-23; J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press New Haven 2012) regarding the response in the US to the Supreme Court's citation of a Zimbabwean precedent; PH Glenn 'Persuasive Authority' (1987) 32 McGill Law Journal 261, 293; and MD Kirby 'The Role of the Judiciary in Advancing Human Rights by Referring to International Human Rights Norms' (1988) 62 Australian Law Journal 514, 519-530, where Kirby describes how the arguments for judicial activism or for restraint may be made. In respect of activist approaches, human rights are argued to be by definition international, and courts are encouraged to enter into an international human rights discourse. In respect of arguments for restraint, it is argued that courts should be reluctant to suggest universal approaches to the discharge of judicial functions, even on human rights questions.

³⁶⁴ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 431.

'depends a good deal on the personal predilection of the judges constituting the bench.'³⁶⁵ In this regard, Burger CJ was not enthused about using foreign precedents, even as an aid to enhance judicial reasoning:

The worldwide trend toward limiting the use of capital punishment, a phenomenon to which we have been urged to give great weight, hardly points the way to a judicial solution in this country under a written Constitution. Rather, the change has generally come about through legislative action, often on a trial basis and with the retention of the penalty for certain limited classes of crimes. Virtually nowhere has change been wrought by so crude a tool as the Eighth Amendment.³⁶⁶

Some judges have expressed a willingness to quash the death penalty in principle, whilst recognising that this is outside of the realm of their judicial power. Burger CJ, in his dissent in *Furman*, stated that he would have joined with Brennan J and Marshall J, who declared the death penalty to be contrary to the Eighth Amendment in all circumstances, if he had legislative power.³⁶⁷ Blackmun J in his dissent stated that although the death penalty is 'antagonistic to any sense of "reverence for life,"' he could only strike it down if he was a legislator, as striking down the death penalty on the basis it was the right thing to do and the road to human decency is a legislative not a judicial argument.³⁶⁸ The Indian Supreme Court was also equivocal in *Rajendra Prasad* in India, where the majority favoured abolition as a matter of principle, but felt that it could not make such a decision on the law at that time.³⁶⁹ This emphasis on separate constitutional roles for the

³⁶⁵ *Swamy Shraddananda v State of Karnataka* AIR 2008 SC 3040.

³⁶⁶ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 404.

³⁶⁷ *ibid*, 375, 405.

³⁶⁸ *ibid* 406-411.

³⁶⁹ *Rajendra Prasad v State of U.P.* AIR 1979 SC 916, 931.

judiciary and legislative arms of the state has underpinned much of the concern expressed by judges regarding an expansive mode of interpretation.³⁷⁰

4.7.2. A Matter for the Legislature

The US Supreme Court has often emphasised the value of judicial self-restraint in favour of Congress, especially in a death penalty context. Powell J in his dissent in *Furman* stated that the court was 'encroaching upon an area that is the historic prerogative of the legislature in a majority decision with implications for the root principles of *stare decisis*, federalism, judicial restraint and - most importantly - separation of powers.'³⁷¹ Rehnquist J felt that the court had overstepped the mark of legitimacy, as the court should ignore not its responsibility of self-restraint, merely because the court was given the final say regarding constitutionality.³⁷² Burger CJ stated that the courts' 'quiescence in this area can be attributed to the fact that in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'³⁷³ Burger CJ actually referred to foreign examples as evidence of how change had been driven legislatively rather than by courts in other jurisdictions:

As is also the case with respect to recent legislative activity in Canada and Great Britain, New York's decision to restrict the availability of the death penalty is a product of refined and discriminating legislative

³⁷⁰ This is often tied to a concern that the US Supreme Court will use foreign law to reach overly judicially active decisions, thereby exceeding the court's constitutional mandate. See AL Parrish 'Storm in a teacup: The US Supreme Court's use of foreign law' (2007) *University of Illinois Law Review* 637, 660.

³⁷¹ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 417.

³⁷² *ibid* 467-470.

³⁷³ *ibid* 383.

judgment, reflecting, not the total rejection of capital punishment as inherently cruel, but a desire to limit it to those circumstances in which legislative judgment deems retention to be in the public interest.³⁷⁴

Burger CJ was to repeat this approach later in his dissent in *Woodson*, where he stated that the '(c)ourt has repeatedly pointed to the reserve strength of our federal system, which allows state legislatures, within broad limits, to experiment with laws, both criminal and civil, in the effort to achieve socially desirable results.'³⁷⁵

The Indian Supreme Court has generally been deferential to the legislature in death penalty cases, at least partly due to the phrasing of article 21 of the Indian Constitution. Sen J in the minority judgment in the *Rajendra Prasad* case argued that the substantive merits of death penalty are for parliament to decide, remarking that the court could not redefine the Penal Code to *de facto* abolish the death penalty.³⁷⁶ Sarkaria J for the majority in the *Bachan Singh* case emphasised that sentencing discretion is a policy matter best left to the legislature, citing *Furman* as an example of a decision rejected by the people of the US through their legislative representatives, thereby demonstrating the problem when judicial opinion does not reflect peoples' 'moral attitudes.'³⁷⁷ The court commented further that the legislature was aware of contemporary social needs, and carried out its

³⁷⁴ *ibid* 438.

³⁷⁵ *Coker v Georgia* 433 US 584, 97 S.Ct. 286 (1977) 615.

³⁷⁶ *Rajendra Prasad v State of U.P.* AIR 1979 SC 916, 946, 957.

³⁷⁷ *Bachan Singh v State of Punjab* AIR 1980 SC 898, 927.

constitutional duty by enacting legislation allowing for and regulating the death penalty.³⁷⁸

4.7.3. Sovereignty

In the US, an antipathy to foreign law has also been credited to an undercurrent of 'exceptionalism'.³⁷⁹ The US constitutional system has been assumed to be different in three primary ways: in granting limited delegated powers under a written constitution; the division of power between national government and the States creates an uncommon federalist system; finally, the design and content of the US Bill of Rights.³⁸⁰ Perhaps these differences were unique at the commencement of the US Constitution, but several contemporary democracies share most if not all of these features.

The most significant point of difference is possibly the federalist system in the US, with the substantial power given to the states. This high regard for the idea of sovereignty residing in the states is evidenced by the US Supreme Court placing emphasis on legislative enactments and executive decisions in the domestic states,

³⁷⁸ *Triveniben v State of Gujarat* (1992) LRC (Const) 425, 445. It was later noted in *Santosh Kumar Satishbhushan* that the court in *Bachan Singh* was constrained not only by the wording in the constitution itself, but 'owing to separation of power doctrine, the court took a deferential view towards section 354(3) which was brought in to discipline the courts on death penalty by making life imprisonment the rule and death penalty the exception.' *Santosh Kumar Satishbhushan v State Of Maharashtra* (2009) 6 SCC 498, [65].

³⁷⁹ Calabresi describes this as the exceptional self-identity of the US, including in respect of its constitutional and social make-up. See SG Calabresi "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' *Boston University Law Review* Vol 86 (2006) 1335; SG Calabresi and B Silverman 'Hayek and the Citation of Foreign Law' (2013) *Northwestern Law & Econ Research Paper* No. 13-23.

³⁸⁰ S Cleveland 'Foreign Authority, American Exceptionalism, and the Dred Scott case' (2013) 82 *Chicago-Kent Law Review* 393, 394.

as opposed to downplaying what is happening in foreign jurisdictions.³⁸¹ The US constitutional system also grants state legislatures a unique power over the contents of the criminal law, a form of federalism not repeated in other developed democracies.³⁸²

Sovereignty defenders see foreign legal principles as irrelevant to understanding the US Constitution.³⁸³ The citation of foreign law arguably creates a 'denominator' effect that falls unjustifiably in favour of the weight of foreign law.³⁸⁴ Alford suggests that limits should be in place regarding the application of international law to the interpretation of the US Constitution, as '(u)sing global opinions as a means of constitutional interpretation dramatically undermines sovereignty.'³⁸⁵

This concern regarding sovereignty is not limited to the US. In India, Sarkaria J in *Bachan Singh* also expressed a related concern regarding judges importing foreign legal principles into the Indian legal system. He noted that there is no Eighth Amendment in the Indian Constitution and that the test of reasonableness could not be applied with the same liberty American judges treat

³⁸¹ RP Alford 'Misusing International Sources to Interpret the Constitution' (2004) 98 American Journal of International Law 57. Steiker states that Americans have a highly developed sense of popular sovereignty. See C Steiker 'Capital Punishment and American Exceptionalism' (2002) 81 Oregon Law Review 97, 108.

³⁸² C Steiker 'Capital Punishment and American Exceptionalism' (2002) 81 Oregon Law Review 97, 109.

³⁸³ AL Parrish 'Storm in a teacup: The US Supreme Court's use of foreign law' (2007) University of Illinois Law Review 637, 669.

³⁸⁴ EA Young 'Foreign Law and the Denominator Problem' (2005) 119 Harvard Law Review 148.

³⁸⁵ RP Alford 'Misusing International Sources to Interpret the Constitution' (2004) 98 American Journal of International Law 57; S Cleveland 'Our International Constitution' (2006) 31(1) Yale Journal of International Law 1, 101.

the due process clause, concluding that the *Furman* case was not applicable in India. He asserted that there are 'grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.'³⁸⁶

Placing a high value on sovereignty is allied to the US tendency to place a great deal of weight on the majority point of view.³⁸⁷ On the other hand, the favouring of legislative policy and executive decisions via the text of the constitution potentially undermines the court's key role in balancing majority against minority interests.

4.7.4. Counter Majoritarianism

The US Supreme court warned in *Weems* that notions of separation of powers should not be used as an excuse by the court to avoid its responsibility to protect against the infringement of the Bill of Rights, when the court stated that otherwise the 'constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.'³⁸⁸ Brennan J was to comment later in *Furman* that 'we must not, in

³⁸⁶ *Bachan Singh v State of Punjab* AIR 1980 SC 898, [161].

³⁸⁷ Y Segal 'The Death Penalty and the Debate over the US Supreme Court's Citation of Foreign and International Law' (2006) 33 Fordham Urban Law Journal 101, 122.

³⁸⁸ *Weems v United States* 217 US 349, 30 S.Ct. 544 (1910) 373.

the guise of "judicial restraint," abdicate our fundamental responsibility to enforce the Bill of Rights.³⁸⁹

In *Stanford*, Brennan J criticised Scalia J's attempts to limit objective evidence to state legislation and jury verdicts, a view previously rejected in *Thompson* and *Penry*, as he was concerned that this gives too much weight to the decisions of majorities reflected in state legislatures:

This Court abandons its proven and proper role in our constitutional system when it hands back to the very majorities the Framers distrusted the power to define the precise scope of protection afforded by the Bill of Rights, rather than bringing its own judgment to bear on that question, after complete analysis.³⁹⁰

The Indian Supreme Court has similarly long recognised the problems arising from the overly deferential approach. In *Deena Dayal*, Chandarchud CJ contested the notion that the legislature has an unfettered policy discretion in the area of penology:

Matters of policy are certainly for the legislature to consider and therefore, by what mode or method the death sentence should be executed, is for the legislature to decide. ... Where the function of the legislature ends, the function of the judiciary begins. ... what the policy judgment of the legislature leaves outstanding for the Court's consideration is the question whether the particular method prescribed by law for executing the death sentence is in consonance with the Constitution. This latter question is manifestly for the Courts to decide.³⁹¹

³⁸⁹ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 269.

³⁹⁰ *Stanford v Kentucky* 492 US 361, 109 S.Ct. 2969 (1989) 391-392.

³⁹¹ *Deena Dayal v Union Of India* AIR 1983 SC 1155, [35].

However, after making such a bold claim for a judicial check and balance, the court held that hanging was a legitimate form of capital punishment stipulated for by Parliament, commenting that judges 'ought not to assume that we are endowed with a divine insight into the needs of a society.'³⁹² Nevertheless, Sinha J in *Satishbhushan* later confirmed the principle that the court must exercise its power of judicial review, as the 'constitutional role of the judiciary also mandates taking a perspective on individual rights at a higher pedestal than majoritarian aspirations. To that extent we play a counter-majoritarian role.'³⁹³

The SA Constitutional Court also downplayed the doctrine of separation of powers in *Mahomed*, instead affirming its role as a key protector against rights infringements:

To stigmatise such an order as a breach of the separation of state power as between the executive and the judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.³⁹⁴

³⁹² *ibid* [46].

³⁹³ *Santosh Kumar Satishbhushan v State Of Maharashtra* (2009) 6 SCC 498, [48].

³⁹⁴ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) 910. [72]. Allan states that this type of counter majoritarian philosophy in modern democracies, which have a tendency to expand rights for citizens, make transjudicialism less acceptable and appropriate in the US (J Allan and G Huscroft 'Constitutional Rights coming homes to roost? Rights Internationalism in American Courts' (2006) 43 San Diego Law Reform 1, 58). When a court refers to foreign precedents and international norms, Alford believes it suffers from a lack of legitimacy as these norms lack the domestic authority to trump the democratic laws of the US (RP Alford 'In Search of a Theory for Constitutional Comparativism' (2005) 52 UCLA Law Review 639, 708-713.). On the other hand, Koh makes the point that favouring majoritarian viewpoints contradicts the long-standing principle of judicial review that constitutional courts should 'apply enduring principles of law to evolving circumstances without regard to the will of shifting democratic majorities' (H Koh 'International Law as Part of Our Law' (2004) 98 American Journal of International Law 43, 55).

This counter majoritarian and less deferential instinct, more evident in India and South Africa, creates more space for external sources of interpretation, including the consideration of foreign law. This does not entail the wholesale import of foreign norms, but rather, at a minimum, a modest consideration of foreign cases where they aid the borrowing court in construing its national constitutional text.

4.8. A ROLE FOR FOREIGN LAW IN DOMESTIC INTERPRETATION

In the US, some judges have been open to using foreign law, although usually limited to the purposes of comparing how other judges have grappled with the same issue. Breyer J in *Knight* laid down a test for the applicability of comparative law:

the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment... In these cases, the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their views are useful even though not binding.³⁹⁵

Foreign law is envisaged here as assisting the interpretation of the meaning of a broadly worded rights provision. The views of other jurisdictions are useful to a

³⁹⁵ *Knight v Florida* 528 US 990, 120 S.Ct. 459 (1999) 464. See *Coker v Georgia* 433 US 584, 97 S.Ct. 286 (1977) footnote 10, which contains a footnote regarding how many nations retain death penalty for rape.

borrowing judge in the task of reasoning through a constitutional problem. The justification for the borrowing is that the texts and standards are similar, but there is no sense of a larger normative project or relationship.

One can distinguish between the 'soft use' of foreign law, in a more decorative sense, from the 'hard use' of foreign precedents, where the usage goes to the interpretation or outcome of the judicial decision.³⁹⁶ It is this last scenario that finds objection amongst certain judges, which is perhaps why Breyer J in *Knight* emphasised that foreign decisions could only be useful and never binding. Scalia J in *Roper* doubted that foreign law was being used in a 'soft' manner, and asserted that judges should be more honest about the role of foreign law when it is cited:

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry.³⁹⁷

Staying within the realm of interpretation, a more limited role for foreign law can be contrasted with the idea of cross-citation as a transjudicial discourse. Parrish views dialogical theories as a leading candidate for a comprehensive theory of cross-citation, because they focus not on substantive law but on the

³⁹⁶ C Saunders 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37, 50.

³⁹⁷ *Roper v Simmons* 543 US 551, 125 S.Ct. 1183 (2005) 627.

institutional processes through which constitutional decisions are reached.³⁹⁸ It is the interaction between courts itself, through their citation of each other's precedents, which is the point of interest, not any normative overlaps or convergence in their decisions. Where discourse implies a commitment to joint problem solving, this is however less supported by what judges are actually doing. Courts either borrow to assist with their own interpretation processes, or on the other hand regard international normative patterns as relevant to delineating domestic standards. The notion of a discourse that is not substantively committed in this latter sense, but that goes beyond an interpretation exercise, is somewhat artificial.

Jackson, who categorises 'convergence' approaches to comparative law as those that subscribe to natural law, universal human rights or *ius commune* viewpoints, suggests that the more cautious approach of engagement is the appropriate path for the US Supreme Court.³⁹⁹ An engagement approach entails a court interacting with another jurisdiction, in order to enhance the reasoning process of the borrowing court.⁴⁰⁰ Engagement is similar to Choudry's 'dialogical interpretation', which allows a court to use comparative law without internationalizing a country's legal culture.⁴⁰¹ Here courts draw on foreign decisions

³⁹⁸ AL Parrish 'Storm in a teacup: The US Supreme Court's use of foreign law' (2007) *University of Illinois Law Review* 637, 677.

³⁹⁹ V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010) 282-285.

⁴⁰⁰ *ibid* 71.

⁴⁰¹ S Choudry 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819, 890. In cases of genealogical interpretation on the other hand, one constitution is born from another. Alternatively there may be a family relationship between two legal systems. This claim is positivistic, since it focuses on legal sources. However, this is the least likely of the three styles to be employed, since a historical

as a means to the end of good interpretation, but norm assimilation is not part of the exercise. Jackson argues that engagement may be the best approach for a country such as the US with an old written constitution, a federalist constitutional structure and sensitivities to democratic overreach by the judiciary.⁴⁰² In accordance with this more conservative notion of cross citation, foreign and international law at most performs the role of 'persuasive evidence of the interpretation of domestic US laws.'⁴⁰³

This attitude of regarding foreign law and international law as a persuasive source of interpretation is not exclusive to the US. From as early as *Bachan Singh*, the Indian Supreme Court has referred to foreign law. Sen J, for the majority, cited two Privy Council and US decisions in support of his view that the death penalty is not per se cruel and unusual.⁴⁰⁴ The majority in the *Rajendra Prasad* case noted that Britain abandoned the death penalty two decades previously.⁴⁰⁵ In *Vatheeswaran*, in referring to Privy Council case law, the court noted that 'judgments of the Privy Council have certainly received the same respectful consideration as the judgments of this Court.'⁴⁰⁶

The Indian Supreme Court has therefore used comparative law to support both arguments in favour and those against the death penalty. The court in *Deena*

relationship has to be proved. This relationship could possibly be applied to common law systems, or legal systems of the commonwealth, or those with an Anglo heritage.

⁴⁰² V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010) 13-15.

⁴⁰³ E Engle 'European Law in American Courts: Foreign law as evidence of domestic law' (2007) 33 Ohio Northern University Law Review 99.

⁴⁰⁴ *Rajendra Prasad v State of U.P.* AIR 1979 SC 916, 953-4.

⁴⁰⁵ *ibid* 937.

⁴⁰⁶ *Vatheeswaran v State of Tamil Nadu* (1983) 2 SCC 68.

Dayal traced the prohibition against cruel and unusual punishment back to the Magna Carta and its incorporation into English Law by its adoption in the English Declaration of Rights in 1688, further noting that the ‘fundamental principal underlying the prohibition against cruel and unusual punishments was incorporated into the Bill of Rights in 1791.’⁴⁰⁷ Ultimately the court relied heavily on the US allowance for the death penalty in the face of a cruel and unusual punishment restriction, noting that although ‘the Eighth Amendment has thus a dynamic content which has been evolved over the years as public moral perceptions changed from time to time, several concurring opinion show that in America, capital punishment is not considered to be violative of the Eighth Amendment.’⁴⁰⁸

The court has continued to thread foreign case law into its reasoning in more recent decisions. For example, in *Swamy Shraddananda*, the court referred to English legislation on abolition, in assessing how life imprisonment could be implemented as an alternative to capital punishment.⁴⁰⁹ In another recent decision, *Satishbhushan*, the court referred to case law from South Africa, the US and Canada, in seeking to understand what would be a sustainable and proportionate limitation on the right to life. These are all qualitative references to cases from specific jurisdictions, which aided the court in resolving specific interpretive questions.

⁴⁰⁷ *Deena Dayal v Union Of India* AIR 1983 SC 1155, [45].

⁴⁰⁸ *ibid* [44].

⁴⁰⁹ *Swamy Shraddananda v State of Karnataka* AIR 2008 SC 3040, [38].

In South Africa, a strong willingness to engage with comparative material has been demonstrated by the Constitutional Court, frequently using this material as a source of examples of how other courts have responded to the same interpretative dilemmas. In terms of the interim constitution in force in 1995, section 35(1) required the court to examine international law in its decisions, and permitted it to examine comparative law.⁴¹⁰ Chaskalson P emphasised both international and foreign authority in his judgement in *Makwanyane*.⁴¹¹ He used both of these sources of law to give meaning to the various rights in dispute. The judge president stated that international and foreign authorities are of 'value because they analyse arguments for and against the death sentence, and show how courts of other jurisdictions have dealt with this vexed issue.'⁴¹² This is a simple statement of the value of solving problems by analogy. The resolution of complex questions is made easier through a consideration of how other jurisdictions have dealt with similar questions. Mahomed J stated that the court would consider 'legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution.'⁴¹³

In *Mohamed*, the court referred to the analogous Canadian case of *Burns*, and highlighted the differences between the two texts.⁴¹⁴ The court held that:

⁴¹⁰ S 39 of the Final Constitution stipulates the same requirements.

⁴¹¹ *S v Makwanyane* 1995 (3) SA 391 (CC) 401-453.

⁴¹² *ibid* 413.

⁴¹³ *ibid* 489.

⁴¹⁴ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC), [52].

whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice. There are no such exceptions to the protection of these rights.⁴¹⁵

Whereas the Canadian Charter section 7 has an internal limitation clause, section 10 of the SA Constitution has no qualifications or exceptions. The court relied on the distinct wording in the constitution for its reasoning, with the foreign precedent in this instance used to highlight the absolute nature of the rights involved in the domestic text. This is an example of one aspect of cross-citation as an exercise in interpretation, where a court refers to foreign law to highlight a distinct domestic practice.

Chaskalson JP had noted previously in *Makwanyane* that the question is not whether the imposition of the death penalty is devoid of reason and purpose, but whether it is cruel, inhuman and degrading.⁴¹⁶ The court highlighted the fact that the unqualified right to life in section 9 of the Interim Constitution differs from the provisions in the United States Constitution, Indian Constitution, the ECHR, and the ICCPR. However, it was noted that even in cases dealing with these instruments, judges have held that, despite the clear tolerating language of the instrument at hand, the death penalty could not be permitted. This demonstrated

⁴¹⁵ *ibid* [53].

⁴¹⁶ *S v Makwanyane* 1995 (3) SA 391 (CC) 428.

the stringent nature of the standards imposed by the judiciary in death penalty cases.⁴¹⁷

Ackerman J stated in an interview that the South African Constitutional Court was 'anxious at the beginning not to be seen to be sucking thumbs as to the basis of their decisions. At least one can say there is not a patent defect in one's viewpoint because other lawyers have followed the same line.'⁴¹⁸ This need for legitimacy is an additional basis for engaging in transjudicial citation, but also reflects the general interpretation-oriented rationale for cross-citation considered in this chapter, that is, seeking interpretive assistance from extra-textual sources in order to reach a correct domestic decision.

4.9. CONCLUSION

When domestic courts use foreign law as an interpretative aid, this would appear to be more as a 'guiding horizon' at the beginning of judgments, or as a 'probative argument' in favour of the court's conclusions.⁴¹⁹ This is possibly what Breyer J was referring to as using foreign law to work out 'how to apply the US Constitution'.⁴²⁰ It also closest to Jackson's idea of engagement, where cross-citation is aimed at improving national law by engaging with external norms.⁴²¹ The

⁴¹⁷ *ibid* 429.

⁴¹⁸ Interview with Ackerman J of the South African Constitutional Court, Oxford, June 2000.

⁴¹⁹ T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing Oregon 2013) 424.

⁴²⁰ A Scalia and S Breyer "Constitutional Relevance of Foreign Court Decisions." U.S. Association of Constitutional Law Discussion. American University, Washington D.C. 13 Jan. 2005. 27 Feb. 2005. Federal News Service. 2 Feb. 2009, available at <http://www.freepublic.com/focus/f-news/1352357/post>.

⁴²¹ V Jackson *Constitutional Engagement in the Transnational Era* (OUP Oxford 2010) 9.

South African Constitutional Court has expressly described the act of citing foreign law as forming part of their problem solving processes.

Zimring points to this perhaps obvious value of comparative law to death penalty analyses:

It would be odd indeed if debates about the desirability of any human institution, policy, or practice were conducted without any reference to what happens in other countries. Even the most detached, neutral, academic observation of society would be severely limited if all reference to any other society were excluded. It would be also not merely pointless but scientifically derelict to permit such an irrational restriction on inquiry. For participants in the death penalty debate to ignore information about imposing and carrying out the penalty in other countries results in shallow and even illogical discourse...Death penalty supporters, like the proverbial ostrich with its head in the sand, must eventually recognise the lessons that can be learned from the experiences of others.⁴²²

Courts in other jurisdictions have similarly premised the use of comparative precedents on their utility to interpretation. Mwalusanya J in the Tanzanian High Court asserted that 'international human rights instruments and court decisions of other countries provide valuable information and guidance in interpreting the basic human rights in our Constitution and so a judge in my present situation should look to them and draw upon them in seeking a solution.'⁴²³ Similarly, the Privy Council

⁴²² FE Zimring and G Hawkins *Capital Punishment and the American Agenda* (Cambridge University Press Cambridge 1986) 4, who add regarding convergence in death penalty thinking, that this involves an 'unconscious parallelism' as abolition has grown unintentionally and not as part of a grand shared plan.

⁴²³ *Mbushuu and Another v Republic* [1995] 1 LRC 216, 342.

noted that ‘decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation.’⁴²⁴

Cross-citation as problem solving is different to the idea that it constitutes or reveals a dialogue between courts. It is somewhat artificial to treat the act of mutual citation itself as a dialogue. A more reciprocal interaction must be evidenced in order for this to reflect a dialogue. In this regard, Choudry’s concept of ‘dialogical’ interpretation is more modest.⁴²⁵ Here courts use foreign law to identify assumptions in their own constitutional system, and then to either justify following or departing from that foreign normative choice. It is unclear what value is to be gained by describing this type of citation of foreign law as constitutive of a dialogue, as it typically is an interaction driven by self-interest. It is closer to a monologue, with an acknowledgment of sources for the court’s reasoning. As with the earlier cases before the Indian Supreme Court, specific foreign precedents are referred to either in support of, or to distinguish, the local situation. This qualitative use of foreign case law from discrete jurisdictions, distinguished from assessments of wider patterns in state practice, is typical of an interpretative judicial mode.

For certain judges, transjudicial communication may merely be a good ‘toolbox at first,’ but then becomes something deeper.⁴²⁶ Here the act of cross-citation moves from the area of interpretative utility to a more purposive intent,

⁴²⁴ *Patrick Reyes v The Queen* [2002] 2 AC 235, 248.

⁴²⁵ S Choudry ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’ (1999) 74 *Indiana Law Journal* 819, 835.

⁴²⁶ Interview by author with Le Bel J of the Canadian Supreme Court, Ottawa, September 2000.

where foreign law may shed light on a more value-oriented search by a court for a solution. This typifies the purposive approach of the SA Constitutional Court.⁴²⁷ Similarly the Supreme Court of India has pursued a liberal interpretation method at times.⁴²⁸ This is more than an intention to enter into a dialogue with other courts, and rather an attempt to apply shared, universal or transnational values. However, this does not go so far as developing or enforcing rules of international human rights law. The following chapter will assess cases from the US, India and South Africa, insofar as they reflect this search by judges to move past the literal meaning of the constitutional text, in part by having regard to the value judgements of courts in other jurisdictions.

⁴²⁷ H Klug 'South Africa: From Constitutional Promise to Social Transformation' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 293; J Dugard 'International Law and the "Final" Constitution' 1995 (11) South African JHR 241, 242; MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law: The Bill of Rights* (Lexis-Nexis October 2014 update SI 17) 33.1.

⁴²⁸ *Maneka Gandhi v India* (1978) 1 SCC 248.

CHAPTER 5: CROSS-CITATION AS A SEARCH FOR SHARED VALUES

5.1. INTRODUCTION

Chapter four demonstrated that courts undoubtedly use foreign precedents for learning purposes, in order to gain a better understanding of a constitutional provision such as ‘cruel and unusual punishment’. Focusing on the text in this manner tends to emphasise its literal meaning and the original intention of the constitutional drafters. When a court adopts this literal approach, foreign law is primarily relevant to the court insofar as it enhances the court’s legal reasoning. This type of foreign law usage serves the purpose of an interpretative aid in assessing the parameters of a domestic provision, which may well amount to no more than the ‘retail use’ of foreign law on a case-by-case basis.⁴²⁹ However, understanding cross-citation as an exercise in interpretive utility provides only a partial explanation of what is happening in domestic courts. Judges are not in practice referring to foreign law merely for *ad hoc* interpretive assistance.

This chapter assesses a second type of cross-citation, where courts draw on foreign law to ascertain guiding values or standards of ‘civilisation’. In 1958, when the US Supreme Court devised a test in *Trop v Dulles* to deal with cruel and unusual punishment challenges, the court introduced yardsticks of evolving

⁴²⁹ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press New Haven 2012) 77.

constitutional standards and the value of human dignity.⁴³⁰ The courts of India and South Africa have subsequently embraced this type of dignity-driven value judgment. This value-oriented approach moves beyond an interpretative technique that aims at a narrow understanding of the meaning of a domestic textual provision. Courts here, drawing on a wider body of comparative law rather than discrete jurisdictions and cases, treat patterns of normative convergence between jurisdictions as being important on their own.

This chapter argues that this judicial focus, on soft and non-binding principles underpinning constitutional rights provisions, presents a more expansive explanation of cross-citation. Whilst complementary to more limited interpretive analyses, it offers a more comprehensive and ambitious account of comparative borrowing. Where courts transcend the text in a search for shared values, they adopt a purposive and dynamic approach to constitutional adjudication. Abstract values external to the text, which act as the moral drivers behind the cruel and unusual punishment prohibition, influence the adjudication process beyond a narrower search for the meaning of shared constitutional wording. Here foreign precedents become important for the purposes of determining the contours of these foundational constitutional values like humanity or dignity. This treatment of foreign law as confirmation of background constitutional principles is captured in the analyses of Carozza and Waldron, which will be critiqued at the end of the chapter. The following section will first consider the judicial origins of a value-oriented approach to the adjudication of death penalty cases.

⁴³⁰ *Trop v Dulles* 356 US 86, 78 S.Ct. 590 (1958).

5.2. FOREIGN LAW AS A REFLECTION OF EVOLVING VALUES

Although there were earlier signs of a shift towards value considerations, it was in *Trop* that the US Supreme Court first set out its landmark test for how a constitutional provision could be interpreted on a contemporaneous basis, rather than in its original context at the time of enactment.⁴³¹ In *Trop*, the court considered a federal statutory law that punished wartime desertion with expatriation. In holding the law unconstitutional, the court stated that the cruel and unusual punishment clause must be interpreted in light of the ‘evolving standards of decency that mark the progress of a maturing society.’⁴³² The case thereby introduced a new value-laden approach that the court has followed in subsequent Eighth Amendment cases. Stevens J affirmed the *Trop* test almost half a century later in *Atkins v Virginia*.⁴³³

In *Satishbhusan*, Sinha J described *Bachan Singh* as a ‘watershed moment in the history of death penalty jurisprudence in India as it severed Indian judiciary’s normative ambivalence on the subject.’⁴³⁴ The implication was that the judiciary had reached its own value judgment on capital punishment for the first time. The Indian Supreme Court later expressly endorsed the *Trop* test of evolving

⁴³¹ *ibid.*

⁴³² *ibid* 100-101. The Supreme Court has ruled that only three punishments are cruel and unusual punishment in all circumstances: See *Weems v United States* 217 US 349, 30 S.Ct. 544 (1910) (12 years in chains at hard labour); *Trop v Dulles* 356 US 86, 78 S.Ct. 590 (1958) (expatriation); and *Robinson v California* 370 US 660, 82 S.Ct. 1417 (1962) (imprisonment for narcotics addiction).

⁴³³ *Atkins v Virginia* 536 US 304, 122 S.Ct. 2242 (2002) 311.

⁴³⁴ *Santosh Kumar Satishbhusan v State Of Maharashtra* (2009) 6 SCC 498, [21].

standards of decency in *Triveniben*.⁴³⁵ Shetty J had regard to English, Australian, American, and Russian examples of evolving values in respect of punishment, before concluding that '(w)e have much to learn from the history of every country.'⁴³⁶ The court therefore connected the consideration of values with the need to look outside of India for guidance.

The SA Constitutional Court endorsed a similar value driven approach to a normative assessment of capital punishment, and notably overlaid this with comparative considerations. Mahomed J stated in *Makwanyane* that to hold that the death penalty is cruel and unusual is a value judgment, legitimised in part by being consistent with 'constitutional perceptions evolving both within South Africa and the world outside with which our country shares emerging values central to the permissible limits and objectives of punishment in the civilised community.'⁴³⁷ In *Mahomed*, the court asserted the role of the limitation clause in cases involving the right to life:

Our Constitution provides that everyone has the right to life. There are no exceptions to this right. However, like all other rights in the Bill of Rights, it is subject to limitation in terms of section 36 of the Constitution. The requirements prescribed by section 36 are that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those mentioned in the section.⁴³⁸

⁴³⁵ *Triveniben v State of Gujarat* (1992) LRC (Const) 425, 443.

⁴³⁶ *ibid* 443.

⁴³⁷ *S v Makwanyane* 1995 (3) SA 391 (CC) 487.

⁴³⁸ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC), [48].

The test contained in the limitation clause, of what is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’, largely achieves similar value-laden goals to the US test of having regard to evolving standards of decency.⁴³⁹ Referring to what is tolerable in ‘an open and democratic society’ inherently demands a contemporary analysis and is phrased in open ended and present tense terms. Finally, a ‘society based on human dignity’ is tantamount to the same *Trop* test of ‘standards of decency that mark the progress of a maturing society.’

The evolving standards test has been adopted in various other jurisdictions in death penalty contexts. The Privy Council stated with reference to cruel and unusual punishment, that one must ‘consider the substance of the right in the light of evolving standards.’⁴⁴⁰ The Canadian Supreme Court has emphasised what the ‘principles of fundamental justice’ demand, where such principles are found in ‘the basic tenets’ of the Canadian legal system.⁴⁴¹ According to the Zimbabwean Supreme Court, section 15 (1) of the Zimbabwean Constitution guarantees that punishment will be imposed according to ‘civilised standards ... Any punishment or treatment incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involves the infliction of unnecessary suffering, is repulsive.’⁴⁴² In Tanzania, Ramadhani J asserted that the concepts of

⁴³⁹ Waldron noted the connection between this common construction of limitation clauses, and how it invites cross-citation. See Waldron (2012) 133.

⁴⁴⁰ *Patrick Reyes v The Queen* [2002] 2 AC 235, 250.

⁴⁴¹ *United States v Burns* [2001] 1 SCR 283, 308.

⁴⁴² *Catholic Commission for Justice v A-G, Zimbabwe* 1993 (4) SA 239 (ZS) 247.

cruel, inhuman and degrading are subject to evolving standards of decency.⁴⁴³ This broader acceptance of the *Trop* test in different regions certainly demonstrates that a value-driven approach has been widely endorsed in courts around the world in death penalty cases.

But what does the ‘evolving standards of decency’ inquiry actually involve? The following sections will attempt to unpack the constituent elements of the test, namely, ‘evolving’, ‘standards’, ‘decency’ or ‘dignity’, and ‘society’. All of the criteria are essentially subjective, although some of the considerations such as ‘standards’ appear to be attempts to balance the test with objective elements. The common thread is that this value-based approach is embedded with a dynamic and comparative approach to adjudication.

5.2.1. Evolving and Maturing

In 1910, the US Supreme Court held in *Weems* that with respect to a constitutional provision, ‘(t)ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.’⁴⁴⁴ The concept of a constitutional norm being informed by the current context within which it is examined, was therefore well-established before *Trop*. The *Trop* court however built on this by using the word

⁴⁴³ *Mbushuu and Another v Republic* [1995] 1 LRC 216, 228. Mwalunsanya J also stated in the High Court that these concepts are subject to evolving standards of decency, citing *Trop* from the US in support.

⁴⁴⁴ *Weems v United States* 217 US 349, 30 S.Ct. 544 (1910) 373.

'evolving', a construction that caught the imaginations of judges in the years to follow, more than its reference to the 'progress' of a 'maturing society'.⁴⁴⁵

There are two ideas at play here, firstly that norms change over time, but also that they do so in a progressive manner, in some form of continuum towards more civilised or higher order norms or principles. As a society develops, the court reflects this change by having regard to an ever-shifting set of principles that sits outside the constitutional text itself. Marshall J confirmed in *Furman* that the constitutionality of a form of punishment must be assessed in the context of the time a judicial decision is being made, even to the extent that a precedent may be overruled by the advent of a change in *mores*:

Perhaps the most important principle in analyzing "cruel and unusual" punishment questions is one that is reiterated again and again in the prior opinions of the Court: i. e., the cruel and unusual language "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Thus even the central role allocated to precedent in a common law system would defer to these considerations of the current standards of civilisation, in that 'the very nature of the Eighth Amendment would dictate that unless a very recent decision existed, stare decisis would bow to changing values, and the question of the constitutionality of capital punishment at a given moment in history would remain open.⁴⁴⁶

The Indian Supreme Court, in *Deena Dayal v Union Of India*, expressly referred to the 'value judgement' that is required of the judiciary in death penalty cases.⁴⁴⁷ The court also embraced an evolutive approach, emphasising that

⁴⁴⁵ The words 'progress' and 'maturing' appear to be repetitions of the notion of 'evolving'.

⁴⁴⁶ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 330.

⁴⁴⁷ *Deena Dayal v Union Of India* AIR 1983 SC 1155, [27].

constitutional standards could not be fixed as rigid guidelines, as this would defeat the role of the judiciary:

To pronounce upon the constitutionality of a law is not legislating, even if such pronouncement involves the consideration of the evolving standards of the society. 'Cruelty' and 'torture' are not static concepts. That is why, the chopping off of limbs which was not considered cruel centuries ago or, is not considered cruel in some other parts of the world today, is impossible to conceive as a punishment by applying the contemporary standards of the Indian society. What might not have been regarded as degrading or inhuman in days by gone may be revolting to the new sensitivities which emerge as civilization advances. The impact and influence of the awareness of such sensitivities on the decision of the law's validity is an inseparable constituent of the judicial function.⁴⁴⁸

The court in *Allauddin Main* also believed that the laying down of guidelines was desirable as long as inflexible standards were avoided.⁴⁴⁹ More recently in *Chauhan*, the court noted that 'this Court has expanded the horizon of "right to life" guaranteed under the Constitution to balance with the progress of human life.'⁴⁵⁰ There has therefore been a generally consistent commitment by the Indian Supreme Court to both an expansive and flexible approach to the constitutional norms at play in death penalty cases.

The South African Constitution Court has also made a dynamic style of interpretation a key part of its methodology. Its generous and purposive mode of

⁴⁴⁸ *ibid.*

⁴⁴⁹ *Allauddin Main v State of Bihar* AIR 1989 SC 1456 , 1468. Although the court later held in *Triveniben* that it was primarily the legislature that was aware of contemporary social needs, and would accordingly enact legislation allowing for and regulating the death penalty. See *Triveniben v State of Gujarat* (1992) LRC (Const) 425, 445.

⁴⁵⁰ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1, [1].

reasoning places a great deal of emphasis on the core values that underpin the bill of rights.⁴⁵¹ In *Tsebe*, the court described the values of life and dignity as being of relevance to the court, but also included the notion of the ‘advancement of human rights’:

We sought to create a society whose cornerstone is our Bill of Rights which enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. ... One of the values of our Constitution on which our new society is based is the advancement of human rights.⁴⁵²

Paying heed to value considerations that evolve over time could be understood as having regard to majoritarian wishes and public opinion. But this risk of judges being swayed by the mood of the moment is ameliorated by what the *Trop* court referred to as the application of a normative test or benchmark, in terms of which impugned conduct falls above or below a shared value threshold.

⁴⁵¹ H Klug ‘South Africa: From Constitutional Promise to Social Transformation’ in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 292. International tribunals have also stated that contemporary standards should be applied in capital punishment cases. In the European death penalty case of *Ocalan*, the court stated that the European Convention on Human Rights was a ‘living instrument’. *Ocalan v Turkey* (Application no. 46221/99) ECHR 2003, 51. In *Soering v United Kingdom* (1989) 11 EHRR 439, 473, De Meyer J stated that ‘There is also something more fundamental. The second sentence of article 2 (1) was adopted in particular historical circumstances shortly after WW2. In so far as it permits capital punishment in times of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice. ... this punishment is not consistent with the present state of European Civilisation. ... The Convention is a living instrument to be interpreted in terms of present-day conditions.’

⁴⁵² *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC), [45] - [46]. Another constitutional value to which the court often refers is the rule of law, which it has dealt with in the context of the separation of powers, stating that ‘(t)o stigmatise such an order as a breach of the separation of state power as between the executive and the judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law.’ The court has in this regard expressed the aspirational aspect of the constitution, to the effect that ‘South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the state lead by example.’ See *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC), [69].

5.2.2. Standards and Values

The next leg of the *Trop* test is the use of the word 'standards'. Chief Justice Warren commented that the 'basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards'.⁴⁵³ Firstly, this is an explicit reference to an external principle that gives meaning to the overt text. The substance of the provision is informed by this background value. Secondly, this value that drives the prohibition on cruel and unusual punishment is dignity. Finally, the implication of 'standards' injects an objective element into an otherwise subjective assessment of the constitutional value of dignity.

In *Furman*, Stewart J used more subjective language, in stating that the death penalty is 'morally unacceptable' to the US population.⁴⁵⁴ Burger CJ in his dissent reiterated an objective test, where 'the Eighth Amendment forbids the imposition of punishments that are so cruel and inhumane as to violate society's standards of civilized conduct.' Although ultimately he somewhat ambiguously referred to a subjective moral judgment demanded in Eighth Amendment cases, in stating that the standard of cruelty 'embodies a moral judgment. The standard itself

⁴⁵³ *Trop v Dulles* 356 US 86, 78 S.Ct. 590 (1958) 100.

⁴⁵⁴ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 332. Stewart J stated further at 361 that it is not a matter of an opinion poll, but of assessing what people would think were all the information available. On the basis of this material, he concluded that the American people would conclude that the death penalty is immoral, and therefore unconstitutional.

remains the same, but its applicability must change as the basic mores of society change'.⁴⁵⁵ This reveals the inherent subjectivity involved in a value-laden test.

The Indian Supreme Court referred more recently in *Satishbhusan* to constitutional standards in the *Trop* sense, stating that the 'capital sentence is a live penalty in India; we should strive to tune the practice to the evolving standards of a maturing society. The normative thresholds attached thereto and evolving constitutional sensibilities shall continue to throw fresh challenges'.⁴⁵⁶ The idea of a 'normative threshold' provides a similar objective element as a constitutional 'standard', against which different death penalty practices can be benchmarked.

In *Mahomed*, the SA Constitutional Court also referred to constitutional standards of life and dignity in a cruel and unusual punishment context:

Whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice. There are no such exceptions to the protection of these rights.⁴⁵⁷

Here the court distinguishes rights from standards. Two constitutions may protect the same rights, but do so by offering different standards, realised in different textual formulations of the same right. The court also referred to the need

⁴⁵⁵ *ibid* 397, 382.

⁴⁵⁶ *Santosh Kumar Satishbhusan v State Of Maharashtra* (2009) 6 SCC 498, [83].

⁴⁵⁷ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC), [53].

for capital punishment to be consistent with overarching constitutional values of life and dignity.⁴⁵⁸ Chaskalson JP also commented in *Makwanyane* that the 'rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.'⁴⁵⁹ The constitutional assessment is a value judgment guided by a sense of what dignity demands, rather than the application of an express textual standard. Dignity is a consistent theme in cases drawn from all three of the jurisdictions under analysis, as the background value that performs the most substantial role in death penalty cases.

5.2.3. Humanity, Dignity and Decency

In the 1947 US Supreme Court case of *Resweber*, the background value of 'humanity' was introduced, when the court commented that the 'traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.'⁴⁶⁰ This wording 'humanity' started to shift in *Trop* to 'decency' and dignity'.⁴⁶¹ But the court continued in *Furman* to use 'dignity' and 'humanity' interchangeably. Brennan J emphasised that in

⁴⁵⁸ *ibid* [39].

⁴⁵⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) 451.

⁴⁶⁰ *Louisiana ex rel Francis v Resweber* 329 US 459, 67 S.Ct. 374 (1947) 463. The court had earlier alluded to a guiding value of humanity, when it held that the meaning of cruel and unusual punishment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.' See *Weems v United States* 217 US (1910) 349, 378.

⁴⁶¹ *Trop v Dulles* 356 US 86, 78 S.Ct. 590 (1958).

'comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.'⁴⁶²

Stewart J on the other hand, concurring in *Furman*, returned to a standard of humanity, in holding that the death penalty 'is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.'⁴⁶³ When the court later invalidated a mandatory death penalty scheme in *Woodson*, it concluded that the 'respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'⁴⁶⁴

Humanity and dignity are concepts that have therefore been used interchangeably, although dignity is the more common modern formulation. Dignity sits at the heart of the value-oriented test for cruel and unusual punishment. What falls foul of the prohibition is that which falls short of the standard or value of 'dignity'. But what does the standard of dignity demand? Brennan J in *Furman* first offered something of a definition of the standard:

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.⁴⁶⁵

⁴⁶² *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 291.

⁴⁶³ *ibid* 306.

⁴⁶⁴ *Woodson v Carolina* 428 US 280, 96 S.Ct. 2978 (1976) 304.

⁴⁶⁵ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 270.

Protecting the inherent worth of people was a theme continued in *Gregg*, where Marshall J reiterated this fundamental conflict between the death penalty and the invasion of dignity, as 'the taking of life "because the wrongdoer deserves it" surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth.'⁴⁶⁶

There are several examples of the Indian Supreme Court expressing the importance of upholding a person's dignity, a value mentioned expressly in the preamble of the Indian constitution. The majority in *Rajendra Prasad* held that 'the right to life and to fundamental freedoms is deprived when he is hanged to death, his dignity is defiled when his neck is noosed and strangled.'⁴⁶⁷ The court also referred to the link between the rights to life and dignity, stating that they are both infringed by the imposition of the death penalty unless 'special reasons' exist.⁴⁶⁸ Reddy J in *Vatheeswaran* used the alternative formulation of 'humanity', in stating that the prolonged delay in the execution of a death sentence had a 'dehumanizing effect.'⁴⁶⁹

In *Bachan Singh*, the court held that with respect to the intention of the constitutional drafters to limit the application of the death penalty to rare cases, a 'real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the

⁴⁶⁶ *Gregg v Georgia* 428 US 153, 96 S.Ct. 2909 (1976) 240.

⁴⁶⁷ *Rajendra Prasad v State of U.P.* AIR 1979 SC 916, 930.

⁴⁶⁸ *ibid* 925.

⁴⁶⁹ *Vatheeswaran v State of Tamil Nadu* (1983) 2 SCC 68.

rarest of rare cases when the alternative option is unquestionably foreclosed.⁴⁷⁰

The resistance to the use of capital punishment, as a means to an end, is similar to the US emphasis on the essential human worth of an offender.

Dignity is recognised as a fundamental value in South Africa's constitution itself.⁴⁷¹ In *Mahomed*, the court noted that the 'importance of human dignity to which great weight was given in *Makwanyane* is emphasised in the 1996 Constitution by including it not only as a right, but also as one of the values on which the state is founded.'⁴⁷² Similarly, in *Tsebe*, the court emphasised:

the need for us as a nation to stay on course on the path we have chosen for ourselves to respect, protect, promote and fulfil human rights, to observe our Constitution and deepen the values upon which we have chosen to create our new society. Those values include human dignity, the achievement of equality and the advancement of human rights and freedoms.⁴⁷³

The court in *Makwanyane* also defined the value of dignity as imposing a duty on the state to treat persons as ends in themselves, not as a means to an end, as the death penalty 'instrumentalises the offender in terms of the state's punitive objectives. This is dehumanising and degrading, and violates s10.'⁴⁷⁴ These types of subjective value-driven considerations are ameliorated in part by

⁴⁷⁰ *Bachan Singh v State of Punjab* AIR 1980 SC 898, 945. Sarkaria J at 930 held that the death penalty did not necessarily infringe the right to dignity, he felt that the framers of the constitution did not consider the death sentence for murder to be a 'degrading punishment which would defile the 'dignity of the individual' within the contemplation of the Preamble to the Constitution' Bhagwati J in his dissent more boldly stated at 1336 that the Indian Constitution as a whole 'recognises and upholds the dignity of man'.

⁴⁷¹ Section 1(a) of the Founding Provisions of the Final Constitution of 1996.

⁴⁷² *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC), [39].

⁴⁷³ *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC), [63].

⁴⁷⁴ *S v Makwanyane* 1995 (3) SA 391 (CC) 503.

the final leg of the *Trop* test, that is, subjecting the evolving standard of decency or dignity to the determination of what is required by civilisation or society.

5.2.4. Civilisation and Society

The US Supreme Court in *Trop* reduced the potentially nebulous effects of applying a moral or value laden standard, by including a further standard of ‘whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause].’⁴⁷⁵ Marshall J stated that ‘(c)apital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization.’

The *Trop* court also used the phrase ‘maturing society’, which implies a similar normative consideration as a standard informed by civilisation. Brennan J in *Furman* meanwhile conjoined the considerations of society and civility:

The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes an examination of the history and present operation of the American practice of punishing criminals by death reveals that this punishment has been almost totally rejected by contemporary society.⁴⁷⁶

⁴⁷⁵ *Trop v Dulles* 356 US 86, 78 S.Ct. 590 (1958) 99.

⁴⁷⁶ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 282, 295.

Once again, the concept of ‘inhuman’ (indignity) is linked with ‘uncivilized’ (society), although it is not immediately obvious what conduct could be undignified or inhumane, but still be tolerated by society or regarded as civilised.⁴⁷⁷ What civilisation or society potentially adds to the equation appears to be a comparative element. It certainly calls for judges to look beyond the text, as ‘civilisation’ is not obviously limited to a narrow assessment of domestic society.

The Indian Supreme court in *Macchi Singh* similarly referred to taking the temperature of societal attitudes to crime and punishment. The court held that the death penalty should only be imposed where the crime is so brutal, diabolical and revolting as to shock the collective conscience of the community.⁴⁷⁸ The court has also expressly referred to the views of ‘society’, where in *Om Prakash v State of Haryana*, Thomas J held that it ‘is true that court must respond to the cry of society and to settle what would be a deterrent punishment for an abominable crime.’⁴⁷⁹

This is similar to the constitutional principle in the South African system that is given express constitutional recognition, that is, that the democratic values of freedom, equality and dignity are guiding values underpinning the Bill of Rights.⁴⁸⁰ This was recognised in *Mahomed*, where the court referred to ‘the weight that our

⁴⁷⁷ *ibid*, 333.

⁴⁷⁸ *Allauddin Main v State of Bihar* 1989 AIR 1456 SC, 1467.

⁴⁷⁹ *Om Prakash v State of Haryana* (1999) 3 SCC 19, [7]. In *Kehar Singh*, the court made a connection between the rights to life and personal freedom, as guiding values given high accord in Indian society: To any civilized society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. See *Kesar Singh v Union of India* (1989) 1 SCC 204, [7].

⁴⁸⁰ Constitution of the Republic of South Africa 1996 s 7.

Constitution gives to the spirit, purport and objects of the Bill of Rights and the positive obligation that it imposes on the state to protect, promote and fulfil the rights in the Bill of Rights.⁴⁸¹ In conducting its interpretive and value-oriented task, courts are also expressly invited by the limitation clause to look at what is 'reasonable and justifiable' in an 'open and democratic society'.⁴⁸² This invitation is embedded with comparative considerations, as the court is not limited to 'this' open and democratic society, but is seemingly encouraged to look at any democratic society. The interpretation clause contains similar language, requiring the courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.⁴⁸³ Whereas the Constitutional Court draws on comparative law to articulate the values shared by democratic societies, the US Supreme Court has expressly categorised foreign law as one objective criterion in determining what evolving values demand.

5.3. FOREIGN LAW AS OBJECTIVE EVIDENCE OF VALUES

After *Furman*, Brennan J and Marshall J both reiterated their views in later cases that capital punishment was fundamentally unconstitutional in all circumstances.⁴⁸⁴

This commitment to a value judgment that capital punishment is fundamentally

⁴⁸¹ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC), [59].

⁴⁸² Constitution of the Republic of South Africa 1996 s 36. The Constitutional Court has been clear that public opinion is to be distinguished from the more enduring notion of the values of society. *S v Makwanyane* 1995 (3) SA 391 (CC) 431.

⁴⁸³ Constitution of the Republic of South Africa 1996 s 38.

⁴⁸⁴ In *Godfrey v Georgia*, Marshall J (with Brennan concurring) stated that 'I continue to believe that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.' See *Godfrey v Georgia* 446 US 420, 100 S.Ct. 1759 (1980) 433. Brennan J repeated his in principle view in *Enmund v Florida* 458 US 782, 102 S.Ct. 3368 (1982) 801: 'I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.'

wrong, notwithstanding the text of the US Constitution, did not sit well with other Supreme Court justices. Scalia J made it clear in *Thompson* that he rejected the notion that there was any room for the court to determine the scope of the Eighth Amendment through the subjective prism of societal standards of decency, as determined by members of the bench:

It is assuredly "for us ultimately to judge" what the Eighth Amendment permits, but that means it is for us to judge whether certain punishments are forbidden because, despite what the current society thinks, they were forbidden under the original understanding of "cruel and unusual," ... or because they come within current understanding of what is "cruel and unusual," because of the "evolving standards of decency" of our national society; but not because they are out of accord with the perceptions of decency, or of penology, or of mercy, entertained — or strongly entertained, or even held as an "abiding conviction" — by a majority of the small and unrepresentative segment of our society that sits on this Court.⁴⁸⁵

Scalia J was even more scathing in his dissent in *Atkins*, commenting that the court's decision 'does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.'⁴⁸⁶

The court's desire to make the standards of society or civilisation an objective saviour of a dangerously subjective test, is revealed in Brennan J's remarks that the

⁴⁸⁵ *Thompson v Oklahoma* 487 US 815, 108 S.Ct. 2687 (1988) 873. Scalia J stated at 872 that 'there is no clear line here, which suggests that the plurality is inappropriately acting in a legislative rather than a judicial capacity.'

⁴⁸⁶ *Atkins v Virginia* 536 US 304, 122 S.Ct. 2242 (2002) 337.

objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute. At the very least, I must conclude that contemporary society views this punishment with substantial doubt.⁴⁸⁷

The court reduced the potential for personal views determining the content of evolving values, by expressly stipulating in *Furman* what objective evidence would be relevant to determining the current standards of decency demanded by society:

A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity. In applying this principle, however, we must make certain that the judicial determination is as objective as possible.⁴⁸⁸

Powell J referred to three objective indicators of 'contemporary standards of decency': legislative enactments; jury decision patterns and referenda decisions.⁴⁸⁹ However, Brennan J critically added a fourth objective indicator, stating that foreign legal practice should be considered as objective evidence of whether an invasion of dignity is constitutionally permissible:

one factor to be considered is the existence of the punishment in jurisdictions other than those before the Court. ... When a severe

⁴⁸⁷ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 299.

⁴⁸⁸ *ibid* 278.

⁴⁸⁹ *ibid* 436. Powell J concluded at 441 that there were forty states that authorised the death penalty at that time, that juries granted two death sentences per annum did not show a 'universal abhorrence', and that referenda decisions further did not show an evolving standard of decency requiring abolition.

punishment is not inflicted elsewhere, or when more serious crimes are punished less severely, there is a strong inference that the State is exercising arbitrary, "unrestrained power."⁴⁹⁰

This was an important step in the court's jurisprudence pertaining to cross-citation, as the court for the first time designated a transparent role and mechanism for foreign law borrowing. The precise weight that the objective evidence of foreign practice would be accorded was left unclear, as it was bundled up with the other objective indicators assessed by the court. An ambivalence to foreign law was demonstrated when Stewart J later held in *Woodson* that the 'indicia of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations' and omitted the relevance of foreign law.⁴⁹¹ In *Atkins*, Rehnquist CJ squarely denied a role for foreign precedents as objective evidence of the standards of decency:

In my view, these two sources - the work product of legislatures and sentencing jury determinations - ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. ... Instead, (the court) adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders. ... I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination.

⁴⁹⁰ *ibid* 278 and footnote 18 of Brennan J's judgment. O'Connor J filed a dissenting judgment in *Enmund* that also applied an objective approach to contemporary standards. However she used foreign law to indicate the different paths that had been taken by England and the US historically: 'The English attitude toward capital punishment, as reflected in recent legislation, differs significantly from American attitudes as reflected in state legislation.' Ultimately she focused on the role of jury determinations and legislative enactments, and in the final analysis omitted any reference to comparative law. See *Enmund v Florida* 458 US 782, 102 S.Ct. 3368 (1982) 825.

⁴⁹¹ *Woodson v Carolina* 428 US 280, 96 S.Ct. 2978 (1976) 288, 293.

The previous chapter demonstrated that Scalia J objected to foreign law on the basis of its redundancy to a solely US constitutional interpretation exercise. Here is another Supreme Court justice reducing comparative practices to the maximal purpose of confirming a US domestic value judgment. Nevertheless, whilst the US has not settled on whether foreign law can constitute objective evidence of evolving values, even the doubters have accepted it plays at least this type of secondary role in their analysis. On the other hand, although the courts of India and South Africa have not expressly referred to foreign law in ‘objective indicia’ terms, they have drawn on foreign law when assessing what is required by the foundational value of dignity. These jurisdictions have also shared a concern that if the ‘language used by the lawgiver is ignored in favour of a general resort to “values” the result is not interpretation but divination.’⁴⁹²

Whether adopting an objective or subjective approach to a value judgment of what society demands, the question remains whether references to foreign law in this context are best explained as a value-sharing exercise. The following sections consider two theories of cross-citation, which both posit that the citation of foreign law reveals a value-driven application of an international common law. The first theory is Carozza’s idea of a common law directed by considerations of human dignity, and the second theory is Waldron’s re-conception of the Law of Nations.

⁴⁹² *S v Zuma* 1995 (2) SA 642 (CC) [17].

5.4. AN INTERNATIONAL COMMON LAW (FOUNDED ON HUMAN DIGNITY)

Carozza's central proposition is that the citation of comparative precedents by domestic courts reflects the development and application of an international common law of norms.⁴⁹³ This '*ius commune*' does not only apply in cases concerning cruel and unusual punishment, but cuts across all human rights issues, with dignity as its foundational value.⁴⁹⁴

In support of Carozza's contentions are the extensive examples in the cases cited above, drawn from all three of the subject jurisdictions, which reveal that a central concern in most of the judgments is the promotion of human dignity. In *Trop*, and the various cases that endorse the *Trop* test, the US Supreme Court has embraced notions of humanity, decency and dignity, as lying at the heart of capital punishment decision-making.

In South Africa, several judges referred to comparative and international material, in *Makwanyane*, regarding the recognition of the importance of human dignity in death penalty cases. Chaskalson JP cited the US as a jurisdiction that acknowledges that dignity is at the core of the cruel and unusual punishment prohibition, despite the fact that the US permits capital punishment.⁴⁹⁵ He referred to the focus on dignity by the German Federal Constitutional Court, as well as by

⁴⁹³ PG Carozza "My Friend is a Stranger": The Death Penalty and the Global *Ius Commune* of Human Rights' (2003) 81 Texas Law Review 10311033.

⁴⁹⁴ *ibid* 1079.

⁴⁹⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) 422.

three judges in the Canadian Supreme Court.⁴⁹⁶ The court also paid significant attention to a decision of the Hungarian Constitutional Court that stressed the relationship between the rights to life and dignity, and the importance and absolute nature of these rights taken together as a source of all other rights.⁴⁹⁷ None of these citations were necessary, since human dignity is specifically guaranteed in the constitution, but Chaskalson JP bolstered the court's 'value judgment' with these references to dignity in comparative sources.

Some of the judges in *Makwanyane* looked to the indigenous value of 'ubuntu' in articulating the role of values in death penalty cases. Langa J stated that an 'outstanding feature of ubuntu in a community sense is the value it puts on life and human dignity.'⁴⁹⁸ Mokgoro J stated that *ubuntu* is an 'important thread in the constitution that translates as "humaneness."⁴⁹⁹ She concluded that the notion of dignity, articulated in the United States, Hungary and in the ICCPR, is consistent with these traditional values of humaneness, and that 'life and dignity are two sides of the same coin. The concept of *ubuntu* embodies them both.'⁵⁰⁰ Dignity cut across both the right to dignity contained in the constitution, and a background indigenous value.

There is ample evidence in other jurisdictions that dignity is key to capital punishment decisions that hinge on cruel and unusual punishment provisions. In Zimbabwe, Gubbay CJ stated that the section 15 (1) of the constitution, which

⁴⁹⁶ *ibid* 423.

⁴⁹⁷ *ibid* 430.

⁴⁹⁸ *ibid* 481.

⁴⁹⁹ *ibid* 501.

⁵⁰⁰ *ibid* 502.

makes cruel and unusual punishment unlawful, 'is a provision that embodies broad and idealistic notions of dignity, humanity and decency ... humaneness and dignity of the individual are the hallmarks of civilised laws.'⁵⁰¹

In Canada, Cory J in his dissent in *Kindler* concluded that upholding the value of human dignity was incompatible with a death penalty system:

Descriptions of executions demonstrate that it is the state-imposed aspect of capital punishment which is so repugnant to the value of human dignity. The methods utilized to carry out the execution serve only to compound the indignities inflicted upon the individual ... The death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity.'⁵⁰²

In the Privy Council, Lord Griffiths in *Pratt* similarly asserted that 'the revulsion against a person being executed is because of our humanity. We regard it as inhuman to keep a person facing the agony of execution for a long period of time.'⁵⁰³ He stated that the court preferred 'an interpretation of the constitution that accepts civilised standards of behaviour that will outlaw acts of inhumanity even if they fall short of the barbarity of genocide.'⁵⁰⁴

⁵⁰¹ *Catholic Commission for Justice v A-G, Zimbabwe* 1993 (4) SA 239 (ZS) 247, 270. In Tanzania, both the rights to dignity and to not be subjected to cruel and unusual punishment are contained in article 13 of the Tanzanian Constitution, and the Supreme Court of Tanzania considers these rights together. See *Mbushuu and Another v Republic* (1995) 1 LRC 216, 342.

⁵⁰² *Kindler v Canada* [1991] 2 SCR 779, 815-817.

⁵⁰³ *Pratt and Another v Attorney-General for Jamaica* (1993) 98 ILR 335 (PC) 350.

⁵⁰⁴ *ibid* 354. Lord Griffiths referred here to *Republic of Ireland v UK* 1978 2 EHRR 25, 120. Lord Goff stated in *Guerra* that 'justice and humanity require that a man under sentence of death should be given reasonable notice of the time of his execution.' See *Guerra v Baptiste* (1995) 4 All ER 583, 596.

The focus on humanity and dignity has also been evident in international tribunals. *LaGrand* was an ICJ case that concerned rights to consular assistance for German citizens who had committed offences in the US and faced the prospect of the death penalty. Judge Oda stated that individual human rights issues should not be brought to the court under the guise of inter-state disputes, the latter being the function of the principal judicial organ of the United Nations, but he supported the orders 'on humanitarian grounds.'⁵⁰⁵

It is apparent from the above analysis that national (and even international) courts draw on other courts' assessment of the demands of dignity, in a manner which impacts on the outcome of the case before them. This provides support for the idea that cross-citation reveals and develops an international common normative system founded on dignity. But the question remains open whether a comparative approach by judges is only an exercise in the sharing of values.

On the one hand, Carozza's description of a *ius commune*, as a system for the 'incorporation, interpretation and implementation' of norms, sounds like customary international law.⁵⁰⁶ But, crucially, Carozza stops short of asserting that it has legal effect in its usual sense, rather referring to it as a non-binding set of principles that stands subordinate to domestic law.⁵⁰⁷ His description of an international common law of rights in more metaphorical terms dilutes the very idea

⁵⁰⁵ *LaGrand (Germany v United States of America)* [1999] ICJ Reports 9, 18-20. See also *Vienna Convention on Consular Relations (Paraguay v. United States of America)* (1998) ICJ Rep 262, where the court gave an order 'for humanitarian reasons'.

⁵⁰⁶ PG Carozza 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' EJIL Vol. 19 No. 5 (2008) 931, 1042.

⁵⁰⁷ *ibid* 1082-1083.

that it is a system of law.⁵⁰⁸ Dignity is rather a common or transnational value that gives a domestic norm a transcendent 'authority' that guides national judges to make consistent and rational choices from available comparative precedent, but does not bind the court to any outcome.⁵⁰⁹ Carozza is no doubt correct that the value of dignity plays a role in cross-citation, particularly in death penalty cases where the right not to be subjected to cruel and unusual punishment is a key consideration. But this approach does not account for the comprehensive references to foreign practice by courts. Here courts are not merely drawing on *ad hoc* lessons regarding the demands of dignity, but are guided by patterns in comparative normative outcomes. Similar explanatory shortcomings also arise in Waldron's version of an international common law.

5.5. THE LAW OF NATIONS

Jeremy Waldron grounds his arguably leading theory of cross-citation on a similar principle-driven approach. Whilst he also refers to an international common law, he draws its origins from the law of nations, a long standing British and, later, US constitutional concept.⁵¹⁰ Waldron postulates that the implicit theory behind the

⁵⁰⁸ *ibid* 1043.

⁵⁰⁹ *ibid* 940. McCrudden also questions whether there is any real judicial common ground as to what is specifically demanded by considerations of dignity. He challenged the reach of an international common law based on dignity, and rather limited dignity to cases involving the determination of right to life and physical integrity issues. Even if there is commonality in death penalty cases considering the background value of dignity, the *ius commune* is limited to right to life and liberty cases only, which reduces its explanatory power for cross-citation in other human rights areas. See C McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' 19 *European Journal of International Law* (2008) 655 and C McCrudden 'A common law of human rights?: Transnational Judicial Conversations on Constitutional Rights' in O'Donovan, K and Rubin, G (Eds) *A Festschrift in Honour of Brian Simpson* (OUP Oxford 2000) 528.

⁵¹⁰ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 4; US Constitution article I section 8 clause 10.

citation of foreign cases stems from the *ius gentium* or the law of nations, a 'dense and mutually reinforced' consensus-oriented 'common law of mankind'.⁵¹¹

The US Constitution mentions the law of nations directly in the Offences Clause, which gives Congress the power to define and punish offences 'against the law of nations'.⁵¹² This reference in the US Constitution to the law of nations was apparently to a more limited source of law related to the conduct of nation states, and individuals situated outside their national territory.⁵¹³ A central criticism of the law of nations is therefore its constrained application as a law that applies as between states.⁵¹⁴ Given that the law of nations is a doctrine contained in the US Constitution, it is perhaps unsurprising that Waldron focuses on whether the law of nations has explanatory power in relation to the US Supreme Court in particular.⁵¹⁵ The court is also predisposed to the law of nations doctrine, citing Emmerich de Vattel, who wrote extensively on the law of nations, more than 150 times.⁵¹⁶

It is one shortfall of the law of nations, as a potential explanation of cross-citation, that it has 'no exact counterpart today'.⁵¹⁷ The reference by Waldron to old US Supreme Court case law from the 1800's, where the law of nations was

⁵¹¹ J Waldron 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 *Harvard Law Review* 129, 132 and 145; J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 4.

⁵¹² US Constitution article I, section 8, clause 10. See further SG Calabresi and SD Zimdahl 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty' (2005) 47 *William and Mary Law Review* 743, 757.

⁵¹³ *ibid* 758.

⁵¹⁴ R Domingo *The New Global War* (Cambridge University Press Cambridge 2010) 58. He attributes this more modern interpretation of the law of nations to Bentham's first writings about the concept of international law in the 1700's. (see p 30)

⁵¹⁵ S Cleveland 'Our International Constitution' (2006) 31(1) *Yale Journal of International Law* 1, 12.

⁵¹⁶ DA Farber 'The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History' (2007) 95 *California Law Review* 1335, 1344.

⁵¹⁷ *ibid* 1346.

considered to be some form of universal principle, is of questionable relevance.⁵¹⁸ The now formalised system of international human rights norms, as contained in international and regional human rights treaty systems, is a more likely causal candidate for judicial borrowing. Waldron himself refers to the ‘multiple positivization’ of norms, which includes international, regional and national positive law layers of rights formalisation.⁵¹⁹ The fact that most national constitutions borrow extensively from international human rights treaty formulations has created an informal and transnational norm transferral system that bears no relation to the law of nations.⁵²⁰

Courts outside of the US do not then refer to the law of nations when they engage with comparative precedent, given that it is not a concept widely recognised in other jurisdictions. For this reason, some writers go so far as to exclude US cases that refer to the law of nations in their analyses of cross citation.⁵²¹ The invocation of foreign law in other jurisdictions outside of the US is uncontroversial, where the borrowing of precedent is not acknowledged to be a result of the law of nations, but more attributable to similar human rights frameworks.⁵²²

⁵¹⁸ For example, a case such as *Riggs v Palmer* 22 NE 188 (NY 1889).

⁵¹⁹ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 120, 122-123. See GL Neuman ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55 *Stanford Law Review* 1863, 1864, regarding ‘dual positivization’. Even with older constitutions such as in the US, there is continuity between the international human rights regime and domestic bills of rights.

⁵²⁰ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 122.

⁵²¹ A Sperti ‘United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court’s Jurisprudence’ in T Groppi and M Ponthoreaux *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing Oregon 2013) 397.

⁵²² J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 17.

Where early US Supreme Court cases that dealt with the law of nations demonstrated a willingness to consider the laws of other jurisdictions, this was framed differently to contemporary issues dealing with the scope and nature of human rights. The court regarded the law of nations not as equivalent to international law but as one aspect thereof.⁵²³ The shift from a focus on international law applying between states, to dealing with the rights of individuals, is recognised by Waldron.⁵²⁴ Trnavci argues that with a shift of emphasis from inter state relations to the rights of individuals, international law has now in fact replaced the concept of the law of nations. The doctrine still has application in respect of the Alien Tort Claims Act 1789, but, even in that instance, an interpretation that identifies with customary international law rather than the law of nations is said to be preferable.⁵²⁵

An important consideration is whether the law of nations is a body of positive law or more akin to natural law principles. Waldron is of the view that the law of nations is a system of positive law not natural law, but critically not law in the proper

⁵²³ *Hilton v Guyot* 159 US 113 (1895).

⁵²⁴ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 133-135. He states that the demand for harmonization of human rights standards (realised through the cross referencing of fundamental values) is derived not derived from a top-down authority, but by the 'bottoms-up' demand from a global community of all peoples as human rights bearers.

⁵²⁵ G Trnavci, 'The meaning and scope of the law of nations in the context of the Alien Tort Claims Act and International law' (2005) 26 *University Pennsylvania Journal of International Economic Law* 193, 263. According to Trnavci, the prevailing view among US courts is that the law of nations, insofar as it captures alien tort claims principles developed to deal with gross human rights violations, is in fact customary international law that has now become a part of US domestic common law (263). See GL Neuman 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863, 188. This is perhaps why Justice Scalia sought to limit the doctrine's reach in *Sosa v Alvarez-Machain* 542 US 692, 124 S.Ct. 2739 (2004) 731, due to its potential to apply to the death penalty and in doing so to potentially bind the US to the views of foreigners.

sense until a local court rules as such in its local legal system.⁵²⁶ Here the domestic court must transform the soft principle into a hard legal norm, as opposed to a peremptory norm in customary international law, which is binding on its own without requiring judicial recognition in a particular territory.⁵²⁷ The deep background Dworkinian principles that make up the law of nations provide 'normative insight' drawn from the positive laws of various jurisdictions that have a bearing on a domestic judicial resolution of a US legal problem.⁵²⁸ These principles are similar to common law maxims that can be inferred from consistent decisions across multiple jurisdictions.⁵²⁹

As much as Waldron contends that the law of nations is positive law, the idea that it offers legal wisdom rather than carrying independent legal weight, subjugates it to the role of offering principles and guiding values for domestic judicial decision-making.⁵³⁰ Similarly, Waldron plays down the role of cross-citation as one motivated primarily by learning, an idea that reduces the utility of foreign precedents to mainly a source for interpretation.⁵³¹

Where Waldron also differs from the international law considerations discussed in the following two chapters, is that whilst he advocates the merits of consistency in the treatment of human rights issues, such as the execution of

⁵²⁶ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 28, 43 and 72.

⁵²⁷ J Crawford *Brownlie's Principles of Public International Law* (OUP Oxford 2012) 594.

⁵²⁸ J Waldron 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 *Harvard Law Review* 129, 143; R Dworkin *Taking Rights Seriously* (Harvard University Press Cambridge 1977).

⁵²⁹ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 64-67.

⁵³⁰ J Waldron 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 *Harvard Law Review* 129, 140.

⁵³¹ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 133.

minors, he does not believe all countries should follow the same solution.⁵³² As a corollary of this notion, he further dilutes the breadth of the law of nations, by suggesting that the US should only refer to jurisdictions that are ‘civilised’ or ‘freedom-loving’, presumably as determined by US courts.⁵³³ Customary international law on the other hand normatively affects and takes in every state in the world, subjecting all states to its peremptory norms.⁵³⁴

Waldron’s account fails to fully explain the type of cross-citation that occurs where courts, including the US Supreme Court, take a comprehensive poll of worldwide state practice. The content of the law of nations, as revealed by the reasoning of other courts, is not the focus of these judges. Rather it is the normative trends and patterns themselves that have a bearing on the outcome.

5.6. SPONTANEOUS ORDERS

Steven Calabresi and Bradley Silverman, in a comprehensive review of Waldron’s proposition, support the core explanation provided by the law of nations for cross-citation, but propose that a stronger explanatory candidate for judicial interactions is Hayek’s idea that ‘spontaneous orders involving a wide array of independent decision makers, free from central planning, cause those independent decision makers to work together’ without ‘realizing that they are doing so in pursuit of their

⁵³² *ibid* 117.

⁵³³ J Waldron ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 *Harvard Law Review* 129, 145.

⁵³⁴ J Crawford *Brownlie’s Principles of Public International Law* (OUP Oxford 2012) 37.

own self interests, to create better and more efficient outcomes than a central planner could.⁵³⁵

Interactions in this normative system are spontaneous and not directed by a higher authority. There is no design or intention of purpose behind a system that is developed spontaneously, such as systems of language or the free market.⁵³⁶ Applied to cross-citation, courts interpreting their own national constitutions work independently to create more efficient outcomes in human rights cases, by drawing on the historical work done by other courts dealing with the same issue. A transnational common law develops spontaneously, in the sense that courts do not have the intention to achieve this result. However, this does not account for the fact that most courts involved with cross-citation are almost by definition aware they are acting, if not in concert, certainly with full awareness of other courts being involved in the same exercise.

Similarly to Waldron, Calabresi sees the learning potential of comparative citation as important. The law of nations allows 'American judges to utilize knowledge from the global jurisprudential universe rather than the more limited set

⁵³⁵ SG Calabresi and B Silverman 'Hayek and the Citation of Foreign Law' (2013) Northwestern Law & Econ Research Paper No. 13-23, 14.

⁵³⁶ *ibid* 30. Calabresi at 47 also distinguishes the domestic US common law from the law of nations, whilst both share the characteristic of processing large disparate amounts of information whilst reaching across 'broad temporal and geographic distances to capitalize on the collective wisdom of multitudes of jurists.' An example of the court broadening its array of applicable 'data' is how the US Supreme Court also relies heavily on *amicus curiae* to carry out much of the broader research including on empirical evidence and international law. See S Behuniak, 'Friendly Fire: *amicus curiae* and *Webster v. Reproductive Health Services*' in E Slotnick, *Judicial Politics: Readings From Judicature* (CQ Press, Thousand Oaks 2005) 179; The influence of foreign nations is less obvious given that a number of these *amicus* briefs are funded by the European Union under council of Europe. See NV Demlietner, 'The Death Penalty: Following the European Lead?' (2002) 81 Oregon Law Review 131, 134 – 135.

of knowledge within our domestic legal universe.’⁵³⁷ He therefore views the availability of foreign precedents as mainly performing the function of expanding the knowledge base for US judges considering a legal problem.⁵³⁸ The weight of foreign law is also diluted by an insistence that the local decision must be able to stand without mention of the foreign source, as legal rules must ultimately be the law of some place.⁵³⁹ Calabresi restricts the ambit of the law of nations to a consideration of ‘nations with reasonably similar cultures, histories, values and legal and economic systems as our own.’⁵⁴⁰

Both Waldron and Calabresi offer value-oriented explanations for cross-citation that have limitations. These include a focus on US judicial practice only, limiting the lending countries to only those with shared cultural and legal histories, and reducing foreign law to a background learning or corroboratory role. This thesis argues that whereas judges use foreign law sometimes for textual guidance, and on other occasions to guide a value judgment, in certain death penalty cases courts are simultaneously and additionally developing and enforcing international law norms, in a more global and binding positive law sense than canvassed by those advocating for a softer international common ‘law’.

⁵³⁷ SG Calabresi and B Silverman ‘Hayek and the Citation of Foreign Law’ (2013) Northwestern Law & Econ Research Paper No. 13-23, 47.

⁵³⁸ *ibid.*

⁵³⁹ *ibid* 15 and 23.

⁵⁴⁰ *ibid* 15-16.

5.7. CONCLUSION

The call by the US Supreme Court for considerations of evolving standards of dignity in cruel and unusual punishment cases goes further than textual elucidation. It requires an examination of underlying constitutional values. Seipp says the cruel and unusual punishment wording in the Eighth Amendment demands a contemporary interpretation.⁵⁴¹ It is this need for an evolutive approach that leads to a consideration of values that shift over time and that shape an otherwise static text. Where a court is of the view that such values are shared by similarly situated constitutional democracies, foreign law becomes relevant.

Concerns in the US Supreme Court regarding the subjective application of the evolving standards test resulted in a formula of 'objective indicia', where foreign law can be used as one objective touchpoint for assessing the substance of an evolving standard on a particular normative point. The Indian Supreme Court and the SA Constitutional Court did not feel the need to explicitly add these objective considerations, but have also used comparative law to guide their own value judgments on the death penalty. Similarly, courts in other parts of the world adopted the core test of considering evolving values with respect to capital punishment, as indicated by the normative directions taken by other countries.⁵⁴²

⁵⁴¹ M Tushnet 'When is Knowing Less Better Than Knowing More? Unpacking the Controversy of the Supreme Court Reference to non-US law' (2006) 90 Minnesota Law Review 1275, 1279.

⁵⁴² In Zimbabwe, Gubbay CJ asserted that the issue of capital punishment involves a 'value judgment,' which 'must not only take account of the emerging consensus of values in the civilised international community (of which this country is a part), as evidenced in the decisions of other Courts and the writings of leading academics, but of contemporary norms operative in Zimbabwe and the sensitivities of its people.' See *Catholic Commission for Justice v A-G, Zimbabwe* 1993 (4) SA 239 (ZS) 248.

In interviews with judges from the Canadian Supreme Court, reference is made to universal values in a cross-citation context. Le Bel J stated that courts that examine comparative precedents have a sense that there are 'shared values between different democracies ... The right to life is an example of a shared value ... it is part of Canadian culture to endorse universal values.'⁵⁴³ Gauthier J similarly referred to common fundamental values:

(A)s the world gets smaller, and values come together, a new consensus must be found. It is clear that courts around the world are faced with the same problems. Humanity has far more in common than differences, but the differences are most striking. This creates common challenges. Problems are basically of the same nature. The appropriate answers may vary, but often it is of interest to see how others have tackled some of these questions. ... Human nature is fundamentally the same, whether over space or time. There are certain values that are common across the world, though they may vary in the way emphasis is laid upon them in different societies and in ways communities respond to them.⁵⁴⁴

It is apparent that the idea of shared or universal values plays a large role in the deliberations of death penalty cases.

Carozza is correct in describing the substantial contribution that the shared human rights value of dignity makes in driving cross-citation in capital punishment judgments. But it is a necessary yet insufficient account of cross-citation. It fails to explain how the citation of state practice without reference to dignity implicates

⁵⁴³ Interview with Arbour J of the Canadian Supreme Court, September 2000, Ottawa.

⁵⁴⁴ Interview with Gauthier J of the Canadian Supreme Court, September 2000, Ottawa. Gauthier J also commented that this idea of broad, universal values provides a principle-based rationale for the assessment of comparative decisions on the same subject matter. In general what is shared is some notion of a common purpose, that there is 'some shared understanding of man's place in society, the relationship between man and state.'

international law, and customary international law in particular. Similarly Waldron's application of the law of nations offers a partial explanation. Since Waldron does not escalate the citation of comparative law beyond background principles that can be drawn from a limited group of countries, this does not explain the additional and separate weight that a norm can reach in the international law arena. Although an international common law resembles the similarly evolving nature of customary international law, there is no sense that the values of other countries can ever be binding. The focus on what is now almost exclusively a US doctrine, and what it means for US courts in particular, also reduces the relevance of the law of nations to other courts around the world.

In the final chapter seven of this thesis, the jurisprudence of the courts in the three selected jurisdictions will be examined from a third perspective. This thesis will argue that cross-citation does not merely reflect a tool of interpretation, or a 'soft' international common law, but is an act in the development and application of emerging customary international law. The assessment of comparative state practice and global trends by a court, considers a state's international law obligations. This tension between comparative law revealing softer guiding values, as compared with harder international legal norms, is displayed in O'Connor J's *dicta* in *Roper*:

But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement - expressed in international law or in the domestic laws of

individual countries - that a particular form of punishment is inconsistent with fundamental human rights.⁵⁴⁵

This congruence between jurisdictions can then range from emerging values to binding international legal rules. Before this thesis examines the death penalty case law of the US, India and South Africa through this latter international law prism, the following chapter will first consider the normative development of capital punishment globally since the Second World War. Chapter six will demonstrate that cross-citation in death penalty cases has occurred within a wider context of a steady shift towards the abolition of capital punishment in the international law arena. This move against the death penalty, by way of both international treaty law ratifications and domestic abolitions, has paralleled the emergence of cross-citation over the same period. The judicial consideration of foreign law, and the striking down of death penalty practices by domestic courts, have therefore marched in lockstep with a retraction of capital punishment in international treaty law and customary international law.

⁵⁴⁵ *Roper v Simmons* 543 US 551, 125 S.Ct. 1183 (2005) 604.

CHAPTER 6: THE DEVELOPMENT OF CAPITAL PUNISHMENT NORMS IN INTERNATIONAL LAW

6.1. INTRODUCTION

This chapter will place the case law from the three selected jurisdictions in an international law context. This will be achieved by assessing the development of death penalty norms in international law since the end of the Second World War. From 1948 onwards, there has been a consistent growth in international human rights law, and especially treaty law, that has a bearing on capital punishment.⁵⁴⁶ This growth was not an overnight process, but rather an incremental development of obligations on states to abolish the death penalty outright, or to banish specific death penalty procedures or practices.

This chapter will also show that national courts have operated against the background of a steady stream of domestic abolitions around the world, which were achieved mainly by legislatures and executives. The rate of domestic abolition increased dramatically in the early 1990's in a 'great leap forward', and the increase was sustained for the past two decades.⁵⁴⁷ Domestic courts have been operating against both this state level abolitionist background and the international law context.

⁵⁴⁶ R Hood and C Hoyle 'Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"' (2009) 38(1) *Crime and Justice* 1, 2.

⁵⁴⁷ R Hood and C Hoyle *The Death Penalty: A Worldwide Perspective* (OUP Oxford 2008) 13.

This chapter will reveal a strong synchronicity between the gradual development of an international law anti-death penalty regime, and the increasingly abolitionist decisions of the courts in the three focus jurisdictions, in the period between the 1970's and the 2000's. Cross-citation in death penalty cases has also followed a similar growth pattern as these abolitionist trends, starting with the US Supreme Court in the 1970's, followed by the Indian Supreme Court in the 1980's, and the South African Constitutional Court in the 1990's. This thesis suggests that these similarities are not coincidental. Rather, as chapter seven will argue, the citation of foreign law reflects an awareness on the part of domestic courts of these international law developments and comparative state practice.

6.2. HISTORICAL OVERVIEW

6.2.1. The death penalty prior to the Second World War

The analysis of the normative trajectory of abolition requires a brief overview of how capital punishment was historically regulated in various countries. The death penalty was a form of punishment that was used by states from ancient times, and execution remained a widely accepted form of punishment until the Enlightenment period towards the end of the Eighteenth century.⁵⁴⁸ It was a punishment that was used for various offences and not just for murder. In 1810, there were at least 223 capital offences in England.⁵⁴⁹

⁵⁴⁸ D Garland *Peculiar Institution* (OUP Oxford 2010) 101.

⁵⁴⁹ R Hood and C Hoyle *The Death Penalty: A Worldwide Perspective* (OUP Oxford 2008) 9.

In 1764, a famous proponent of abolition, Cesare Beccaria, first expressed the thought that capital punishment was an unacceptable method of punishment for an enlightened state to administer.⁵⁵⁰ Notions of 'restraint, refinement, and reduction' altered the language and attitude around capital punishment, with the result that the death penalty became less of a public event, and the number of capital offences was greatly diminished.⁵⁵¹

These abolitionist ideas led Tuscany, Austria and Russia to put in place a moratorium on the death penalty as early as the 1780's.⁵⁵² Execution rates in turn dropped across Europe. The number of executions in France dropped from 264 per annum in the early part of the nineteenth century, to 32 executions per annum by the middle of the nineteenth century, which as it happens is a rate similar to that in the US during parts of the last decade.⁵⁵³ This reduction in the imposition of capital punishment continued in the twentieth century. The categories of offenders eligible for execution was restricted, with England imposing an age limit in 1908 for capital offenders of sixteen years, a century before the US Supreme Court would rule likewise.⁵⁵⁴

⁵⁵⁰ *ibid* 10.

⁵⁵¹ D Garland *Peculiar Institution* (OUP Oxford 2010) 101, 105. 15 capital crimes remained in English law by 1938.

⁵⁵² *ibid* 111.

⁵⁵³ *ibid* 105. There were 39 executions in the US in 2013 (Death Penalty Information Centre, 2013 Year End Report <<http://www.deathpenaltyinfo.org/> accessed 1 September 2014).

⁵⁵⁴ Children and Young Persons Act 1908; *Roper v Simmons* 543 US 551, 125 S.Ct. 1183 (2005).

In the US, the first abolition took place in 1794 in Pennsylvania, when capital punishment was abolished for all crimes except murder.⁵⁵⁵ The first steps to abolish capital punishment for all crimes were in Michigan (1846), Rhode Island (1852), Wisconsin (1853) and Maine (1887).⁵⁵⁶ The US was therefore in the vanguard of the early abolitionist moves. Alexis de Tocqueville remarked at the time that 'the Americans have almost expunged capital punishment from their codes.'⁵⁵⁷

The progression towards abolition also spread southwards in the first half of the twentieth century. Brazil, Columbia, Costa Rica, Ecuador, Uruguay, Argentina, and Venezuela had all abolished capital punishment before the Second World War. By the outbreak of the Second World War, abolition had established a firm foothold in Latin America, whereas only 8 states around the world had abolished the death penalty for all crimes.⁵⁵⁸

Between the 1860's and the 1880's, the death penalty was expunged in most of the north east of the US, with similar measures introduced in Germany, Belgium, the Netherlands, Norway, Sweden, Italy, Portugal and Switzerland.⁵⁵⁹ North Dakota (1915) and Minnesota (1911) later joined as US abolitionist states. Many of these early stage abolitions or moratoriums were however reversed at

⁵⁵⁵ R Hood and C Hoyle *The Death Penalty: A Worldwide Perspective* (OUP Oxford 2008) 11.

⁵⁵⁶ *ibid* 11.

⁵⁵⁷ Quoted in S Banner *The Death Penalty: An American History* (Harvard University Press Cambridge 2002) 99.

⁵⁵⁸ 'Amnesty International, Death Penalty: Countries Abolitionist for All Crimes, 2008' (available at <<http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes>> accessed 30 June 2015); International Commission Against the Death Penalty, Report on How States Abolish the Death Penalty, Oslo, April 2013, 6.

⁵⁵⁹ D Garland *Peculiar Institution* (OUP Oxford 2010) 112.

later stages, particularly during the world wars. Colorado, Kansas, Washington, South Dakota, Tennessee, Arizona and Missouri all flirted with abolition in the first half of the twentieth century, before reintroducing the death penalty later.⁵⁶⁰ Despite these setbacks in a generally transformative process, a gradual path towards more limited use of execution had taken root.⁵⁶¹ The idea of abolition had gained traction, but it was a position adopted by a minority of countries at this stage. Abolition was also not yet an international law issue, but overwhelmingly a domestic criminal justice policy issue.⁵⁶²

6.2.2. International Human Rights paradigm

The 'modern movement to abolish the death penalty really begins in the late 1940s.'⁵⁶³ It was after World War II that the death penalty became a truly global issue, or at least an issue with an international law dimension. It was at this juncture that capital punishment became the subject of international treaty law, as 'human rights law emerged as the guiding normative regime for the newly-minted international organisations, the United Nations and the Council of Europe.'⁵⁶⁴

The drafting and adoption of various international treaties codified individual rights that were previously encapsulated only in domestic constitutional texts such as the US Constitution. By creating mirror clauses in national and international

⁵⁶⁰ *ibid* 120.

⁵⁶¹ *ibid* 111. Italy amongst others reintroduced the death penalty during the Second World War.

⁵⁶² R Hood and C Hoyle *The Death Penalty: A Worldwide Perspective* (OUP Oxford 2008) 19.

⁵⁶³ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 2003) 2.

⁵⁶⁴ *ibid*.

texts, a foundation was laid for the vertical and horizontal precedential borrowing by courts that would follow later. But this was also the first time that codified human rights, which were previously the domain only of local parliaments and courts, gained an international treaty law dimension. The normative choices of another country concerning a certain rights question had been previously available to another country, but the status of that right in international law would now become relevant, especially if a country was a signatory to an applicable treaty.

The Chronology Table appearing below (Chart A) illustrates the extensive ratification of the main human rights treaties, including regional treaties. One must also bear in mind the growth in the number of nation states during the period under examination, as there were only 51 member states in the United Nations when it was formed.⁵⁶⁵ Currently there are 193 member states of the United Nations.⁵⁶⁶

⁵⁶⁵ 'Growth in UN Membership, 1945-present' <<http://www.un.org/en/members/growth.shtml>> accessed 30 June 2015.

⁵⁶⁶ *ibid.*

Chart A: Chronology of Key International Treaties, Protocols and Resolutions⁵⁶⁷

Document / Convention	Relevant Article / Resolution	Year of Enactment / Adoption	No. of State Ratifications
Universal Declaration of Human Rights	Articles 3, 5	1948	n/a
American Declaration of the Rights and Duties of Man	Articles 1, 26	1948	n/a
European Convention on Human Rights (ECHR)	Articles 2, 3	1950	47
International Covenant on Civil and Political Rights (ICCPR)	Articles 1, 6	1966	168
American Convention on Human Rights (IACHR)	Article 4	1969	25
African Charter on Human and Peoples Rights (ACHPR)		1981	53
ECHR Protocol 6		1983	46
Convention Against Torture, Cruel, Inhuman or Degrading Treatment		1984	156
ICCPR Optional Protocol 2		1989	80

⁵⁶⁷ Ratifications as at 1 September 2014. Sources: 'United Nations Treaty Collection, Chapter IV: Human Rights' <<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>>; 'Council of Europe, Chart of signatures and ratifications of Treaty 005' <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>; 'Department of International Law, OAS, American Convention ... Signatories and Ratifications' http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm; 'Amnesty International, Death Penalty: Ratification of International Treaties' <http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties>; 'African Commission on Human and Peoples' Rights, Ratification Table; African Charter on Human and Peoples' Rights' <http://www.achpr.org/instruments/achpr/ratification/>> accessed 1 September 2014.

Convention on the Rights of the Child		1989	193
Protocol to the American Convention on Human Rights to Abolish the Death Penalty		1990	13
ECHR Protocol 13		2002	43

This section will now deal chronologically with the development of these key treaties relevant to this thesis, and the question of the progression of death penalty norms in international law.

6.2.3. UDHR

The adoption of the Universal Declaration of Human Rights⁵⁶⁸ (UDHR) in 1948 was the first time the international community of states recognised human rights as legal rights.⁵⁶⁹ The UDHR was not, nor was it intended to be, a binding treaty, but it was influential in the development of the subsequent International Covenants, regional conventions and national constitutions.⁵⁷⁰

The UDHR encapsulates the right to life in article 3, but makes no mention of the death penalty. This was the first time the right to life was encapsulated in an international legal instrument in broad terms. The provision therefore allowed for an

⁵⁶⁸ Universal Declaration of Human Rights, adopted by UN General Resolution 217A (III) (1948) on 10 December 1948, U.N. Doc. A/810.

⁵⁶⁹ F Prezetacznik 'The right to life as a basic human right' (1976) IX Human Rights Journal 585.

⁵⁷⁰ WA Schabas 'International Legal Aspects' in P Hodgkinson and A Rutherford *Capital Punishment: Global Issues and Prospects* (Waterside Press Hampshire 1996) 19.

evolution of values regarding the death sentence, by neither favouring abolition nor retention. However, in 1971, the UN General Assembly later affirmed in a resolution that the main objective of the right to life in the UDHR was to 'progressively restrict the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries.'⁵⁷¹ Article 5 of the UDHR included the provision that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. This wording was inspired by the US Eighth Amendment and the English Bill of Rights.

6.2.4. ECHR

The European Convention of Human Rights (ECHR) was adopted in 1950 as a regional human rights treaty system.⁵⁷² By 1990, there were 20 signatories to the ECHR, and 47 states are currently signed up to the ECHR system.⁵⁷³ Article 2 (1) of the ECHR states that:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.⁵⁷⁴

⁵⁷¹ UN General Assembly Resolution 2857(XXVI) (1971) of 20 December 1971.

⁵⁷² European Convention of Human Rights (adopted 4 November 1950, entered into force 3 September 1953) European Treaty Series 5, Rome.

⁵⁷³ See 'Council of Europe, Chart of signatures and ratifications of Treaty 005' <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>> accessed 1 September 2014.

⁵⁷⁴ The European Commission has had occasion to consider article 2. The Committee of Ministers in the old ECHR system confirmed the Commission's decision in *Cyprus v Turkey* 4 EHRR 482 (1976) 535, that article 2 was breached by Turkey's soldiers killing Greek Cypriot civilians following the invasion of Northern Cyprus. See

Article 3 of the ECHR states that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. Article 2 is the first substantive right guaranteed in the Convention, and it is one of the few articles that cannot be derogated from in time of war or in a state of emergency.⁵⁷⁵ Express allowance is made for capital punishment as an exception to the right to life, if it is the outcome of a legitimate judicial process. This is a clear departure from the UDHR, and more similar to the US Constitution which also expressly limits the right to life in this manner.

Further exceptions to the right are expressly laid down in article 2(2). Violations of the right to life are permitted where absolutely necessary in defence of a person, in order to effect a lawful arrest, or in order to quell a riot or insurrection.⁵⁷⁶ Whilst not every taking of life is illegal, states must, in all other circumstances, in their general protection of the community, act reasonably.⁵⁷⁷

The ECHR added a regional international law layer of death penalty norms, with the result that Europe has become a powerful regional abolitionist constituency. Although predominantly a civil law region, the progressive ban on

⁵⁷⁵ Article 15 (2).

⁵⁷⁶ Dinstein argues that these exceptions can be used as guidelines for interpreting the content of the requirement of ‘arbitrary’ in article 6 of the ICCPR. See Y Dinstein ‘The right to life, physical integrity and liberty’ in L Henkin (ed) *The International Bill of Human Rights* (Columbia University Press New York 1990) 119.

⁵⁷⁷ See D Harris *Law of the European Convention on Human Rights* (Butterworths London 1995) 39, who mentions the margin of appreciation given to states on matters concerning domestic policy.

capital punishment in all member states, constituting 25% of UN members, has had a material impact on the shift away from the death penalty elsewhere.⁵⁷⁸

6.2.5. ICCPR

Sixteen years after the adoption of the ECHR, the International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966, an international human rights treaty regime foreshadowed by the UDHR.⁵⁷⁹ By the end of the 1970's, 56 states had signed or acceded to the ICCPR.⁵⁸⁰ 168 states have now ratified or acceded to the ICCPR, which constitutes 87% of current UN member states.⁵⁸¹

The ICCPR is a significant departure from the broadly worded article 3 of the UDHR, and closer to the position in the ECHR.⁵⁸² The death penalty is expressly dealt with in article 6, which has abolition as its theme. Article 6(1) of the ICCPR states that '(e)very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'⁵⁸³ Article 6(2) limits application of the death penalty to only those countries that have not yet abolished the death penalty, limits death sentences to the most serious crimes only, and restricts death sentences to a judicial process. Article 6(3) states that where

⁵⁷⁸ See A McGann 'Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors' (2012) 56 *International Studies Quarterly* 275.

⁵⁷⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁵⁸⁰ 'United Nations Treaty Collection, Chapter IV: Human Rights' <<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>> accessed 1 September 2014.

⁵⁸¹ *ibid.*

⁵⁸² WA Schabas 'International Legal Aspects' in P Hodgkinson and A Rutherford *Capital Punishment: Global Issues and Prospects* (Waterside Press Hampshire 1996) 17-19.

⁵⁸³ Article 3 of the UDHR states that 'everyone has the right to life, liberty and security of person.' Note the Second Optional Protocol to the ICCPR.

the death penalty constitutes genocide, the implicated state is bound by the provisions of the Genocide Convention. Article 6(4) grants persons sentenced to death the right to seek a pardon or commutation of the sentence. Article 6(5) limits the application of death sentences to offenders over the age of eighteen. Finally, article 6(6) encourages states to abolish capital punishment. Article 6(5) will be considered in the following chapter in more detail as a specific example of a norm that has developed in customary international and treaty law, especially in the context of the US Supreme Court's initial endorsement and later rejection of the juvenile death penalty.

Article 6 'transformed the laconic and in some sense equivocal "right to life" provision found in article 3 of the Universal Declaration into a complex text that recognises capital punishment as an exception or limitation on the right to life.'⁵⁸⁴ The death penalty is authorised by article 6, but only in restrictive terms, as an attempt to accommodate the large number of countries at the time that practised the death penalty.⁵⁸⁵ The obligations under article 6 have been interpreted very broadly by the ICCPR enforcement tribunal, the Human Rights Committee, by requiring states not only to refrain from killing arbitrarily, but also to take positive steps to ensure proper enjoyment of the right. The right to life especially is to be given a generous and non-restrictive interpretation.⁵⁸⁶

⁵⁸⁴ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 2003) 4.

⁵⁸⁵ R Sapienza 'International Legal Standards on Capital Punishment' in BG Ramcharan *The Right to life in international law* (Martinus Nijhoff Leiden 1985) 284-285; G Robertson *Crimes against Humanity: The Struggle for Global Justice* (Penguin Press New York 1999) 120.

⁵⁸⁶ See UN Human Rights Committee General Comment 6 (adopted at Sixteenth Session on 30 April 1982) U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994). The Human Rights Committee is the authoritative body concerned with the implementation of the ICCPR.

Article 7 of the ICCPR prohibits cruel, inhuman or degrading treatment or punishment. Robertson points to the illogical nature of the relationship between articles 6 and 7, arguing that the death penalty possesses the qualities of cruel and unusual punishment, described in article 7, in all circumstances. On this basis, it follows that the death penalty can never pass the article 6 test that allows for capital punishment in certain circumstances.⁵⁸⁷ This is a dichotomy reflected in most international instruments and domestic texts. The SA Constitutional Court accepted this reasoning, whilst the US Supreme Court has regarded cruel and unusual punishment as a more limited procedural threshold.

6.2.6. American Convention on Human Rights

Human rights in the Inter-American system are derived from the American Declaration of the Rights and Duties of Man of 1948 (ADRDM),⁵⁸⁸ and the American Convention on Human Rights (ACHR) that was adopted in 1969.⁵⁸⁹ 25 states have ratified the American Convention on Human Rights.⁵⁹⁰ Those states that are not party to the Convention, but are members of the Organisation of American States (OAS), can still be subject to the Inter-American Court's jurisdiction. The Inter-American Court also refers to the ADRDM in order to

⁵⁸⁷ G Robertson *Crimes against Humanity: The Struggle for Global Justice* (Penguin Press New York 1999) 120.

⁵⁸⁸ American Declaration of the Rights and Duties of Man, (adopted 2 May 1948) Ninth International Conference of American States, Bogota, Colombia.

⁵⁸⁹ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

⁵⁹⁰ International Commission Against the Death Penalty, Report on How States Abolish the Death Penalty, Oslo, April 2013, 8.

interpret references to human rights in the OAS Charter.⁵⁹¹ If the formulation of the right is broader in the American Declaration than in the Convention, the broader interpretation is to be preferred.⁵⁹² There is therefore a relationship of interdependency between the two instruments.⁵⁹³

Article 1 of the Declaration states that '(e)very human being has the right to life, liberty and security of his person.' Article 4(1) of the Convention states that '(e)very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.' The rest of article 4 addresses capital punishment. The ACHR goes the furthest in restricting the death penalty, and explicitly disallows states that have abolished capital punishment from reintroducing it.⁵⁹⁴ This is different to the open-ended wording of the ECHR, which was adopted 19 years previously.

By the end of the 1960's, the international instruments described above had curtailed the scope of the death penalty. These international treaty obligations, including at a regional level in Latin America and Europe, created an abolitionist

⁵⁹¹ Inter American Court of Human Rights, Advisory Opinion, 14 July 1983, No OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights.

⁵⁹² *ibid* para 41.

⁵⁹³ S Davidson 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in DJ Harris and S Livingstone *The Inter-American System of Human Rights* (Clarendon Oxford 1998) 214.

⁵⁹⁴ WA Schabas 'International Legal Aspects' in P Hodgkinson and A Rutherford, *Capital Punishment: Global Issues and Prospects* (Waterside Press Hampshire 1996) 17-20. Ironically the US delegate at the 1969 conference at which the IACHR was adopted went to far as to refer to the 'general trend, already apparent, for the gradual abolition of the death penalty.' See OAS Doc. OEA/Ser.K/XVI/1.1 Doc. 10 (Eng.) 9, quoted in WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 2003) 6.

foothold during the first two decades following the end of the Second World War. Although the death penalty was expressly permitted, the international treaty regime from its inception favoured a reduction and eventual abolition of capital punishment.

6.2.7. Domestic developments in the 1970's

Whilst these international law developments unfolded, there were sporadic domestic abolitions, but these events were too infrequent to amount to any marked trend towards abolition. In a manner that would be repeated in the decades to follow, countries emerging from authoritarian rule, including Germany, Italy and Austria, abolished the death penalty by way of constitutional enactment just after the Second World War, as part of their transitions to democracies.⁵⁹⁵ More states opted for abolition during the 1970's, taking the final step of removing rarely used laws allowing for execution for political crimes: Portugal (1976), Denmark (1978), Luxembourg (1979), Norway (1979) and the Netherlands (1982). Domestic abolition therefore started to follow the pattern established in international treaty law in the preceding two decades.

Yet it was only in 1970's that the death penalty issue first came before a major court, domestic or international. By the late 1960's the use of the death penalty was in decline in the US. Public opinion shifted against capital punishment, and 'America seemed on the verge of nationwide abolition'.⁵⁹⁶ In 1972, the

⁵⁹⁵ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 2003) 2.

⁵⁹⁶ D Garland *Peculiar Institution* (OUP Oxford 2010) 120.

landmark decision of the United States Supreme Court in *Furman* came close to invalidating the death penalty in the United States on a fundamental basis.⁵⁹⁷ However, the lead taken by the US Supreme Court in *Furman* was undone by in 1976 in *Gregg*.⁵⁹⁸ But for a moment, whilst leading member states of Western Europe, such as France, Spain, and Greece, were still handing down death sentences, capital punishment had effectively ended in the US.

6.2.8. The 1980's

The retentionist position in the US subsequently hardened during the 1980's and executions increased during this decade. The US in turn focused on the search for a more restricted and humane method of execution. Lethal injection was introduced as a form of capital punishment in 1982.⁵⁹⁹ Elsewhere a trend towards abolition emerged, although the pace of change was steady at best for the most part, with only two additional signatories to the ECHR by 1990.⁶⁰⁰ Ratification levels of key international instruments had however reached a critical mass. By 1989, the ICCPR had been signed or acceded to by 84 countries.⁶⁰¹ The trend away from capital punishment was bolstered by additional international multilateral treaties and optional protocols that entered into force during the 1980's.

⁵⁹⁷ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972).

⁵⁹⁸ *Gregg v Georgia* 428 US 153, 96 S.Ct. 2909 (1976).

⁵⁹⁹ D Garland *Peculiar Institution* (OUP Oxford 2010) 117. The electric chair was first used in 1890, and the gas chamber in 1924.

⁶⁰⁰ 'Council of Europe, Chart of signatures and ratifications of Treaty 005'
<<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>>
accessed 1 September 2014.

⁶⁰¹ 'United Nations Treaty Collection, Chapter IV: Human Rights'
<<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>> accessed 1 September 2014.

6.2.9. ECHR, 6th Optional Protocol

In 1983, the Sixth Optional Protocol to the ECHR was adopted by the Council of Europe.⁶⁰² 46 states are now signed up to the Optional Protocol.⁶⁰³ In terms of the Optional Protocol, all parties to the European Convention, including new members, must commit to the abolition of capital punishment in all circumstances. The Protocol has subsequently been adopted and ratified by all member states of the Strasbourg system. As stated earlier, this presents a powerful block of states that have endorsed abolition as an international law norm.

6.2.10. ICCPR, 2nd Optional Protocol

The Second Optional Protocol to the ICCPR, which had the single objective of abolishing the death penalty, was adopted on 29 December 1989, and entered into force on 11 July 1991. Article 1 of the Second Optional Protocol to the ICCPR states: '(n)o-one within the jurisdiction of a State party to the present Optional Protocol shall be executed.' As of 1 January 1996, there were only twenty-nine ratifications, whereas 80 states have currently ratified the Protocol.⁶⁰⁴ Just over 40% of member states of the UN have therefore specifically committed to abolition by signing up to this instrument.

⁶⁰² Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty (adopted 28 April 1983, entered into force 1 March 1985) European Treaty Series 114.

⁶⁰³ 'Council of Europe, Chart of signatures and ratifications of Treaty 005'
<<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>>
accessed 1 September 2014.

⁶⁰⁴ 'United Nations Treaty Collection, Chapter IV: Human Rights'
<<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>> accessed 1 September 2014;
WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 1993) 176.

6.2.11. Other Treaties

Various further international treaties and guidelines were adopted during the 1980's, which evidenced an increased concern in the international community with limiting the death penalty as a form of criminal punishment. In 1984, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted.⁶⁰⁵ The current number of states party to the treaty is 156.⁶⁰⁶ In 1984, the UN Committee on Crime Prevention and Control adopted the 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty'.⁶⁰⁷ In 1988, the UN Economic and Social Council adopted the 'Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty'.⁶⁰⁸

The African Charter on Human and Peoples' Rights, adopted in 1981 and in force since 1986, incorporated a limited right to life in article 4, but did not mention the death penalty.⁶⁰⁹ Article 5 prohibits 'torture, cruel, inhuman or degrading punishment and treatment'. The Arab Charter on Human Rights, adopted in 1994, included a right to life provision but expressly allowed for the death penalty for 'the

⁶⁰⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁶⁰⁶ 'United Nations Treaty Collection, Chapter IV: Human Rights'

<<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>> accessed 1 September 2014.

⁶⁰⁷ UN Economic and Social Council Resolution 50 (1984) of 25 May 1984, 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', UN Doc. E/1984/16.

⁶⁰⁸ UN Economic and Social Council Resolution 64 (1989) of 24 May 1989, 'Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty'.

⁶⁰⁹ African Charter on Human and Peoples' Right (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), .

most serious crimes'.⁶¹⁰ However article 12 does exclude the death penalty for offences committed by persons under the age of eighteen, and a delay in its application for pregnant women and young mothers. Article 13 prevents persons from being 'subjected to physical or mental torture or cruel, inhuman or degrading treatment'.

States could also not avoid the normative onslaught from international agencies and non-governmental organisations (NGO's) that have promoted an abolitionist message. NGO's working in the anti-death penalty area include Amnesty International, Human Rights Watch, Hands Off Cain, International Federation for Human Rights, Ensemble Contre la Peine de Mort and the World Coalition Against the Death Penalty.⁶¹¹ International NGO's such as the Death Penalty Information Centre in the US have also come to the fore in terms of data collection, reporting and advocacy.⁶¹² This pressure has been described as creating a "spiral" or "cascade" of norm acceptance.⁶¹³ International treaties and their related international implementing organisations have in certain cases directly affected domestic decisions to abolish.⁶¹⁴

⁶¹⁰ Arab Charter on Human Rights, Council of the League of Arab States (adopted 15 September, 1994, entered into force 15 March 2008) 18 Human Rights Law Journal 151 (1997).

⁶¹¹ R Hood and C Hoyle 'Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"' (2009) 38(1) Crime and Justice 1, 31.

⁶¹² International Commission Against the Death Penalty, Report on How States Abolish the Death Penalty, Oslo, April 2013, 8.

⁶¹³ A McGann 'Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors' (2012) 56 International Studies Quarterly 275, 276.

⁶¹⁴ *ibid* 277.

6.2.12. The end of the Cold War

At the onset of the 1990's the international human rights system had now been in place for four decades, and the pro-life ICCPR for a quarter century. International bodies continued to push an abolitionist theme, as the issue arose before various UN entities. A subordinate body to the UN's Human Rights Council, the Sub-Commission on the Promotion and Protection of Human Rights, adopted a resolution in 1999 condemning the application of the death penalty to juveniles.⁶¹⁵ Abolition was raised as an issue in the UN Economic and Social Council, and the UN Congress on Crime Prevention and Control.⁶¹⁶

The UN Human Rights Committee monitors the implementation of the ICCPR, an instrument which, although permissive of the death penalty, is clearly pro-abolitionist in nature.⁶¹⁷ In 1994, the Human Rights Committee issued General Comment No. 24, which declared that the prohibition of arbitrary deprivation of life is a part of customary international law amounting to *ius cogens* or a peremptory norm.⁶¹⁸

⁶¹⁵ UN Sub-Commission on the Promotion and Protection of Human Rights Resolution, UN Doc. E/CN.4/Sub.2/1999/L.16.

⁶¹⁶ P Hodgkinson and A Rutherford *Capital Punishment* (Waterside Press Hampshire 1996) 26-7.

⁶¹⁷ See the UNHRC's Rules of Procedure adopted at the Committee's 2852nd meeting during its 103rd session.

⁶¹⁸ UN Human Rights Committee General Comment 24 (adopted 11 November 1994) U.N. Doc. CCPR/C/21/Rev.1/Add.6, General Comment on Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant.

The death penalty was excluded from the list of possible punishments in the international tribunals for Rwanda and Yugoslavia.⁶¹⁹ Capital punishment has been excluded from the list of punishments that can be handed down in terms of the Rome Statute of the International Criminal Court.⁶²⁰ To these treaties and international communications were also added further optional protocols that were expressly abolitionist. In 1990, an Optional Protocol was introduced in the IACHR system that called upon states to abstain from the use of the death penalty, but does not oblige them to erase the death penalty legislatively.⁶²¹ The European Union's specification that abolition was required for EU membership was to become a key driver of abolition for the next two decades.⁶²²

The pattern of abolition accelerated at the beginning of the 1990's, which was a tipping point in terms of the number of nations opting for formal abolition or putting in place a moratorium on executions.⁶²³ McGann conducted an empirical study, focusing on the period from 1960 to 2005, which revealed the role that key variables have played in abolition.⁶²⁴ Abolition was most likely in the period from 1990 to 2005 when political transitions increased the number of democratic

⁶¹⁹ UN Security Council Resolution 955 (1994) of 8 November 1994, respectively.

⁶²⁰ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

⁶²¹ Protocol To The American Convention On Human Rights To Abolish The Death Penalty (adopted 8 June 1990 entered into force 28 August 1991) OAS Treaty Series 73.

⁶²² Commission Communication to the Council and the European Parliament, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, COM (2001) 252 final (May 2001).

⁶²³ International Commission Against the Death Penalty, Report on How States Abolish the Death Penalty, Oslo, April 2013, 8.

⁶²⁴ A McGann 'Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors' (2012) 56 International Studies Quarterly 275, 283-285. Whilst only democratic states have turned their backs on capital punishment, some forms of democracy are more conducive to abolition than others. Countries that make use of deliberative decision-making and proportional representation are more likely to abolish than states that favour a 'winner-takes-all presidential or plurality system.' In a system such as the latter, for example the US, an unpopular policy like abolition is kept off the agenda, whereas a consensus democracy has more potential to overcome public opinion.

states.⁶²⁵ A state with a proportional system of parliamentary democracy, with a dominant religion of Catholicism, which had signed ECHR Protocol No. 6, was 50% more likely to abolish within ten years. During the 1990's the probability of abolition within ten years in a consensus democracy was higher than 60%.

However, even countries with a less suited political system could be tipped in favour of abolition if there was a pressure from regional international law, such as in Europe.⁶²⁶ The role played by the Council of Europe and the European Union has therefore been key in shifting states in Eastern and Central Europe towards abolition. But the peer pressure alone in this region has also been a significant factor, with the study showing that a country with a proportional representation parliamentary democracy system, in a region where most other countries no longer have capital punishment, is almost certain to abolish within ten years. This type of pressure has been exerted in other ways, where the existence of the death penalty in a country has been a basis for refusing to extradite in a number of states.⁶²⁷

Another major factor triggering abolition has been political transitions to democracy and a related commitment to fundamental rights.⁶²⁸ This has sometimes been a reaction to the overthrow of an oppressive regime, such as in South Africa, but also to garner the acceptance of the rest of the world as a

⁶²⁵ *ibid* 279-280.

⁶²⁶ R Hood and C Hoyle 'Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"' (2009) 38(1) *Crime and Justice* 1, 22.

⁶²⁷ P Hodgkinson and A Rutherford *Capital Punishment* (Waterside Press Hampshire 1996) 29.

⁶²⁸ R Hood and C Hoyle 'Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"' (2009) 38(1) *Crime and Justice* 1, 17.

'legitimate, modern state.'⁶²⁹ Other countries, like Rwanda, Cambodia, Haiti, Argentina, Mexico, Turkey and the Republic of Korea, emerged from draconian regimes or severe internal conflict, and sought to shed their regressive past that frequently involved the use of the death penalty for political purposes.⁶³⁰ With the opening up of various parts of the world at the end of the Cold War, several Central and Eastern European states also sought the democratic mainstream of Western Europe.

The swing towards abolition has therefore been fuelled by both the rapid growth in international human rights law, but also the related increase in constitutional democracies. The number of states in the world has quadrupled since 1900. There were 56 states in existence when the Universal Declaration of Human Rights was adopted, whereas as of 2008 there were 162 and 159 states signed up to the two main international human rights covenants respectively, out of 193 UN member states.⁶³¹

6.2.13. 2000's

The issue of the abolition of the death penalty retained a prominent position in the work of the United Nations in the 1990's and beyond. Besides the reporting system that operates on a rolling five-year period basis, the UN General Assembly has

⁶²⁹ A McGann 'Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors' (2012) 56 *International Studies Quarterly* 275, 280.

⁶³⁰ International Commission Against the Death Penalty, Report on How States Abolish the Death Penalty, Oslo, April 2013, 6.

⁶³¹ V Jackson *Constitutional Engagement in the Transnational Era* (Oxford University Press Oxford 2010) 206.

passed a number of resolutions calling for the end of the death penalty.⁶³² In 2007, the General Assembly repeated its message, when it called for a worldwide moratorium on executions, with a view to abolition.⁶³³ During February 2014, the UN Human Rights Council, which replaced the Commission on Human Rights in 2006, recently convened a high level panel discussion of the death penalty at its 25th session.⁶³⁴ The Human Rights Council uses a peer review mechanism to put states on terms regarding death penalty usage.⁶³⁵

In 2002, Protocol no. 13 was added to the ECHR system.⁶³⁶ Similar to the Sixth Optional Protocol, it did not amend the ECHR text itself but offered 'States parties to the original texts the possibility of enhancing their obligations.'⁶³⁷ In 2000, the European Union adopted a Charter of Fundamental Rights.⁶³⁸ Article 2 declares that everyone has the right to life, and prescribes in absolute terms that

⁶³² UN General Assembly Resolution 1396 (XIV) (1959) of 20 November 1959, UN General Assembly Resolution 2393 (XXIII) (1969) of 26 November 1968, UN General Assembly Resolution 2857 (XXVI) (1971) of 20 December 1971, UN General Assembly Resolution 3011 (XXVII) (1972) of 18 December 1972, UN General Assembly Resolution 32/61 (1977) of 8 December 1977. See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1997/60; UN Commission on Human Rights Resolution 12 (1997) of 3 April 1997, UN Commission on Human Rights Resolution 8 (1998) of 3 April 1998, UN Commission on Human Rights Resolution 61 (1999) of 28 April 1999, and UN Commission on Human Rights Resolution 65 (2000) of 27 April 2000. In the European context, see Parliamentary Assembly of the Council of Europe Resolution 1044 (1986) of 20 September 1986; European Parliament Resolution 0542 (1997) of 17 June 1997; and Declaration by the European Union's General Affairs Council on June 29, 1998, stating that: 'The European Union will work towards the universal abolition of the death penalty as a strongly held policy now held by all European Union Member States.'

⁶³³ UN General Assembly Resolution 62/149 (2007) of 18 December 2007.

⁶³⁴ The UNHRC was established by UN General Assembly Resolution 60/251 (2006) of 15 March 2006. The 25th regular session of the Council was held from 3 - 28 March 2014.

⁶³⁵ Universal Periodic Review Mechanism established by Article 5(e) of UN General Assembly resolution 60/251.

⁶³⁶ Protocol 13 to the European Convention on Human Rights (adopted 3 May 2002, entered into force 1 July 2003) European Treaty Series 187.

⁶³⁷ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 2003) 7.

⁶³⁸ Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force December 2009) 2000/C.364/01.

no one shall be condemned to the death penalty or executed. This is the most direct international law treaty proscription on capital punishment.

6.3. ABOLITION PATTERN ANALYSIS

From the above overview of international treaty adoption, regional treaty enactment and the statements from various bodies within the UN structures, it is apparent that the international law arena widely accepts the eradication of capital punishment as a normative aim. Having discussed the international treaty architecture insofar as it applies to capital punishment, this thesis will now analyse global abolitionist trends at a nation state level. Anecdotal examples of domestic abolition have been mentioned briefly in this chapter, but more quantitative analysis will now be provided. The purpose of this exercise is to assess to what degree there are patterns in trends towards abolition, when comparing what has happened at an international level with national practices over the past half a century.

This section will also consider the various ways in which abolition has been achieved by states.⁶³⁹ Ireland did so by way of referendum on 31 May 2001. Russia declared capital punishment unlawful by executive fiat. Apex courts in some countries have struck down the death penalty, such as in Hungary and South Africa. A number of states have abolished capital punishment by way of legislative or constitutional enactment or amendment. Finally, in certain states the death

⁶³⁹ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 2003) 26.

penalty has fallen into disuse, such that this situation is described as *de facto* abolition.

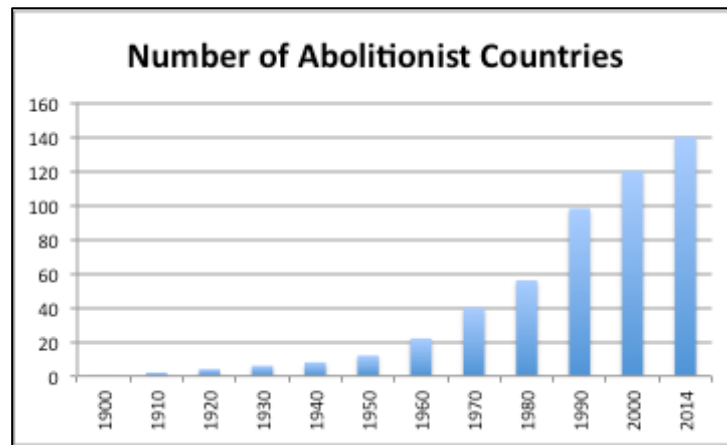
6.3.1. Rate of Abolition

In 1965, there were only 25 abolitionist nations, whereas in December 1995, there were 58 totally abolitionist countries. 14 countries were abolitionist for ordinary crimes only, 30 *de facto* abolitionist states, and 90 countries that retained the death penalty.⁶⁴⁰ Today more than 140 States no longer sanction the use of the death penalty.⁶⁴¹ Although the rapid increase in the total number of nation states that have come into existence during this period must be kept in mind, the trajectory towards abolition since the United Nations system came into being in 1948 is undeniable. Chart B below shows that abolition took meaningful shape after the Second World War, but has ramped up substantially thereafter, and in particular after 1980.

⁶⁴⁰ R Hood *The Death Penalty: A Worldwide perspective* (Clarendon Press Oxford 1996) 9; International Commission Against the Death Penalty, Report on How States Abolish the Death Penalty, Oslo, April 2013, 6.

⁶⁴¹ R Hood and C Hoyle *The Death Penalty: A Worldwide Perspective* (OUP Oxford 2008) 404; 'Amnesty International, Death Penalty' <<http://www.amnesty.org/en/death-penalty>> accessed 1 September 2014.

Chart B: Number of Abolitionist Countries (1900 to 2014)⁶⁴²



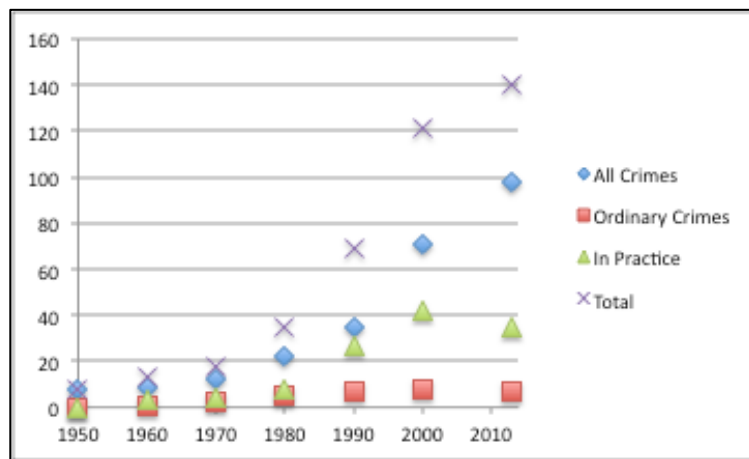
The annual rate of increase of countries abolishing the death penalty between 1989 and 1995 was 4%, compared with 1.5% for the preceding 25 years.⁶⁴³ This increased rate of abolition continued at political, legislative and judicial levels after 2000, including in Albania, Armenia, Azerbaijan, Bermuda, Bulgaria, Chile, Ireland, Lithuania, Montenegro, Poland, Serbia, Turkey and Turkmenistan. It is apparent that the trend commenced in the 1960's when the ECHR and the ICCPR came into force, and ramped up significantly in the 1990's after the end of the cold war. This latter period coincides with an enlargement in the regional ECHR system, and the adoption of more specific treaties such as CAT. In other words, there is a pattern of corroboration between domestic abolition and the growth in applicable international law over the past several decades.

⁶⁴² R Hood and C Hoyle *The Death Penalty: A Worldwide Perspective* (OUP Oxford 2008) 404-413; 'Amnesty International, Death Penalty' <<http://www.amnesty.org/en/death-penalty>> accessed 1 September 2014.

⁶⁴³ R Hood *The Death Penalty: A Worldwide perspective* (Clarendon Press Oxford 1996) 9.

Chart C below indicates that abolition has been a mixture of *de facto* abolition, outright abolition, and abolition for ordinary crimes only. It is evident that there has been a drop off in *de facto* abolition particularly in the past decade, whilst in turn states have increased their more express renunciation of the death penalty by legislative and other formal means.

Chart C: Domestic Abolitions for All Crimes, Ordinary Crimes, and in Practice⁶⁴⁴



The following section will further consider the various ways in which countries have terminated their capital punishment regimes.

6.3.2. Legislative Abolition and Constitutional Amendments

It is important to note that the normative synergy between domestic and international systems is not merely a judicial one. A number of states have

⁶⁴⁴ R Hood and C Hoyle *The Death Penalty: A Worldwide Perspective* (OUP Oxford 2008) 404-413; 'Amnesty International, Death Penalty' <<http://www.amnesty.org/en/death-penalty>> accessed 1 September 2014.

abolished the death penalty through legislative amendment, such as Turkey, whilst others have passed constitutional amendments. After several years of challenges to the death penalty in the courts, France abolished capital punishment in 1981 by way of legislative enactment.⁶⁴⁵ In 2007, the French constitution was amended to provide that 'no one shall be sentenced to the death penalty'.⁶⁴⁶ Also in 2007, France acceded to the Second Optional Protocol to the ICCPR and acceded to Protocol 13 of the ECHR, having previously ratified Additional Protocol 6 in 1986.⁶⁴⁷

In 1984, Argentina removed the death penalty from its Penal Code for ordinary crimes.⁶⁴⁸ Capital punishment was later abolished in 2008 for military related crimes such as desertion.⁶⁴⁹ An important development in Argentina took place in 1994 when its Constitution was amended to incorporate international human rights treaties directly in the Constitution.⁶⁵⁰ In 2008, Argentina both ratified the Second Optional Protocol to the ICCPR and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. Similar to other examples provided in this thesis, this achieved an overt synthesis between Argentina's domestic law and its international human rights normative commitments.

⁶⁴⁵ Law No. 81-809 Article 1 (France).

⁶⁴⁶ Constitution of France 4 October 1958 Article 66-1.

⁶⁴⁷ These actions were largely symbolic, as the death penalty had long been removed from French law. This possibly reflects a desire to be seen to be party to the international abolitionist legal framework on the one hand, and on the other to bring the state's external international obligations in line with domestic law.

⁶⁴⁸ Law 23077 (Argentina).

⁶⁴⁹ This was done by way of repeal of the Military Justice Code 1951.

⁶⁵⁰ Constitution of the Argentine Nation 1994 Article 75 (22).

Some time after the genocide under Pol Pot and the Khmer Rouge in Cambodia, the death penalty was abolished for all crimes in 1989, when a constitutional amendment was passed.⁶⁵¹ This abolitionist standpoint was confirmed in article 32 of Cambodia's new constitution, adopted on 24 September 1993, following the conclusion of the Paris Peace process and the involvement of various UN bodies including the UN Transitional Authority in Cambodia.⁶⁵² After the genocide in Rwanda, there was a moratorium on executions until, in 2007, the death penalty was abolished by way of legislative enactment.⁶⁵³ This was partly motivated by a desire to prosecute those charged with genocide in local courts, but by 2008 Rwanda had also ratified the Second Optional Protocol to the ICCPR.⁶⁵⁴ Haiti was another state that abolished the death penalty immediately after emerging from an extreme internal conflict, when it abolished the death penalty in 1987, pursuant to a national referendum.⁶⁵⁵

The imposition of the death penalty on opposition leader Abdullah Ocalan in Turkey in 1999, led to his case being brought before the European Court of Human Rights.⁶⁵⁶ The episode increased the pressure on Turkey to abolish capital punishment. In 2003, Turkey acceded to the Sixth Optional Protocol to the ECHR, and in 2004 the death penalty was prohibited for all crimes by article 38 of the constitution. The 'ninth harmonization law' removed the penalty from the penal

⁶⁵¹ Constitution of the Kingdom of Cambodia 1993 article 35.

⁶⁵² International Commission Against the Death Penalty, Report on How States Abolish the Death Penalty, Oslo, April 2013, 12.

⁶⁵³ Law 31/2007, The Law Relating to the Abolition of the Death Penalty, 25 July 2007 (Rwanda).

⁶⁵⁴ International Commission Against the Death Penalty, Report on How States Abolish the Death Penalty, Oslo, April 2013, 23.

⁶⁵⁵ Constitution of Haiti 1987 Article 20.

⁶⁵⁶ International Commission Against the Death Penalty, Report on How States Abolish the Death Penalty, Oslo, April 2013, 29. A Turkish court commuted the sentence before the European court could hand down judgment.

code.⁶⁵⁷ In 2006, Turkey acceded to the Thirteenth Protocol to the ECHR, and the Second Optional Protocol to the ICCPR. This is yet a further example of a state not being content with a domestic commitment only, but taking the additional step of subjecting itself to a corresponding international law restriction.

In 2005, Mexico removed the death penalty from its criminal law provisions. Later that year the Mexican constitution was also amended to prohibit the death penalty for all crimes.⁶⁵⁸ President Vicente Fox remarked that 'Mexico shares the opinion that capital punishment is a violation of human rights.'⁶⁵⁹ In 2007, Mexico acceded to the Second Optional Protocol to the ICCPR and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. As with the case of Turkey, these present clear examples of states directly invoking international treaty obligations in bringing their capital punishment laws in line with global trends. Whilst legislatures play a different constitutional role to judiciaries in the domestic arena, there are clear analogies that can be drawn between courts and legislatures that draw on international norms, either by referring to treaty rules, or by assessing state practice in national legislative or judicial form.

6.3.3. Executive Intervention

Occasionally there has been strong leadership at an executive level that has precipitated legislative change. President Bakiyev drove the adoption of a new

⁶⁵⁷ Law No. 5218 (Turkey).

⁶⁵⁸ Constitution of Mexico 1917 Articles 14, 22.

⁶⁵⁹ M Stevenson 'Mexico Outlaws Death Penalty' *Chronicle* (10 December 2005) <<http://www.chron.com/news/nation-world/article/Mexico-outlaws-death-penalty-1915699.php>> accessed 30 June 2015.

constitution in Kyrgyzstan in 2006, which provided for an absolute right to life. This abolitionist position was confirmed in an amendment to the criminal code in 2007, and the prohibition of the death penalty in a constitution was approved by public referendum in June 2010.⁶⁶⁰ Similarly, President Elbegdorj of Mongolia pushed in 2012 to have a bill passed that effectively abolished the death penalty, by approving Mongolia's accession to the Second Optional Protocol to the ICCPR.⁶⁶¹ Mongolia thus directly invoked the international legal regime in its national law in order to achieve normative parity. In 2006, the Philippines passed an abolitionist law, with President Gloria Macapagal-Arroyo playing a key role.⁶⁶²

Legislative abolition at a state level has been the primary source of change in the US, often also led by the executive. Certain state governors have adopted the view that the death penalty is unworkable, and used their powers to both grant clemency and approve abolition Bills passed by state congresses. Most recently the state of Maryland repealed capital punishment in 2013 when Governor Martin O' Malley signed a Bill outlawing the death penalty.⁶⁶³ On 25 April 2012, Governor Dannel Malloy signed a Bill in Connecticut replacing the death penalty with life imprisonment without parole.⁶⁶⁴ On 18 March 2009, Governor Bill Richardson of New Mexico signed a similar Bill.⁶⁶⁵ Richardson, who is a notable advocate of

⁶⁶⁰ The Constitution Of The Kyrgyz Republic 2010 Article 20(4)(1).

⁶⁶¹ 'United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General' <<https://treaties.un.org/pages/ParticipationStatus.aspx>> accessed 30 June 2015.

⁶⁶² Act Prohibiting the Imposition of the Death Penalty in the Philippines RA 9346.

⁶⁶³ Maryland General Assembly 2012 Regular Session Senate Bill 872.

⁶⁶⁴ Public Act No. 12-5 (State of Connecticut).

⁶⁶⁵ New Mexico General Assembly Bill to Abolish the Death Penalty HB 285, introduced in the 2009 Regular Session.

abolition, said that from 'an international human rights perspective, there is no reason the United States should be behind the rest of the world on this issue.'⁶⁶⁶

6.3.4. Court Decisions

Until the late 1980's most national death penalty case law emerged from the US and India, as their constitutional provisions clearly contemplated capital punishment. At this juncture international tribunals were confronted with the issue, often in the context of extradition or the right to consular assistance, in cases frequently involving the US. The death penalty has now been considered in various international tribunals, including the ICJ, HRC and ECHR. In this way, the US inadvertently continued to play its role in normative developments in the sphere of capital punishment.

There have been some incidents in the US of abolition arising from court decisions, but at a state court level. In 2004, the state court in New York declared the death penalty unlawful, taking the lead ahead of the state legislature.⁶⁶⁷ The US Supreme Court on the other hand has avoided dealing with the constitutionality of the death penalty *per se* since *Furman*, but has made significant interventions to proscribe the scope of the death penalty such as its decision in *Roper* in 2005.⁶⁶⁸

⁶⁶⁶ Statement by Bill Richardson dated 18 March 2009, reported at <<http://www.amnesty.org/en/library/asset/AMR51/039/2009/en/a54a67e8-05d2-4f46-8f09-7427e73cc359/amr510392009en.pdf>> accessed 30 June 2015.

⁶⁶⁷ *People v LaValle* 3 N.Y.3d 88 (2004).

⁶⁶⁸ *Roper v Simmons* 543 US 551, 125 S.Ct. 1183 (2005).

In other countries, it was left to apex courts in the 1990's onwards to decide squarely whether the death penalty was constitutional or not. After the end of apartheid, the SA Constitutional Court declared the death penalty to be an unlawful breach of the right to dignity and the prohibition on torture, and cruel and unusual punishment.⁶⁶⁹ Other countries whose courts that have dealt with the constitutionality of the death penalty include Kenya, Uganda, Tanzania and Hungary. The death penalty has also been considered more indirectly in domestic judicial decisions concerning whether it was lawful to extradite to other states that retain the death penalty, when the sending country was abolitionist. This issue arose in Canada, Europe, and more recently in South Africa.

6.3.5. De Facto Abolition

Legislative abolition of the death penalty has often been preceded by a period where executions are not carried out, or frequently it has involved an official moratorium on death sentences being handed down. In both cases this has been labelled as *de facto* abolition or abolition in practice, accepted to be a period of at least 10 years without a death sentence.⁶⁷⁰ States that have introduced moratoriums on capital punishment, or have made policy announcements that the death penalty is no longer to be carried out in practice in those territories, include Cuba, Estonia, Georgia, Japan, Kazakhstan, Kyrgyzstan, Latvia, Lebanon, Malawi, Philippines, Russia, South Korea and Taiwan.⁶⁷¹ Chart D below illustrates that *de*

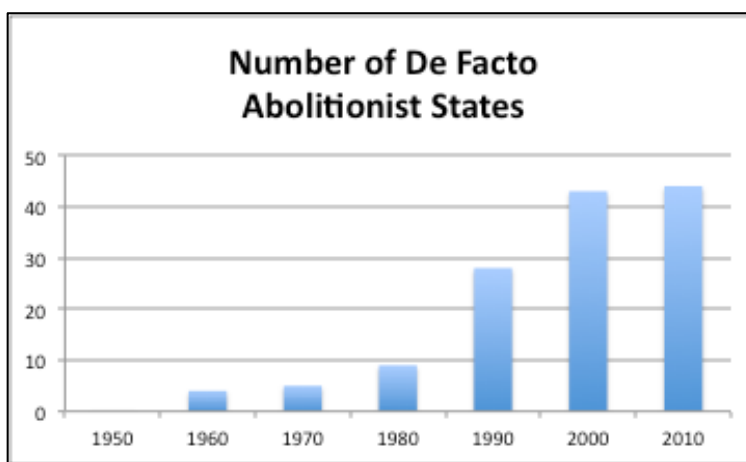
⁶⁶⁹ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁶⁷⁰ <<http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>> accessed 30 June 2015.

⁶⁷¹ R Hood and C Hoyle *The Death Penalty: A Worldwide Perspective* (OUP Oxford 2008) 404.

facto abolition follows a familiar pattern of a significant increase in the rate of abolition after 1990, with a levelling off in the past decade. As stated above, more states are now opting for outright abolition and frequently matching relevant domestic legislative arrangements with international law commitments.

Chart D: Number of De Facto Abolitionist States (1960 – 2010)⁶⁷²



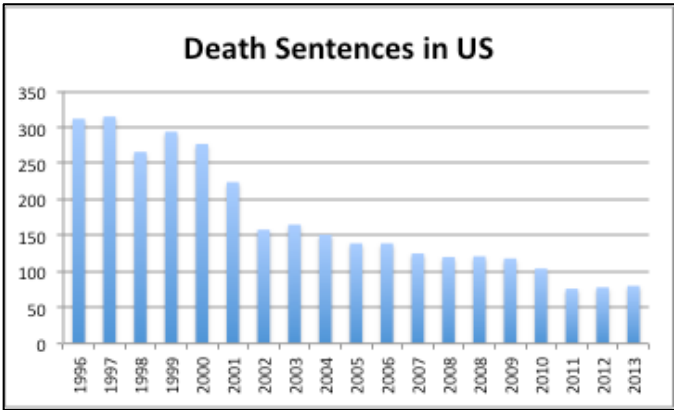
Although the overwhelming majority of countries in the world no longer legally permit capital punishment, the number of executions that take place each year occur mainly in a small number of nations and regions, including the US, China, the Middle East, India, Japan, Indonesia and South Korea. In 1999, five countries - the US, China, Congo, Saudi Arabia and Iran - accounted for 85% of the world's executions.⁶⁷³ By 2013, Iran, Iraq and Saudi Arabia carried out 80% of

⁶⁷² *ibid* 410-413.

⁶⁷³ According to Amnesty International statistics, referred to in *United States v Burns* [2001] 1 S.C.R. 283 at 313. The number of executions being carried out in China is on the decline, and there is other evidence of capital punishment retracting. See C Hoyle and M Miao 'Thinking Beyond Death Penalty Abolitionist Reform' (2014) 2 *China Legal Science* 121; R Hood and C Hoyle

all known executions.⁶⁷⁴ Chart E below however illustrates a significant decline in the practice of the death penalty in the US. From more than 300 death sentences granted per annum in the 1990's, this has decreased to below 100 death sentences per annum currently.

Chart E: Death Sentences handed down in the US (1996 – 2013)⁶⁷⁵



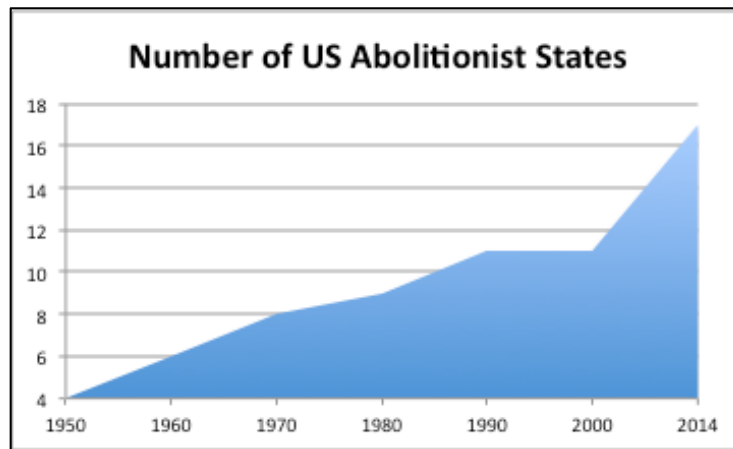
Although the use of the death penalty in the US has been on the decline, it remains one of a small number of countries that execute offenders in significant numbers. Closer analysis of the US situation is required however, as there has been interesting trend within regions in the US that follows the clear pattern of abolition in the international arena. With reference to Chart F below, almost 40% of the states in the US have now abolished capital punishment.

'Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"' (2009) 38(1) Crime and Justice 1, 47.

⁶⁷⁴ Amnesty International Report, Death Penalties and Executions, 2013.

⁶⁷⁵ 'Death Penalty Information Centre, Execution Database' <<http://www.deathpenaltyinfo.org/views-executions>> accessed 1 September 2014.

Chart F: Number of US Abolitionist States (1950 – 2014)⁶⁷⁶



In addition to just under half of the states in the US following the broader abolitionist trend among nation states, these states have also exhibited a greater growth in abolitions during the last decade. What is evident is that capital punishment has been retained primarily for southern states, as most abolition has occurred in the northern parts of the US. This reveals a significant geographical split, where the northern part of the country has brought itself in line with the dominant international law position, whilst a majority of southern states have steadfastly gone against the grain.

6.3.6. Increase in Treaty Ratifications

The most overt test for the normative standpoint of states around the world concerning capital punishment is to assess the number of anti-death penalty treaties that they have signed or acceded to. The recent increase in ratifications of

⁶⁷⁶ 'Death Penalty Information Centre, Execution Database' <<http://www.deathpenaltyinfo.org/views-executions>> accessed 1 September 2014.

these treaties represents a widespread embrace by states of the international human rights normative framework.⁶⁷⁷ Chart G below shows the sharp increase in the rate of ratification of key treaties such as the ICCPR, the Second Optional Protocol to the ICCPR and CAT. The 1990's witnessed a stark increase in the number of states that signed or acceded to the ICCPR, where 59 states became party to the ICCPR during this period, and a further 28 states signed on after 2000.⁶⁷⁸ The result is that almost all of the world's nations are now party to the ICCPR, with 167 states having ratified the ICCPR as of the end of 2013.⁶⁷⁹ What is of further interest is the correlation between the growth in the number of abolitionist states and the rate of treaty ratification over the past three decades. There is a stark alignment between states' domestic arrangements and their international law commitments.

⁶⁷⁷ R Hood and C Hoyle 'Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"' (2009) 38(1) *Crime and Justice* 1, 19

⁶⁷⁸ 'United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General' <<https://treaties.un.org/pages/ParticipationStatus.aspx>> accessed 30 June 2015.

⁶⁷⁹ *ibid.*

Chart G: Growth in International Treaty Ratification (1960's to date)⁶⁸⁰

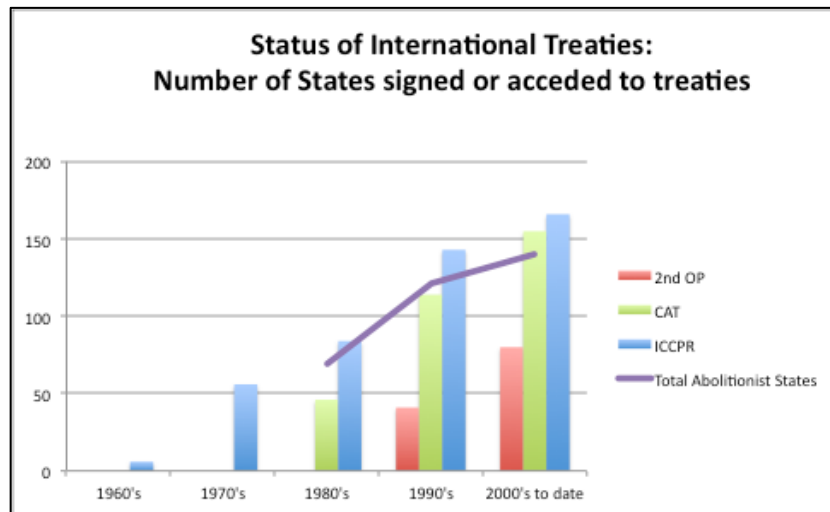


Chart H below demonstrates the scale of ratification of the key human rights treaties as of 2013. Since 1990, 109 states have become signatories to CAT, and 75 states have ratified the Second Optional Protocol to the ICCPR.⁶⁸¹ 152 states have ratified CAT, 193 states have ratified the Convention on the Rights of the Child (CRC), and 145 states are party to the Rome Statute.⁶⁸²

The high rate of ratification of CAT and the CRC will become relevant to the analysis of whether any subsidiary death penalty norms, such as the issue of juvenile death penalty, have passed into customary international law and the degree to which domestic courts have recognised this legal position. In this regard, of particular interest is that the CRC, which prohibits capital punishment for those persons under eighteen at the time of an offence, has been 'ratified by essentially

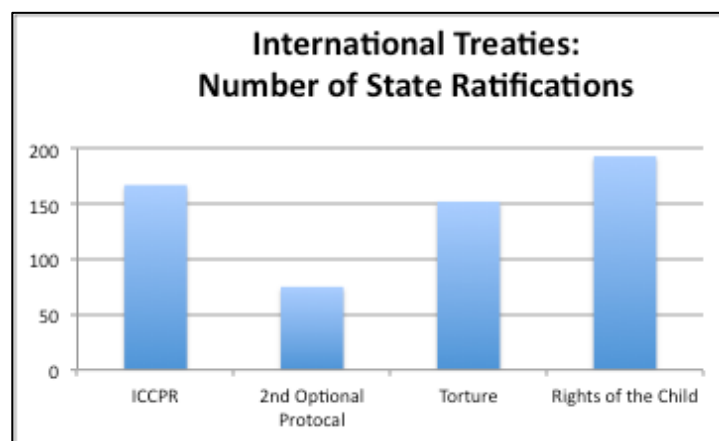
⁶⁸⁰ *ibid.*

⁶⁸¹ *ibid.*

⁶⁸² *ibid.*

the whole world with the exception of the United States, which signed it without reservation in 1995.⁶⁸³ Since signatories to international treaties are required ‘to refrain from acts which would defeat the object and purpose of a treaty’, even the reservation by the US may be ineffective.⁶⁸⁴

Chart H: International Treaty Ratifications Levels (at 2014)⁶⁸⁵



Certain anomalies in ratification behaviour, such as the US and China’s ratification of CAT, notwithstanding their retention of capital punishment, are indications of a normative trajectory from a situation of no international human rights law framework existing prior to the Second World War, to an increasing legal commitment to a shared value system that includes the right not to be subjected to cruel and unusual punishment.

⁶⁸³ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 2003) 5.

⁶⁸⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 18(a).

⁶⁸⁵ ‘United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General’ <<https://treaties.un.org/pages/ParticipationStatus.aspx>> accessed 30 June 2015.

Regional international law treaties favouring abolition have also attracted increased state support. 25 states have ratified the American Convention on Human Rights, a region in which the Inter-American Commission on Human Rights of the OAS has called for a moratorium.⁶⁸⁶ Additional Protocol 6 to the ECHR has been ratified by 46 states, whilst Protocol 13 has been ratified by 43 states. All 47 members of the Council of Europe have abolished capital punishment or issued a moratorium, in line with the requirement that abolition is a condition of membership for both the Council of Europe and the European Union.⁶⁸⁷ Council of Europe accession agreements have also obliged new members to place an immediate moratorium on executions.⁶⁸⁸ It is worth noting that the EU bloc of states constitutes approximately a quarter of the states in the world.

The African Commission on Human and Peoples' Rights adopted two resolutions, in 1999 and 2008, calling on states to observe a moratorium.⁶⁸⁹ In 2011, the Chairpersons of the African Commission and its Working Group on the Death Penalty in Africa publicly stated that the death penalty infringed the African

⁶⁸⁶ 'IACHR Calls on a Moratorium in the Application of the Death Penalty (3 August 2012) <http://www.oas.org/en/iachr/media_center/PReleases/2012/100.asp> accessed 30 June 2015.

⁶⁸⁷ Parliamentary Assembly of the Council of Europe Recommendation 1246 (1994) of 4 October 1994, paragraph 6.

⁶⁸⁸ A McGann and W Sandholtz, 'Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors' (2012) 56 *International Studies Quarterly* 275, 278.

⁶⁸⁹ African Commission on Human and Peoples' Rights Resolution 42/XXVI (1999) of 15 November 1999 and African Commission on Human and Peoples' Rights Resolution ACHPR/Res 136/XXXVIII (2008) of 24 November 2008.

Charter and called for a Protocol to be introduced similar to that of the ICCPR and ECHR.⁶⁹⁰

One can observe, from the extent of the global and regional treaty ratifications that have taken place, that a large number of countries are now bound by international conventions that aim to abolish the death penalty.⁶⁹¹ It can even now be said that several international treaties make capital punishment unlawful. Arguably at least 85 states are bound by international treaty law to not resort to the death penalty, based on their ratification of the ECHR's Optional Protocol 13 or the ICCPR's Optional Protocol 2.⁶⁹²

6.4. TREATY STATUS OF THE DEATH PENALTY

International law traditionally prioritises the sovereignty of states. However international law no longer restricts itself to the regulation of rights as between states but is focused additionally on the rights of individuals.⁶⁹³ In the realm of capital punishment, this has led to an encroachment on this traditionally sacrosanct area of domestic criminal law policy. Capital punishment is 'not merely a matter of

⁶⁹⁰ African Commission on Human and Peoples' Rights Resolution, Regional Conference on the Abolition and/or Moratorium on Executions of the Death Penalty in Africa, Kigali, Rwanda, 14 October 2011.

⁶⁹¹ A McGann and W Sandholtz, 'Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors' (2012) 56 *International Studies Quarterly* 275.

⁶⁹² <https://treaties.un.org/pages/ParticipationStatus.aspx>. Chart A at 180.

⁶⁹³ WA Schabas, 'International Legal Aspects' in P Hodgkinson and A Rutherford *Capital Punishment: Global Issues and Prospects* (Waterside Press 1996) 17; R Sapienza, 'International Legal Standards on Capital Punishment' in BG Ramcharan (ed) *The right to life in international law* (Martinus Nijhoff 1985) 284.

domestic concern, but is an issue bearing on international relations.’⁶⁹⁴ International law now limits the manner in which states can impose the death penalty, through the development of minimum standards and an ever-increasing pressure on states to commit to abolition.

International treaty law has had the most impact on abolition in regional treaty systems.⁶⁹⁵ The European endorsement of abolition as an international norm, through the Council of Europe and the European Union, initially applied soft pressure on states, until abolition was made a requirement of membership of these respective European political and economic systems.⁶⁹⁶ Abolition has now been converted into an international obligation in Western Europe, rather than merely a matter for domestic politics. This obligation expanded in its reach in the 1990’s onwards as the rate of membership greatly increased, fed by political change in Central and Eastern Europe.⁶⁹⁷

In terms of conventional international law, the death penalty was initially structured as an exception to the right to life, prohibiting the death penalty unless implicitly or expressly allowed otherwise.⁶⁹⁸ This authorisation of the death penalty, which also appears in the US and Indian Constitutions, has led to prohibitions on cruel and unusual punishment being used to attack the death penalty indirectly.

⁶⁹⁴ JA Joyce *The right to life – A world view of capital punishment* (Victor Gollancz Ltd 1962), 16.

⁶⁹⁵ A McGann and W Sandholtz, ‘Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors’ (2012) 56 *International Studies Quarterly* 275, 277.

⁶⁹⁶ *ibid* 277.

⁶⁹⁷ D Garland *Peculiar Institution* (OUP Oxford 2010) 113.

⁶⁹⁸ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 1993) 7.

Robertson states that the 'role of international law, at this stage of its development, is to play Portia: the State may have its pound of flesh, on the condition that it sheds no drop of blood. A set of safeguards has developed which limit the applicability of the death penalty in retentionist countries.'⁶⁹⁹ These minimum standards are found in subsections of the international instruments, such as in article 6 of the ICCPR. Hodgkinson states that:

'The limitation and abolition of the death penalty is a central theme in the development of international human rights law. The number of states that choose to bind themselves, as a matter of international law, to the abolition of the death penalty continues to grow. Those that have not yet accepted the abolitionist norms are subject to a number of specific rules limiting use of the death penalty, of both convention and customary origin.'⁷⁰⁰

As far back as the 1960's the ad hoc UN Advisory Committee of Experts on the Prevention of Crime and Treatment of Offenders noted that the major trend among experts and practitioners was towards abolition.⁷⁰¹ In 1994, a draft resolution before the UN General Assembly called for a moratorium on the death penalty.⁷⁰² Despite the trend towards abolition in the early 1990's, there was however an insufficient consensus then for capital punishment to be regarded as prohibited in international law.⁷⁰³ This position is most likely unchanged today.

⁶⁹⁹ G Robertson *Crimes against Humanity: The Struggle for Global Justice* (Penguin Press New York 1999) 121.

⁷⁰⁰ P Hodgkinson and A Rutherford *Capital Punishment* (Waterside Press Hampshire 1996) 30.

⁷⁰¹ Report of the UN Ad Hoc Advisory Committee of Experts on the Prevention of Crime and Treatment of Offenders UN Doc. E/CN.5/371, UN Doc. E/3724 (1963).

⁷⁰² UN General Assembly Resolution 49/234 (1994) of 23 December 1994.

⁷⁰³ G Robertson *Crimes against Humanity: The Struggle for Global Justice* (Penguin Press New York 1999) 118-9. Robertson regards this as a central failure of the project of human rights law in the twentieth century.

6.5. CONCLUSION

Although there is no rule in conventional or customary international law as yet that the death penalty is illegal *per se*, such a rule may be in its emergent stages. Certainly sub principles such as those relating to the juvenile death penalty or excessive delay on death row have almost certainly passed into customary international law. Domestic courts have played a role in this evolving process, through their continuing restriction of the operation of the death penalty. The downward pressure from international law developments flows through to the local judicial level, as normative jumps in the international arena compel 'national courts to adjust their jurisprudence in the light of developments elsewhere.'⁷⁰⁴ But advances towards abolition that have been made in the courts are only one piece of the puzzle.

The extensive abolition by states through legislative enactment, constitutional amendment, executive action, *de facto* criminal justice policy, and the ratification of international instruments have all been drivers of the wave of abolition since the end of the Second World War. The question arises as to what motivated the executive and legislative arms of various nations to take the normative lead in this manner. If it was from a sense that capital punishment is fundamentally wrong, this was seemingly influenced materially by the treatment of the issue in international treaties and forums. If it stemmed from a pressure to conform with a growing trend, this was most likely also formed in the international

⁷⁰⁴ WA Schabas 'International Legal Aspects' in P Hodgkinson and A Rutherford *Capital Punishment: Global Issues and Prospects* (Waterside Press Hampshire 1996) 18.

field, more than any sense of an historical common law tie. This motivation is not just a matter of conforming to a trend, but more likely the harder commitment to achieving consistency with evolving international law, and at times amounts to the enforcement of customary international law itself, although not necessarily stated in those terms. If '(f)ew more dramatic examples of the spread and the success of human rights law can be found' than the gradual normalisation of the abolition of the death penalty, this evolutive normative process has no doubt been led by the growth in international law commitments.⁷⁰⁵

The following chapter will assess how courts in the US, India and South Africa have referred to foreign precedents and international human rights law in death penalty decisions, against this backdrop of a comprehensive normative shift in the global arena. The death penalty judgments in these three jurisdictions occurred in a context of a dramatic move towards abolition internationally. This has taken place domestically and regionally on the one hand, but was also led and bolstered by the codification of this trend in international treaty law. Chapter seven will show that a growth in cross-citation has mirrored the emergence of this normative trend in international law. This thesis argues that the link is not accidental, as domestic courts engage with foreign law as an action in the development and application of customary international law.

⁷⁰⁵ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 2003) 2.

CHAPTER 7: CROSS-CITATION AND INTERNATIONAL LAW

7.1. INTRODUCTION

This final chapter considers cross-citation by judges as an act in international law, and customary international law in particular. The first section of the chapter will deal with the relevance of international treaties, and human rights law treaties in particular, to the domestic adjudication of death penalty cases. The balance of the chapter contemplates on the one hand, what role customary international law plays in a domestic court, and on the other, how national courts both develop and enforce international custom.

It will be demonstrated that there is a strong inter-relationship between international law and cross-citation in capital punishment cases in the US, India and South Africa. There are various cases in these jurisdictions where the courts have engaged with foreign state practice in a manner that equates with the identification, development and enforcement of customary international norms by national courts. This most closely approximates what Jackson describes as a mode of judicial action she calls 'convergence', where a domestic legal system converges with international legal norms.⁷⁰⁶ The attraction to achieving a confluence of laws stems in part from the connection between the codification of

⁷⁰⁶ V Jackson *Constitutional Engagement in the Transnational Era* (Oxford University Press Oxford 2010) 8.

human rights norms in international instruments and their prior or later inclusion of the same rights in domestic bills of rights.⁷⁰⁷

The phenomenon of citing foreign law as custom is engaged when local courts draw on the state practices of other nations, in order to determine applicable capital punishment norms. This is contemplated by the ICJ Statute, which states that the sources of international law are:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁷⁰⁸

As stated by Benvenisti, '(a)s a purely doctrinal matter, national courts are directly and indirectly engaged in the evolution of customary international law: their decisions that are based on international law are viewed as reflecting customary international law, and their government's acts in compliance with their decisions constitute state practice coupled with *opinio juris*.'⁷⁰⁹ In certain cases, international customary norms are peremptory in nature, and demand specific outcomes as a matter of international law. In other cases, domestic courts, whether consciously or not, shape their decisions in conformity with emerging patterns of state practice, and developing principles of international legal custom.

⁷⁰⁷ J Allan and G Huscroft 'Constitutional Rights coming homes to roost? Rights Internationalism in American Courts' (2006) 43 San Diego Law Reform 1, 15.

⁷⁰⁸ Article 38(1) of the Statute of the International Court of Justice, annexure to The United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

⁷⁰⁹ E Benvenisti 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' 2008 (42) 102 American Journal of International Law 241, 248.

Whereas foreign cases are often regarded as merely persuasive sources for the purposes of constitutional interpretation, the ICJ Statute also makes allowance for comparative judicial decisions to constitute a subsidiary source of international law.⁷¹⁰ It can be difficult to distinguish a situation where a national court treats foreign sources as persuasive authority for interpretation purposes, from where a court draws on customary international law in the form of widespread state practice.⁷¹¹ Before this chapter considers cases where this dichotomy between domestic interpretation and international custom plays out, the role of treaty law in domestic death penalty decisions will first be considered.

7.2. INTERNATIONAL TREATY LAW

Generally the domestic courts in the US, India and South Africa accept that treaties create international law obligations on the executive, and will attempt to construe treaties in a manner that is consistent with their treatment in other jurisdictions.⁷¹² But in death penalty cases there are scant examples of treaty law being applied directly by domestic courts, in order to determine the outcome a matter.⁷¹³ Where treaties are not directly applied in domestic capital punishment cases, they have

⁷¹⁰ A Roberts 'Comparative International Law? The Role of National Courts in Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 90-91.

⁷¹¹ S Cleveland 'Our International Constitution' (2006) 31(1) *Yale Journal of International Law* 1, 11.

⁷¹² *ibid* 9, 92; *Hamdi v Rumsfeld* 542 US 507, 124 S.Ct. 2633 (2004).

⁷¹³ Roberts notes that courts generally do not have an issue with using comparative case law in order to achieve consistency in how treaties are interpreted in different states. See A Roberts 'Comparative International Law? The Role of National Courts in Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 83.

served as evidence of normative trends and customary principles, both in respect of their substantive content and their ratification patterns.

7.2.1. Treaties as Binding International Law

A role for international law was contemplated in the US Constitution at the time of its drafting.⁷¹⁴ However, as much as the US Supreme Court has referred to international treaties for guidance, it has exhibited a more rigid attitude towards treaties as binding international law.⁷¹⁵ Where the Court has had occasion to assess international treaty law in cases where the death penalty formed the backdrop to the main issue before the court, it has focused on the limited domestic bases in terms of which treaty law can become a part of US law.

In *Medellin v Texas*, the court was faced with a petition from a Mexican citizen challenging his conviction and death sentence. The petitioner's complaint was that he had not been informed of his Vienna Convention rights, which allow an accused person to be informed of his right to consult with his government's local consul.⁷¹⁶ Roberts CJ for the court held that, in terms of the US Constitution, an

⁷¹⁴ S Cleveland 'Our International Constitution' (2006) 31(1) Yale Journal of International Law 1, 8; RB Ginsburg 'Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication' (2003) 40 Idaho Law Review 1, 1-5; DJ Seipp 'Our Law, Their Law, History, and the Citation of Foreign Law' (2006) 86 Boston University Law Review 1417, 1429.

⁷¹⁵ *McCulloch v Maryland* 17 US 316, 4 L.Ed. 579 (1819) 405; *The Paquete Habana* 175 US 677, 20 S.Ct. 290 (1900) 700; *Knight v Florida* 528 US 990, 120 S.Ct. 459 (1999) 997; G Trnavci 'The meaning and scope of the law of nations in the context of the Alien Tort Claims Act and international law' (2005) 26 University Pennsylvania Journal of International Economic Law 193, 263.

⁷¹⁶ *Medellin v Texas* 552 US 491, 128 S.Ct. 1346 (2008). The application was based on an International Court of Justice decision in *Case Concerning Avena and Other Mexican Nationals, Mexico v US* (2004) ICJ 12, where it was held that foreign nations had a right under the Vienna Convention to be informed of their consultation rights. Whilst the case did not concern a substantive

international treaty law obligation only becomes binding on the US in the event it is self-executing or it has been brought into US law through an Act of Congress.⁷¹⁷ Besides these two avenues for a treaty to become part of US law, the petitioner was effectively without a remedy.

Breyer J in his dissent, joined by justices Souter and Ginsburg, was of the view that the US was obliged to comply with the ICJ judgment, on the basis that the US Supremacy Clause of the US Constitution does not set such a high bar for a treaty to be directly enforceable within the US, especially when individual rights are involved.⁷¹⁸ He concluded that 'the treaty provisions before us and the judgment of the International Court of Justice address themselves to the Judicial Branch and consequently are self-executing.'⁷¹⁹

The issue arose once more in 2011 in *Leal Garcia v Texas*, where a Mexican national unsuccessfully applied for a stay of execution on the ground that his conviction was obtained in violation of the Vienna Convention on Consular Relations.⁷²⁰ The majority followed the court's prior decision in *Medellin*, whereas Breyer J again dissented, joined by justices Ginsburg, Sotomayor, and Kagan. The court observed that the execution of Leal Garcia would place the US in irreparable breach of its international obligations to grant an accused the right to request the

challenge to the death penalty, it does demonstrate certain of the challenges in a matter where international treaty obligations have not yet been assimilated into domestic law.

⁷¹⁷ *Medellin v Texas* 552 US 491, 128 S.Ct. 1346 (2008) 504-505. It should be noted that even Scalia J, in other areas of law, has supported using foreign decisions for the purposes of achieving consistent interpretation of treaty obligations. See A Scalia 'Keynote Address: Foreign Legal Authority in the Federal Court (2004) 98 American Society of International Law Proceedings 305.

⁷¹⁸ *Medellin v Texas* 552 US 491, 128 S.Ct. 1346 (2008) 555, 562.

⁷¹⁹ *ibid* 567.

⁷²⁰ *Leal Garcia v Texas* 564 US, 131 S.Ct. 2866 (2011).

assistance of his country's consulate. The dissenters focused on the fact that Congress may introduce the necessary legislation in order to give effect to this international treaty obligation:

In reaching its contrary conclusion, the Court ignores the appeal of the President in a matter related to foreign affairs, it substitutes its own views about the likelihood of congressional action for the views of Executive Branch officials who have consulted with Members of Congress, and it denies the request by four Members of the Court to delay the execution until the Court can discuss the matter at Conference in September. In my view, the Court is wrong in each respect.⁷²¹

The stricter approach adopted by the majority of the US Supreme Court reflects the partly dualist legal system in the US, where at least as far as treaties are concerned, they primarily achieve legal status through an executive act followed by domestic legislation.⁷²² Although domestic ratification of a treaty is also required in India, the Supreme Court has had occasion to accept the applicability of international conventions in death penalty cases. Sarkaria J in *Bachan Singh* referred to the fact that India is party to the ICCPR, which represents the 'evolving attitudes and standards of decency in a maturing world.'⁷²³ However, the court concluded that India's international commitment did not go beyond what was provided for in the Indian Constitution, as most of the countries that were party to the ICCPR at the time retained the death penalty.⁷²⁴ Although this decision was handed down in 1980, whereas most countries that are now party

⁷²¹ *ibid* 6.

⁷²² J Crawford *Brownlie's Principles of Public International Law* (OUP Oxford 2012) 57. Roberts differentiates between monist, dualist and intermediate approaches. See A Roberts 'Comparative International Law? The Role of National Courts in Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 60.

⁷²³ *Bachan Singh v State of Punjab* AIR 1980 SC 898 [141].

⁷²⁴ *ibid* [142].

to the ICCPR have abolished capital punishment in law or practice, the court accepted that a principle from an international treaty could have a bearing on a domestic death penalty challenge. The applicability of the ICCPR was uncontroversial, but it was accepted that the ambiguous language of the Covenant at that stage (before the adoption of the Second Optional Protocol in 1989) did not prohibit the death penalty.

The dramatic shift towards abolition by nation states in the decades to follow, reflected in the signatories to the Second Optional Protocol, was revisited by the Indian Supreme Court recently in 2013, in *Chauhan*, where Sathasivam CJ held that

India has been a signatory to the Universal Declaration of Human Rights, 1948 as well as to the United Nations Covenant on Civil and Political Rights, 1966. Both these conventions contain provisions outlawing cruel and degrading treatment and/or punishment. ... [I]nternational covenants to which India is a party are a part of domestic law unless they are contrary to a specific law in force.⁷²⁵

The court asserted that, in terms of Indian law, treaties ratified by India are a part of domestic law unless the treaty provisions contradict a specific local law.⁷²⁶ The court found that, subject to this proviso, multilateral treaties prohibiting cruel and unusual punishment are binding on the Indian Supreme Court. The court noted in this regard the substantial swing towards abolition around the world, and, on that

⁷²⁵ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1, [40].

⁷²⁶ This is a common law principle. The Indian Constitution 1950 (as amended) deals with international law in two aspects. Article 53 obliges the State to 'foster respect' for international law and its treaty obligations. Article 253 gives Parliament the power to enact any legislation to give effect to an international treaty

basis, the court upheld the proscription of the death penalty being applied to the mentally handicapped.⁷²⁷

The South African Constitution reflects a partly dualist, partly monist approach to international law, similar to the US. An international agreement becomes law when it is enacted into law by national legislation, unless it is self-executing and has been approved by Parliament and is not contrary to local law.⁷²⁸ However, section 232 of the Constitution states that customary international law is applicable law in South Africa unless it is inconsistent with local law. This presents a mixed approach to international law, with a dualist treatment of treaty law and a more monist attitude to customary international law.

An important sub-principle is that domestic law should be read to achieve conformity with international law where possible.⁷²⁹ Actions in international treaty law can therefore also be referred to for normative guidance. This occurred in

⁷²⁷ *Swamy Shraddananda v State of Karnataka* AIR 2008 SC 3040, [30]. A similar path was followed by the Canadian Supreme Court, from the majority finding in *Kindler* that there was no general abolitionist norm in international treaty law, to its later decision in *Burns*, which reached the opposite conclusion. Whilst La Forest J recognised that there were a number of international agreements supporting the trend towards abolition, the point was made that except for Protocol 6 to the ECHR, all fall short of actually prohibiting the death penalty, which could be contrasted with the 'overwhelming universal condemnation that has been directed at practices such as genocide, slavery and torture.' (*Kindler v Canada* [1991] 2 R.C.S. 779, 833.) The majority of the court could therefore hold in 1989 that there was no international norm suggesting that the death penalty is invalid per se. Cory J, in his dissent in *Kindler*, summarised twentieth century developments in the field of human rights, before concluding that the international community has affirmed its commitment to human dignity through the various international instruments that have been enacted (806). Cory J concluded that except for the United States, the Western World has reinforced the abolitionist position through the express abolition of the death penalty (807). Canada's international commitment is shown in her accession to the United Nations Charter, voting in favour of the Universal Declaration of Human Rights, her accession to the ICCPR and its Optional Protocol, and her accession to the United Nations Convention against Torture (807).

⁷²⁸ Constitution of the Republic of South Africa 1996 s 231(4).

⁷²⁹ *ibid* 1996 s 233. This is known as the *Charming Betsey* doctrine in the US. See *The Charming Betsey* 6 US (2 Cranch) 64, 2 L.Ed. 208 (1804).

Mohamed, where the South African Constitutional Court referred to article 24 of the Statute for the International Criminal Tribunal for the former Yugoslavia (which denied the option of capital punishment as a potential punishment that could be granted by the Tribunal), as affirmation of its judgment that the death penalty is intolerably cruel and unusual. The court recorded ‘that the international community shares this Court’s view of the death sentence, even in the context of international tribunals with jurisdiction over the most egregious offences, including genocide.’⁷³⁰

7.2.2. Treaty Reservations

States may escape the full import of ratifying an international instrument, by way of entering a reservation to a treaty at the time of signing. Although sometimes controversial, the inclusion of a reservation in a treaty is an option for a state that seeks to both opt into a certain treaty regime, whilst opting out from a particular norm in the treaty that conflicts with a domestic rule, thereby removing it from the realm of judicial consideration. The US entered such a reservation when it signed up to the ICCPR in 1992, specifically in relation to article 6(5) that concerns the juvenile death penalty. In terms of the reservation, the US retained the right to impose the death penalty on offenders under the age of eighteen.⁷³¹

⁷³⁰ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) [40].

⁷³¹ Senate Committee on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102–23 (1992). Although India has not entered a reservation to the ICCPR, it has not signed up to either of the Optional Protocols to the ICCPR. See ‘United Nations Treaty Collection, Chapter IV: Human Rights’ <<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>> accessed 1 September 2014.

This reservation was not before the US Supreme Court in *Thompson* in 1992, where the court upheld an interpretation of the cruel and unusual punishment restriction that permitted the sentencing to death of those under the age of eighteen at the time they committed capital offences.⁷³² However, in *Roper* the court rode roughshod over the ICCPR reservation, where it struck down the death penalty for those under the age of sixteen and eighteen respectively.⁷³³ The majority held that the legal weight of the reservation was reduced by the fact that five US states had abandoned the juvenile death penalty since the reservation was entered into, and also that the Federal Death Penalty Act introduced in 1994 indicated the intentions of Congress to abandon juvenile capital punishment at a federal level.⁷³⁴

In his dissent, Scalia J made the observation that the US reservation to the ICCPR does not expire by the passage of time:

Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position. That the Senate and the President - those actors our Constitution empowers to enter into treaties, see Art. II, §2 - have declined to join and ratify treaties prohibiting execution of under-18 offenders can only suggest that our country has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. That the reservation to the ICCPR was made in 1992 does not suggest otherwise, since the reservation still remains in place today.⁷³⁵

⁷³² *Thompson v Oklahoma* 487 US 815, 108 S.Ct. 2687 (1988).

⁷³³ *Roper v Simmons* 543 US 551, 125 S.Ct. 1183 (2005).

⁷³⁴ *ibid* 568.

⁷³⁵ *ibid* 622.

Whilst it is correct that a reservation remains in place until it is withdrawn, such a reservation may be invalid in terms of the Vienna Convention of the Law of Treaties.⁷³⁶ Article 19 prohibits the formulation of reservations that are incompatible with the object and purpose of a treaty. This issue of the validity of the US reservation to article 6(5) of the ICCPR was considered in the Inter-American system in 2002. The Commission heard the case of *Michael Domingues v The United States of America*, which concerned a juvenile by the name of Michael Domingues who was 16 years old when he was convicted of a double homicide in the state of Nevada in the US.⁷³⁷ Domingues argued that in sentencing him to death whilst he was a juvenile, the US breached article 1 of the American Declaration of the Rights and Duties of Man, because of a *ius cogens* norm that prohibited the execution of juvenile offenders. Whilst the Commission, as an international tribunal, has a different orientation to international treaties as compared with a domestic court, its reasoning on the relationship between treaty and custom is sound. The Commission noted that the US

reservation provoked condemnation within the international community and prompted eleven European States Parties to file objections declaring the reservation to be invalid, a majority on the basis that it was inconsistent with the aims and purposes of the ICCPR as provided by Article 19(c) of the Vienna Convention on the Law of Treaties. Moreover, in 1995 the U.N.

⁷³⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, ratified by the US in 1995. Article 22 provides for the withdrawal of a reservation. See J Crawford *Brownlie's Principles of Public International Law* (OUP Oxford 2012) 376.

⁷³⁷ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913. The US falls under the jurisdiction of the Inter-American Commission of Human Rights, as it is a member of the Organisation of American States. Article 20 of the Commission's Statute provides for jurisdiction in respect of a state that is a member of the OAS but not a party to the American Convention on Human Rights. See Statute of the Inter-American Commission on Human Rights (adopted 1 October 1979, entered into force 1 November 1979) O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80 (1) 88; R Hood and C Hoyle 'Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"' (2009) 38(1) *Crime and Justice* 1, 50.

Human Rights Committee declared this reservation to be contrary to the object and purpose of the ICCPR and recommended that the United States withdraw it.⁷³⁸

The Commission's doubts about the validity of the US reservation were ultimately overshadowed by its conclusions that the US was bound by a *ius cogens* rule that prohibits the death penalty.⁷³⁹

7.2.3. Treaties as Evidence of Custom

Sometimes a treaty norm can indicate the development of customary international law, or even be elevated to the status of customary international law, thereby binding states that are not party to the treaty.⁷⁴⁰ Hodgkinson argues that all of the requirements laid down in article 6 of the ICCPR, as well as article 3 of the Geneva Conventions, have passed into customary international law.⁷⁴¹ Schabas argues that the effect of the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty elevates the substance of article 6 of the ICCPR to the level of customary international law, and consequently plays an

⁷³⁸ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [62].

⁷³⁹ *ibid* [112]. The Nevada Supreme Court a quo had on the other hand had assessed the single issue as to whether Nevada law is superseded by an international treaty ratified by the United States that prohibits the execution of individuals who committed capital offenses while under the age of eighteen. The Court concluded that a reservation to the ICCPR made by the U.S. Senate, purporting to reserve the right to execute juvenile offenders despite the non-derogation provisions of the ICCPR, permitted the execution of Domingues. The consequences of an impermissible reservation has been the subject of some debate. See B Simma and G Hernandez 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty', in E Cannizzaro *The Law of Treaties Beyond the Vienna Convention* (OUP Oxford 2011).

⁷⁴⁰ J Crawford *Brownlie's Principles of Public International Law* (OUP Oxford 2012) 333.

⁷⁴¹ P Hodgkinson and A Rutherford *Capital Punishment* (Waterside Press Hampshire 1996) 23.

important role in the limitation or partial abolition of international law.⁷⁴² Article 6(5) of the ICCPR, which prohibits the death penalty for persons under eighteen at the time their crime was committed, in particular exhibits the characteristics of such a customary international law norm, given the extent to which this norm is reinforced in international and regional instruments, and by the significant number of nation states that have committed to this obligation.

The Commission in *Domingues* also considered the role of treaties in serving as evidence of customary rules. The Commission referred to article 37(a) of the Convention on the Rights of the Child, which proscribes the death penalty and life imprisonment without parole for persons under the age of eighteen, noting that although the Convention had 191 state parties and no reservations, the US was only one of two states that had signed the Convention but not ratified it.⁷⁴³ The Commission concluded that ‘the extent of ratification of this instrument alone constitutes compelling evidence of a broad consensus on the part of the international community repudiating the execution of offenders under 18 years of age.’⁷⁴⁴

Other international instruments served in *Domingues* as further proof of an established principle of customary law that prohibits capital punishment for juveniles. The Commission noted that the ICCPR had 147 parties at the time of its

⁷⁴² WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 1993) 168.

⁷⁴³ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [56]; The US signed the CRC in 1995, and currently is the only UN member state which has not ratified it.

⁷⁴⁴ *ibid* [57].

decision, with 64 states having become party between 1986 and 2002.⁷⁴⁵ With 24 parties to the American Convention, the Commission concluded that ‘this broad hemispheric adherence to the American Convention ... constitutes compelling evidence of a regional norm repudiating the application of the death penalty to persons under 18 years of age’.⁷⁴⁶ The Commission also noted similar restrictions in international humanitarian law, specifically the Fourth Geneva Convention of 1949 that prohibits the application of the death penalty to juveniles in times of armed conflict or occupation, before concluding that there was ‘no appropriate justification for applying a more restrictive standard for the application of the death penalty to juveniles in times of occupation than in times of peace.’⁷⁴⁷

The Commission found on the basis of the above analysis that ‘there has been concordant and widespread development and ratification of treaties by which nearly all of the world states have recognized, without reservation, a norm prohibiting the execution of individuals who were under 18 years of age at the time of committing their offense.’⁷⁴⁸ Importantly, it was concluded that the ‘norms of a treaty can be considered to crystallize new principles or rules of customary law. It is also possible for a new rule of customary international law to form, even over a

⁷⁴⁵ *ibid* [58].

⁷⁴⁶ *ibid* [64].

⁷⁴⁷ *ibid* [65]-[67]. As of January 1, 1986, there were 162 state parties to the Fourth Geneva Convention, Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287. As of 2001, the number of state parties had risen to 189. This includes the United States, which ratified the Convention on August 2, 1955 without any reservation to paragraph 4 of Article 68. ‘United Nations Treaty Collection, Chapter IV: Human Rights’

<<https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>> accessed 1 September 2014.

⁷⁴⁸ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [68].

short period of time, on the basis of what was originally a purely conventional rule, provided that the elements for establishing custom are present.⁷⁴⁹

7.2.4. Conclusion

Although treaties have not been applied directly in the death penalty cases under examination, they have played a separate but supportive role to comparative law. How significant a role depends on whether a court adopts a more restrictive, dualist approach as in the US, or a more open, monist approach as in India. A reservation may limit the applicability of a particular treaty in the reserving territory, although courts have circumvented such reservations, as in *Roper*. Certain courts draw on treaty law by preferring interpretations that uphold international law, as in South Africa. Other tribunals draw on international conventions as evidence of custom. There are therefore multiple ways in which international treaty law both complements analyses of foreign law and influences the outcome of death penalty cases. The next section will canvass these constituent elements of customary international law, and the normative role of customary international law in death penalty cases.

⁷⁴⁹ *ibid* [104]. The Commission also noted that the provisions of an international 'instrument might themselves properly be considered as evidence of *opinion juris*. Human rights treaties are particularly significant in this respect, as they are widely regarded as recognizing and building upon rights that already exist by reason of the attributes of the human personality and which therefore may not be abrogated by any state' [107].

7.3. CUSTOMARY INTERNATIONAL LAW

Customary norms come into existence through state practice, and develop through sufficiently wide practice to become emerging norms, before finally arriving at a situation where a customary norm can bind a state despite it being a persistent objector to the rule. This section describes the circumstances in which custom can bind states. Domestic courts' role in the development of emerging norms and enforcement of binding norms will also be considered.

7.3.1. Elements of Custom

It is generally accepted that the elements of customary international law are a concordant practice by a number of states; a continuation or repetition of the practice over a considerable period of time; a conception that the practice is required by or consistent with prevailing international law (*opinion iuris*); and general acquiescence in the practice by other states.⁷⁵⁰ An important consideration is what in fact constitutes state practice.

Article 38 of the Statute of the International Court of Justice defines international custom as 'evidence of a general practice accepted as law.'⁷⁵¹

General state practice for these purposes may be indicated by the 'decisions of its

⁷⁵⁰ Yearbook of the International Law Commission, 1950 (II) 26 [11]; J Crawford *Brownlie's Principles of Public International Law* (OUP Oxford 2012) 24-27; *Roach and Pinkerton v The United States* (1987) Inter-American Commission on Human Rights, Resolution No. 3/87, Case 9647 (United States) [51]; *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [46].

⁷⁵¹ Statute of the International Court of Justice, annexure to The United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. The Statute binds all UN member states.

national courts'.⁷⁵² Article 38(1)(d) of the Statute also recognizes judicial decisions of the 'various nations' as a subsidiary source of international law. Domestic court decisions then play a dual role in international law, in that they are both evidence of a state's practice and therefore international custom, and, in addition, a secondary means for determining international law.⁷⁵³ Whereas in the former case widespread practice is required for a norm to be considered binding, in the case of the latter a smaller pool of judicial decisions can constitute a subsidiary source of international law.⁷⁵⁴ This is a useful yardstick for distinguishing situations where a court is treating widespread practice as custom, from where a court refers to specific cases as an aid in interpretation.

⁷⁵² "Ways and Means for Making the Evidence of Customary International Law More Readily Available" (1950) Report of the International Law Commission to the UN General Assembly 368 [40]. The generally accepted view is that domestic decisions both count as state practice and *opinion iuris*. See J Crawford *Brownlie's Principles of Public International Law* (OUP Oxford 2012) 25; M Shaw, *International Law* (6th ed. Cambridge University Press Cambridge, 2008) 82; P Moremen 'National Court Decisions as State Practice: A Transjudicial Dialogue?' (2006) 32 North Carolina Journal of International Law and Commercial Regulation 259, 274-284. In *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [47], it was accepted that state practice is generally interpreted to mean official governmental conduct which would include state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international and regional governmental organizations such as the United Nations and the Organization of American States and their organs, domestic policy statements, press releases and official manuals on legal questions. In summary, state practice generally comprises any acts or statements by a state from which views about customary laws may be inferred.

⁷⁵³ A Roberts 'Comparative International Law? The Role of National Courts in Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 59. Roberts refers to the former as the creation of international law, and the latter as the enforcement of international law. See also H Lauterpacht 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British Yearbook of International Law* 65, 67 footnote 1; A Nollkaemper 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in G Boas and W Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff Leiden 2003) 277; R Falk *The Role of Domestic Courts in the International Legal Order* (Syracuse University Press New York 1964) 72; H Schermers 'The Role of Domestic Courts in Effectuating International Law' (1990) 3 *Leiden Journal of International Law* 77, 79; B Conforti and F Francioni (eds) *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff Boston 1997); T Franck and G Fox (eds) *International Law Decisions in National Courts* (Transnational Publishers New York 1996); B Conforti *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff London 1993); H Koh 'How is International Human Rights Law Enforced?' (1998-1999) 74 *Indiana Law Journal* 1397.

⁷⁵⁴ A Roberts 'Comparative International Law? The Role of National Courts in Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 63.

7.3.2. Binding Custom

A key question is what level of state practice satisfies the criterion of 'general acquiescence' for the purposes of assessing a rule of international custom. The Inter-American Commission on Human Rights considered the matter in *Roach*, where it held that 'how many states need to engage in the state practice for it to acquire the authority of a customary norm has never been definitively established, but it is clear that while a universal practice is not necessary, the practice must be common and widespread.'⁷⁵⁵ A further important consideration is the subjective nature of the acceptance of a practice by states. Their endorsement of a norm must be of the nature of *opinion iuris*, a belief that a particular norm is binding and creates a legal obligation for states.⁷⁵⁶

Capital punishment norms in international law offer examples of principles that have developed over time to become binding legal rules, although not necessarily in any neat linear or chronological process. There is no customary norm holding that the death penalty is *per se* invalid, but the emergence of such a norm has arguably begun.⁷⁵⁷ Gormley argues that the contents of article 3 right to life in the UDHR binds all governments as customary international law.⁷⁵⁸ But this is too general an assertion to have a substantial impact in death penalty

⁷⁵⁵ *Roach and Pinkerton v The United States* (1987) Inter-American Commission on Human Rights, Resolution No. 3/87, Case 9647 (United States) [52].

⁷⁵⁶ J Crawford Brownlie's *Principles of Public International Law* (OUP Oxford 2012) 25-26.

⁷⁵⁷ P Hodgkinson and A Rutherford *Capital Punishment* (Waterside Press Hampshire 1996) 23.

⁷⁵⁸ WP Gormley in BG Ramcharan (ed), *The Right to life in international law* (Martinus Nijhoff Leiden 1985) 7, 146; *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 (2002) 913 [49].

adjudication, as the right to life in international law is subject to well-established exceptions. The pertinent issue is to what degree a customary norm pertaining to the right to life recognises the death penalty as an exception to the right. Similarly, the prohibition of torture and other cruel, inhuman or degrading punishment has most likely reached a level of customary international law.⁷⁵⁹ However, this is again an elusive concept, as the death penalty has been recognised as an exception to this ban.

Even though customary international law falls short of requiring outright abolition, there are a number of subsidiary rules that lay down minimum standards, which serve to restrict the scope of the application of the death penalty. Certain of these specific standards, which have mostly developed under cruel and unusual punishment clauses, have arguably reached customary international law status.⁷⁶⁰ The Inter-American Commission has held that there is a customary norm pertaining to the illegality of the execution of juveniles.⁷⁶¹

Customary rules, unless they amount to *ius cogens*, do not bind States that protest the norm. As stated in *Domingues*:

⁷⁵⁹ WA Schabas in P Hodgkinson and A Rutherford *Capital Punishment* (Waterside Press Hampshire 1996) 5; *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 (2002) 913 [49].

⁷⁶⁰ WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 1993) 7; P Hodgkinson and A Rutherford *Capital Punishment* (Waterside Press Hampshire 1996) 30.

⁷⁶¹ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913. Schabas comments that only Iran continues to execute juvenile offenders, it follows that a ban on the execution of persons who were under eighteen at the time they committed an offence, is now a rule of customary international law. See WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 2003) 5.

a norm of international customary law binds all states with the exception of only those states that have persistently rejected the practice prior to its becoming law. While a certain practice does not require universal acceptance to become a norm of customary international law, a norm which has been accepted by the majority of States has no binding effect upon a State which has persistently rejected the practice upon which the norm is based.⁷⁶²

The situation is different with a *ius cogens* norm, which is binding on all states regardless of any objection by a state, persistent or otherwise.

7.3.3. *Ius Cogens*

The concept of *ius cogens* is dealt with in Article 53 of the Vienna Convention on the Law of Treaties, which states that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁷⁶³

As with many general principles of customary international law, a peremptory norm of *ius cogens* typically evolves from a non-binding status until it becomes an absolute rule. This is evidenced by the twin decisions by the Inter-

⁷⁶² *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [48]. The US argued in the case that it was a persistent objector to the juvenile death penalty norm. Although the Commission rejected this argument, the US has been persistent since 1976 in its general endorsement of capital punishment.

⁷⁶³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. See I Sinclair *The Vienna Convention on the Law of Treaties* (Manchester University Press Manchester 1973) 208; J Crawford *Brownlie's Principles of Public International Law* (OUP Oxford 2012) 594.

American Commission concerning the juvenile death penalty. In *Roach*, the Commission ruled in 1987 that although a categorical rule had arisen making the juvenile death penalty unlawful, there was not yet consensus regarding the threshold age at which the prohibition would take effect.⁷⁶⁴

However, the Commission held later in *Domingues* that as of 2000 there was a peremptory norm prohibiting the execution of persons who were under eighteen at the time they committed a capital crime. The Commission stated that:

Norms of *ius cogens*, on the other hand, derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence. Commonly cited examples of rules of customary law that have attained the status of *ius cogens* norms include genocide, slavery, forced disappearances and torture or other cruel, inhuman or degrading treatment or punishment. It has been suggested that a reliable starting point in identifying those international legal proscriptions that have achieved *ius cogens* status is the list of rights that international human rights treaties render non-derogable.⁷⁶⁵

Importantly, the Commission commented that 'the standard for determining a principle of *ius cogens* is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole. This can occur where there is acceptance and recognition by a large majority of states, even if over dissent by a small number of states.'⁷⁶⁶ *Ius cogens*, as opposed to general

⁷⁶⁴ *Roach and Pinkerton v The United States* (1987) Inter-American Commission on Human Rights, Resolution No. 3/87, Case 9647 (United States) [57]. The Commission commented that the 'concept of *ius cogens* is derived from ancient law concepts of a "superior order" of legal norms, which the laws of man or nations may not contravene' [55].

⁷⁶⁵ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 (2002) 913 [49].

⁷⁶⁶ *ibid* [50].

principles of customary international law, can be binding even where a State objects, and where there is less than unanimous consent. What must be evidenced is that an overwhelming number of states treat the rule as if it is a law that is a permanent custom that is binding on all states.

7.3.4. Comparisons with an International Common Law

It is useful at this juncture to reiterate the central differences between Waldron's idea of an international common law and customary international law, insofar as they explain cross-citation.⁷⁶⁷ Whereas the *ius gentium* or *ius commune* are never binding on a domestic jurisdiction, customary international law sits on a spectrum from trends and patterns of state behaviour, to emerging norms and standards, until, finally, norms that have reached peremptory status.

It is this fundamental difference that is reflected in more recent decisions in the selected jurisdictions. Foreign law has apparently played an independent role, in combination with international treaty law, and exhibited a weight that has on occasion been more than merely persuasive. Customary law passes through a stage akin to the soft law status of the law of nations, when it is still in an emergent or developing stage. Here a domestic court may regard an emerging norm as relevant to distilling the evolving values underpinning a constitutional right. On the other hand, national courts may embrace the convergent normative trend itself.

⁷⁶⁷ Other are of the view that the law of nations was supplanted by public international law and does not retain its status as a separate body of legal principles. See J Crawford *Brownlie's Principles of Public International Law* (OUP Oxford 2012) 3; G Trnavci 'The meaning and scope of the law of nations in the context of the Alien Tort Claims Act and international law' (2005) 26 University Pennsylvania Journal of International Economic Law 193, 263.

This judicial state practice has the effect of shifting the norm further along a continuum from an emerging norm towards a binding one. This represents an additional step towards 'general acquiescence' by states. It is both an endorsement of an emerging custom and an incremental move towards its realisation as a binding norm.

7.3.5. Emerging Custom

Before a situation arises where it can be concluded that there is general acceptance of a norm by a wide enough body of states, that norm passes through a stage where it is emerging or in development.⁷⁶⁸ Domestic courts have noted trends and patterns in the legal treatment of the death penalty, which are akin to the recognition of an evolving or emerging normative trajectory towards a binding custom. In India, the majority in *Rajendra Prasad* referred to 'cross-fertilisation from...constitutional currents', and a 'compassionate trend' towards abolition.⁷⁶⁹ In *Bachan Singh*, Bhagwati J considered 'the international trend of opinion in regard to the death penalty.'⁷⁷⁰ Given these decisions occurred in the early 1980's, it can be seen how domestic courts can play a decisive role as originators of trends in state practice.

⁷⁶⁸ S Cleveland 'Our International Constitution' (2006) 31(1) Yale Journal of International Law 1, 93; A Roberts 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) AMJIL 95(4) 757. Roberts distinguishes traditional custom as an inductive process gleaned from state practice, contrasted with modern custom which comes into existence deductively by the statement of a norm (as with a treaty), followed by compliant practice.

⁷⁶⁹ *Rajendra Prasad v State of UP* AIR 1979 SC 916, 920, 925-926, 928.

⁷⁷⁰ *Bachan Singh v State of Punjab* AIR 1980 SC 898, 933. The court noted that a large number of countries have abolished the death penalty, and that most European and American countries have moved towards abolition.'

The progression in international treaty norms pertaining to the death penalty has no doubt created an abolitionist pressure on death penalty states to change their practice, elevating abolition to 'the status of an international human rights principle.'⁷⁷¹ In 1996, Schabas stated that the 'day when abolition of the death penalty becomes a universal norm, entrenched not only by convention but also by custom and qualified as a peremptory rule of *ius cogens*, is undeniably in the foreseeable future,' before concluding that international developments show an 'inexorable progress towards abolition.'⁷⁷² Writing almost ten years later in 2003, Schabas reflected that the prohibition of capital punishment in customary international law 'is a probable development at some point in the not-too-distant future.'⁷⁷³ There are no doubt even stronger trends towards uniformity in respect of abolitionist attitudes to the death penalty than in 2003.⁷⁷⁴ But the abolition of capital punishment in its totality remains no more than an emerging norm.

7.3.6. Conclusion

Although under acknowledged in death penalty cases, customary international law can and should be relevant to a national court. Where local law allows for a more

⁷⁷¹ Garland (2010) 113.

⁷⁷² WA Schabas *The Abolition of the Death Penalty in International Law* (Cambridge University Press Cambridge 1993) 3, 19.

⁷⁷³ WA Schabas 'The Abolition of Capital Punishment from an International Law Perspective', International Society for the Reform of Criminal Law, 17th International Conference, 'Convergence of Criminal Justice Systems – Bridging the Gaps', The Hague, 2003.

⁷⁷⁴ Zimring notes that the 'pattern is so simple it is stunning. Every Western industrial nation has stopped executing criminals except the United States.' F Zimring and G Hawkins *Capital Punishment and the American Agenda* (Cambridge University Press Cambridge 1986) 3. Hood is not as bold, stating that the 'objective of reaching full international agreement on the abolition of capital punishment appears still to be a distant aspiration, in part because it has become a politically divisive issue, involving wider questions of religious and cultural values.' See R Hood *The Death Penalty* (Oxford University Press Oxford 1996) 53.

monist incorporation of custom, as in South Africa, this is particularly apt. A general state practice in favour of a particular norm over a period of time, combined with a view that such practice is required by international law, can bind a local court as an issue of customary international law. Customary rules can also reach the elevated status of *ius cogens*, where persistent objection by a state becomes irrelevant. The judicial decisions of other states can also be applied as subsidiary sources of international law.

Where national court considers custom in the form of state practice, this creates a potential binding effect that is absent from the idea of an international common law. Even where it falls short of binding custom, it may constitute emerging law, which has more weight than a mere persuasive precedent. Conversely a domestic decision, as judicial state practice, may itself contribute to emerging custom. As Benvenisti states, judges are ‘meaningfully shaping the evolution of customary law through (national court) judgments.’⁷⁷⁵ Customary international law and cross-citation are therefore closely aligned, especially where courts draw on both the reasoning of specific foreign cases, whilst also considering broader patterns in comparative state practice. The following section will consider how the apex courts in the three selected jurisdictions have had regard to foreign practice and judicial decisions, together with international law, in developing this emerging abolitionist norm.

⁷⁷⁵ E Benvenisti and GW Downs ‘Court Cooperation, Executive Accountability and Global Governance’ Tel Aviv University Law School, Tel Aviv University Law Faculty Papers 2009 Paper 108, 10.

7.4. THE DEATH PENALTY *PER SE*

Whereas the following cases have been previously considered from the point of view of how the courts used foreign cases for textual interpretation or value elucidation purposes, the focus will now be on the role that foreign state practice played in these cases, in terms of its implications for customary international law.

7.4.1. *Furman v Georgia* (1973)

The climate for an attack on the death sentence was ripe in the US when the issue came before the Supreme Court in 1973. The case was heard seven years after the adoption of the ICCPR, and just four years after the adoption of the American Convention.⁷⁷⁶ Two years prior to the court's decision, the UN General Assembly had also adopted a resolution to the effect that the main objective of the UDHR right to life was the abolition of the death penalty worldwide.⁷⁷⁷ Moreover, the climate in Western Europe had shifted, with numerous states removing capital punishment from their domestic laws during the 1970's.⁷⁷⁸

The court struck down the death penalty but was split in terms of its reasoning. Only a plurality of the judges found that capital punishment was unconstitutional *per se* in all circumstances. However, the majority of the court left the door open for it to be reintroduced by appropriate state legislative amendment.

⁷⁷⁶ Chapter six at 180.

⁷⁷⁷ UN General Assembly Resolution 2857 (XXVI) (1971) of 20 December 1971.

⁷⁷⁸ Portugal, Denmark, Norway, Netherlands, Luxembourg. See Chapter VI.

Marshall J was enthusiastic about declaring the death penalty unlawful in absolute terms, in part because of the fact that this would see the US becoming party to an international trend towards abolition:

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve "a major milestone in the long road up from barbarism" and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.⁷⁷⁹

The *Furman* decision embraced a customary international law way of thinking, in seeking to join with widespread comparative abolitionist practice. Notwithstanding the enthusiasm from various of the judges for getting in line with seventy other abolitionist states, the court however reversed in 1976 in *Gregg* and the death penalty was once again legally endorsed in the US.⁷⁸⁰ Both cases though

⁷⁷⁹ *Furman v Georgia* 408 US 238, 92 S.Ct. 2726 (1972) 371. Marshall J included in his calculations those countries that had engaged in *de facto* abolition and *de jure* abolition. See footnote 65. Brennan J in *Furman* observed that in 'the United States, as in other nations of the western world, "the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century"' (296).

⁷⁸⁰ In *Coker v Georgia* 433 US 584, 97 S.Ct. 286 (1977), the court relied on the objective evidence of both state legislatures and the legal position in other countries. In dealing with the question whether the imposition of the death penalty for the crime of rape was a disproportionate punishment, White J accorded material weight to what had happened outside of the US: 'We observe that, in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system. ... In *Trop v. Dulles* ... the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that, out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.' See footnote 4 and 10 of White J's judgment, where he also relied on data supplied by the United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 86 (1968). In *Enmund* (where the death penalty was invalidated for vicarious felony murder), White J affirmed that the court would be guided by objective factors in Eighth Amendment cases, including 'the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions

were decided in the 1970's, prior to the jump in abolitionist treaty ratifications and widespread national abolitions that were witnessed in the decade to follow. Just a few years later, the Indian Supreme Court similarly upheld the fundamental constitutionality of the death penalty.

7.4.2. *Bachan Singh v State of Punjab* (1980)

The Indian Supreme Court faces the same constitutional allowance for capital punishment as the US, but has recently suggested that the fundamental unlawfulness of the death penalty be revisited. However, in 1980 Sarkaria J in *Bachan Singh* concluded that there was a retentionist global trend. After asserting that the death penalty may be especially important for the crime of treason and to prevent political murders, he noted that a number of countries have retained or reintroduced the death penalty when confronted with this threat, and that none of these countries can be called 'uncivilized nations or immature societies.'⁷⁸¹

juries have made before bringing its own judgment to bear on the matter.' *Enmund v Florida* 458 U.S. 782, 102 S.Ct. 3368 (1982) 788. White J then damned the role of foreign law with faint praise: "The climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant", before noting that 'the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe' (796). Later in 2002, Breyer J noted in *Ring* that other countries have abandoned the death penalty, that the United States was one of only four frequent users of capital punishment, but that only 3% of the counties in the United States imposed 50% of death penalties carried out.' *Ring v Arizona* 536 U.S. 584, 122 S. Ct. 2428 (2002) 589. Sessions J, in the Vermont Supreme Court, stated the same year in *Fell* that 'capital punishment is under siege.' *United States of America v Donald Fell* 536 US 584, 122 S.Ct. 2428, 625.

⁷⁸¹ *Bachan Singh v State of Punjab* AIR 1980 SC 898, 926-28. These included Norway, Belgium, United Kingdom, Ceylon, Israel, Saudi Arabia. China, Israel, Argentina, Belgium, Japan, Greece, Turkey, Malaysia, Singapore, Cuba, and Russia. Only 18 states had abolished the death penalty for all offences at the time, while 8 more retained it only for offences committed during wartime.

On the other hand, in his minority opinion, Bhagwati J considered 'the international trend of opinion in regard to the death penalty', noting that a large number of countries had abolished it, and that most European and American countries had moved towards abolition.⁷⁸² He noted further that the 'objective of the United Nations has been and that is the standard set by the world body that capital punishment should ultimately be abolished in all countries. This normative standard set by the world body must be taken into account in determining whether the death penalty can be regarded as arbitrary, excessive and unreasonable so as to be constitutionally invalid.'⁷⁸³ Bhagwati J also asserted that proportionality must be judged by objective factors such as 'international standards or norms or the climate of international opinion, modern penological theories and evolving standards of human decency.'⁷⁸⁴ This is a contrasting reading of international practice to the majority, which recognised the beginnings of an abolitionist norm that was to be codified by the end of the decade in the Second Optional Protocol to the ICCPR. But both the majority and minority had engaged with state practice as an independent factor in their analysis.

Three decades later in *Satishbhushan*, Sinha J for the majority referred to the global swing towards abolition, and hinted at the need for India to revisit its position on the death penalty:

Although these questions are not under consideration and cannot be addressed here and now, we cannot help but observe the global move away

⁷⁸² *ibid* 933.

⁷⁸³ *ibid* 1336. UN Economic and Social Council Resolution 1574(L) (1971) of 21 May 1971.

⁷⁸⁴ *Bachan Singh v State of Punjab* AIR 1980 SC 898, 1354.

from the death penalty. Latest statistics show that 138 nations have now abolished the death penalty in either law or practice (no executions for 10 years). Our own neighbours, Nepal and Bhutan are part of these abolitionist nations while others including Philippines and South Korea have also recently joined the abolitionist group, in law and in practice respectively. We are also aware that on 18 December 2007, the United Nations General Assembly adopted resolution 62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty. India is, however, one of the 59 nations that retain the death penalty. Credible research, perhaps by the Law Commission of India or the National Human Rights Commission may allow for an up to date and informed discussion and debate on the subject.⁷⁸⁵

Although the Indian Constitution continues to make allowance for the death penalty, the court's conclusion and tone was starkly different to thirty-five years earlier. The shifts in treaty ratification and international practice prompted the court to suggest that the Executive or the bureaucracy take another look at the issue, which reflects an acknowledgment of an emerging norm of blanket abolition.⁷⁸⁶ The UN General Assembly had repeated its call for a global moratorium on the death penalty just two years previously in 2007.⁷⁸⁷ New conventional law was still being adopted, such as Protocol 13 to the ECHR, which was introduced in 2002.⁷⁸⁸ But more noticeable than any specific international instrument was that over 70% of countries had abolished capital punishment by the end of the first decade of the twenty first century, a fact that clearly weighed heavily with the court.⁷⁸⁹

⁷⁸⁵ *Santosh Kumar Satishbhushan v State Of Maharashtra* (2009) 6 SCC 498 [62]-[63].

⁷⁸⁶ This includes the strongly worded resolution by the UN General Assembly in 2007 that pushed for a moratorium on capital punishment internationally.

⁷⁸⁷ UN General Assembly Resolution 62/149 (2007) of 18 December 2007.

⁷⁸⁸ Protocol 13 to the European Convention on Human Rights (adopted 3 May 2002, entered into force 1 July 2003) European Treaty Series 187.

⁷⁸⁹ Chapter six at 200.

7.4.3. *S v Makwanyane* (1995)

In 1995, the South African Constitutional Court referred extensively to foreign and international law in *Makwanyane*. Kentridge J stated that most countries one would naturally include in the category of open and democratic societies have abolished the death penalty, either through legislation or disuse, with the exceptions of the 'great democracies of India and the United States.'⁷⁹⁰ Mahomed J stated that to hold that the death penalty is cruel and unusual is a value judgment, legitimised by attaining consistency with 'constitutional perceptions evolving both within South Africa and the world outside with which our country shares emerging values central to the permissible limits and objectives of punishment in the civilised community.'⁷⁹¹

Chaskalson JP was the only judge to refer to customary international law itself, but apparently as a body of law that could be used for interpretation purposes:

⁷⁹⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) 472.

⁷⁹¹ *ibid* 487. Mokgoro J on the other hand stressed the importance of traditional values. She stated at 499 that 'Section 35 seems to acknowledge the paucity of home-grown judicial precedent upholding human rights, which is not surprising considering the repressive nature of the past legal order. It requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and internationally accepted values in the cultivation of a human rights jurisprudence for South Africa. However, I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality. These enduring values are not the same as fluctuating public opinion. They are values that should be drawn from the domestic arena.' This is an important point, but this concern would be addressed even better if traditional values were examined alongside values emerging in the international community. The Constitutional Court has on other occasions used international law, binding and otherwise, to identify international trends. In *Coetzee*, Sachs J stated that 'we need to locate ourselves in the mainstream of international democratic practice.' See *Coetzee v Government of the Republic of South Africa* (1995) 4 SALR 631 (CC) 659.

In the context of s35 (1) public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chap 3 can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialized agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of chap 3.⁷⁹²

Chaskalson JP's statement is broad, and allows for a wide variety of international law sources to be consulted.⁷⁹³ Non-binding international law is expressly referred to as a source for interpretation, but Chaskalson JP seemed to elevate non-binding international law to the same status as binding international law. Chaskalson JP went further and stated elsewhere in his judgment that 'we can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.'⁷⁹⁴ The court didn't ascertain whether an international legal rule exists regarding the validity of the death penalty, and then whether it binds South Africa. Instead it incorrectly examined international law and foreign practice together, without distinguishing what might be binding.

⁷⁹² *S v Makwanyane* 1995 (3) SA 391 (CC) 413-414.

⁷⁹³ Chaskalson JP refers to Amnesty International data at 413.

⁷⁹⁴ *ibid* 415. It is apposite to repeat what was stated in *Azapo v President of South Africa* (1996) 4 SALR 671 (CC) 688 regarding international law, where Mahomed DP stated that 'International law and the contents of international treaties to which South Africa might or might not be party, are relevant only in the interpretation of the constitution itself, on the grounds that the makers of the constitution should not lightly be presumed to authorize any law which might constitute a breach of the obligations of the state in terms of international law.' This statement is unproblematic in relation to non-binding international law. It encapsulates the common law principle requiring domestic laws to be interpreted, so far as possible, in a manner in which international law is not contravened. However, as in *Makwanyane* there is a failure to distinguish the distinct interpretative roles of binding and non-binding international law.

Although Chaskalson JP noted that the death penalty is abolished either specifically or in practice by almost half the countries of the world, including European democracies and the neighbouring countries of South Africa, he concluded that capital punishment is not prohibited by public international law.⁷⁹⁵ Kentridge J added however that although one cannot say the death penalty is contrary to international law, Chaskalson JP had demonstrated that it is the direction in which international law is developing.⁷⁹⁶ Although the court did not find there was a general abolitionist principle in customary law, this was an affirmation of an emerging custom that was heading in an abolitionist direction.

The timing of the *Makwanyane* decision is relevant, in that the case was heard when there was a great deal of abolitionist momentum. The Optional Protocol to the ICCPR was adopted in 1989 (although only ratified by South Africa in 2002), the Sixth Optional Protocol to the ECHR had been adopted in 1983, the Optional Protocol to the American Convention was adopted in 1990, the CAT was adopted in 1984, and the CRC in 1989. Just the year before the court's decision, the UN Human Rights Committee issued a general comment, which declared that the prohibition of arbitrary deprivation of life was now a *ius cogens* norm.⁷⁹⁷ Also in 1994, the death penalty had been excluded from the possible punishments that could be handed out by the international tribunals for Rwanda and Yugoslavia.⁷⁹⁸

⁷⁹⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) 413-414.

⁷⁹⁶ *ibid* 473.

⁷⁹⁷ UN Human Rights Committee General Comment 24 (adopted 11 November 1994) UN Doc. CCPR/C/21/Rev.1/Add.6, General Comment on Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant.

⁷⁹⁸ UN Security Council Resolution 955 (1994) of 8 November 1994, UN Security Council Resolution 827 (1993) of 25 May 1993

Besides these enactments in the international arena, both treaty ratification and domestic abolition levels jumped considerably in the 1980's and especially around the turn of the decade when a number a new democracies were formed. The rate of abolition by nation states had more than doubled in the six years prior to *Makwanyane*.⁷⁹⁹

One problem with the judgment by Chaskalson JP is that whilst concluding that the death penalty is not prohibited by international law, he did not take account of protocols to the ICCPR, ECHR and IACHR, which prohibit the death penalty. Although it was undoubtedly correct that the death penalty was not prohibited by international law in 1995, and that most likely remains the case, 'one would have expected a more considered and substantiated justification for such a sweeping statement.'⁸⁰⁰

7.4.4. Conclusion

Of the three jurisdictions under consideration, only South Africa has declared the death penalty fundamentally unconstitutional. Although the US Supreme Court fell one vote short of reaching the same conclusion in 1972, the emergent international shift towards abolition was an important consideration for the court. In 1980, the minority of the Indian Supreme Court took the view that abolition patterns at a transnational level and international treaty objectives were material. More recently,

⁷⁹⁹ R Hood *The Death Penalty: A Worldwide Perspective* (OUP Oxford 1996) 9.

⁸⁰⁰ J Dugard 'International Law and the 'Final' Constitution' 1995 (11) South African JHR 241. O' Regan J however did draw attention to the protocols in her concurrence. See *S v Makwanyane* 1995 (3) SA 391 (CC) 505, footnote 221.

the majority of the court has noted the relevance of the much more pronounced international abolitionist trend that exists today.

Although there are textual barriers to abolition in the US and India, considerations of general state practice have therefore been significant factors in all three jurisdictions. This has been even more explicit when addressing how subordinate issues have been dealt with, such as the execution of the mentally handicapped. Selected cases over the past quarter century reveal a convergence towards a ban on capital punishment in respect of offenders with serious mental disabilities.

7.5. EXECUTION OF THE MENTALLY HANDICAPPED

Both the US and India have moved to a normative position where today both jurisdictions disallow capital punishment for persons that fit within the definition of being insane or mentally handicapped. This was a result of court decisions in 2002 and 2014 in the US and India respectively. In the US, the shift was preceded by prior case law that had held the exact opposite just over a decade earlier. Comparative law played a meaningful role in the US in 2002, and both foreign and international law had a significant bearing on the Indian Supreme Court's decision in 2014.

7.5.1. *Penry v Lynaugh* (1989)

In *Ford v. Wainwright*, the US Supreme Court held that the Eighth Amendment prohibits the execution of the insane, defined as someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it.'⁸⁰¹ But this case did not consider the lawfulness of capital punishment as applied to persons with diminished mental capacity or a mental disability, reflected in objectively low IQ scores. Three years later in *Penry v Lynaugh*, the Supreme Court was faced with a case that concerned an individual with an IQ between 50 and 63, a 'mentally retarded person' in the words of the court.⁸⁰²

After being denied *certiorari* for an appeal to the Supreme Court, Penry filed a federal *habeas corpus* petition challenging the death sentence. O'Connor J for the majority ruled that the objective evidence of state legislation did not establish a national consensus that the execution of such a person would fall foul of the Eighth Amendment.⁸⁰³ There was no mention of international law or foreign practice in the majority judgment, notwithstanding the UN safeguards that were introduced five years previously in 1984.⁸⁰⁴

⁸⁰¹ *Ford v. Wainwright*, 477 U.S. 399, 104 S.Ct. 3498 (1986) 422.

⁸⁰² *Penry v Lynaugh* 492 US 302, 109 S.Ct. 2934 (1989) 313.

⁸⁰³ *ibid* 334.

⁸⁰⁴ UN Economic and Social Council Resolution 50 (1984) of 25 May 1984. Article 3 proscribed the application of the death penalty to the 'insane'.

7.5.2. *Atkins v Virginia* (2002)

Thirteen years later, there was a shift from no mention of foreign law in *Penry* to a different approach in *Atkins v Virginia*, where the Supreme Court revisited its earlier decision in *Penry* and declared the execution of mentally disabled persons to be prohibited by the Eighth Amendment.⁸⁰⁵ The case was heard against the backdrop of a 50% drop in death sentences in the preceding three years in the US.⁸⁰⁶ A quarter of US states had also now formally removed the death penalty from their laws.⁸⁰⁷ This was in addition to the rampant treaty ratification witnessed in the preceding decade, including in respect of the ICCPR and the CAT.⁸⁰⁸ After noting that ‘much had changed since *Penry*, particularly with state legislatures considering the issue [it is] not so much the number of States that is significant, but the consistency of the direction of change’, Stevens J critically commented in a footnote that:

Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved ... Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.⁸⁰⁹

⁸⁰⁵ *Atkins v Virginia* 536 US 304, 122 S.Ct. 2242 (2002).

⁸⁰⁶ Chapter six, Chart E at 209.

⁸⁰⁷ *ibid* Chart F at 210.

⁸⁰⁸ *ibid* Chart G at 212.

⁸⁰⁹ *Atkins v Virginia* 536 US 304, 122 S.Ct. 2242 (2002) 314-316. Stevens J here referred to an amicus curiae brief filed by the European Union. Amicus curiae briefs, including from the European Union, played a key role in the Court’s considerations. See Brief Of Amicus Curiae The European Union In Support Of The Petitioner. See Amicus Brief. The Supreme Court has continued to break its own records in terms of the number of amicus briefs filed in cases that it hears, such as 148 amicus briefs in its groundbreaking Gay Marriage rights decision of *Obergefell v Hodges* 576 U.S. ____ (2015).

Although Justice Stevens appeared to be at pains to deny that the normative position of other foreign states was material to the court's decision, this statement certainly recognises a widespread normative pattern in foreign state practice. Young refers to this as the 'common denominator effect' of drawing on comparative practice, where the express mention of foreign law on its own may tip the normative scales in one direction or another.⁸¹⁰ It was the central concern of the minority in the case that the weight given to foreign practice was in fact material to the outcome of the decision.

Rehnquist CJ complained of the defective decision by the majority to 'place weight' on foreign precedents, as this was 'antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved."⁸¹¹ He concluded that

if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant. ... Thompson, Enmund, and Coker rely only on the bare citation of international laws by the Trop plurality as authority to deem other countries' sentencing choices germane. But the Trop plurality - representing the view of only a minority of the Court - offered no explanation for its own citation, and there is no reason to resurrect this view given our sound rejection of the argument in Stanford.⁸¹²

See N Totenberg 'Record Number of Amicus Briefs Filed in Same-Sex-Marriage Cases' *NPR* (28 April 2015) <<http://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases>> accessed 25 August 2015.

⁸¹⁰ EA Young 'Foreign Law and the Denominator Problem' (2005) 119 *Harvard Law Review* 148.

⁸¹¹ *Atkins v Virginia* 536 US 304, 122 S.Ct. 2242 (2002) 322.

⁸¹² *ibid* 324.

Rehnquist's suspicion, that foreign law was being given authoritative status, was shared by Justice Scalia. Scalia J made the point that the fact that 18 out of 38 States in the US that permitted capital punishment had enacted legislation barring the execution of the mentally disabled did not constitute a consensus, but his main concern was that the majority was overreaching in their references to foreign law:

While it is true that some of our prior opinions have looked to "the climate of international opinion," ... to reinforce a conclusion regarding evolving standards of decency, ... we have since explicitly rejected the idea that the sentencing practices of other countries could "serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people."⁸¹³

Scalia J saw the matter as exclusively a domestic one, requiring at most a consideration of local state legislative choices. But he also found himself for the first time in the minority on this point, a stark contrast to his concurrence in *Penry*, where he joined with the majority of the court over a decade earlier to find that persons with substantially impaired intelligence could be sentenced to death. This presented a sea change in the approach of the US Supreme Court. Here the court reached a polar opposite normative conclusion to its earlier precedent in *Penry*, but this time the court drew expressly on patterns in international state practice. A decade later, the Indian Supreme Court arrived at the same decision, but the court focused more expressly on the normative requirements of international treaty law.

⁸¹³ *ibid* 324.

7.5.3. *Shatrughan Chauhan v Union of India* (2013)

In *Chauhan*, the Indian Supreme Court was faced with a challenge in 2013 to the imposition of the death penalty on persons suffering from insanity or mental illness. The court noted that Indian cases including *Vatheeswaran* and the leading case of *Triveniben* had been followed in the EU and other Commonwealth countries.⁸¹⁴ The court made a connection between domestic cruel and unusual punishment jurisprudence and parallel international developments, noting that this ‘jurisprudence has developed in the light of the mandate given in our Constitution as well as various Universal Declarations and directions issued by the United Nations.’⁸¹⁵

The court extensively assessed the applicable international instruments that specifically deal with the issue of the execution of mentally impaired persons, including clause 3(e) of UN Commission on Human Rights Resolution 2000/65 which ‘urges “all States that still maintain the death penalty...not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person”’.⁸¹⁶ Clauses 89 and 116 of the Report of the UN Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions were also referred to, which respectively prohibit the execution of ‘mentally retarded or insane persons’ and urges that “Governments that enforce such legislation with respect to minors and the mentally ill are particularly called upon to bring their domestic

⁸¹⁴ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1 [40]. This included references to Jamaica, Zimbabwe, Uganda and Belize.

⁸¹⁵ *ibid* [42].

⁸¹⁶ *ibid* [73]. UN Commission on Human Rights Resolution 65 (2000) of 27 April 2000, ‘The Question of the Death Penalty’.

criminal laws into conformity with international legal standards”.⁸¹⁷ The court concluded that the ‘above materials, particularly, the directions of the United Nations International Conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment.’⁸¹⁸ In this instance, international conventions played a direct role in the outcome of the case. The court concluded that its decision was supported by

relying on commentaries from various countries that civilized countries have not executed death penalty on an insane person. Learned counsel also relied on United Nations Resolution against execution of death sentence, debate of the General Assembly, the decisions of the International Court of Justice, Treaties, European Conventions, 8th amendment in the United States which prohibits execution of death sentence on an insane person. In view of the well established laws both at national as well as international sphere, we are inclined to consider insanity as one of the supervening circumstances that warrants for commutation of death sentence to life imprisonment.⁸¹⁹

Just more than ten years after the US Supreme Court ruled similarly in *Atkins*, the Indian Supreme Court reached the same conclusion. After reflecting on both foreign practice and international instruments in tandem, the court affirmed a norm that was apparent from both bodies of law, to the effect that persons with

⁸¹⁷ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1 [74]. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1997/60 ‘Restrictions on the use of death penalty’. The court also referred to the United Nations General Assembly Resolution, adopted in its Sixty-second session on 18 December 2007, which “1. Expresses its deep concern about the continued application of the death penalty; 2. Calls upon all States that still maintain the death penalty: (a) To respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984; 76th plenary meeting, 18 December 2007”.

⁸¹⁸ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1 [78].

⁸¹⁹ *ibid* [79].

mental disorders cannot receive capital punishment. Whilst the US Supreme Court focused on foreign state practice and the Indian Supreme Court on international treaty law, both courts recognised a normative shift against the practice. The developing custom was evidenced by both comparative state practice and international conventions.

7.5.4. Conclusion

The US has moved in line with international practice, in declaring capital punishment for persons with mental disabilities to be unconstitutional. Importantly, the Supreme Court moved from upholding the practice in 1989 without reference to comparative law, before striking it down in 2002 whilst referring to international trends and a consensus in the world community. The Indian Supreme Court followed the same path in 2013, relying on both comparative practice and international treaty developments. In both jurisdictions, this exhibits the self-standing role of state practice and customary international law in the outcome of domestic death penalty cases. International treaty law also plays a supporting and complementary role in pointing to the existence of an international norm.

An even starker commitment to an emerging custom took place in both the US and India, in cases dealing with the juvenile death penalty. Just a few years later, the US Supreme Court handed down its landmark decision in *Roper*, which revealed a transparent regard for foreign state practice. Even more recently in

India, the court referred to record levels of commitment in state practice in upholding a ban on the juvenile death penalty.⁸²⁰

7.6. THE JUVENILE DEATH PENALTY

The strongest example of an evolution in customary law through domestic judicial rulings is the juvenile death penalty. A chronological assessment of cases dealing with the juvenile death penalty over the last quarter of a century reveals a dramatic shift towards the eventual conclusion, of both Indian and US Supreme Courts, that the sentencing of persons under eighteen at the time of the commission of their offences is unlawful. Amidst these domestic decisions are two cases heard by the Inter-American Commission on Human Rights, which ruled expressly on the question whether such a proscription is *ius cogen*.

7.6.1. *Roach and Pinkerton v The United States* (1987)

In the Inter-American system, the issue of customary international law and the death penalty came before the Commission for the first time in 1987.⁸²¹ This case is the clearest example of a court, albeit an international tribunal, deciding a death penalty case primarily on the basis of an express analysis of the customary international law position. James Roach and Jay Pinkerton were sentenced to death and executed in the United States for separate crimes of murder committed

⁸²⁰ Chapter six, Charts B and G at 200 and 212 respectively.

⁸²¹ *Roach v Pinkerton* (1987) Inter-American Commission on Human Rights, Resolution No. 3/87, Case 9647 (United States).

when they were each seventeen years of age.⁸²² The question arose whether sentencing to death in the US of persons under 18 at the time of the commission of their offence, was a violation of human rights in the Inter American human rights system. The US is subject to the Commission's jurisdiction as a result of its membership of the Organisation of American States.⁸²³

The central argument for the Commission to consider was whether the American Declaration, as informed by customary international law, prohibits the imposition of the death penalty for crimes committed by juveniles. The American Declaration does not expressly deal with the legality of capital punishment, whereas article 4(5) in the American Convention on Human Rights clearly prohibits the death penalty for persons under 18 at the times the crime was committed.

The US could not however be bound by the American Convention which it had not signed up to, so the Commission assessed whether there was instead a governing rule of customary international law binding on the US, and found that 'in the member States of the OAS there is recognized a norm of *ius cogens* which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system, including the United States.'⁸²⁴ However, although

⁸²² Roach was also substantially mentally handicapped, with an IQ of between 75 and 80, although the Commission did not deal with this issue.

⁸²³ The regional international obligations of the US, as a member of the Organisation of American States, are governed by the Charter of the Organisation of American States, and the American Declaration of the Rights of Man. The US is not party to the Inter-American Convention of Human Rights, but is subject to the Commission's jurisdiction and the American Declaration as a member of the OAS. See Inter American Court of Human Rights Advisory Opinion, September 8, 1983, No. OC-3/83; *Roach v Pinkerton* (1987) Inter-American Commission on Human Rights, Resolution No. 3/87, Case 9647 (United States) [49].

⁸²⁴ *ibid* [47], [56]. The Commission had held previously in Case 2141 (United States) [31] that 'it would be impossible to impose upon the United States Government or that of any other State

there was recognition among member states of OAS of a norm of *ius cogens* prohibiting the juvenile death penalty, there was no uniform practice regarding the minimum age at which capital offenders could be sentenced to death.⁸²⁵ Nevertheless, the Commission noted that

in light of the increasing numbers of States which are ratifying the American Convention on Human Rights and the United Nations Covenant on Civil and Political Rights, and modifying their domestic legislation in conformity with these instruments, the norm is emerging. As mentioned above, thirteen states and the U.S. capital have abolished the death penalty entirely and nine retentionist states have abolished it for offenders under the age of 18.⁸²⁶

Just one year later the same issue arose in the US itself. However, here the question concerned the imposition of the death penalty on children under the age of sixteen, rather than under the age of eighteen as it was in *Roach*. As noted by the Commission, international treaty law was stacking up against the juvenile death penalty. Article 6(5) of the ICCPR and article 4(5) of the American Convention made it unlawful to sentence persons under eighteen to death.

member of the OAS, by means of "interpretation," an international obligation based upon a treaty that such State has not duly accepted or ratified.'

⁸²⁵ *ibid* [50], [57]. The International Court of Justice has categorised the prohibition of genocide as an obligation *erga omnes*. In the *Barcelona Traction* case, the court referred to obligations *erga omnes*, owed to the international community as a whole, derived from laws outlawing acts of aggression, genocide, and principles concerning the basic rights of the human person, including slavery and racial discrimination. See *Barcelona Traction Light and Power Company, Limited* (New Belgium v. Spain) [1970] ICJ Rep 1.

⁸²⁶ *Roach and Pinkerton v The United States* (1987) Inter-American Commission on Human Rights, Resolution No. 3/87, Case 9647 (United States) [60]. Ultimately the Commission took issue with the diversity in the practice of the various states in the US, which resulted in arbitrariness in terms of which persons receive the death sentence in respect of their low age. A juvenile in one state could receive the death penalty whereas in a neighbouring state the same penalty could not be applied to an identical offender. The failure of the federal government in the US to pre-empt the states as regard the fundamental right to life was held to result in a pattern of legislative arbitrariness, which resulted in arbitrary deprivation of life and inequality before the law, contrary to articles 1 and 2 of the American Declaration ([62]-[63]).

7.6.2. *Thompson v Oklahoma* (1988)

In 1988, the US Supreme Court struck down the death penalty for persons under the age of 16 in the case of *Thompson v Oklahoma*.⁸²⁷ The decision was heard just a few years after the adoption of CAT by the UN General Assembly, which expressly banned the juvenile death penalty. State practice during the 1980's had also shown a rapid increase in domestic acts of abolition, together with a growth in ratifications of key treaties such as the ICCPR, ECHR and the IACHR.⁸²⁸ The *Thompson* decision echoed international law and foreign practice.

The case involved an assessment of societal consensus regarding the minimum age at which one can commit a serious crime and subsequently be sentenced to death. Five members of the court considered international treaties and widespread foreign practice a relevant consideration.⁸²⁹ After reviewing domestic state legislation, Stevens J for the plurality embraced a survey of foreign views as an objective indicator of the evolving standards of decency, before concluding that the execution of a person less than sixteen years of age would offend civilized standards of decency as expressed 'by other nations that share our Anglo-American heritage, and by the leading members of the Western European Community.'⁸³⁰ Stevens J referred to various jurisdictions in which the death penalty has been abolished, asserting that

⁸²⁷ *Thompson v Oklahoma* 487 US 815, 108 S.Ct. 2687 (1988).

⁸²⁸ Chapter six, Charts G and H at 212 and 213.

⁸²⁹ HA Blackmun 'The Supreme Court and the Law of Nations' (1994) 104 Yale Law Journal 39, 46.

⁸³⁰ *Thompson v Oklahoma* 487 US 815, 108 S.Ct. 2687 (1988) 830. See H Cleveland, 'Our International Constitution' (2006) 31(1) Yale Journal of International Law 1, 2, for further commentary on the case.

although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.⁸³¹

Stevens J therefore recognised the authority of convergent opinion in the world community, emphasising that the Supreme Court had ‘previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.’⁸³² Stevens J further referred to the fact that three international treaties had banned the juvenile death penalty: the ICCPR, IACHR and the Fourth Geneva Convention.⁸³³ O’Connor J, in her concurrence, also accorded weight to ‘the fact that the United States has agreed by treaty to set a minimum age of 18 for capital punishment in certain circumstances.’⁸³⁴

Scalia J in his dissent focused on the fact that domestic state legislation, where forty per cent of states allow for the possibility of establishing the minimum age at sixteen rather than eighteen, meant that the court could not establish a

⁸³¹ *Thompson v Oklahoma* 487 US 815, 108 S.Ct. 2687 (1988) 830-831.

⁸³² *ibid* footnote 31. Stevens J endorsed the court’s previous decisions in *Trop v Dulles*, *Coker v Georgia*, and *v Georgia*; *Edmund v Florida*.

⁸³³ *ibid* footnote 34. The Fourth Geneva Convention had been ratified by the US at this stage, which was also noted by the court.

⁸³⁴ *ibid* 851. Article 68 of the Fourth Geneva Convention, Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287. O’Connor J also referred to two other treaties cited at footnote 34 of the judgment, signed but not ratified by the United States, prohibiting capital punishment for juveniles.

social consensus in the 'legislation of this society, which is assuredly all that is relevant.'⁸³⁵ Scalia J stated further in a footnote that:

The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries ... is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world.⁸³⁶

This emphasis on the legislative position of the domestic states in the US, over patterns in foreign state practice, casts international law into a negligible role. Scalia J observed that given 'it is a Constitution for the United States of America that we are expounding', it followed that the 'practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty: that it occupies a place not merely in our mores but, text permitting, in our Constitution as well.'⁸³⁷

The idea of an implicit morality echoes peremptory international human rights norms. But Scalia J limits the potential role of foreign law by returning to his general originalist standpoint, that ultimately the question of the juvenile death penalty is determined by the text of the Constitution. Yet he leaves open the

⁸³⁵ *ibid* 868.

⁸³⁶ *ibid* Scalia's judgment at footnote 4.

⁸³⁷ *Ibid*. Scalia J added that 'where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.'

possibility that foreign practice can affirm a US practice as being fundamental and enduring, rather than 'merely a historical accident'. This subsidiary place for considerations of comparative state practice runs contrary to the international law principle that on occasion domestic law may be trumped by a customary norm.

7.6.3. *Stanford v Kentucky* (1989)

Only one year later after *Thompson*, the Supreme Court was faced with another juvenile death penalty case. Here the offender was seventeen years and four months old at the time the offence was committed, as opposed to the *Thompson* situation of an offender under the age of sixteen at the material time. Scalia J for the majority of the court rejected an attempt to impugn the application of the death penalty to offenders under the age of eighteen but over sixteen at the time of their offence, on the basis that as compared with *Thompson* there was insufficient national consensus that death sentences for offenders under the age of eighteen were cruel and unusual.⁸³⁸ For his assessment of this consensus, Scalia J rejected the consideration of any other objective factors besides state legislation and jury decision patterns, and reiterated his concern about interpretation of the Eighth Amendment descending into judges' personal preferences:

When this Court cast loose from the historical moorings consisting of the original application of the Eighth Amendment, it did not embark rudderless upon a wide-open sea. Rather, it limited the Amendment's extension to those practices contrary to the "evolving standards of decency that mark the progress of a maturing society." ... It has never been thought that this was a shorthand reference to the preferences of a majority of this Court... to say

⁸³⁸ *Stanford v Kentucky* 492 US 361, 109 S.Ct. 2969 (1989) 373.

and mean that, is to replace judges of the law with a committee of philosopher-kings.⁸³⁹

Brennan J in his dissent (joined by Justices Blackmun and Stevens) on the other hand found that executing juveniles under the age of eighteen is cruel and unusual and contrary to the Eighth Amendment.⁸⁴⁰ After commenting that ‘the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society’,⁸⁴¹ he concluded that:

Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis. ... Many countries, of course — over 50, including nearly all in Western Europe — have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. ... Twenty-seven others do not in practice impose the penalty. ... Of the nations that retain capital punishment, a majority — 65 — prohibit the execution of juveniles.⁸⁴²

Although 61 countries retained capital punishment at the time and did not prohibit the execution of juveniles, Brennan J observed that ‘some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles.’⁸⁴³ Furthering this awareness of the connection between state practice and international treaty law, he noted that ‘three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties. ... Within

⁸³⁹ *ibid* 377-379.

⁸⁴⁰ *ibid* 382.

⁸⁴¹ *ibid* 384.

⁸⁴² *ibid* 389. The court also noted that since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world, three of these in the United States. The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados.

⁸⁴³ *ibid* 390.

the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.⁸⁴⁴

The minority also applied an objective test for contemporary standards of decency, but their consideration of the legal position of other territories included an analysis of comparative state practice. Brennan J included on his list of objective factors that the court should take into account were the rejection of the death penalty for juveniles 'generally throughout the world',⁸⁴⁵ and the fact that 'international opinion' views the execution of juveniles as unacceptable.⁸⁴⁶

'International opinion' falls short of an international legal rule on its own, but it does have a similar import to *opinio iuris* in determining states' attitudes to a principle of customary international law.⁸⁴⁷ If courts around the world are rejecting a practice or finding it unacceptable, this is precisely the line of reasoning that could lead to the objective conclusion that there is sufficiently widespread state practice that demonstrates a norm has evolved into a customary international law principle. In its emergent stage, this norm could be described as a form of hybrid international-national norm.⁸⁴⁸ In the case of the juvenile death penalty, a norm proscribing the practice was recognised by the minority of the US Supreme Court. But it would be more than a decade before the issue arose in the US Supreme

⁸⁴⁴ *ibid* 390, footnote 10.

⁸⁴⁵ *ibid* 390.

⁸⁴⁶ *ibid* 405. Other objective factors included the rejection of the death penalty for juveniles by a majority of the States, the rarity of the sentence for juveniles, and the decisions of respected organizations in relevant fields that this punishment is unacceptable.

⁸⁴⁷ J Crawford Brownlie's *Principles of Public International Law* (OUP Oxford 2012) 25.

⁸⁴⁸ See A Roberts 'Comparative International Law? The Role of National Courts in Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 73-74, where she refers to the 'hybridity that results from domesticating international law' and makes the point that domestic courts assimilate international law into their national systems in diverse ways.

Court again. *Stanford* had upheld the juvenile death penalty for offenders under the age of 18 at the time of their offence, but the dissenters had opened a window to the consideration of a strongly emerging norm.

7.6.4. *Toronto Patterson v Texas* (2002)

Thirteen years later the issue of the juvenile death penalty, for offenders under the age of eighteen, arose in a *habeas corpus* application and petition for a writ of certiorari before the US Supreme Court in *Toronto Patterson*.⁸⁴⁹ The application was summarily dismissed by Scalia J for the court. Stevens J, in his dissent, referring to the case of *Stanford*, stated that

Since that opinion was written, the issue has been the subject of further debate and discussion both in this country and in other civilized nations. Given the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity.⁸⁵⁰

This *dicta* appears to be a direct appeal by Stevens J to the independent weight of an international consensus regarding the juvenile death penalty. Coincidentally, the Inter-American Commission revisited the question of the juvenile death penalty in 2002, the same year that *Toronto Patterson* was decided. Here the Commission took the same path as the minority in *Stanford* and *Toronto Patterson*, but as an international tribunal was not constrained by domestic considerations. Instead the Commission decided the case squarely on the basis of

⁸⁴⁹ *Toronto Patterson v Texas* 536 US 984, 122 S.Ct. 2242 (2002).

⁸⁵⁰ *ibid* 984.

international law, with the consensus amongst states a key factor in its determinations.

7.6.5. *Michael Domingues v The United States* (2002)

The *Domingues* case offered the Inter-American Commission an opportunity to fifteen years later squarely reconsider the question whether the 'state of international law concerning the execution of individuals under the age of 18 has evolved since its decision in *Roach and Pinkerton*.⁸⁵¹ The complainant placed the conflict between US and international juvenile death penalty norms at the forefront of the dispute, in claiming that Nevada State law was superseded by an international law that prohibits the execution of juveniles, including the ICCPR, customary international law and *ius cogens*.⁸⁵² One of the key questions for the Commission was whether the US reservation to the ICCPR article 6(5), which prohibits the imposition of the death penalty on children under eighteen at the time they commit their offence, was valid in light of customary international law.⁸⁵³

In assessing the status of customary international law pertaining to the juvenile death penalty, the Commission had regard to various international treaties and resolutions by UN agencies.⁸⁵⁴ This included the resolution adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights and the UN

⁸⁵¹ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [42].

⁸⁵² *ibid* [13].

⁸⁵³ The US ratified the ICCPR on 8 June 1992.

⁸⁵⁴ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [20], [69]-[70].

Commission on Human Rights in 1999 and 1997 respectively, condemning the imposition of the death penalty on those who were under the age of 18 at the time the offense was committed.⁸⁵⁵ Further, the Commission considered the fact that Third Committee of the United Nations General Assembly in 1980 had already recognized Article 6 of the ICCPR as constituting a minimum standard for all U.N. member states and not just those that had ratified the ICCPR.⁸⁵⁶ Consistent with this position, on August 24, 1999 the United Nations Sub-Committee on the Promotion and Protection of Human Rights passed a resolution condemning the imposition of the death penalty on those who were under 18 at the time of their offence and calling upon countries that continued to execute juveniles to bring an end to the practice.⁸⁵⁷ In addition, in 1998 the United Nations Commission on Human Rights passed a resolution calling on states that maintained the death penalty to comply with the International Covenant by not imposing the death penalty for crimes committed by persons below eighteen years of age.⁸⁵⁸

The United Nations Economic and Social Council also adopted standards in 1984, which forbid the execution of children who committed their crimes when they were under eighteen.⁸⁵⁹ Those same standards have been endorsed by the General Assembly and the Seventh United Nations Congress on the Prevention of

⁸⁵⁵ UN Sub-Commission on the Promotion and Protection of Human Rights Resolution 4 (1999) of 24 August 1999, UN Doc. E/CN.4/Sub.2/RES/1999/4; UN Commission on Human Rights Resolution 12 (1997) of 3 April 1997.

⁸⁵⁶ 12 UN General Assembly C.3 (819th mtg) 287, UN Doc. A/C.3/SR.819.

⁸⁵⁷ UN Sub-Commission on the Promotion and Protection of Human Rights Resolution 4 (1999) of 24 August 1999, UN Doc. E/CN.4/Sub.2/RES/1999/4.

⁸⁵⁸ UN Commission on Human Rights Committee Resolution 8 (1998) of 3 April 1998, UN Doc. E/CN.4/RES/1998/8, para 3(a).

⁸⁵⁹ See UN Economic and Social Council Resolution 50 (1984) of 25 May 1984, annex para. 3.

Crime and Treatment of Offenders.⁸⁶⁰ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice likewise prohibits the execution of juvenile offenders.⁸⁶¹ There were therefore numerous international instruments that had recently affirmed a blanket international law proscription against a juvenile death penalty applied to offenders under the age of eighteen.

The Commission extensively considered the worldwide practice by states with respect to the juvenile death penalty. A connection was made between the international law proscription outlined above, and widespread uniform state practice, as the Commission noted that the 'articulation of an international norm proscribing the execution of juvenile offenders through international practice has been accompanied by the expression of a similar standard in the domestic practice of states.'⁸⁶² With respect to domestic practice during the preceding fifteen years, the Commission concluded that there was a 'nearly unanimous and unqualified international trend toward prohibiting the execution of offenders under the age of 18 years.'⁸⁶³ Besides the number of states in absolute terms that had turned their

⁸⁶⁰ UN General Assembly Resolution 39/118 (1984) of 14 December 1984; Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/Conf.121/22 (1985) 86-87.

⁸⁶¹ UN General Assembly Resolution 40/33 (1985) of 29 November 1985, Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") annex rule 17.2.

⁸⁶² *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [72].

⁸⁶³ *ibid* [76]. The Commission referred to the fact that 'in 1986, 46 countries had abolished the death penalty for traditional crimes, with the exception of certain crimes committed under military law or in time of war. Today, according to available statistics the number has more than doubled, with an additional 49 countries having abolished the death penalty during the intervening fifteen years for all but exceptional crimes. ... Moreover, a further 20 countries have not carried out any executions for ten years or more. According to statistics compiled by Amnesty International, a leading source of research and information concerning the global application of the death penalty, 109 countries have abolished the death penalty by law or in practice as of the year 2001.' It was also found that there was 'a particularly pervasive regional norm repudiating the application of the death penalty to persons under 18 years of age,' given that only the US in the Inter-American system continued to execute juveniles.' See para 75.

backs on the juvenile death sentence, it was observed 'that the average annual rate at which countries have abolished the death penalty has increased from 1.5 (1965-1988) to 4 per year (1989-1995), or nearly three times as many.'⁸⁶⁴

The trend crossed 'political and ideological lines and has nearly isolated the United States as the only country that continues to maintain the legality of the execution of 16 and 17 year old offenders, and then ... only in certain state jurisdictions.'⁸⁶⁵ The diversity of practice within the US, was therefore regarded as important, on the basis that internal US 'judicial determinations and legislative initiatives over the past 20 years have also demonstrated a trend towards lack of acceptance of the application of the death penalty to those offenders under the age of 18 years.'⁸⁶⁶ These references included the *Thompson* decision, a Florida Supreme Court decision in 1999, a change to Montana legislation in 1999, and the imposition of a federal death penalty limit of a minimum age of 18.⁸⁶⁷

The Commission concluded that 'a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime', and that 'this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *ius cogens*, a development anticipated by the Commission in its Roach and Pinkerton decision.'⁸⁶⁸ The

⁸⁶⁴ *ibid* [72]. See R Hood *The Death Penalty: A Worldwide Perspective* (OUP Oxford 1996) 8.

⁸⁶⁵ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [76].

⁸⁶⁶ *ibid* [77].

⁸⁶⁷ *ibid* [77]-[78], [82]. See *Thompson v Oklahoma* 487 US 815, 108 S.Ct. 2687 (1988) 823-831; *Brennan v Florida* 754 So. 2d 1 (1999).

⁸⁶⁸ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913 [82].

argument that the US was a persistent objector to the norm was specifically rejected, on the basis that the US had ‘in several significant respects recognized the propriety of this norm by, for example, prescribing the age of 18 as the federal standard for the application of capital punishment and by ratifying the Fourth Geneva Convention without reservation to this standard.’⁸⁶⁹ In any event, since the conclusion had been reached that the proscription was a *ius cogens* norm, regardless of any objection it ‘binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise.’⁸⁷⁰

Clearly the Commission, as an international tribunal, is differently placed to a national court in key respects. The Commission must base its decisions on international law only, whereas a domestic court is faced with a more complex interplay between national and international law, partly depending on how its national system is constitutionally structured to treat or receive international law. Nevertheless, when the identical issue arose before the US Supreme Court three years later in *Roper*, it reached the same conclusion as the Commission, that the juvenile death penalty was unlawful, but the Supreme Court made no express reference to customary international law.

⁸⁶⁹ *ibid* [82].

⁸⁷⁰ *ibid* [82]. The Commission also stated that ‘The overwhelming evidence of global state practice as set out above displays a consistency and generality amongst world states indicating that the world community considers the execution of offenders aged below 18 years at the time of their offence to be inconsistent with prevailing standards of decency. ... As noted above, nearly every nation state has rejected the imposition of capital punishment to individuals under the age of 18. They have done so through ratification of the ICCPR, U.N. Convention on the Rights of the Child, and the American Convention on Human Rights, treaties in which this proscription is recognized as non-derogable, as well as through corresponding amendments to their domestic laws. The acceptance of this norm crosses political and ideological boundaries and efforts to detract from this standard have been vigorously condemned by members of the international community as impermissible under contemporary human rights standards.’

7.6.6. *Roper v Simmons* (2005)

The three-year intervening period between *Atkins* and *Roper* had witnessed a great deal of conflict about the reference to foreign cases in US Supreme Court jurisprudence. *Atkins* had put the issue of cross-citation firmly on the top of the judicial agenda, with a number of sitting Supreme Court justices making *ex facie curiae* comments on the matter.⁸⁷¹ The US Congress had also entered the fray, with various bills introduced but not passed, which would have had the effect of preventing references to foreign cases by the court.⁸⁷² By the time *Roper* was heard, it was 'the culmination of a battle over the use of international and foreign law in constitutional interpretation that has raged on the Court since the late 1980s'.⁸⁷³

Sixteen years had passed since its decision in *Stanford* that it was not cruel and unusual to sentence juvenile offenders under the age of eighteen to death, but the court was now faced additional developments in international treaty law. In addition, there was now overwhelming worldwide state practice running contrary to *Stanford*. Finally, the very clear reasoning and judgment in *Domingues*, to the

⁸⁷¹ Justice Breyer Keynote Address at the American Society of International Law Proceedings (2 April, 2003) in 97 American Society of International Law Procedure 265 (2003); Justice Sandra Day O'Connor Keynote Address at the American Society of International Law Proceedings (16 March 2002) in 96 American Society of International Law Procedure 348 (2002); Justice Ruth Bader Ginsburg Remarks for the American Constitution Society, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (2 August 2003).

⁸⁷² HR Resolution 97, 109th Congress (2005); American Justice for American Citizens Act, HR 4118, 108th Congress 2(5) (2004); The Constitution Restoration Act 2004 S.2082, 108th Congress 201, 332 (2004); H.R. Resolution 568, 108th Congress (2004).

⁸⁷³ SH Cleveland 'Our International Constitution' (2006) 31(1) Yale Journal of International Law 1, 2.

effect that the US juvenile death penalty was unlawful in terms of customary international law, had been handed down three years earlier.

The UN's Human Rights Council, through its Sub-Commission on the Promotion and Protection of Human Rights, had also adopted a resolution just a few years earlier condemning the juvenile death penalty.⁸⁷⁴ The ratification of relevant treaties had reached fever pitch, with well over 100 states having joined the ICCPR and CAT systems.⁸⁷⁵ The CRC, which contains an express prohibition on juvenile death sentences, was also ratified by a significant majority of the UN member states.⁸⁷⁶ Domestic trends followed a similar dramatic shift towards *de facto* abolition, with a drop of 50% in the number of death sentences handed out in the US in the five-year period prior to *Roper*.⁸⁷⁷ There was also a doubling in the number of domestic states turning their backs on capital punishment in the 2000's.⁸⁷⁸

Kennedy J, for the majority of the Court, found that the law had evolved to the point that, as of 2005, a juvenile death penalty for offenders under the age of eighteen at the time of their crime, was now constitutionally unsustainable. The fact that the US had become such a stark normative outlier in global terms weighed heavily with the court. Kennedy stated that '(o)ur determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in

⁸⁷⁴ UN Sub-Commission on the Promotion and Protection of Human Rights Resolution 4 (1999) of 24 August 1999, UN Doc. E/CN.4/Sub.2/RES/1999/4.

⁸⁷⁵ Chapter six, Chart G at 212.

⁸⁷⁶ *ibid* Chart H at 213.

⁸⁷⁷ *ibid* Chart E at 209.

⁸⁷⁸ *ibid* Chart F at 210.

the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.⁸⁷⁹

In a rare consideration of international treaty law pertaining to the death penalty, Kennedy J noted various international conventions that deal with the unlawfulness of the juvenile death penalty:

Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. ... No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. ... Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U. N. T. S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5), as noted, *supra*, at 13); American Convention on Human Rights: Pact of San José, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U. N. T. S. 146 (entered into force July 19, 1978) ...; African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999)⁸⁸⁰

Although Justice Kennedy implies otherwise, he also effectively applied a customary international law analysis to foreign state practice. His assessment of a widespread quantitative trend in state practice away from a juvenile death penalty is consistent with the definition of international custom in the ICJ Statute:

Respondent and his amici have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these

⁸⁷⁹ *Roper v Simmons* 543 US 551, 125 S.Ct. 1183 (2005) 575.

⁸⁸⁰ *ibid* 576-577. See UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Article 37.

countries has either abolished capital punishment for juveniles or made public disavowal of the practice. ... In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.⁸⁸¹

Kennedy J concluded that 'it is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.'⁸⁸² However, he was at pains to assert that this 'reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments"'.⁸⁸³ With this ringing endorsement of comparative practice and international law, the court 'robustly recommitted itself to consideration of international law' in the jurisprudence of the court.⁸⁸⁴ A high watermark had been reached in the treatment of customary international law considerations as an apparent independent factor in the court's analysis.

⁸⁸¹ *Roper v Simmons* 543 US 551, 125 S.Ct. 1183 (2005) 577. The court also referred to the UK history with the juvenile death penalty specifically: 'Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. ... In the 56 years that have passed since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established.'

⁸⁸² *ibid* 578.

⁸⁸³ *ibid* 575. Kennedy J emphasised the primary role of the Constitution at [578]: 'The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. ... It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.'

⁸⁸⁴ SH Cleveland 'Our International Constitution' (2006) 31(1) *Yale Journal of International Law* 1, 77.

O'Connor J, in her dissent, disregarded any confirmatory role for international law in the case at hand, as she did not believe there was a national consensus in this matter.⁸⁸⁵ However, she accepted as a general principle that international and foreign law can play a role, and acknowledged that 'there has been a global trend in recent years towards abolishing capital punishment for under-18 offenders.'⁸⁸⁶ The court could have regard to an international consensus as confirmation of a national consensus, but only where a domestic consensus has been independently established. O'Connor J departed from the dissent of Scalia J to the effect that foreign and international law are irrelevant in Eighth Amendment cases, as

this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement - expressed in international law or in the domestic laws of individual countries - that a particular form of punishment is inconsistent with fundamental human rights. ... At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.⁸⁸⁷

Although she relegated international consensus to a secondary role, O'Connor J recognised, in particular, the relevance of clear agreement in the

⁸⁸⁵ *Roper v Simmons* 543 US 551, 125 S.Ct. 1183 (2005) 604. She concluded that 'the instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.'

⁸⁸⁶ *ibid.*

⁸⁸⁷ *ibid* 604. She noted that 'Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. ... This inquiry reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society.'

international community of states, which could be indicated by international law or domestic state practice.

Scalia J, in his dissent on the other hand, posed the question as to what the Supreme Court is actually doing when it cites foreign laws. He asserted that 'the basic premise of the Court's argument - that American law should conform to the laws of the rest of the world - ought to be rejected out of hand. In fact the Court itself does not believe it.'⁸⁸⁸ He critiqued O'Connor J's notion of a secondary role for foreign and international law, on the basis that 'America's principles are its own, or they follow the world; one cannot have it both ways.'⁸⁸⁹ Scalia J continued in this vein, in suggesting that if the court is bothering to extensively cite foreign law, it must be playing a role and the court should be transparent in recognising what that role is. He complained that '(f)oreign sources are cited today, not to underscore our "fidelity" to the Constitution' but 'to set aside the centuries-old American practice ... of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty.'⁸⁹⁰

Scalia J was of the view that the mention of foreign cases was in fact material to the decision reached by the majority, stating that 'acknowledgment of foreign approval has no place in the legal opinion of this Court unless it is part of

⁸⁸⁸ *ibid* 624.

⁸⁸⁹ *ibid* footnote 9 of Scalia's judgment. He added that 'Finally, Justice O'Connor finds it unnecessary to consult foreign law in the present case because there is "no domestic consensus" to be confirmed. *Ibid*. But since she believes that the Justices can announce their own requirements of "moral proportionality" despite the absence of consensus, why would foreign law not be relevant to that judgment? If foreign law is powerful enough to supplant the judgment of the American people, surely it is powerful enough to change a personal assessment of moral proportionality.' He added at para 628 that 'What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.'

⁸⁹⁰ *ibid* 628.

the basis for the Court's judgment - which is surely what it parades as today.⁸⁹¹ Roberts has described this criticism as a court using the enforcement of an international norm as a cloak or shield for norm creation.⁸⁹² Scalia J's concern was that the court was endorsing the *Trop* suggestion that foreign and international norms could be granted independent weight in the final judgment of the court, such that domestic legislative choices and jury patterns could be overridden.⁸⁹³ Certainly *Roper* was a significant departure from the majority's position in *Stanford* 16 years previously, in at least two respects. Firstly, the court had joined with the predominant position in international treaty law. Secondly, comparative state practice shifted front and centre to the considerations factored into the court's reasoning.

7.6.7. *Subramanian Swamy v Raju* (2014)

The Indian Supreme Court followed the majority of the US Supreme Court when the issue came before it a decade later. The concerns raised by Justice Scalia were not mentioned by the Indian Supreme Court, but the situation was distinguishable as the Indian legislature had introduced a new statute, the Juvenile Justice Act 2000, that prohibited the juvenile death penalty.⁸⁹⁴ The court was faced with an attack on the statute, which set the minimum age for capital sentences at 18.⁸⁹⁵ The Act was challenged on the basis that it did not accord sufficient weight

⁸⁹¹ *ibid* 628.

⁸⁹² A Roberts 'Comparative International Law? The Role of National Courts in Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 71.

⁸⁹³ SH Cleveland 'Our International Constitution' (2006) 31(1) *Yale Journal of International Law* 79.

⁸⁹⁴ The Juvenile Justice (Care and Protection of Children) Act 2000 (India).

⁸⁹⁵ *Subramanian Swamy v Raju* (2014) 8 SCC 390.

to the rights of victims.⁸⁹⁶ Gogoi J for the court upheld the statute. As the most recent case to consider a constitutional death penalty question, the court was faced with the dramatic levels of treaty law and domestic abolitionist commitments by states. Together with the fact that over 140 states around the world were *de lege* or *de facto* abolitionist, more than 150 states had now signed up to the ICCPR, CAT and the CRC.⁸⁹⁷

The Court had regard to various international instruments, including the UN Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the General Assembly of the United Nations in 1985 (Beijing Rules), the CRC and Rule 1.2 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules).⁸⁹⁸ The Court also took note of the CRC Committee recommendation that India abolish by law the imposition of the death penalty on persons under the age of eighteen.⁸⁹⁹ It was a result of the Committee's recommendations that the JJ Act was amended in 2000, to stipulate a uniform age of 18 for both male and female juveniles. The court concluded that the JJ Act was 'enacted to give full and complete effect to the country's international obligations arising from India being a signatory to the three separate conventions delineated

⁸⁹⁶ The Juvenile Justice (Care and Protection of Children) Act 2000 (India).

⁸⁹⁷ Chapter six, Charts B, G, H at 200, 212 and 213. 80 states have ratified the Second Optional Protocol.

⁸⁹⁸ *Subramanian Swamy v Raju* (2014) 8 SCC 390 [23]-[26]. Rule 17.2 of the Beijing Rules prohibits the imposition of capital punishment of juveniles. Article 37(a) of the CRC prohibits the imposition of capital punishment and life imprisonment without possibility of release on offenders below 18 years of age. Rule 1.2 of the Havana Rules provide that a juvenile should be deprived of his/her liberty only as a measure of the last resort limited to exceptional cases and for the minimum necessary period.

⁸⁹⁹ *ibid* [27].

hereinbefore, namely, the Beijing Rules, the UN Convention and the Havana Rules.⁹⁰⁰

The court then connected international treaty norms to consistent state practice, when it analysed state practice in certain jurisdictions, including Canada, the United Kingdom, the US, Brazil, Bangladesh, Afghanistan, Bhutan and Nepal.⁹⁰¹ The court held that

there is a considerable body of world opinion that all under 18 persons ought to be treated as juveniles and separate treatment ought to be meted out to them so far as offences committed by such persons are concerned. The avowed object is to ensure their rehabilitation in society and to enable the young offenders to become useful members of the society in later years. India has accepted the above position and legislative wisdom has led to the enactment of the JJ Act in its present form.⁹⁰²

The introduction of domestic legislation was a form of state practice on the part of the Indian legislature, which confirmed an international obligation arising from treaty law. The reference to concordant comparative practice, whilst also affirming the state practice of India at a judicial level, is implicitly an enforcement of the customary rule recognised in *Domingues*. Otherwise the mention of foreign practice was superfluous. The court had referred to broad patterns of comparative

⁹⁰⁰ *ibid* [39]. The court noted that '(n)otwithstanding the avowed object of the Act and other such enactments to further the country's international commitments, all of such laws must necessarily have to conform to the requirements of a valid legislation judged in the context of the relevant constitutional provisions and the judicial verdicts rendered from time to time. Also, that the Act is a beneficial piece of legislation and must therefore receive its due interpretation as a legislation belonging to the said category ... In other words, the Act must be interpreted and understood to advance the cause of the legislation and to confer the benefits of the provisions thereof to the category of persons for whom the legislation has been made.'

⁹⁰¹ *ibid* [30].

⁹⁰² *ibid* [46].

practice, rather than isolated cases from other jurisdictions, which is more typical of a borrowing court looking for interpretative guidance.

7.6.8. Conclusion

The juvenile death penalty presents the starkest example of a synergy between convergent abolitionist practice, international treaty adoption, and the engagement with customary international law in key domestic death penalty cases. The key jurisdiction of the US exhibited an about turn from *Stanford* in 1989, when the majority rejected a role for the consideration of foreign practice. *Roper* not only achieved the striking down of the juvenile death penalty, but embraced the analysis of both international treaty law and global trends. Insofar as the majority expressly aligned itself with widespread comparative practice and international law, it would appear that the court had, without saying as much, recognised the applicability of a customary rule, and taken a decision that had effectively enforced the international norm. The court both contributed to and upheld what the Inter-American Commission had previously held to be a binding customary rule.

The Indian Supreme Court reached the same conclusion in *Raju* a decade later, also expressly acknowledging comparative state practice and international treaty law. The high ratification levels of treaties, such as the ICCPR, CAT and the CRC, had suggested an established international law norm of a ban on the juvenile death penalty norm, by the time these respective cases were decided in the US and India. This was supported by domestic state practice in the form of legislation

and other moves away from a juvenile death penalty. The recognition of these global developments by domestic courts connects their comparative methodology to this progression in treaty and customary norms. The following section demonstrates how different national courts more expressly cross-cite each other's decisions with respect to another death penalty subordinate issue, extensive delays in the execution of convicted capital offenders.

7.7. DELAY

The death row phenomenon refers to the extensive delays that occur between a death sentence being imposed by a court and execution. The leading cases from India, the US and elsewhere on this topic provide evidence of cross-citation from the same pool of cases and jurisdictions, on a discrete death penalty sub-issue. The path from the emergence of a normative trend against delays on death row commences in India in 1992, and after a detour through Africa (Zimbabwe) and Europe (the European Court of Human Rights), is developed further in a dissenting judgment in the US in 1999. Whilst it cannot be said that there is an established blanket customary rule against delays of the carrying out of death sentences, this series of cases illustrates the manner in which different national courts build both normative content and momentum around a specific issue. The breakthrough decision in India also followed shortly on the heels of the introduction of the Second Optional Protocol in the ICCPR system in 1989. Further, the period during

which these decisions were handed down occurred during one of the most intense periods of abolition by nation states.⁹⁰³

7.7.1. *Triveniben v State of Gujarat* (1992)

The leading Indian case of *Triveniben v State of Gujarat*, considered the question of the starting point at which a period of delay on death row could be regarded as undue.⁹⁰⁴ Shetty J stated that periods of delay during trials and appeals are due to the aim of ensuring a fair trial, and are for the benefit of the accused.⁹⁰⁵ Only inordinate delay after a final verdict could be a basis for approaching the court and challenging the sentence.⁹⁰⁶ The court held that the only relevant period of delay is that following the decision of the appeal court, which is the end of the judicial process. Delays after this period, resulting from petitions for review and repeated mercy petitions, would not be considered undue, whereas undue delay would be that resulting from delays in disposal of the petitions, or caused by the country's Executive.⁹⁰⁷ Although the delay period was therefore quite tightly constrained by

⁹⁰³ Chapter six, Chart B at 200, which indicates that there was a doubling in the number of abolitionist states between 1980 and 2000.

⁹⁰⁴ *Triveniben v State of Gujarat* (1992) LRC (Const) 425, 434-5.

⁹⁰⁵ *ibid* 449. The Indian Supreme Court held previously that the cause of delays in death penalty cases is irrelevant in determining the dehumanising effect of the delay. See *Vatheeswaran v State of Tamil Nadu* (1983) 2 SCC 68, 353.

⁹⁰⁶ This line of reasoning was supported in *Daya Singh*, where the Indian Supreme Court was faced with an appeal against a death sentence on the basis of an unjust delay between sentencing and execution. The appellant had been sentenced in 1978, the appeal process had terminated in 1988, and two years had now passed since a further mercy application. Sharma J held that an application could be brought on the basis of undue delay, however the delay prior to 1988 would not be considered by the court. The court stressed that it was not laying down a general rule of two years. See *Daya Singh v Union of India and others* (1992) LRC (Const) 452, 454 and *Sher Singh v State of Punjab* AIR 1983 SC 465, where the court confirmed that there was no hard and fast rule regarding the two-year rule.

⁹⁰⁷ *Triveniben v State of Gujarat* (1992) LRC (Const) 425, 435.

the Indian Supreme Court, this was the first express recognition by a domestic apex court that delays could vitiate a death sentence.

7.7.2. *Catholic Commission for Justice, Zimbabwe v Attorney-General* (1993)

The recognition of a principle that delay on its own could implicate the lawfulness of the death penalty was subsequently embraced in other jurisdictions. In Zimbabwe, the prisoners in the *Catholic Commission* case in Zimbabwe were on death row for four to six years.⁹⁰⁸ In this 1993 decision, Gubbay CJ commenced an extensive discussion of comparative law, by declaring that the decision of the Zimbabwean Supreme Court twenty-five years previously was now out of step with more enlightened thinking exemplified in recent cases in other foreign jurisdictions.⁹⁰⁹ He cited with approval Indian and American judges regarding the mental and physical anguish of the death row phenomenon, noting that the Indian constitution does not contain a cruel and unusual punishment clause.⁹¹⁰ Caribbean cases were also reviewed, with the minority opinion of the Privy Council in *Riley* favoured.⁹¹¹

⁹⁰⁸ *Catholic Commission for Justice v A-G, Zimbabwe* 1993 (4) SA 239 (ZS).

⁹⁰⁹ *ibid* 252.

⁹¹⁰ *ibid* 249-253. In respect of American cases dealing with the death row phenomenon, he referred to the State courts of California and Massachusetts that recognise delay as a relevant constitutional factor (at 255).

⁹¹¹ *ibid* 258. Gubbay CJ also discussed the extradition cases of *Soering v United Kingdom* (1989) 11 EHRR 439 and *Kindler v Canada* [1991] 2 SCR 779, preferring an approach which recognised the desire to appeal one's sentence as a natural desire.

7.7.3. *Pratt and Another v Attorney-General for Jamaica* (1993)

Shortly thereafter in *Pratt*, Lord Griffiths reviewed the now established jurisprudence from Zimbabwe and India in a Privy Council decision considering the lawfulness of a fourteen year period on death row. Lord Griffiths cited the *Catholic Commission* case as holding that ignoring delays in death row cases is artificial and unrealistic.⁹¹² The Privy Council was an institution long predating the existence of the Zimbabwean Supreme Court, and yet was influenced by the latter's jurisprudence. The court also disagreed with a previous Privy Council decision, and instead used a foreign precedent to discount the value of an indigenous precedent.⁹¹³

⁹¹² *Pratt and Another v Attorney-General for Jamaica* (1993) 98 ILR 335 (PC) 350-352. The court concluded at 355-6 that an appeal to the Judicial Committee and the two international human rights bodies was not to be regarded as frivolous. The court did not want to discourage Jamaica from membership of IACHR and UNHRC systems, from whose wisdom there might be benefit. Lord Griffiths also referred to the case law of the European Court of Human Rights, in order to establish what was an inappropriate delay between conviction and execution. He concluded that fourteen years is double the time the European Court thought would be an infringement of article 3.

⁹¹³ *Abbott v Attorney General of Trinidad and Tobago* (1979) 1 WLR 1342. For further Privy Council and Caribbean death penalty jurisprudence, see *Spence v The Queen* (unreported, 2 April 2001) confirmed on appeal by the Privy Council in *The Queen v Peter Hughes* [2002] 2 AC 259, where the Eastern Caribbean Court of Appeal, in striking down the mandatory death penalty, stated that the 'collective experience and wisdom of courts the world over must be considered. One is compromised by paying homage to unenlightened common law relics or slavish adherence to the outmoded mores of yesteryear.' (para 217); *Patrick Reyes v The Queen* [2002] 2 AC 235, 19; *Forrest Bowe Jr v The Queen* [2006] UKPC 10; *Roodal v State of Trinidad and Tobago* [2005] 1 AC 328. See also *Kigula v The Attorney General of Uganda* (2005) AHRLR 197 (UGCC 2005), which relied heavily on *Pratt* for its decision. The prisoners on death row in *Pratt* had previously petitioned the Human Rights Committee (HRC) in 1986. The HRC held that the death penalty in the ICCPR system is not per se cruel and unusual, including in respect of the manner of execution and delays on death row, except in limited circumstances. But the Committee concluded that article 14 was violated due to a delay in court proceedings in Jamaica leading to an extended period in prison. The delay at that stage of forty-five months was the responsibility of the Jamaican judicial authorities that had mixed up court files and had failed to give satisfactory reasons for the delay. *Pratt and Morgan v Jamaica* 98 ILR 322 (Communications Nos 210/1986 and 25/1987) 333.

7.7.4. *Knight v Florida* (1999)

In 1999, the death row phenomenon question came before the US Supreme Court in *Knight v Florida*. The court was asked to consider whether a two decades or more wait for a death sentence to be carried out is itself so cruel and unusual as to be unconstitutional.⁹¹⁴ The court turned down the hearing of two appeals of two convicted murderers, one on death row in Nebraska for nearly twenty years, and the other on death row in Florida for nearly twenty-five years. Thomas J, concurring in denial of *certiorari*, stated that there is no support in American precedents for a defendant to use the appellate process and then complain of delay. He criticised the minority for their reference to foreign law, stating that 'were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.'⁹¹⁵

In his dissent, Breyer J embarked on a thorough examination of international and foreign tribunal precedents. He referred to case law from Jamaica (The Privy Council), India, Zimbabwe, and the European Court of Human Rights, as courts that have struck down the death penalty on the basis of prolonged delay.⁹¹⁶ He stated that a 'growing number of courts outside the United States - courts that accept or assume the lawfulness of the death penalty - have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhuman,

⁹¹⁴ *Knight v Florida* 528 US 990, 120 S.Ct. 459 (1999).

⁹¹⁵ *ibid.*

⁹¹⁶ *ibid* 461-4. This included the Privy Council case of *Pratt*; the Zimbabwean case of *Catholic Commission*, the Indian case of *Sher Singh v State of Punjab* AIR 1983 SC 465, and the EU case of *Soering v United Kingdom* (1989) 11 EHRR 439.

degrading, or unusually cruel.’⁹¹⁷ Breyer J concluded that a ‘(w)illingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a “decent respect to the opinions of mankind.”’⁹¹⁸

7.7.5. Conclusion

This is a stark example of how comparative state judicial practice can have a direct bearing on a domestic court judgment. The reasoning contained in the comparative precedents was considered together with trends in state practice. The case came before the US Supreme Court at the end of a decade in which there had been a dramatic increase in abolitions at a nation state level, in part due to the rapid growth in constitutional democracies in Eastern Europe and elsewhere. However, it was the minority of the court that endorsed the emergent practice against extended delays on death row. It was however witnessed previously, with the issues of the mentally disabled and the juvenile death penalty, how these minority judges in earlier cases were vindicated over a decade later when these issues came before the court again.

7.8. EXTRADITION

A similar pattern of cross-citation within a pool of cases over an extended period of time occurred with another death penalty sub-issue. Here abolitionist states find themselves in a dilemma when a death penalty country attempts to extradite an

⁹¹⁷ *Knight v Florida* 528 US 990, 120 S.Ct. 459 (1999) 463.

⁹¹⁸ *ibid* 464.

offender from a country that does not permit capital punishment. This factual matrix first arose in the ECHR system in a case involving the UK, and has since also been considered in South Africa and Canada. The cases exhibit once again the emergence of a norm over a period of two decades, to the point where it may be now said that it is international custom that an abolitionist state must refuse to extradite a person to face the death penalty in a receiving state.

7.8.1. *Soering v The United Kingdom* (1989)

The starting point is a case that arose in the ECHR system. In 1989, the applicant in *Soering v The United Kingdom* alleged that the UK had breached his article 3 right to life, by potentially exposing him to the death row phenomenon, as a consequence of his extradition to the US.⁹¹⁹ The court noted that although there is no right not to be extradited in the Convention, if an extradition has the foreseeable consequences of adversely affecting the enjoyment of a Convention right, the obligations of a contracting state could be invoked.⁹²⁰ The decision took place at a time when 84 countries had ratified the ICCPR.⁹²¹ More pertinently, it was the same year that the Second Optional Protocol to the ICCPR was adopted.⁹²²

⁹¹⁹ *Soering v United Kingdom* (1989) 11 EHRR 439.

⁹²⁰ *ibid* 466.

⁹²¹ Chapter six, Chart G at 212.

⁹²² Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414. *Article 1* states that no one within the jurisdiction of a State Party to the present Protocol shall be executed, and that each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

7.8.2. *Kindler v Canada* (1991)

Just two years later the same issue arose in the Canadian Supreme Court in *Kindler v Canada*.⁹²³ The court upheld the right of Canada to extradite offenders to the US without obtaining any assurances that the death penalty would not be applied. Commenting in 1991, La Forest J for the majority stated that ‘the vast majority of the nations of the world retain the death penalty’, whilst acknowledging ‘a growing and, in my view, welcome trend among Western nations over the past 50 years to abolish the death penalty but some have gone against this trend, notably the United States, a fact of especial concern having regard to its size and proximity to this country.’⁹²⁴

Cory J in a dissenting judgment stated that the ‘international recognition of the importance of human dignity culminated in the abolition of the death penalty in many countries’, including the United Kingdom, Australia, New Zealand, Western European countries, as well as Eastern European countries such as the Czech Republic, Hungary and Romania.⁹²⁵ Whilst the position was different in the United States, the ‘commitment of the international community to human dignity, and the trend in Western nations towards abolition, paralleled Canada’s own international stance.’⁹²⁶

⁹²³ *Kindler v Canada* [1991] 2 SCR 779.

⁹²⁴ *ibid* 832.

⁹²⁵ *ibid* 806-807.

⁹²⁶ *ibid*.

7.8.3. *UN Human Rights Committee (1991)*

When *Kindler* was brought before the UN Human Rights Committee in 1991, it observed an evolution in international law towards abolition, illustrated by the ICCPR optional protocol and the fact that many states that retain the death penalty in domestic legislation, have abolished it in practice.⁹²⁷ The Committee later reaffirmed in *Ng v Canada* that a state that has abolished the death penalty should give serious consideration to its own chosen policy.⁹²⁸ In both cases, the Committee emphasised that States should pay heed to the emerging trend in the international community towards abolition.

7.8.4. *United States v Burns (2001)*

A decade later in 2001, in *United States v Burns*, the Canadian Supreme Court was faced once again with precisely the same question as to whether extradition from Canada to the US without assurances regarding the death penalty would be in breach of the Canadian Charter. This time the court was far more directly critical of the United States position, noting that the death penalty was under internal attack in the United States. The court concluded that its decision was 'consistent

⁹²⁷ *Kindler v Canada* (Communication No 470/1991) 98 ILR 426, 445.

⁹²⁸ *Ng v Canada* (Communication No 469/1991) 98 ILR 479, 502. In 1993, in *Cox v Canada*, the HRC recalled its General Comment on article 6, where it stated that while states are not obliged to abolish the death penalty, they are obliged to limit its use. General Comment No. 6/16 of 27 July 1982 [6], cited in *Cox v Canada* (Communication No 539/1993) (1994) 15 HRLJ 410 [16.1]. Although Canada was not party to the Second Optional Protocol at the time, the HRC commented that Canada's domestic abolition of the death penalty was relevant to its extradition treaty obligations. Therefore when exercising a permitted discretion under an extradition treaty (such as seeking assurances), a state that has abandoned capital punishment is expected to give serious consideration to its own policies when deciding whether to extradite or not. But the HRC noted that the availability of due process in the receiving state of Pennsylvania meant that 'serious consideration' was given by Canada, and it was permitted to extradite in the circumstances [16.1].

with the practice of other countries with whom Canada generally invites comparison, apart from the retentionist jurisdictions in the United States,' siding with the part of the US that had abolished the death penalty.⁹²⁹

The court noted that the 'abolition of the death penalty has emerged as a major Canadian initiative at the international level, and reflects a concern increasingly shared by most of the world's democracies'. The court reaffirmed the relevance of Canada's international human rights obligations and international human rights law sources to its method of constitutional interpretation, by emphasising the relevance of international relations instruments that establish extradition with assurances as an international norm.⁹³⁰

The court further observed that Canada was one of the only remaining states that had abolished the death penalty but continued to extradite without assurances, and concluded that although there was not yet an international norm against the death penalty, there was 'significant movement towards acceptance internationally of a principle of fundamental justice that Canada as already adopted internally, namely the abolition of capital punishment.'⁹³¹ After commenting that state practice is 'frequently taken as reflecting underlying legal principles', it was noted that, since *Kindler* in 1991, more states had become abolitionist, including

⁹²⁹ *United States v Burns* [2001] 1 SCR 283 [128].

⁹³⁰ *ibid* [78], [80]-[84]. This included the European Convention on Extradition (adopted 13 December 1957, entered into force 18 April 1960) European Treaty Series 24, Article 11; Model Treaty on Extradition, UN General Assembly Resolution 45/116 (1990) of 14 December 1990, Article 4(d); UN Commission on Human Rights Resolution 61 (1999) of 28 April 1999 and UN Commission on Human Rights Resolution 65 (2000) of 27 April 2000).

⁹³¹ *United States v Burns* [2001] 1 SCR 283 [83], [89].

'all of the major democracies except some of the United States, India and Japan.'⁹³² Reference was made to trends in worldwide state practice:

The existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend to abolition in the democracies, particularly the Western democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada.⁹³³

The harmonisation of Canadian and international norms identified by the court is for all intents and purposes a customary international law conclusion. *Burns* was heard by the Canadian Supreme Court at the end of the 1990's, a period in which there had been a tremendous growth in the number of nation states, and the ratification levels of the various pertinent treaties, including the ICCPR, the Second Optional Protocol and the CAT. Further, the abolitionist trend identified by the minority in *Kindler* in 1991 had solidified to such a degree that the majority of the court could now make this a material consideration in its findings. Around the same time, a similar case was brought to court in South Africa.

⁹³² *ibid* [90]-[91]. The court also referred to Amnesty International statistics that stated that 85% of the world's executions in 1999 were accounted for by only five countries: the United States, China, Congo, Saudi Arabia and Iran.

⁹³³ *ibid* [92].

7.8.5. *Mohamed v President of the Republic of South Africa* (2001)

The South African Constitutional Court was faced with a similar case concerning an extradition from the now abolitionist South Africa to the US. The lawfulness of an extradition request by the US in respect of a bomber of the US embassy in Tanzania in 1999, Khalfan Khamis Mohamed, was in dispute. Mohamed was captured in Cape Town, South Africa, and extradited to the US without any assurances that the death penalty would not be implemented in the event of a conviction.

The court held that a refusal by an abolitionist state to extradite a person to a death penalty state is 'consistent with the practice followed by countries that have abolished the death penalty.'⁹³⁴ The court relied on the change of law in Canada, from *Kindler* to *Burns*.⁹³⁵ The court also referred to the ECHR cases of *Soering* and *Chahal*, which dealt with extradition and deportation of persons to territories where they would face inhuman or degrading punishment.

The court noted that these 'cases are consistent with the weight that our Constitution gives to the spirit, purport and objects of the Bill of Rights and the positive obligation that it imposes on the state to protect, promote and fulfil the

⁹³⁴ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) [45]. The court referred here to another suspect, Mahmoud Mahmud Salim, whom the US attempted to extradite from Germany. The German government sought and secured an assurance from the United States government as a condition of the extradition that if he is convicted, Salim will not be sentenced to death.

⁹³⁵ *ibid* [46].

rights in the Bill of Rights.⁹³⁶ The court also relied on international treaty law, such as CAT.⁹³⁷ The court concluded that the international norm against extradition from abolitionist to death penalty states is a 'standard that our Constitution demands from our government in circumstances such as those that existed in the present case.'⁹³⁸ In other words, the international standard informed the domestic norm. *Mohamed* was heard shortly after *Burns*, and this foreign case had a significant impact on the Constitutional Court.⁹³⁹ Although the court was not overturning a previous precedent, as in Canada, it was operating in a new context where a large number of states had abolished the death penalty in the decade following *Makwanyane*. The number increased substantially again when the extradition issue came before the court a decade later, with a further 17% jump in states that turned to abolition during the intervening period.⁹⁴⁰

7.8.6. *The Minister of Home Affairs v Tsebe* (2012)

Another decade on, the same issue once again arose in the South African Constitutional Court, in *Tsebe*. The court was asked to consider the lawfulness of the extradition of a convicted murderer to Botswana, a death penalty state. Zondo AJ reaffirmed both bilateral and regional multilateral treaty norms that allowed a state to refuse to extradite an offender to another state where the

⁹³⁶ *ibid* [59].

⁹³⁷ South Africa is a signatory of the Treaty and ratified it on 10 December 1998.

⁹³⁸ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) [60].

⁹³⁹ *ibid* [46]-[47].

⁹⁴⁰ Chapter six, Chart B at 200.

death penalty is the sanction for an offence for which the sentence is unavailable in the sending state's domestic system.⁹⁴¹

The court followed the principle established in *Mahomed*, to the effect that 'the Government has no power to extradite or deport or in any way remove from South Africa to a retentionist State any person who, to its knowledge, if deported or extradited to such a State, will face the real risk of the imposition and execution of the death penalty.'⁹⁴² After referring to the same Canadian and ECHR cases as dealt with in *Mohamed*, the court concluded that 'the obligations South Africa incurs in terms of treaties concluded with other countries are required to be consistent with its constitutional obligations.'⁹⁴³ Notwithstanding this reference to the tension between domestic and international obligations, the court upheld the obligation not to extradite as being consistent with South African law. The court's unequivocal commitment to a consistency between its domestic ruling and international law, was no doubt influenced by the continuing high levels of treaty ratification in the preceding decade.⁹⁴⁴

⁹⁴¹ *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC) [31]-[32]. Extradition Treaty between South Africa and Botswana, Proclamation No. R118 1969, Government Gazette 2376, 2 May 1969, article 6; Protocol on Extradition, Southern African Development Community (adopted 3 October 2002, entered into force 1 September 2006)

http://www.sadc.int/files/3513/5292/8371/Protocol_on_Extradition.pdf, accessed 1 November 2015, article 5(c).

⁹⁴² *ibid* [43].

⁹⁴³ *ibid* [64]. The Extradition Treaty between South Africa and Botswana permitted either state to refuse to extradite if it did not have the death penalty on its statutes whilst the receiving state permitted capital punishment [31].

⁹⁴⁴ Chapter six, Chart G at 212, which demonstrates the marked increase in ratification in the 1990's and then again after 2000, in respect of the ICCPR, Second Optional Protocol and CAT.

7.8.7. Conclusion

Although not one of the three selected jurisdictions, the shift in Canada from *Kindler* to *Burns* demonstrated a clear nod by a domestic court to changes in comparative state practice and applicable Canadian treaty commitments. The SA Constitutional Court drew on these changes in Canada and elsewhere, as well as the underlying reasoning used in *Burns*. Cross-citation, when used in this manner, is not merely a tool of interpretation, but is bound up with considerations of custom and treaty law.

7.9. CONCLUSION

International law has played an ever increasing role in death penalty cases in the US, India and South Africa. The proliferation of treaty law dealing with the fundamental unlawfulness of capital punishment, as well as subordinate issues such as the juvenile death penalty, offers a substantial pool of normative material to which a domestic court can refer. On the other hand, widespread practice by states has reached the level where customary international law norms can arguably now be evidenced. In many instances, there is an overlap between conventional and customary international law. Sometimes it can be observed that treaty rules are codifications of customs. On other occasions, a particular norm has reached customary status regardless of the level of corresponding treaty ratification.

When a domestic court draws on international law, whether treaty or customary, the court is acting both nationally and internationally. The court's decision will be a ruling on a domestic constitutional point, informed by both national and international law.⁹⁴⁵ On the other hand, in terms of the doctrine of sources, a domestic decision also draws on, informs, develops and enforces international law.⁹⁴⁶ It can be difficult at times to distinguish domestic law from international law, and it may be preferable to refer to hybrid norms that contain both elements.⁹⁴⁷ Whilst each jurisdiction will have its own rules regulating the relationship between national and international law, the methodology it employs, in drawing on comparative case law in death penalty decisions, reflects variations on a theme of judiciaries performing in the international law arena.

No customary rule has yet come into being that holds the death penalty to be unlawful in all circumstances in such a manner that would bind states even where they were persistent objectors. But there has been a marked progression from *Furman* and *Gregg* in the US, through to *Makwanyane* in South Africa, and *Satishbhushan* in India. The South African Constitutional Court could, two decades

⁹⁴⁵ A Roberts 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 61. Roberts refers to the potentially contradictory treatment of international law in accordance with domestic constitutional law, as compared with what is demanded by international law itself. Cleveland suggests that international law is not enforceable through the common law but independently as international law itself. See SH Cleveland 'Our International Constitution' (2006) 31(1) *Yale Journal of International Law* 10; CA Bradley and JL Goldsmith 'Customary International Law as Federal Common Law: A Critique of the Modern Position' 110 *Harvard Law Review* 815 (1997).

⁹⁴⁶ A Roberts 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57.

⁹⁴⁷ *ibid* 77; L Antonioli 'Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law before US Federal Courts' (2005) 12 *Indiana Journal of Global Legal Studies* 651; C Ochoa 'Access to US Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claim Act' (2005) 12 *Indiana Journal of Global Legal Studies* 631.

after *Furman*, reached its decision in a world in which the majority of states had become abolitionist *de lege* or *de facto*. Notwithstanding the textual barriers to the complete elimination of the death penalty in India, the environment of overwhelming levels of ratification of the ICCPR and other key treaties brought about a shift in the court's point of view in 2014, compared with *Bachan Singh* in 1980.

The process in which the courts develop a norm in a progressive manner over time is seen most clearly in juvenile death penalty decisions. The US witnessed an about turn from *Stanford* in 1989, to *Roper* in 2005. This marked departure from earlier precedent took place at a time when the US had become a pariah in global terms as a user of the juvenile death penalty. The emergent norm captured in article 6(5) of the ICCPR had become prolific by the end of the twentieth century, where the proscription was now contained in the Second Optional Protocol to the ICCPR and regional instruments, as well as the CAT and the CRC. The US Supreme Court, not without vigorous disagreement between the majority and the dissenters, drew on the widespread patterns of normative conformity both in international treaty law and comparative practice around the juvenile death penalty. The court's review of state practice in particular bore the hallmarks of the type of quantitative assessment that is necessary for the recognition and enforcement of customary norms.

The shift in international practice led to the Indian legislature introducing a statute that outlawed the juvenile death penalty, which was upheld in the recent

judgment of *Raju*. The Indian Supreme court's seamless discussion of both treaty law and comparative state practice demonstrates the hybrid nature of a domestic court completing the normative loop at both a national and international level. The ruling was both a matter of distilling domestic constitutional law, and reinforcing an international law rule.

The *Roper* decision was foreshadowed in the US by the Supreme Court's treatment of the issue of imposing the death penalty on the mentally disabled. The court again had reversed its earlier precedent in *Penry*, in favour of joining worldwide trends in *Atkins*. The Indian Supreme Court followed that decision about a decade later, in a case that both affirmed and enforced a customary rule against the execution of the mentally disabled. Similar patterns in cross-citation, reflecting normative development in both national and international spheres, can be seen in the treatment of the issue of delays on death row. *Knight* was the culmination of a line of cases circumscribing extensive delays in the execution of capital offenders. This group of cases showed how a norm might emerge through various national courts progressively interacting with a growing body of domestic precedents. Further, the scale and momentum of a converging practice carries a separate weight, assisted by parallel developments in treaty law.

Another line of domestic cases involving the extradition of offenders from abolitionist states to death penalty states exhibits the same tendencies. Canada shifted over a twenty-year period to the European position, to the effect that extradition by an abolitionist state to a death penalty country was impermissible.

Both treaty law and an incontrovertible trend in state practice drove the court's change in thinking. The South African Constitutional Court referred to these qualitative case law precedents from Canada. Further, the court also examined more quantitative normative patterns. This presents a further example of the interplay between cross-citation, comparative practice and international law. The death row and extradition jurisprudence reflects domestic courts making both discrete references to particular foreign judicial precedents, and also taking cognisance of broader normative trends over extensive timeframes.

The US Supreme Court's use of foreign and international law in cases concerning individual rights, including in respect of cruel and unusual punishment, has ostensibly reduced these sources to 'background principle informing the courts search for the fundamental values embodied in constitutional text.'⁹⁴⁸ In the court's Eighth Amendment decisions, the principle has been well established that international law performs a secondary role of confirming a national consensus on an issue such as capital punishment.⁹⁴⁹ However, even in the US the pattern of decision-making in death penalty cases appears to confirm that comparative law has played a more material role in the outcome of those decisions than mere background confirmation of a domestic consensus.⁹⁵⁰

⁹⁴⁸ SH Cleveland 'Our International Constitution' (2006) 31(1) Yale Journal of International Law 63.

⁹⁴⁹ *ibid* 18.

⁹⁵⁰ For a judge who has embraced a comparative approach when faced with an international treaty rule, it is perhaps surprising how critical Scalia is of having regard to foreign state practice in a capital punishment context. As with the South African Constitutional Court in *Makwanyane*, it evidences confusion about the applicability of customary international law in human rights cases, both in terms of international law and constitutional law principles. See SH Cleveland 'Our International Constitution' (2006) 31(1) Yale Journal of International Law 77-79.

Courts play a dual role in the development and enforcement of international law. National judicial decisions serve as evidence of custom, but they are also a 'subsidiary means of determining the existence and content of international law'.⁹⁵¹ When a domestic court reaches a decision on an issue that has international law dimensions, as with death penalty cases, its judgment will be both an enforcement of international law (the contents of which are subjectively determined by that court) and an act of state practice further embedding the relevant norm as international custom.

International law is less a distinct bundle of rules waiting for domestic courts to discover or enforce, but rather a continually contested area where courts must attempt to both shape its development and apply those rules that are affirmed by widespread consensus by states.⁹⁵² Where domestic courts embrace a widespread and widely accepted foreign practice, it becomes clear that courts are engaging with and enforcing international custom, rather than merely treating these comparative sources as persuasive materials.⁹⁵³ In this manner, cross-citation can be used to both generate and apply binding norms from the international law regime, and perform a function that moves well beyond merely being a tool of judicial interpretation.

⁹⁵¹ A Roberts 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 62.

⁹⁵² *ibid* 80; A Bradford and E Posner 'Universal Exceptionalism in International Law', February 2010, University of Chicago, Public Law Working Paper No. 290.

⁹⁵³ SH Cleveland 'Our International Constitution' (2006) 31(1) *Yale Journal of International Law* 11, 92.

CHAPTER 8: CONCLUSION

This thesis described how the apex courts of the US, India and South Africa have drawn on comparative law in domestic death penalty cases. This thesis proposed a matrix of three considerations, in order to potentially explain this comparative judicial methodology. Firstly, the question was raised whether courts draw on foreign cases merely as a method of textual interpretation, especially where there is a paucity of local sources. Secondly, this thesis assessed if judges borrow from comparative precedent in order to assess patterns in the evolving values that underpin bill of rights clauses, like the cruel and unusual punishment proscription. Finally, it was investigated whether the reference to comparative death penalty norms, often in conjunction with international treaty law, reflects the domestic judicial development and enforcement of international rules of custom. Since capital punishment norms are implicated in both national and international law the interplay and overlap between local constitutional law and the international legal regime was examined.

The following conclusions can now be articulated. A classic literalist approach to constitutional provisions, such as the right to life and the right not to be subjected to cruel and unusual punishment, is often motivated by a desire to respect the separation of powers doctrine and the inherent limits of the judiciary's constitutional mandate.⁹⁵⁴ However, the vague construction of these fundamental

⁹⁵⁴ R Posner 'The Supreme Court 2004 Term: Foreword: A Political Court' (2005) 119 *Harvard Law Review* 31, 88; 'The United States: Eclecticism in the Service of Pragmatism' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 27; SG Calabresi "A Shining City on a Hill": American

rights clauses makes it necessary for judges to look beyond the text in order to solve constitutional questions. The inclusion of the same rights in numerous national constitutions and international instruments, together with the accessibility of online legal databases, means that there are now widely available examples of how similar human rights cases have been dealt with in other jurisdictions and in the international law arena.⁹⁵⁵ Here judges primarily consult comparative sources, particularly foreign case law, for learning purposes. Cross-citation is used in this manner as a tool of interpretation, and comparative law is of persuasive value.⁹⁵⁶

Similarly, where courts make reference to 'shared values', comparative sources remain influential and not binding on the borrowing court. The wording used in cruel and unusual punishment clauses is laden with open-ended value-laden references. This requires that judges assess how capital punishment has been treated in other countries, in order to more specifically address what conduct is too cruel, too unusual, or an invasion of dignity. This evolutive approach has been accepted as embedded in the normative standards of humanity and decency at play in death penalty cases.⁹⁵⁷ The US Supreme Court attempted to make this search for values a more objective process, by having regard to objective indicators of threshold standards, such as domestic state legislation, jury patterns,

Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' Boston University Law Review Vol 86 (2006) 1335.

⁹⁵⁵ J Waldron *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale U Press New Haven 2012) 120; GL Neuman 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863, 1864.

⁹⁵⁶ E Engle 'European Law in American Courts: Foreign law as evidence of domestic law' (2007) 33 *Ohio Northern University Law Review* 99.

⁹⁵⁷ *Trop v Dulles* 356 US 86, 78 S.Ct. 590 (1958) 100-101; *Furman v Georgia* 408 US 238, 92 S.Ct 2726 (1972) 330; *Triveniben v State of Gujarat* [1992] LRC (Const) 425, 443; *S v Makwanyane* (1995) 3 SALR 391 (CC) 487; H Klug 'South Africa: From Constitutional Promise to Social Transformation' in J Goldsworthy *Interpreting Constitutions* (OUP Oxford 2006) 292-293.

and then, later, the legal situation in other countries.⁹⁵⁸ Waldron has described this as an application of the law of nations doctrine, a soft non-binding set of background principles contained in an international common law.⁹⁵⁹ However, this approach fails to explain what is taking place in other jurisdictions like India and South Africa, where the law of nations is a distant memory from an earlier English colonial legal history. A more compelling explanation of the widespread references to foreign law in death penalty cases is that offered by customary international law.

According to the ICJ Statute, domestic judgments can constitute state practice and therefore international custom, or may be considered subsidiary sources of international law.⁹⁶⁰ The status of national court decisions in international law involves a hybridity then in two senses. Firstly, local courts can develop evolving customary norms by becoming party to normative trends and practice. They can also enforce rules that have become binding, where there is sufficiently widespread state practice to justify such a conclusion.⁹⁶¹ The second manner in which cross-citation is composite in nature is where a domestic court plays a dual role in establishing a precedent in local law, whilst simultaneously performing a normative act in international law.

⁹⁵⁸ *Furman v Georgia* 408 US 238, 92 S.Ct 2726 (1972) 278, footnote 18 of Brennan J's judgment.

⁹⁵⁹ J Waldron 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 *Harvard Law Review* 129, 140; PG Carozza 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' *EJIL* Vol. 19 No. 5 (2008) 931, 1082-1083.

⁹⁶⁰ Statute of the International Court of Justice, annexure to The United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI; A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 63.

⁹⁶¹ A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 61.

The citation of foreign law by national courts has ramifications then for both constitutional law and international law. The degree to which the same levels of cross-citation and normative convergence exist with respect to other constitutional questions is perhaps limited. However, there are numerous examples of references to comparative practice and international law in different types of human rights cases, such as euthanasia, homosexuality and affirmative action, where similar considerations of custom may apply.⁹⁶²

Where a national court is selective in the jurisdictions it considers, this qualitative approach is more typical of an interpretative mode. But where a court engages in a comprehensive quantitative assessment of state practice, this is customary international law in action. The convergence between norms across jurisdictions is of interest to the domestic court.⁹⁶³ This is different from a value-focused approach that is also interested in convergence. Here widespread practice can lead to a conclusion that the consensus rule is binding on the domestic court on an international law basis alone. This approach was expressly articulated in these terms in *Domingues*, where the Commission noted that the 'articulation of an international norm proscribing the execution of juvenile offenders through international practice has been accompanied by the expression of a similar

⁹⁶² SH Cleveland 'Our International Constitution' (2006) 31(1) *Yale Journal of International Law* (2006) 1, 2; C McCrudden 'A Part of the Main: The Physician-Assisted Suicide Cases and Comparative Law Methodology in the US Supreme Court' in CE Scheider *Law at the End of Life: The Supreme Court and Assisted Suicide* (U of Michigan Press Ann Arbor 2000).

⁹⁶³ V Jackson *Constitutional Engagement in the Transnational Era* (Oxford University Press Oxford 2010) 8.

standard in the domestic practice of states.⁹⁶⁴ The courts of the US, India and South Africa have all on occasion engaged in this type of judicial reasoning, whilst emphasising that consistency in state practice is only of supportive or persuasive value. However, in joining with established international practice, these courts are developing and enforcing international custom. In this manner, it can be said that courts are “‘finding” customary international law’ and ‘determining which of these norms is directly applicable within the domestic legal system and how they interact with domestic norms.’⁹⁶⁵ The clearest example of this is with respect to the juvenile death penalty.

The idea that cross-citation is an exercise in international law is corroborated by the significant developments in international treaty law since World War II. Besides the creation of an overarching international human rights law under the UN system from the time of the UDHR in 1948, key treaties have been adopted. These include the ICCPR and Second Optional Protocol, the ECHR and Sixth Optional Protocol, the IACHR, CAT and CRC, not to mention various UN resolutions. These multilateral treaties have witnessed remarkable ratification levels, especially in the last three decades. The death penalty has consequently been substantially curtailed if not largely abolished by international convention. Although the death penalty is not *per se* unlawful in international law, certain

⁹⁶⁴ *Michael Domingues v United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., Doc. 5 rev. 1 (2002) [72] and 913.

⁹⁶⁵ E Benvenisti and GW Downs ‘National Courts, Domestic Democracy and the Evolution of International Law’ 2009 (20)1 *European Journal of International Law* 59, 67; E Benvenisti and GW Downs ‘Court Cooperation, Executive Accountability and Global Governance’ Tel Aviv University Law School, Tel Aviv University Law Faculty Papers 2009 Paper 108, 9.

subordinate norms such as the execution of juveniles or the mentally disabled have become universally accepted as illegal. In addition, most countries have now in various ways *de facto* or *de lege* abolished capital punishment. These shifts in international treaty law and worldwide state practice parallel the trend in death penalty case law towards the eradication of capital punishment, and the increased use of cross-citation.

Domestic courts are not international tribunals. They are governed by national law, and must apply international law in the manner allowed for by their domestic constitutional arrangements. Yet this thesis has shown that national courts are developing and enforcing widely accepted international human rights norms in death penalty cases, notwithstanding any conflicts with domestic law. As Jackson notes that

the success of both domestic and international law ... is dependent on independent guarantors – mechanisms, internal or external, to secure the enforcement of these rights – a classic function of (at least Western) constitutions, enforced through judicial review, and now interlocking with the interests of the international community and echoed in the international law of human rights.⁹⁶⁶

This interconnection between domestic courts and international human rights law is significant for both national and international legal systems. Justice Breyer referred recently in an extra-curial comment to the increasing reality of

⁹⁶⁶ V Jackson *Constitutional Engagement in the Transnational Era* (Oxford University Press Oxford 2010) 267.

'harmonised multinational enforcement efforts' by national courts.⁹⁶⁷ This process would be enhanced and legitimised by an express acknowledgment that what national judges are doing, when engaging with foreign law, is by definition an act in customary international law.

⁹⁶⁷ S Breyer *The Court and the World: American law and the New Global Realities* (Knopf New York 2015) 7.

APPENDIX I

Table of main cases used in thesis, with substantive chapter references.

	Ch. 4	Ch. 5	Ch. 7
India			
<i>Bachan Singh v State of Punjab</i> AIR 1980 SC 898	x		x
<i>Deena Dayal v Union Of India</i> AIR 1983 SC 1155	x	x	
<i>Triveniben v State of Gujarat</i> (1992) LRC (Const) 425	x	x	x
<i>Swamy Shraddananda v State of Karnataka</i> AIR 2008 SC 3040	x		x
<i>Santosh Kumar Satishbhushan v State Of Maharashtra</i> (2009) 6 SCC 498	x	x	x
<i>Shatrughan Chauhan v Union of India</i> (2014) 3 SCC 1	x	x	x
<i>Subramanian Swamy v Raju</i> (2014) 8 SCC 390			x
South Africa			
<i>Minister of Home Affairs v Tsebe</i> 2012 (5) SA 467 (CC)	x		x
<i>Mohamed v President of the Republic of South Africa</i> 2001 (3) SA 893 (CC)	x		x
<i>S v Makwanyane</i> 1995 (3) SA 391 (CC)	x	x	x
United States			
<i>Atkins v Virginia</i> 536 US 304, 122 S.Ct. 2242 (2002)		x	x
<i>Furman v Georgia</i> 408 US 238, 92 S.Ct. 2726 (1972)	x	x	x
<i>Gregg v Georgia</i> 428 US 153, 96 S.Ct. 2909 (1976)	x	x	
<i>Roper v Simmons</i> 543 US 551, 125 S.Ct. 1183 (2005)			x
<i>Stanford v Kentucky</i> 492 US 361, 109 S.Ct. 2969 (1989)			x
<i>Thompson v Oklahoma</i> 487 US 815, 108 S.Ct. 2687 (1988)	x	x	x
<i>Trop v Dulles</i> 356 US 86, 78 S.Ct. 590 (1958)	x	x	
<i>Woodson v Carolina</i> 428 US 280, 96 S.Ct. 2978 (1976)	x	x	
Inter-American Commission on Human Rights			
<i>Michael Domingues v United States</i> , Case 12.285, Report No. 62/02, Inter American Commission on Human Rights, Doc. 5 rev. 1 (2002) 913			x
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