A Journey of Two Countries: A Comparative Study of the Death Penalty in Israel and South Africa

Michelle M. Sharoni
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BY Michelle M. Sharoni*

Introduction

The ethical, moral and philosophical dilemmas associated with the death penalty have been exhaustively researched and explored. Nonetheless, the death penalty remains a complex and controversial topic in many countries all around the world. Two countries, Israel and South Africa, have traveled along diverse and fascinating paths in deciding whether the death penalty is constitutional. This is their story.

This note was partially inspired by the following statement: "No one gives us rights. We win them in struggle. They exist in our hearts before they exist on paper. Yet[,] intellectual struggle is one of the most important areas of the battle for rights. It is through concepts that we link our dreams to the acts of daily life."\(^1\)

The decision to abolish the death penalty has been a struggle for human rights, primarily, the right for life. This note examines the intellectual struggle in maintaining that right by investigating the history of the death penalty in Israel and South Africa, emphasizing the process of its abolition. Part I of this note reviews the sources of Hebrew law, the history of the death penalty in Israel and the Jewish legal system. Part II addresses the history of the death penalty in

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* J.D. candidate, Hastings College of the Law, 2001. This note is dedicated to my parents, Dr. Asher and Tova Sharoni, who have always taught by both word and deed; and whose love and support encouraged my intellectual curiosity.

South Africa, from the period of the early settlers up to the recent unanimous decision made in *S. v. Makwanyane and Another* (1995) to abolish the death penalty. Part III examines international trends to abolish the death penalty. Part IV proposes the steps necessary to ending the death penalty in countries that still assert it.

I. Israel's Perspective on the Death Penalty

A. Origins of Hebrew Law

Hebrew law is rooted in the Torah and the Talmud. The Torah consists of the five books that Moses received at Mount Sinai which include: Genesis, Exodus, Leviticus, Numbers, and Deuteronomy. The Torah consists of legal principles as they relate to all aspects of life. All other sources of Jewish law are derived from the essence of the Torah. According to the Jewish perspective, the Torah is considered the most authoritative and sacred source of Jewish law.

The Talmud consists of the Mishnah and the Gemara. The Mishnah describes the unwritten tradition of many decades, including different aspects of Jewish life. The Gemara explains the Mishnah.

B. Eye for an Eye

According to the Torah, the death penalty was imposed for various offenses, including intentional murder, crimes against the family, and religious crimes.

Hyman E. Goldin described the offenses for the death penalty as falling under one of six categories: (1) eighteen moral abuses, arising out of illicit sexual relations; (2) twelve violations of religious laws, including witchcraft, desecration of the Sabbath and idolatry; (3) three crimes against one's parents; (4) murder; (5) kidnapping and

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2. Mechachem Elon, *Authority, Rabbinical* in *The Principles of Jewish Law*, 54 (1975). The “Torah” here refers only to the written Torah, and not the oral Torah. The oral Torah also received by Moses at Mount Sinai consisted of all of the Jewish legal principles not explicit in the written law.


4. Id.

5. Id.


7. Id. at 32-33.

sitting into slavery; and (6) rebelliousness.\(^9\)

The Torah illustrates the general notion regarding the aptness of the death penalty in one of its most infamous statements: when men fight and damage results, "the penalty shall be life for life, eye for an eye, tooth for tooth . . ."\(^10\) Under the Torah's law, murder is a crime against society and thus society is required to atone for the crime.\(^11\)

**C. The Sanctity of Human Life in Hebrew Law**

The sanctity of life is so essential in Jewish law that it necessitates violating the Sabbath, Yom Kippur and Tishah Be'Av (the holiest days in the Jewish religion) even if only to treat the life of one who is sick or injured and is surely to die soon thereafter. Based on this view, all human life is treated equally. There is no difference between the killer of a one-day-old baby or that of a one hundred-year old man. In each of these theoretical scenarios, the person responsible for the act is a killer and should be punished by being put to death.

The value of life has no measure or gradation, the life of the very old or the very young are equally worthy.

One may argue that there is a paradox in existence here. According to the Jewish perspective, life is sacred. Thus, one would imagine that this view would prevent the implementation of the death penalty. Yet, it is the sanctity of life, which ultimately demands that the killer be punished by death for taking the life of another human being.

The sanctity of all life is the predominant principle in discussions about capital punishment.\(^12\) It is this principle that ultimately rendered the imposition of the death penalty rare or even nonexistent in Jewish law.\(^13\)

**D. Biblical Methods of Executing Criminals**

In Biblical times, punishment was to be carried out swiftly. The

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10. Exodus 21:23-24; see also Leviticus 24:17 ("If a man kills any human being, he shall be put to death.").
12. See generally Erez, supra note 8.
13. Id.
person avenging the death of the victim took the life of the offender. The Torah proscribes four methods for the death penalty: stoning, burning, slaying, and hanging.

Stoning was considered the most severe form of execution. The entire community was expected to participate in the stoning execution. Currently, there is no evidence to suggest whether and how the Jews carried out executions by burning. Hanging was only used as a method for executing non-Jews who had followed their own laws. One of the primary objections expressed against the death penalty, particularly hanging, was respect for the image of God.

Throughout Jewish history, selecting an appropriate form of death has been very significant in the minds of many Jewish academics. The rationale behind this selection is, and has always been, the preservation of human dignity coupled with maintaining the spirit of the law.

E. Reluctance in the Imposition of the Death Penalty

Death penalty advocates wishing to find moral and historical justification for implementing capital punishment have misinterpreted Jewish law. While the Torah does refer to imposing the death penalty, Talmudic interpretation reveals that Rabbis developed various hurdles designed to make death sentences virtually impossible.

There have been numerous efforts by Talmudic Rabbis to express their reluctance to impose the ultimate punishment, namely, the death penalty. Rabbi Meir's expressions of anguish best illustrate this resistance: "When a man suffers punishment, what does the Shekinah Divine Presence say? As it were, I am lighter than [m]y head, I am lighter than [m]y arm." This passage expresses the notion

15. Erez, supra note 8, at 29.
16. Horowitz, supra note 9, at 171.
17. See, e.g., Leviticus 26:16 ("The whole community shall stone him."); Numbers 15:35 ("The whole community shall pelt him with stones.").
21. Id. at 33.
23. Mishnah, Sanhedrin 6:5, quoted in Goldin, supra note 9, at 25.
that God is tormented by human suffering and is tired (i.e., exemplified by a heavy head and arm) from its existence. This strong reluctance to impose the death penalty combined with numerous procedural and evidentiary barriers had the practical effect of rendering the death penalty unenforceable.24

F. Procedural and Evidentiary Barriers

The traditional resistance to imposing the death penalty has been evidenced by the various procedural and evidentiary barriers established by the Rabbis. The Rabbis surrounded the accused with many safeguards, making the imposition of the death penalty virtually impossible.25 The goal of the judicial system was to invoke witness testimony that would help the accused, rather than testify that would denounce the accused.26 The rationale behind this process was the Rabbinical fear of convicting and executing an innocent person.27 The tools used to eliminate the death penalty consisted of five major categories: (i) jurisdictional requirements; (ii) procedural requirements; (iii) testimonial requirements; (iv) qualifications pertaining to judges; and (v) sentencing and appellate procedure.

1. Jurisdictional Requirements

The jurisdictional requirements served as the greatest obstacle to the imposition of the death penalty.28 Only a high tribunal of twenty-three judges had the jurisdiction to try capital cases (this tribunal was referred to as Beit-Din).29 If the Beit-Din opened its adjudication process with a unanimous vote against the defendant, then he was acquitted.30 This is because such an opening could only mean that the court had failed to sufficiently engage in the defense of the defendant, since it would be virtually impossible not to find some argument in favor of the defendant.31 The accused could only be convicted if some of the Beit-Din members voted to acquit because that would imply

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25. See De Sola Pool, supra note 14, at 14-15; see also Goldin, supra note 9, at 24.
29. Erez, supra note 8, at 33.
30. Id. at 34.
31. Id.
that the court had considered arguments in favor of the defendant.\textsuperscript{32} Also, the Rabbis denied jurisdiction to any court when the alleged crime was one for which the Torah prescribes banishment as the punishment.\textsuperscript{33}

2. \textit{Procedural Requirements}

The procedural requirements rendered conviction in capital cases practically impossible. Adjudication of capital cases had to start and end in the daytime.\textsuperscript{34}

Two capital cases could not be heard on the same day because briefness of time would prevent the court from engaging itself in the defense of each defendant.\textsuperscript{35} Furthermore, the trial could not be held on the eve of the Sabbath.\textsuperscript{36}

Regardless of the number of witnesses, each eyewitness had to be examined very carefully.\textsuperscript{37} The witnesses were required to be rational adults without any personal relationship to the defendant and could not have any interest in the case.\textsuperscript{38} The judges began deliberations only if, after the testimony of each eyewitness, the evidence appeared to be unfavorable to the defendant.\textsuperscript{39}

The trial was not adversarial in nature; rather, the judges were required to act in defense of the accused.\textsuperscript{40} The Torah required two witnesses in a capital case. Numbers 35:30 states, “Who so killeth any person, the murdered shall be put to death by the mouth of witnesses: but one witness shall not testify against any person to cause him to die.”\textsuperscript{41}

This was a very strict requirement. This passage was read broadly and employed to eliminate the use of circumstantial evidence to convict an accused. The Talmud states, “I saw a man chasing another into a ruin; I ran after him and saw a sword in his hand

\begin{itemize}
\item \textsuperscript{32} \textit{The Code of Maimonedes}, 14 Judges 28, Ch. 9, §§ 1, 2.
\item \textsuperscript{33} \textit{See, e.g.}, Numbers 19:16-20 (person who touches corpse and does not cleanse himself “shall be cut off from Israel”).
\item \textsuperscript{34} \textit{Erez}, supra note 8, at 34.
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Schreiber}, supra note 28, at 268 (quoting \textit{Maimonides, Mishnah Torah} 11:2).
\item \textsuperscript{37} \textit{Horowitz}, supra note 9, at 644.
\item \textsuperscript{38} \textit{Erez}, supra note 8, at 34.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{See, e.g.}, Numbers 35:30 (“[T]he testimony of a single witness against a person shall not suffice for a sentence of death.”).
\end{itemize}
dripping with the other's blood and the murdered man in his death agony. I said to him, You villain! Who killed this man? Either I or you. But what can I do? Your life is not delivered into my hand, for the law says, at the mouth of two witnesses shall he that is to die be put to death.”

3. Testimonial Requirements

The Torah was also interpreted to exclude the testimony of the murderer himself. Thus, a murderer's own confession, no matter the probity, was inadmissible in a capital crime case. This was a strictly guarded rule and all statements that could arguably imply guilt were construed to avoid such interpretation. Jewish law also required witnesses' testimony to be uncontroverted as to any fact. If there was discrepancy between their testimony, it was excluded. In effect, this rule was employed to exclude the testimony of witnesses who would testify to the defendant's guilt.

Moreover, these witnesses endured separate and intense interrogations prior to being questioned about various details of the crime. Rabbi Yochanan Ben Zakkai illustrated this technique when he interrogated witnesses about the number of figs growing on the tree beneath which the crime was committed. Some have argued that the sole aim of this type of questioning was to evade the death penalty.

The Torah also required the defendant to be forewarned of the possible consequences of his actions. The defendant could only be sentenced to die if two witnesses had advised the defendant of the potential consequences of his crime. The accused also must have acknowledged this penalty before the proceeding. This requirement was applicable only to cases where the death penalty, not imprisonment, was at issue.

Furthermore, the court did not recognize the death penalty for

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43. See Erez, supra note 8, at 34.
45. See BLIDSTEIN, supra note 22, at 317.
46. The Code of Maimonides, supra note 32, at 14 Judges 28, Ch. 9, §§ 1, 2.
47. Kazis, supra note 42, at 328.
48. The Code of Maimonides, supra note 32, at 14 Judges 28, Ch. 9, §§ 1, 2.
49. Id.
50. Id.
felony murder. Thus, an accessory was not subject to the death penalty.\textsuperscript{51} The individual sentenced to die had to be the one who directly caused the death.\textsuperscript{52}

Finally, when none of the procedures above could stop the implementation of the death penalty, there was a loophole in Jewish law. The lower courts could implement the death penalty only if the Great Sanhedrin\textsuperscript{53} met within the grounds of the Second Temple.\textsuperscript{54}

4. Qualifications of Judges

Rabbis imposed numerous requirements on the qualification of judges in death penalty cases. For example, men who served on the court had to display compassion.\textsuperscript{55}

Additionally, the men had to be accomplished with impeccable character in the community.\textsuperscript{56} Furthermore, the judges were constrained in their personal activities during the trial. For example, if a capital case was adjourned until the next day, the judges went home in pairs, ate very little, did not drink wine, discussed the case all night, and returned to court the following day.\textsuperscript{57} These requirements exemplify the Rabbi's distaste for the death penalty.

5. Sentencing and Appellate Procedures

As the guilty defendant was led to his death, a person announced the upcoming execution. This provided an opportunity for anyone to say a word in favor of the guilty party.\textsuperscript{58}

On the other hand, if the accused was acquitted at trial, a retrial was improper notwithstanding any new evidence.\textsuperscript{59} If the accused was found guilty, he was immediately taken to be executed.' No appeal was allowed following an acquittal although after a conviction, an

\begin{itemize}
  \item \textsuperscript{51} An accessory could, however, be tried under non-capital procedure and imprisoned. \textit{Sanhedrin} 24:26. However, if an accessory was tried under capital strictures, he was adjudged innocent and released. \textit{Sanhedrin} 18:8.
  \item \textsuperscript{52} \textit{Mishnah Sanhedrin} 6:5, quoted in \textit{GOLDIN}, supra note 9, at 24.
  \item \textsuperscript{53} The Great Sanhedrin was considered the highest court of the land.
  \item \textsuperscript{54} The Second Temple was destroyed in 70 C.E.
  \item \textsuperscript{55} Kazis, \textit{supra} note 42, at 327.
  \item \textsuperscript{56} \textit{DE SOLA POOL}, \textit{supra} note 14, at 32.
  \item \textsuperscript{57} \textit{GOLDIN}, \textit{supra} note 9, at 128.
  \item \textsuperscript{58} \textit{Id.} at 270.
  \item \textsuperscript{59} Kazis, \textit{supra} note 42, at 329.
  \item \textsuperscript{60} \textit{SCHREIBER}, \textit{supra} note 28, at 269.
\end{itemize}
appeal could be made at any time. Finally, in certain instances (e.g., when legal technicalities tainted the trial), the court could commute a death sentence to life imprisonment.

The numerous barriers imposed by the judicial system on the implementation of the death penalty depicts the rarity of execution. Moreover, such barriers show the practical impossibility of sentencing a criminal defendant to death. Although the Rabbis could not supersede the words of the Torah by abolishing the death penalty completely, their Talmudic interpretations had the same effect.

G. Theories Explaining the Rarity of Execution in Israel

In Jewish law, there is a correlation between moral value and the law. As such, religion is the law. The moral force of religion is given explicit effect in the law. There are two moral forces which could possibly account for the court's structuring of the death penalty system to thwart executions. First, as discussed above, the Biblical requirement of mercy reduces the number of executions because of the overriding belief in preserving the sanctity of life. The second possible basis for this phenomenon is the value the Jewish religion places upon the sanctity of human life. In Judaism, the person is viewed as created in God's image. The fact that a person may have been a sinner is of no consequence. The Torah makes no distinction between involuntary killing and premeditated murder, reinforcing the value of all human life. Thus, because the sanctity and value of life is so fundamental under Jewish law, the death penalty is a rare event. How often the death penalty was used is still a matter of speculation, but some scholars have suggested that more than one execution every seven years was unacceptable.

From the analysis above, it is evident that executions in Israel were rare. Mainly, this was due to the procedures that the Sanhedrin and Jewish law required for the implementation of the death penalty. Moreover, executions were infrequent in Israel because of the merger of morality and religion in Jewish law. For in Judaism, religion and moral values are, and always have been, the law.

61. DE SOLA POOL, supra note 14, at 34 (quoting Mishnah Sanhedrin 4:1).
62. See id. at 22-23.
II. South Africa's Perspective on the Death Penalty

A. The History of the Death Penalty in South Africa

In 1652, the Dutch East India Company built its first European settlement in South Africa. At that time, South African courts imposed the death penalty for a variety of offenses, including murder (for which the death penalty was mandatory), rape, treason, arson, theft, robbery, fraud, sodomy, bestiality, and incest. Executions usually took place in public by hanging or decapitation. On occasion, these executions were conducted by slow strangulation, burying alive, or impaling.

In 1795, the British arrived in South Africa. The British Commander, General Craig, pleaded to abolish the torturous executions, suggesting that mere hanging or decapitation would be satisfactory. However, this suggestion was dismissed. Nonetheless, torture stopped in 1796 when the Royal Instructions to the Earl of Macartney ended all forms of legal torture in the British colonies and possessions.

The abolition of the torturous executions in South Africa resulted in a lower number of executions in general. The number of capital crimes decreased between 1840 and 1910, and by 1910, the death penalty was restricted to cases of murder. Although the death

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70. See Kahn, supra note 65, at 221.
penalty was mandatory for murder, the executive branch commuted a large number of death sentences.  

B. The Criminal Procedure and Evidence Act of 1917

In 1917, the Union of South Africa passed its first countrywide Criminal Procedure and Evidence Act ("The Act"). The Act imposed a mandatory death sentence for murder, rape and treason. At first, this seemingly rigid rule had limited impact because juries found defendants guilty of lesser offenses to avoid imposing the death penalty. In 1935, the concept of extenuating circumstances was introduced.

In 1945, the Smuts government appointed an investigatory commission under the leadership of Mr. Justice Landsdown to examine the existence of the death penalty. The commission decided against its abolition. The commission articulated the rationale for its decision when it announced that "in the mind of the undeveloped Native[,] but recently brought into contact with western civilisation and ideas, the sanctity of human life is a matter of less concern than it would be to the western civilised man." The commission distinguished the experiences of abolishment countries by citing the "difference of racial and consequently of social and economic conditions."  

72. Kahn, supra note 65, at 221.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
78. Id.  
80. Kahn, supra note 65, at 221.
81. Id.
82. Id.
83. Id.
84. Id.
85. David Welsh, Capital Punishment in South Africa, in AFRICAN PENAL SYSTEMS 397, 398-99 (Alan Milner ed., 1969). In 1949, the following extenuating circumstances were recognized:  
(i) Immaturity of the mind, as might be found in a youth or mentally undeveloped persons;  
(ii) Degeneracy of the mind, as might be seen in extreme old age;  
(iii) Undue influence of a person in authority, though not amounting in law to coercion;  
(iv) Reason or judgement clouded (e.g. by drink or drugs);  
(v) Distraction of the mind not amounting in law to provocation (e.g. the killing of an unfaithful wife by her husband);  
(vi) A wrong, but not entirely unreasonable belief that a fatal attack was about to occur;  
(vii) Minor degree of participation in a crime;  
(viii) Diminished heinousness (e.g. mercy killings).  
86. PENAL AND PRISON REFORM COMMITTEE, REPORT OF THE PENAL AND PRISON REFORM COMMITTEE 460 (1947).
87. Id.
The next group commissioned to look into penal issues, appointed in 1974, was explicitly prohibited from considering the question of the death penalty.\textsuperscript{78}

The implementation of the death penalty increased in 1948 with the rise of the Afrikaner National Party. The number of capital crimes increased, as the death penalty became a tool of state repression.\textsuperscript{79} During the apartheid era, executions for political offenses were relatively common in South Africa. The first wave of political executions took place in the mid-1960s when about sixty members of the Pan-Africanist Congress (PAC) were executed.\textsuperscript{80} Executions of this type continued until the fall of the apartheid government.\textsuperscript{81}

Executions in South Africa were viewed specifically as tools for controlling and punishing opponents of apartheid.\textsuperscript{82} This is particularly evident in the state's treatment of accused members of banned liberation movements. For instance, in 1983, the execution of three convicted African National Congress (ANC) combatants was timed to coincide with the seventh anniversary of uprisings in the black township of Soweto.\textsuperscript{83}

C. Racism and the Death Penalty

Extensive evidence exists indicating that racial discrimination played a significant role in the implementation of the death penalty in apartheid South Africa. A 1988 Amnesty International study showed that during a one-year period, forty-seven percent of blacks convicted of murdering whites were sentenced to death, compared to no death sentences for whites convicted of murdering blacks, and only two and a half percent for blacks convicted of killing blacks.\textsuperscript{84}

One commentator stipulated that between 1910 and 1975, blacks were executed twenty-seven times more often than whites.\textsuperscript{85} A study

\textsuperscript{79} Bouckaert, supra note 66, at 291.
\textsuperscript{81} Id. at 302.
\textsuperscript{83} Holt, supra note 80, at 303.
\textsuperscript{84} AMNESTY INT'L NEWSL., supra note 71, at 6.
\textsuperscript{85} JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER
of rape sentencing between 1947 and 1969 found that no whites were executed for the rape of black women, despite 288 such convictions. During the same period, 120 out of 844 black men convicted of raping white women were executed.\textsuperscript{86}

Many whites in South Africa perceived themselves as an isolated minority group under constant attack from the majority African population.\textsuperscript{87} After the Civil War, the institution of a rigid penal code and the extensive use of the death penalty were seen as necessary precautions to protect the white minority and to preserve white supremacy.\textsuperscript{88} Many whites believed that the black population had a greater propensity to violence; thus, use of the death penalty against blacks was designed, at least in part, to ingrain and protect the sanctity of white life.\textsuperscript{89}

An examination of the death penalty in South Africa leaves a sobering impression. Although reliable statistics are difficult to obtain, it appears that between 1981 and 1990 approximately 1,100 people were executed in South Africa.\textsuperscript{90} The previous decade (1971-1980) claimed the lives of another 841 people.\textsuperscript{91}

Between 1978 and 1988, the number of executions fell below 100 per year only once. These numbers place South Africa near the top of the world’s executing countries.\textsuperscript{92}

The number of executions per year continued to rise in the late 1980s, reaching a stunning 164 deaths in 1987, the equivalent of almost one execution every two days.\textsuperscript{93}

\textbf{D. The Abolition of the Death Penalty in South Africa}

The abolition of the death penalty in South Africa was an event of historical proportions. With so many criminals being put to death, the abolitionist movement in South Africa began to build strength

\begin{itemize}
\item\textsuperscript{86} Id. at 128.
\item\textsuperscript{87} Welsh, supra note 75, at 419.
\item\textsuperscript{88} Id.
\item\textsuperscript{89} Id.
\item\textsuperscript{90} State v. Makwanyane & Mchunu, 1995 (3) SALR 391, 508 (CC) (O'Regan, J., concurring), available at 1995 SACLR LEXIS 218, at *329.
\item\textsuperscript{91} Id.
\item\textsuperscript{92} Id.
\item\textsuperscript{93} Heads of Argument on Behalf of the Appellants para. 49, Makwanyane, 1995 (3) SALR 391 (CC) (in South Africa, the briefs filed by the parties with the Court are called “Heads of Argument”).
\end{itemize}
throughout the 1970s. The formation of the Society for the Abolition of the Death Penalty in South Africa, headed by B. Van Niekerk, dramatically lowered the number of people being executed. For example, in 1970-73, a total of 246 persons were executed. However, this group soon lost its effectiveness. In 1987, 164 people in one South African city were executed, amounting to “thirty-two times more than [the number of executions in] China[,] with its population of [two] billion.”

The trend in the number of persons being executed changed again in 1988. After a campaign to save a highly publicized group of accused criminals known as the “Sharpville Six,” international and domestic pressure to abolish the death penalty in South Africa helped lower the actual number of people put to death. In 1988, the death toll was 117 people, and in 1989, the number executed decreased significantly to fifty-three. Although fifty-three might appear low, South Africa was still executing people in numbers that were relatively large considering the size of the country’s population.

With the death penalty in force and large numbers of South African blacks being sentenced to death, pressure was placed on the government to establish some guidelines to curb the death penalty. On February 2, 1990, President F.W. De Klerk announced a moratorium on the death penalty. In his speech, the President called for the reform of the death penalty by stating that it should be revised to limit its applicability only to extreme cases. This endeavor would be accomplished by broadening judicial discretion in its imposition, and by establishing an automatic appeal process for those sentenced to death.

In response to President De Klerk’s speech, the Parliament enacted the Criminal Law Amendment Act ("Amendment Act"). The Amendment Act limited the death penalty to six crimes.
including murder. Because of the moratorium, the last execution in South Africa was the hanging of S. Ngobeni on November 14, 1989.

George Devenish, author of *The Evolution*, stated, “[t]he abolition of the death penalty in South Africa would contribute to the process of political reconciliation, since many blacks view the excessive use of the death penalty in South Africa as a tool of oppression by a minority racist regime.” Many people began to predict a change in South Africa regarding apartheid and the justice system. After the moratorium was announced, Nelson Mandela, a prominent black leader, was released from prison. This signaled the birth of a new justice system in South Africa, confirming Devenish’s predictions to be true.

E. The Constitutional Court of South Africa

In 1993, South Africa adopted a transitional Constitution (also referred to as the “IC”) based on respect for fundamental rights and equity between people of all races.

The Constitution was formed through negotiations conducted by the Multi-Party Negotiation Process. Technical committees advised negotiators through documented reports. In 1994, the Constitutional Court established the 1996 permanent Constitution, which complied with the constitutional provisions agreed in advance by the negotiators of the interim Constitution.

The Constitutional Assembly – that is, the old Parliament – must implement the Constitution. The Assembly, if it has any questions regarding a proposed portion of the new Constitution, can submit the portion to the Constitutional Court for its opinion.

The Assembly differs from South Africa’s old government, a

102. Devenish, *supra* note 64, at 27.
104. Devenish, *supra* note 64, at 27.
106. *Id.*
107. DION BASSON, SOUTH AFRICA’S INTERIM CONSTITUTION V (1965).
108. *Id.* at 1-2.
109. *Id.*
111. *Id.*
112. *Id.*
parliamentary system, because now a Court and a Constitution govern along with the Assembly.\textsuperscript{113}

Before the Constitution was ratified, the people of South Africa were very proud of their new Constitution. Chapter Three of the interim Constitution lays out the fundamental rights of South African citizens and instructs how the courts are to interpret those rights.\textsuperscript{114} Section eleven, subsection two prohibits “cruel, inhuman or degrading treatment or punishment.”\textsuperscript{115} Additionally, Section eight states that “every person shall have the right to equality before the law and equal protection of the law.”\textsuperscript{116}

Section nine proclaims that “every person should have the right to life.”\textsuperscript{117} Similarly, Section ten states that “every person shall have the right to respect for and protection of his or her dignity.”\textsuperscript{118} These provisions clearly mandate that the interpretation of constitutionally protected rights must be enlightened and influenced by a consideration of international law and may be influenced by judicial consideration of foreign constitutional jurisprudence.\textsuperscript{119}

\section*{F. The Constitutional Court in South Africa}

Along with the new Constitution and the Parliament, a new Constitutional Court was created. The new President of South Africa, Nelson Mandela, who stated, “[t]he last time I was in court was to hear whether or not I was going to be sentenced to death,” inaugurated the new judges of the Court.\textsuperscript{120} This new Court consists of eleven members, nine men and two women, each serving a non-renewable term of twelve years, with a mandatory retirement age of seventy.\textsuperscript{121} The installation of the new judges was “another milestone on [South Africa’s] difficult journey toward democracy and a culture of human rights.”\textsuperscript{122} South Africa now has a system of checks and

\begin{footnotes}
\footnote{113. \textit{Id.}}
\footnote{114. \textit{See} \textit{Basson, supra} note 107, at 2.}
\footnote{115. \textit{S. Afr. Const.} \textsection 11(2).}
\footnote{116. \textit{Id.} \textsection 8.}
\footnote{117. \textit{Id.} \textsection 9.}
\footnote{118. \textit{Id.} \textsection 10.}
\footnote{119. \textit{See} Information About the Constitutional Court, \textit{supra} note 110.}
\footnote{120. Paul Taylor, \textit{Mandela Swears in the First Constitutional Court; By Creating a System of Checks and Balances, South Africa Joins World's Democracies,} \textit{Wash. Post}, Feb. 15, 1995, at A13.}
\footnote{121. \textit{See} Information About the Constitutional Court, \textit{supra} note 110.}
\footnote{122. \textit{Id}.}
balances similar to those of other democracies around the world.\textsuperscript{123}

\section*{G. The Process by Which a Case Reaches the New Court}

First, the case must go to the Supreme Court, which can refer the case to the Constitutional Court or decide the case itself.\textsuperscript{124} The role of the Constitutional Court, as the judges were told during their inauguration, is to act as guardian and protector of the Constitution. The Constitutional Court is guided by wisdom and a deep respect for human rights, and, in particular, the dignity of every woman and man in their country.\textsuperscript{125} Second, an appeal can be lodged with the Constitutional Court. If the judges on the Supreme Court think that a case involves constitutional interpretation, they send the case to the new Constitutional Court, putting their decision on hold.\textsuperscript{126} If the Constitutional Court decides that the question posed relates to an interpretation of the Constitution, it will hear the case.\textsuperscript{127}

The Court is an important part of the new South Africa and its new democratic government. It has the authority to overrule the Parliament when laws are established that the Court interprets as unconstitutional.\textsuperscript{128} The Court can also review and evaluate disputes within the Parliament.\textsuperscript{129}

\section*{H. The New Court's Proceedings}

The Court is open to the public and to the press, although no cameras or recorders are permitted.\textsuperscript{130} The Court decides whether the issue(s) implicated in the case relate to the Constitution and if they do, whether they fall within the Constitution's parameters.\textsuperscript{131}

The Court does not hear evidence or question any witnesses, and it does not decide whether someone is guilty or deserves damages.\textsuperscript{132}

The Court plays an important role in the evolution of a

\begin{footnotesize}
\begin{enumerate}
\item[123.] \textit{Id.}
\item[124.] \textit{Id.}
\item[125.] \textit{See} Bogie, \textit{supra} note 82, at 242.
\item[126.] Taylor, \textit{supra} note 120, at A13.
\item[127.] \textit{Id.}
\item[129.] \textit{See} Information About the Constitutional Court, \textit{supra} note 110.
\item[130.] \textit{Id.} The court is in session as follows: February 15 to March 31, May 1 to May 31, August 1 to September 1, and November 1 to November 30.
\item[131.] \textit{Id.}
\item[132.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
democratic society in South Africa. The judges must view their roles as protectors of the rights of South African citizens. Mr. Dullah Omar, Minister of Justice, reminded them, "[T]he eyes of the people of South Africa—and indeed the world—are upon you. We wish you success." The eyes of South African inmates and abolitionists around the world were definitely watching when the Court decided its first case: the constitutionality of the death penalty.

I. State v. Makwanyane & Mchunu: The End of the Death Penalty for South Africa

Themba Makwanyane and Mvuso Mchunu robbed a bank security vehicle, which was delivering monthly wages to the Coronation Hospital in Johannesburg. The robbers had been armed with AK-47s and had opened fire on the security vehicle and the accompanying vehicle. Consequently, two occupants in the vehicle were killed, and a third was seriously wounded. The robbers also killed two police officers in an accompanying vehicle. On April 14, 1992, the trial court found the two defendants guilty of four counts of murder, one count of attempted murder, and one count of robbery with aggravated circumstances. Two weeks later, they were sentenced to death on each of the four counts of murder.

As provided under the new legislation, the appellate division automatically reviewed the death sentences. Although the sentences had been imposed before the new interim Constitution came into effect, counsel for the defense argued at the appellate division hearing that the sentences were inconsistent with fundamental rights contained in the Constitution. The court dismissed the appeals on the attempted murder charge and the robbery charge. The appellate division decided that for the murder charges, the accused should receive the heaviest penalty available under the law. However, the new Constitution was implemented during the review of this case, thus the appellate division postponed its hearing on the murder charges until the constitutional issues could be decided by the

133. See generally Information About the Constitutional Court, supra note 110.
134. Id.
135. Bogie, supra note 82, at 229, citing Inaugural address.
137. Id. at 401, available at 1995 SACLR LEXIS 218, at *41.
138. Id.
139. Id.
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Constitutional Court.\footnote{140} On February 15, 1995, the Constitutional Court began hearing the case. The issues presented by the defendants were: (1) “the constitutionality of Section 277(1)(a) of the Criminal Procedure Act,” and (2) “the implications of Section 241(8) of the Constitution.”\footnote{141} The Court decided that because the issue of constitutionality was not raised at trial, since the Constitution was not yet in force, counsel for each side would appear before the Court to argue their case.\footnote{142}

The Court decided unanimously that the death penalty was unconstitutional.\footnote{143} The President of the Court wrote the main opinion, with each of the other judges writing a separate concurring opinion. The concurrences stressed the historic importance of the decision itself. Furthermore, the Court used many resources to reach its conclusion. It used the sections of the Constitution mentioned earlier to evaluate the constitutionality of the death penalty.\footnote{144} In analyzing the sections of the Constitution, the Court looked at parliamentary material to aid in the interpretation of ambiguous or obscure terms.\footnote{145}

The Court, under the guidance of Section thirty-five, subsection one of the Constitution, also considered foreign law in its attempt to understand the international aspects of the death penalty.\footnote{146} The laws and the interpretation of those laws came from many international sources. The Court first examined whether or not the death penalty violated the right to equal protection under the law. The Court found disparity in the application of the death penalty because the Criminal Procedure Act, which allowed for the death penalty, was in force only in the “Old Republic of South Africa.”\footnote{147} The other “states”\footnote{148} of South Africa had either repealed the death penalty altogether or developed different criteria for its imposition.

\footnote{140}{Id. at 401, available at 1995 SACLR LEXIS 218, at *42.}
\footnote{141}{Id.}
\footnote{142}{Id.}
\footnote{143}{See generally Makwanyane, 1995 (3) SALR 391.}
\footnote{144}{Id.}
\footnote{145}{Id. at 405, available at 1995 SACLR LEXIS 218, at *52.}
\footnote{146}{See generally Makwanyane, 1995 (3) SALR 391.}
\footnote{147}{Id. at 411, available at 1995 SACLR LEXIS 218, at *66.}
\footnote{148}{Id. The other “states” refers to the former Transkei, Bophuthatswana, Venda or Ciskei, which were then treated as independent states under South African law and had their own legislation. Although their respective Criminal Procedure statutes were based on the South African legislation, there were differences, including in regard to the death penalty. Id.}
Under Section 229 of the Constitution, all of the laws in force in any area of the national territory, immediately before the commencement of the Constitution, were to remain in force, subject to repeal or amendment.\textsuperscript{149} Therefore, the Criminal Procedure Act applied only to the "Old Republic of South Africa," and not to the other "States."\textsuperscript{150} Now that one new national territory existed, the rules needed to be the same.

The defendants argued that the disparity in sentencing violated their rights to "equal protection under the law."\textsuperscript{151} The Court agreed. It stated that the Constitution was formed to bring the country together, and, under Section 229 of the Constitution, it can rule that Section 277 caused disparity in the sentencing structure of South Africa.\textsuperscript{152} The Court mentioned that disparity is only one of the factors it used to find that the death penalty was unconstitutional.\textsuperscript{153}

Another factor that the Court examined was whether the death penalty was arbitrarily applied.\textsuperscript{154} The Court believed each stage of the death penalty process was an element of chance.\textsuperscript{155} Whether a criminal was put to death was dependent upon an investigation by the police, the presentation of the prosecution at trial, the effectiveness or ineffectiveness of defense counsel, the personality of the trial and appellate judges regarding the death penalty, and the race and economic status of the criminal.\textsuperscript{156} The Court contended that mistakes are too easily made in such a system. The Court repeatedly referred to how imprisonment was the better alternative in case a mistake was made. The President of the Court stated that "unjust imprisonment is a great wrong, but if it is discovered, the prisoner can be released . . . the killing of an innocent person, [however,] is irremediable."\textsuperscript{157}

After deciding that the death penalty denied citizens equality under the law, the Court developed a two-stage test to determine whether the law violated rights under chapter three of the Constitution.\textsuperscript{158} The first stage of the test was to determine if there

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\textsuperscript{149} See generally Makwanyane, 1995 (3) SALR 391.
\textsuperscript{150} Id. at 411, available at 1995 SACLRL EXIS 218, at 66.
\textsuperscript{151} Id. at 411-12, available at 1995 SACLRL EXIS 218, at *68.
\textsuperscript{152} Id. at 412, available at 1995 SACLRL EXIS 218, at *69.
\textsuperscript{153} Id., available at 1995 SACLRL EXIS 218, at *70.
\textsuperscript{154} Id. at 417, available at 1995 SACLRL EXIS 218, at *81.
\textsuperscript{155} Id. at 418, available at 1995 SACLRL EXIS 218, at *85.
\textsuperscript{156} Id. at 419, available at 1995 SACLRL EXIS 218, at *86.
\textsuperscript{157} Id. at 421, available at 1995 SACLRL EXIS 218, at *92.
\textsuperscript{158} Id. at 435, available at 1995 SACLRL EXIS 218, at *130.
\end{flushleft}
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was disparity between the crime and the penalty. In evaluating whether a disparity existed, a broad interpretation was given to the fundamental rights laid out in chapter three of the Constitution. In deciding whether proportionality existed between the two, the Court cited factors such as "the enormity and irredeemable character of the death sentence in circumstances where neither arbitrariness nor error exists between the accused and other persons facing similar charges, race, poverty, and ignorance."

The factors mentioned above were not the only ones considered. Stage two demanded that a Court consider the limitation clause in the Constitution under Section thirty-three. The limitation clause provided that the rights outlined in chapter three of the Constitution could be limited only if the limitation was "reasonable and justifiable in an open and democratic society based on freedom and equality."

Therefore, the decision of the state to execute someone must be justifiable under Section thirty-three.

The first "right" in chapter three that the Court tested was the right not to be subjected to cruel and unusual punishment under Section eleven, subsection two. The state failed to prove, even under broad interpretation, that the death penalty was proportional to the crime of murder. Under Section eleven, subsection two of the Constitution, the Court held that the death penalty was degrading because it stripped "the convicted person of all dignity" and treated "him or her as an object to be eliminated by the state." The death penalty was perceived as "final and irrevocable," making it an "undoubtedly cruel punishment." It was also held to be inhumane because it denied defendants their humanity.

The Court examined Section nine, specifically, the right to life, and found that the section was straightforward in guaranteeing the right to life to every person. An individual's right to life in South
Africa was the "most fundamental of all human rights."\textsuperscript{170} However, under the second stage of the test, the Court looked to whether the state had a reason to limit the right to life under Section thirty-three. This stage involved the balancing of: (1) the limitation of the nature of the right; (2) the importance of the right in a democratic and free society; (3) the purpose of the limitation and the importance of that limitation; and (4) the "extent of the limitation," looking particularly at whether the ends could be reached by way of other, comparable, less damaging means.\textsuperscript{171}

In its case to prove that the state had a reason to limit the right to life, the state argued that the death penalty was a necessary deterrent for the "preservation of society ... [for] [w]ithout law, society cannot exist, [and] [w]ithout law [j] individuals in society have no rights."\textsuperscript{172} It argued that if the law was too lenient, then the people of South Africa would begin to take the law into their own hands.\textsuperscript{173}

The Court disagreed.\textsuperscript{174} It stated that the reason crime was at an all-time high was because of the social changes going on in the country, including the political turmoil from 1990 to 1994.\textsuperscript{175} In addition, poverty and homelessness were on the rise. Finally, the Court stated that the way to combat crime was to impose a penalty as a deterrent, and although death penalty and imprisonment are both deterrents, the Court favored imprisonment.\textsuperscript{176} The judges concluded that the death penalty was unconstitutional.\textsuperscript{177}

The judges ordered the state not to execute any citizen in the future or any criminal already convicted.\textsuperscript{178} The criminals that were sentenced to die would have their sentences revoked and replaced by another proper sentence.\textsuperscript{179}

As discussed above, the decision of the Constitutional Court was not based solely on the right to life clause, but found considerable support for abolition in the dignity clause, the prohibition of cruel, unusual and degrading punishment, and the equality clause.

\textsuperscript{170} Id. at 429, available at 1995 SACLR LEXIS 218, at *116.
\textsuperscript{171} Id. at 436, available at 1995 SACLR LEXIS 218, at *134.
\textsuperscript{172} Id. at 442, available at 1995 SACLR LEXIS 218, at *148.
\textsuperscript{173} Id. at 444, available at 1995 SACLR LEXIS 218, at *155.
\textsuperscript{174} Id. at 442-43, available at 1995 SACLR LEXIS 218, at *150-51.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 443, available at 1995 SACLR LEXIS 218, at *152-53.
\textsuperscript{177} Id. at 452, available at 1995 SACLR LEXIS 218, at *178.
\textsuperscript{178} Id., available at 1995 SACLR LEXIS 218, at *179.
\textsuperscript{179} Id. at 452, available at 1995 SACLR LEXIS 218, at *179.
However, the decision also placed considerable weight on the fact that the right to life clause did not explicitly recognize the death penalty as a justified limitation. An explicit recognition of capital punishment in the Constitution might thus require a reconsideration of the constitutionality of capital punishment.

South Africa has tried to examine a penalty that was applied through much of its history in order to make a decision about its future. The death penalty in South Africa seems to be cyclical. South Africa has not heard the last of the death penalty. Deputy President De Klerk has already vowed to contest the decision ending the death penalty and to move for a constitutional amendment. Where will South Africa's debate regarding the death penalty lead the country? Clearly, the history of the death penalty illustrates that the sentiment regarding the death penalty may change.

III. International Trends to Abolish the Death Penalty

When the distinguished penologist, Professor Norval Morris, carried out his survey for the United Nations, covering the years up to 1965, only twelve countries had completely abolished the death penalty. Only eleven countries had abolished the death penalty for murder and other ordinary offenses in peacetime. Several more countries were abolitionist de facto, having executed no one for at least ten years. A similar survey, completed for the United Nations twenty-three years later in 1988, revealed that the number of completely abolitionist countries had increased from twelve to thirty-five and those for ordinary offenses from eleven to eighteen.

Since 1965, the pace of change has been even more remarkable due largely to the freedom gained by new states and political changes in others. Over the short period from 1989 to 1995, an additional twenty-three countries abolished capital punishment completely and another three countries abolished it for ordinary crimes. In other words, the annual rate at which countries have acted to abolish the death penalty has increased from an average of about one-and-a-half

181. Id. These figures have been calculated from NORVAL MORRIS, CAPITAL PUNISHMENT: DEVELOPMENTS 1961 TO 1965, in combination with other sources.
182. Id.
184. See generally MORRIS, supra note 180.
countries per year to nearly four countries per year. Among the
states that have retained the death penalty, at least thirty have not
executed anyone during the past ten years, and thirteen of these
countries have become abolitionist de facto since 1989.\textsuperscript{185} By the end
of 1995, just about a third of all separate political entities had
abolished the death penalty completely, and nearly one in four had
done so for all crimes committed in peacetime.

While most countries are making strides to abolish the death
penalty, a few countries have moved in the opposite direction by
reinstating the death penalty. Three countries – the Philippines,
Papua New Guinea, and Gambia – have reinstated the death penalty.
Likewise, the death penalty was recently restored in two states in the
United States, Kansas (in 1994)\textsuperscript{186} and New York (in 1995),\textsuperscript{187} raising
the number of retentionalist states to thirty-eight. In addition,
 attempts have been made to reinstate the death penalty in at least
half the abolitionist states, including Michigan and Rhode Island.\textsuperscript{188} At
least eleven countries formerly thought to have abandoned their
use of the death penalty have resumed executions, as did several
American states. In 1988, twenty-five of the thirty-six states that had
the death penalty had not executed any person in more than ten
years. By 1995, this number had dwindled to twelve. Since 1990,
Arizona, California, Washington and Wyoming have resumed
executions after a gap of more than a quarter of a century.\textsuperscript{189} The
suspension of capital punishment, even for lengthy periods, has not
eradicated its use. Only complete abolition and a commitment to
international conventions providing for abolition will accomplish the
goal of eliminating the use of the death penalty.

\section*{A. International Equal Protection Standards Protecting Those
Facing the Death Penalty}

In 1984, the General Assembly of the United Nations endorsed a
resolution, adopted by the Economic and Social Council, listing a
series of nine safeguards guaranteeing protection of the rights of
those facing the death penalty.\textsuperscript{190}

\begin{footnotesize}
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\item \textsuperscript{185} See \textit{Hood}, supra note 183, at 7-10.
\item \textsuperscript{186} See \textit{KAN. STAT. ANN.} § 21-4624 (1995).
\item \textsuperscript{187} See \textit{N.Y. CRIM. PROC. LAW} § 400.27 (McKinney Supp. 1996).
\item \textsuperscript{188} See \textit{Hood}, supra note 183, at 47-48.
\item \textsuperscript{189} \textit{Id. at} 49-52.
\item \textsuperscript{190} \textit{Resolutions and Decisions of the Economic And Social Council 1985}, U.N.
\end{enumerate}
\end{footnotesize}
These safeguards aim to ensure that capital punishment is implemented only for the most serious intentional crimes with extremely grave consequences. The goals of the safeguards are as follows: (1) to protect convicted people from retroactive applications of the death penalty; (2) to provide for the possibility of lighter punishments for those already under sentence of death; (3) to exempt those under the age of eighteen at the time of the commission of the crime, pregnant women, new mothers, and those who are or have become insane; (4) to ensure that the death penalty is only applied where no possibility of wrongful conviction exists; (5) to ensure that defendants had a fair trial with legal assistance; (6) to provide adequate time and facilities to prepare a defense; (7) to provide a provision for a mandatory appeal and mandatory review for clemency in all cases; (8) to provide a minimum age for death sentences and executions; and (9) to provide a provision that no person suffering from mental retardation or extremely limited mental competence should be sentenced to death.\(^{191}\)

The safeguards further provide for appeals and the possibility of pardon or commutation of sentences and assurances that no executions are carried out until all procedures have been completed.\(^{192}\) Where capital punishment does occur, the safeguards are intended to ensure that the sentence is carried out with minimal suffering.\(^{193}\)

**B. The Effect of Public Opinion upon Capital Punishment in Other Countries**

Several countries that have abolished capital punishment did so with public opinion strongly favoring its continuance. In fact, Franklin Zimring and Gordon Hawkins wrote: "in most abolitionist countries, if the issue had been decided by direct vote rather than by the legislature, the death penalty probably would not have been repealed."\(^{194}\) For example, following World War II, both government officials and the public at large advocated capital punishment in England.\(^{195}\) At the time, Britain's capital punishment laws were


\(^{192}\) *See id.*

\(^{193}\) *See id.*

\(^{194}\) *FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 3, 12 (1986).*

\(^{195}\) *See JAMES B. CHRISTOPH, CAPITAL PUNISHMENT AND BRITISH POLITICS 21,*
mandatory for all convicted murderers. Nonetheless, by 1956, England became de facto abolitionist, and by 1983, the country upheld an abolitionist stance for all civilian offenses.

The British experience is similarly replicated in France, Germany and Australia. In 1982, France’s President Mitterrand, who noted his plan for eliminating the death penalty during his election campaign, abolished the death penalty while sixty-two percent of the people favored its retention. Similarly, two-thirds of the Federal Republic of Germany were in favor of retention of the death penalty when abolition was in process. Likewise, Australia remains abolitionist although a large portion of the population still favors the death penalty.

To a lesser extent, a similar phenomenon occurred in Canada. In 1995, the country remained abolitionist despite the fact that forty-four percent of Canadians still strongly supported the death penalty.

**IV. Proposed Solutions to Ending the Death Penalty in Countries That Still Assert It**

What is essential in order for the death penalty to be permanently abolished is a campaign to raise public awareness of not only the horror of the death penalty itself, but of its total lack of effectiveness in serving as a deterrent. The feelings of helplessness, frustration, and anger are often at the core of why people believe that the death penalty should be either reintroduced or retained in a country. Rising crime rates, civil strife, and terrorist acts are almost certain to incite public sentiment toward invoking the death penalty.

Furthermore, strong political leadership could prompt abolition. In today’s political environment, leadership sources could form an abolitionist coalition that would push towards an end to capital punishment.

A number of countries have attempted to interpret the

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22 (1962).
196. *Id.*
199. *See* Zimring & Hawkins, supra note 194, at 21-22. In the Federal Republic of Germany, capital punishment was entirely abolished in its Constitution.
201. *Id.*
relationship between the right to life and the right to human dignity. The Hungarian Constitutional Court held that capital punishment is unconstitutional. The Hungarian Constitution prohibits the arbitrary deprivation of life. Furthermore, Canadian decisions also offer support for the abolition of the death penalty. For example, Justice Cory stated in Kindler v. Canada that "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." Growing respect for human rights will gradually instill the basic premise that the value of life cannot be reconciled with death as a form of punishment.

The question is whether the country or state should, or even has the right to act as the enforcer of a lynch mob, selecting who is to die and who is to live. Decisions regarding the imposition of the death penalty should never be made in charged atmospheres. Moreover, the public, as well as legislatures, should become informed as to the myths surrounding the death penalty. Nowhere is information regarding the death penalty more necessary than when Constitutions and/or bills of rights are being drafted for newly formed nations. These nations have the unique opportunity to establish developmental goals and policies for their people, and should be encouraged to adopt policies that protect the right to life for all their people. They should follow the lead of Europe and Latin America, where the abolition of the death penalty is codified in the regional system as stemming from the inalienable right to life.

**Conclusion**

South Africa and Israel no longer impose the death penalty. South Africa has resolved to abolish the death penalty constitutionally whereas Israel has achieved a similar result by making it exceedingly difficult, as a practical matter, to execute convicted defendants. Although inspired by different historical, political, and in Israel's case, religious influences, both countries recognize the importance of human dignity and the right to life. In

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203. HUNG. CONST. Ch. xii, art. 54(1).

Israel, the traditional resistance to imposing the death penalty was exhibited by various procedural and substantive legal requirements for convictions in capital cases. These requirements rendered the imposition of the death penalty virtually impossible.

In South Africa, the abolitionist movement during the 1970s helped lower the number of people executed. President F.W. De Klerk furthered these efforts in 1990. South Africa, which once led the world in executions, has abolished the death penalty by a unanimous vote of its new Constitutional Court.

Although Israel and South Africa took very different paths in dealing with capital punishment, their decision to reject the death penalty as a mode of punishment ultimately brought their paths to a place of convergence. The question remains, where is each country headed regarding the death penalty? In Israel, there is and always has been a historical and moral resistance to exercising the death penalty. South Africa, however, needed a legal and constitutional barrier to put a halt to the application of the death penalty. Israel has a strong domestic precedence in its opposition to the death penalty, but South Africa’s future appears less certain. South Africa has moved from being a nation that liberally used the death penalty on its own citizens to one that completely abolished the practice. The fear, however, is that South Africa swiftly moved from being a notorious violator of human rights to a champion of human rights, and the lack of gradation in this process may lead South Africa to regress to its old ways. However, it appears that even if South Africa were to reinstate the death penalty, the Constitutional Court may allow for its resumption, but with very stringent guidelines.205

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205. See generally Furman v. Georgia, 408 U.S. 238, 309-30 (1972). Use of the death penalty came to a halt in the United States when the Supreme Court rendered its longest written opinion in its history in Furman. The Court held that the death penalty laws in many states were unconstitutional because they violated the Eighth Amendment. Here, the Court did not analyze whether the punishment itself is "cruel and unusual." Therefore, for the death penalty to be constitutional, states need only make the procedure for imposing the death penalty constitutional.