

**Address for the Launch of the ACSJC Series Paper
Confronting the Death Penalty: People, Politics and Principle
Catholic Social Justice Series Paper No. 61**

Delivered by Professor Andrew Byrnes

St Joseph's Catholic Parish, Corinda, 20 December 2007

Your Grace, Distinguished Guests, Ladies and Gentlemen,

It is a privilege and a pleasure to be here today with you in the parish of Corinda-Graceville, and to have been part of this contribution by the Australian Catholic Social Justice Council to the struggle to bring about the abolition of capital punishment. Although it is I who has been asked to speak today, I am only one of four authors who wrote papers for the compilation being launched today – Michael Costigan, Fr Peter Norden SJ and Brian Deegan are the others. I would also like to acknowledge the contribution of Dr David Brennan, the editor of the publication.

The compilation offers reflections on the right to life, the development of the teaching of the Catholic Church on the issue of the death penalty, its status under international law, the cruelty capital punishment involves and the pain it inflicts on all involved, and the question whether the death penalty is the way we should respond at a personal level in response to those who injure or kill those whom we love.

My own involvement with the issue is as an academic who specialises in international human rights law, but it goes beyond that. I had the opportunity to be involved earlier this year in the proceedings brought by Scott Rush and others before the Constitutional Court of the Republic of Indonesia, challenging the imposition of the death penalty under the Indonesian Constitution and its guarantees of the right to life. My role was to give expert evidence on the illegality of the death penalty in relation to drug offences under international human rights treaties by which Indonesia was bound. Unfortunately, we were not able to persuade a majority of the Court that our view was the correct one; the constitutional challenge failed, and the battle to save Scott and his colleagues continues in other forms.

My involvement is also a personal and family one. My own family – like many others – has had to grapple with the question of how we should respond to criminal acts that injure and ultimately take from us those who are dear to us. The last time I spoke from behind a pulpit like this was seven years ago, when I delivered a eulogy for my elder brother, Gerard, who had died the previous week from a heroin overdose. Whatever the pain and anger we all felt at this loss, we know only too well that one senseless loss of life can never be remedied by another.

There are three questions that I would like to address briefly today:

- Why is it right to oppose the death penalty?
- What is the state of international law and policy on the legitimacy and legality of the death penalty?
- Where do we go from here? What can we do to further the struggle for abolition of capital punishment?

Why is it right to oppose the death penalty?

Society's views of the legitimacy and effectiveness have changed fundamentally over the centuries, and Michael Costigan's essay shows how the official attitudes of the Catholic Church have evolved as well. There have been many eloquent attacks on the legitimacy of the death penalty, and there are at least two fundamental reasons why we should oppose it as a matter of principle, wherever it is proposed and on whomsoever it is imposed.

The first reason is that all of the arguments advanced to justify the use of capital punishment are flawed or ultimately unpersuasive – if the State is to kill, intentionally and in a calculated fashion extinguishing a human life, the State and those who support its position surely must convincingly demonstrate that such a sanction serves a useful purpose that cannot be achieved in any other way.

The second reason is because of the harm that the death penalty does – to those on whom it is imposed and the degradation it involves, on those convicted wrongly by fallible institutions, on the communities which impose it, and on the individuals who crave its imposition in response to a wrong inflicted on them or those close to them.

The two principal arguments for the death penalty have been those of retribution and deterrence. While one can readily understand the desire of individuals and communities to exact payment for grievous wrongs done to them, the exaction of an eye for an eye cannot ultimately justify this practice. It is ultimately unsatisfying, unlikely to bring peace to those individuals who have been hurt, and it brutalises the State and community which advocates or tolerates it. It is also a strategy of despair, as Justice Mahomed of the Constitutional Court of South Africa compellingly wrote in *S v Makwanyane*, in which the Court held the death penalty unconstitutional:

[271] The death sentence must, in some measure, manifest a philosophy of indefensible despair in its execution, accepting as it must do, that the offender it seeks to punish is so beyond the pale of humanity as to permit no rehabilitation, no reform, no repentance, no inherent spectre of hope or spirituality; nor the slightest possibility that he might one day, successfully and deservedly be able to pursue and to enjoy the great rights of dignity and security and the fundamental freedoms protected in Chapter 3 of the Constitution, the exercise of which is possible only if the 'right to life' is not destroyed. The finality of the death penalty allows for none of these redeeming possibilities. It annihilates the potential for their emergence ...

Deterrence is the justification most often advanced by those who support the death penalty, and it is relied on by most of the countries in our region which still support the use of capital punishment – not only in cases involving homicide, but also in relation to drug offences, economic crimes and corruption offences. Yet there is no persuasive evidence in these countries or elsewhere that capital punishment has a unique deterrent effect that would justify its use, when compared with other sanctions such as life sentences or lengthy terms of imprisonment. Those States which continue to justify their use of this sanction on the basis of deterrence, are acting in willful ignorance at best and in bad faith at worst.

What is the state of international law and policy on the death penalty?

Although there is no rule of international law which absolutely prohibits the death penalty, many countries have accepted obligations under treaties which prohibit them from imposing capital punishment. There are also many other countries which have voluntarily undertaken not to impose or carry out death sentences, so that nearly two-thirds of the world's nations are de facto or de iure abolitionist. Even for those countries for which it is still not unlawful to use the death penalty, there is an extensive array of international rules which regulate when, on whom and how capital sentences may be imposed. Regrettably, in some of the countries which regularly employ the death penalty, these restrictions are often ignored.

But the overall international trend has been clear for the last fifty years: international law has been moving towards greater restrictions on the use of the death penalty, with a view to its eventual abolition.

Where do we go from here? How can we contribute?

What can we do individually and collectively to continue the struggle against the senseless and barbaric practice that is the death penalty? We can, I think, address the problem on at least three levels: in individual cases, at the political level regionally and internationally, and as communities.

We must continue to lend our support to the efforts of those who are seeking to intervene to avoid the imposition or carrying out of death sentences already imposed on compatriots such as Scott Rush and his colleagues, but also on those who come from other countries. This will take a combination of legal support, personal support for those on death row and for their families, and savvy diplomatic and other official interventions.

But we must also address the issue on the political level, and demand of our political leaders that they take a principled approach to the death penalty in our region and beyond. In the recent election campaign we had the unedifying spectacle of Australian politicians who proclaim that they are in principle opposed to the death penalty running for cover when it appeared that clearly stating that this principled opposition would apply as much to the Bali bombers as it did to Scott Rush, Michael Czugai and the other Australians on death row would have adverse consequences in the polls. This is not the first occasion on which Australian politicians – from both the major parties – have professed such principles, yet have been content to acquiesce in or even welcome the imposition of the death penalty on those whose particular crime has been to harm, however grievously, Australians. This may be terribly hard to accept, particularly for those who have lost people they loved in the bombings. But we should learn from Brian Deegan, who lost his son Joshua in the Sari nightclub that night in October 2002, who reflects in the following way on that loss and his attitude towards the bombers against the background of his own opposition to the death penalty:

The vision of my son's murderer, seated uncomfortably on the harsh concrete floor in a room bare of the conveniences he had once taken for granted, evokes little sympathy. But the prospect of him picking at grains of rice from his last meal is something I wish no part of.

I do not wish for death of those convicted, for I oppose the death penalty under any circumstances. But due to my own shortcomings, while I have understood the murderers' motives, I have yet to find forgiveness and therefore cannot pray for their lives.

We must demand of our leaders that they have the courage to say that if the death penalty is wrong in principle, then that principle applies to the Bali bombers as well. If we are to have new leadership as we have been promised, then let this be part of it. While such an approach may also have pragmatic benefits, it is right as a matter of principle.

At the same time the Australian government must continue its work at the United Nations on the death penalty, but also supplement it with a focused and well-thought-out regional strategy, of the sort which was proposed by our new Prime Minister some time ago, but about which he seemed less enthusiastic in the weeks just before the November 2007 election. A diplomatic campaign does not necessarily mean megaphone diplomacy, and it needs to be undertaken, not just as a matter of principle but arguably also for pragmatic reasons as well: a government seeking clemency for its own citizens while being uninterested in or welcoming death sentences for others may have difficulties persuading other governments and their constituencies.

The third level at which we might take action is at the community level. The fact that the reintroduction of capital punishment in Australia has not been a realistic prospect over the last decades is because community sentiment has shifted on this issue. Our challenge – if we are to change laws and policies in our region – must be to help to bring about the same changes in communities and among the opinion-makers and policy-makers in those countries which still maintain the death penalty. Just as Uncle Des Sandy urged us to do in the Australian context, we must find ways to cross political, national, cultural and religious barriers to connect with those communities – in Indonesia, Singapore, Malaysia, Vietnam, and China, to name but a few – so that we can share our perspectives and knowledge with them, since their governments do not care to see the futility and barbarity of the capital punishment they endorse.

This is an enormous challenge, but it is one that may ultimately be critical to the success of the struggle to relegate the death penalty to the books of history.

Andrew Byrnes
Professor of Law
Australian Human Rights Centre
Faculty of Law
University of New South Wales