

Death Penalty in Canada and Its Abolition: The Way to Go for Other Countries?

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Abstract

This paper presents the historical and legislative background and discusses the evolution of Canada's position on death penalty, which includes considerations of international legal standards. A few of the main arguments usually raised by those who are in favour or against it are also briefly covered.

Keywords: *death penalty, abolition, Canada.*

1. Introduction

Currently, Vietnam reserves the death penalty to some “very rare cases”.¹ Since “Vietnam represents a prime, unique case to understand the nature, role, and issues in relation to the death penalty and justice”², and then that “[m]uch has been written about the death penalty in Vietnam”³, our primary focus, as a Canadian scholar, will rather be on Canada and on what led it to eventually abolish the death penalty.

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¹ Ngu, Ho Trong. (December 14, 2009). “A matter of life and death: rethinking capital punishment”, Vietnam Law & Legal Forum, p. 1. Retrieved from: <https://vietnamlawmagazine.vn/a-matter-of-life-and-death-rethinking-capital-punishment-3634.html>; see also Ngu, Ho Trong. (2009). “Some Issues Related to Death Penalty Judiciary in Vietnam”, International Association of Democratic Lawyers, Commission 2: Anti-Terrorism Laws, Hanoi, Vietnam. Retrieved from: <https://iadllaw.org/commissions/commission-2-anti-terrorism-laws-hanoi-2009/>

² Tran, Kien & Cong Vu. (2019). “The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry” *Societies*, 9(56), p. 2.

³ Ibid.

In Canada, capital punishment has been “a highly controversial issue” for many years⁴, and it may still be nowadays for some portions of the Canadian population since a recent poll held in Canada suggested that “over half of Canadians are in favour of reinstating the death penalty in Canada as a punishment for murder”.⁵ This is not new since it was also the case in a distant past.⁶ In that respect, it is interesting to note that Justice La Forest of the Supreme Court of Canada (hereinafter ‘Court’) warned in *Kindler v. Canada* against judging the death penalty “in terms of statistical measurements of approval or disapproval by the public at large”⁷, and gave weight in the same decision to the assumption that “the Canadian people *through* their elected representatives [who] have voted against the death penalty numerous times”.⁸ This shows how representative democracy⁹ may not always be reflective of the will of some of the Canadian population who were and are in favour of capital punishment. On a global scale, “[t]he debate between the advocates that support capital punishment and those who condemn it has been going on since ages.”¹⁰

Contrary to what Sahni and Junnarkar stated, we can hardly agree that capital punishment is just “another kind of punishment prescribed by law.”¹¹ Because the life of an accused is at stake with such punishment, this sole fact should be enough to make it stand out from other punishments. In all fairness for these authors, they further clarified, “Whether or not a convict should be sentenced to death is not just a matter of the law of the land, but it also entails a huge human rights issue.”¹² On that, the author of this paper agrees. In fact, “there seems to be nothing more

⁴ Rancourt, Marc-Antoine, Catherine Ouellet & Yannick Dufresne. (2020). “Is the Death Penalty Debate Really Dead? Contrasting Capital Punishment Support in Canada and the United States”, *Analyses of Social Issues and Public Policy*, p. 1.

⁵ Carly Yoshida-Butryn. (March 3, 2020). “51% of Canadians support return of capital punishment for murder convictions, poll suggests”, CTV News. Retrieved from: <https://bc.ctvnews.ca/51-of-canadians-support-return-of-capital-punishment-for-murder-convictions-poll-suggests-1.4837434>

⁶ For example, in the middle of the 1960s, “[a]lthough most of the population continued to favour the use of the death penalty for the most serious violent crimes and acts of treason, many inside and outside of the government came to see it as an outdated sentence that belonged to a passing era in Canadian history”: Thompson, Andrew S. (2008). “Uneasy Abolitionists: Canada, the Death Penalty, and the Importance of International Norms, 1962-2005” *Journal of Canadian Studies/Revue d’études canadiennes*, 42(3), p. 174.

⁷ [1991] 2 S.C.R. 779, p. 832.

⁸ Bateman, Thomas. (2003). “The new globalism in Canadian charter of rights interpretation: extradition, the death penalty, and the courts”, *The International Journal of Human Rights*, 7:3, p. 58 (italics added).

⁹ Representative democracy is a type of democracy founded on the principle of elected officials representing a group of people as opposed to direct democracy.

¹⁰ Sahni, Sanjeev P. & Mohita Junnarkar. (2020). *The Death Penalty – Perspectives from India and Beyond*, Springer, p. 2.

¹¹ Ibid, p. 1.

¹² Ibid, p. 2.

contentious than the issue of the death penalty, especially since the right to life started to emerge as one of the most fundamental human rights”.¹³

What Koestler and Camus wrote about death penalty in 1957 is also worth mentioning:¹⁴

[...] even by overturning fundamental conceptions of the law, with the sole aim of making the law on the death penalty a little less barbaric, the contradictions it contains would remain unresolved. [...] since *it is impossible to say with precision when a man acted freely and must die, when he acted under duress and keeps the right to live*, the only solution is to bring back the law on the death penalty at the level of the other laws, by eliminating the punishment that it foresees, since only it is fixed in advance, prohibits any gradation and leaves the choice only between all or nothing.

Since then, and to briefly mention Canada’s current legal reality regarding the issue of voluntariness, suffice to say that the Court defined ‘moral involuntariness’ in a criminal law context as a situation in which the accused “retains conscious control over her bodily movements [and whose] will is overborne by threats of another,” the bottom line being that “[h]er conduct is not, in a realistic way, freely chosen by threats of another,” the bottom line being that “[h]er conduct is not, in a realistic way, freely chosen.”¹⁵

2. A few arguments against and in favor of death penalty

With respect to death penalty, all States “can be divided into two categories - those that are retentionists and others who are abolitionists.”¹⁶ That being said, with respect to this division, one should refrain from adopting a simplistic Manichean approach that would aim to determine, in pure moralistic terms about good and evil, what State is right or wrong; to decide what is day or night, light or darkness, sun or moon. Not that one should be deprived of standing up for one side (and, in all transparency, the author of this paper does that, too), however this issue is not as simple as it first looks like, especially for jurists - even for those who support this or that side - for whom all arguments that have some merit should be at least known, if not examined with scrutiny. This is so mostly because “[i]f you know the enemy and know yourself, you need not fear the result of a hundred battles; If you know yourself but not the enemy, for every victory gained you will also

¹³ Tran & Vu, *supra*, pp. 1-2.

¹⁴ Koestler, Arthur & Albert Camus. (2002). *Réflexions sur la peine de mort* [Thoughts on the Death Penalty], Gallimard. First published in 1957, pp. 137-138 (italics added) [translated in English by Sébastien Lafrance].

¹⁵ *R. v. Ruzic*, [2001] 1 S.C.R. 687, para. 44; see also Sinel, Zoe. « The Duress Dilemma: Potential Solutions in the Theory of Right » (2005) 10:1 *Appeal: Rev Current L. & L. Reform* 56, p. 62.

¹⁶ Sahni & Junnarkar, *supra*, p. 1.

suffer a defeat.”¹⁷ Here, the enemy remains in the realm of ideas and arguments and intellectual discourse.

In many countries, death penalty is limited to “the most heinous crimes that can be committed by a person.”¹⁸ Robinson wrote, “advocates of capital punishment assert that death is a proper punishment for those who commit the most heinous crimes because offenders owe their lives to society as payment for the harms they inflicted on society (retribution).”¹⁹ For example, in 1865, murder, treason or rape (now covered by the more catch-all offence of sexual assault²⁰) carried the death penalty in Canada.

Interestingly, Robinson distinguished between ‘retribution’ and ‘vengeance’ explaining that “[v]engeance is a human emotion experienced by individual people. Retribution is a collective response to wrongdoing from society rather than individual family members.”²¹ Vietnam exemplifies the practical application of this distinction throughout its history: “Death penalty was used [in the past] as a tool to take revenge against the violated for their anti-social behaviours”²², but now “Vietnam does not recognise such punishment as means of vengeance”.²³ In addition, Ngu argued that “death penalty defined in the [Vietnamese] *Criminal Code* does not mean to take away the human life, but only *when there are no other measures* which can be used to save a committed person, and that the perpetrator himself cannot be reintegrated in any way back into the human society, and that *the State has used every other means it can*.”²⁴ This approach brings us back to the dichotomy of the “all or nothing” mentioned above and identified by Koestler and Camus where, in fact, nothing would prevent a State to adopt legislative measures to make possible

¹⁷ Sun Tzu. (2000). *Sun Tzu on the Art of War – The Oldest Military Treatise in the World*, Allandale Online Publishing, p. 11, para. 18. In the original version in Chinese Mandarin: “知己知彼，百战不贻；不知彼而知己，一胜一负；不知彼不知己，每战必贻”.

¹⁸ Sahni & Junnarkar, *supra*, p. 2.

¹⁹ Robinson, Matthew B. (2008). “Assessing Scholarly Opinion of Capital Punishment: The Experts Speak” in Robert M. Bohm (ed), *The Death Penalty*, Routledge, p. 114.

²⁰ Section 271 of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46; see also Lafrance, Sébastien. (2021). “Women in the Context of Canadian Criminal Offences”, Vietnam National University (VNU) Journal of Science: Legal Studies, 37(1); Lafrance, Sébastien. (July 26, 2020). “Do You Need Guts, As Men, To Stand Up for Women? If Yes, Get Some.”, *The Law Culture*. Retrieved from: <https://thelawculture.in/do-you-need-guts-as-men-to-stand-up-for-women-if-yes-get-some/>

²¹ Robinson, *supra*, p. 115.

²² Ngu, *supra*, p. 3.

²³ *Ibid*, p. 5.

²⁴ *Ibid* (italics added).

the commutal of a death sentence to life imprisonment.²⁵ This would not require the State either to reintegrate the accused into the society. In other words, contrary to what Ngu claimed, there are means available that are different than having to resort to the imposition of death on an accused should a State decide to make it possible, but it is true, however, that the means do not exist (yet) in Vietnam. It leaves us with the “major issue of contention with regard to retribution [that] is whether capital punishment actually achieves retribution”²⁶, which issue will be left for another day.

Another argument in favor of death penalty is that it serves as a “*specific* deterrent” by preventing a murderer, for example, “from killing again” but we agree with the fact that this is “a form of incapacitation rather than deterrence.”²⁷ “A sentence emphasizing specific deterrence is a sentence intended to *discourage* the accused from again committing the offence”.²⁸ Discouraging the accused from committing wrongful actions he may commit in the future mandatorily implies that the accused is meant to remain alive, which would not happen, obviously, if the accused is put to death following a sentence of death penalty. In short, “[m]any experts were insistent that the death penalty does not deter.”²⁹

Moving on to the issue of wrongful convictions in the context of capital punishment, one expert stated, “there is no evidence that convinces me that during the modern period of capital punishment that an innocent was executed. *Maybe...* but not convincing proof”.³⁰ With respect to Canada more specifically, Topping asked, “Have any innocent persons been hanged in Canada? This is a *difficult* question to answer.”³¹ However, saying that “maybe” it happened, that it is a difficult question to answer should not be sufficient to end the debate. The sole possibility that a wrongful conviction *may* have happened and entailed the death penalty is precisely the starting point of most analysis of cases involving potential wrongful convictions, and it should not be the

²⁵ For example, “From 1963 to 1968, under the direction of Prime Minister Pearson, the Liberal government was responsible for making Canada *de facto* abolitionist, intervening in all capital cases to commute each death sentence to life imprisonment without parole”: Nicholson, Michael. (2014). “Unpopular Abolition: Analysis of Canadian Parliament’s 1976 Debate to Abolish Capital Punishment”, Master of Arts Thesis, University of Guelph, p. 8.

²⁶ Robinson, *supra*, p. 116.

²⁷ *Ibid*, p. 117 (italics added).

²⁸ *R. v. Woodward*, 1993 CanLII 8183 (NL CA), p. 253.

²⁹ Robinson, *supra*, p. 149; see also, generally, National Research Council. (2012). *Deterrence and the Death Penalty*. The National Academies Press. <https://doi.org/10.17226/13363>.

³⁰ Robinson, *ibid*, p. 126.

³¹ Topping, C. W. (1952). “The Death Penalty in Canada”, *The Annals of the American Academy of Political and Social Science*, 284(1), p. 153 (italics added).

final answer that puts to bed and dismisses this issue. Roach also recalled, “An awareness of the alarming reality of wrongful convictions in both Canada and other criminal justice systems led the Supreme Court of Canada in 2001 to overturn prior jurisprudence that allowed Canada to extradite fugitives to face the death penalty.”³²

As for the arguments against the death penalty, the main ones are that “it is morally wrong, it is cruel and unusual, it constitutes a human rights violation”.³³ The author of this paper will discuss this later. Let us just point out, for now, that in addition to the death penalty itself, “[p]rolonged delay following sentence of death prior to execution may [also] be deemed a form of cruel, inhuman and degrading treatment or punishment.”³⁴

In a nutshell, Tran and Vu brilliantly summarized the two opposite main schools of thought regarding death penalty as follows:³⁵

there is a growing consensus among the international community about the need to abolish the death penalty with many arguments pertaining to the nature, role, and ineffectiveness of the death penalty in combating crimes, a better adherence of sovereign states to universal human rights standards to which the right to life is the most fundamental, and more interestingly, the emergence and reception of modern. [Those who support the death penalty] rely on a wide range of justifications for maintaining the most brutal punishments ranging from culture, politics, ideology, religion, law, history, and even economics.

3. International legal standards

Canada’s “opposition to the death penalty is also reflected by the nation’s position on the international level.”³⁶ The most well-known international legal instrument is probably the Universal Declaration of Human Rights³⁷ (hereinafter ‘Universal Declaration’); “Although the Universal Declaration is not a binding treaty, it has played a seminal role”.³⁸ It states “the right to life in absolute terms in Article 3: ‘Everyone has the right to life, liberty and security of person.’ The silence of Article 3 on the death penalty issue has a dual explanation. It can either be seen as

³² Roach, Kent. (2013). “Wrongful Convictions in Canada”, 80(4) *U. Cin. L. Rev.*, p. 1465; *United States v. Burns*, [2001] 1 S.C.R. 283; see also, generally, Lafrance, Sébastien. (2020). “The Presumption of innocence in Canada: A Comparative Perspective with Vietnam”, Conference Paper: ‘The Presumption of Innocence’ Online Experts Workshop. Retrieved from: <https://law.unimelb.edu.au/centres/alc/news-and-events/the-presumption-of-innocence-online-experts-workshop#papers>

³³ Robinson, *supra*, p. 115.

³⁴ Schabas, William A. (1997). *The Abolition of the Death Penalty in International Law*, 2nd ed., Cambridge University Press, p. 141.

³⁵ Tran & Vu, *supra*, p. 2.

³⁶ Pak, John. (1993). “Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life”, *Cornell International Law Journal*, 26(1), p. 264.

³⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

³⁸ Schabas, *supra*, p. 23.

supporting the retention of the death penalty or as foreshadowing its eventual abolition.”³⁹ However, as Tohme pointed out, “[p]resenting the right to life in absolute form, the drafters *implicitly* supported the abolitionist movement.”⁴⁰ Besides, Schabas remarked, “The death penalty, by its very definition, is a form of punishment, and it is surprising that the drafters of the Universal Declaration [...] did not consider that it might be deemed ‘cruel.’”⁴¹

In 1976, Canada acceded to the 1966 *International Convention on Civil and Political Rights*⁴² (hereinafter ‘ICCPR’) and its *Optional Protocol*⁴³: “This was significant for a number of reasons. First, articles 1 and 6 of the ICCPR discouraged states from employing the death penalty: the former protected the right to life against arbitrary execution; the latter encouraged parties to the treaty to become abolitionist.”⁴⁴ As Tohme noted:⁴⁵

[...] unlike the Universal Declaration of Human Rights, the ICCPR mentions the death penalty as an exception to the right to life. When reading Article 6, one can notice that the application of the death penalty, although accepted, was restricted to certain crimes and certain groups of people were excluded from its ambit. The second paragraph of Article 6 limits the application of the death penalty to the most serious crimes. The same paragraph states that the death penalty can be carried out if two conditions are satisfied: (a) the punishment is provided by law; and (b) the punishment is carried out as a result of a judgment rendered by a court.

In addition, paragraph 6 of Article 6 of the ICCPR states: “nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present covenant.”⁴⁶ Further, it also contemplates its abolition”.⁴⁷

In its decision rendered in 2020 *Quebec (Attorney General) v. 9147-0732 Québec inc.*⁴⁸, the majority of the Court stated: “This Court has recognized a role for international and

³⁹ Tohme, Roni. (2001). *Abolition of the Death Penalty: A Process in Motion*, LL.M. thesis, Faculty of Law, McGill University, pp. 18-19.

⁴⁰ Ibid, p. 20 (italics added).

⁴¹ Schabas, William A. (1996). *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts*, Northeastern University Press, p. 8.

⁴² *International Covenant on Civil and Political Rights*, 19 December 1966, 999 *United Nations Treaty Series* 171, *Canada Treaty Series* 1976 No. 46, 6 *International Legal Materials* 368 (accession by Canada 19 May 1976).

⁴³ *Optional Protocol to the International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, 6 I.L.M. 383 (1967).

⁴⁴ Thompson, *supra*, p. 178.

⁴⁵ Tohme, *supra*, pp. 22-23.

⁴⁶ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 *United Nations Treaty Series* 171, *Canada Treaty Series* 1976 No. 46, 6 *International Legal Materials* 368 (accession by Canada 19 May 1976); see also Tohme, *ibid*, p. 23.

⁴⁷ Thome, *Ibid*.

⁴⁸ 2020 SCC 32 [hereinafter ‘9147-0732 Québec inc.’].

comparative law in interpreting *Charter* rights. However, this role has properly been to *support* or *confirm* an interpretation”.⁴⁹ It also stated, “While this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms.”⁵⁰ That being said, both the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*⁵¹ and the ICCPR “are both binding on Canada, thus triggering the presumption of conformity.”⁵²

4. Canada’s (short) relevant historical background

Topping mentioned, “The four capital offenses in Canada, according to the Revised Statutes of 1927 with Amendments, are murder, treason, making war against Her Majesty, and rape”⁵³ Canada abandoned the death penalty in 1976 abolishing the death penalty for all offences. 1,481 people had been sentenced to death, and 710 had been executed. However, the death penalty was *de facto* abolished in Canada in 1963 and *de jure* in 1999. Thomson recalled, “Parliament officially removed the death penalty from Canada’s *Criminal Code* in 1976 and defeated a motion to have it reinstated in 1987, and yet both debates were deeply divisive and did little to settle the issue for Canadians, the majority of whom still favoured the practice.”⁵⁴

5. Canada’s relevant legal background

In 1977, in *Miller*⁵⁵, the Court unanimously “considered that the death penalty, as provided for by the *Criminal Code* as a sanction for the murder of a police officer or a prison guard, did not authorize the imposition of a cruel and unusual punishment in the sense of section 2(b) of the

⁴⁹ Ibid, para. 28; see also, generally, Lafrance, Sébastien. (2020). “The Role and Utility of Comparative Law” (Podcast), *The Contemporary law Forum*. Retrieved from: <https://www.youtube.com/watch?v=zfuLv87aK2A>

⁵⁰ Ibid, para. 22.

⁵¹ Can. T.S. 1987 No. 36.

⁵² 9147-0732 Québec inc., *supra*, para. 39; see also its Preamble: “The presumption of conformity is the firmly established interpretive principle that the [*Canadian Charter of Rights and Freedoms*] is presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified”; see also, generally, Lafrance, Sébastien. (2020). “A Brief Overview of Quebec Civil Law and Canadian Constitutional Interpretation in Canada”, Amicus Institute (Australia). Retrieved from: <https://www.amicusinstitute.org/scholarship-series>

⁵³ Topping, *supra*, p. 147. Of note, the offence of ‘making war against Her Majesty’ existed because Canada was and still is a constitutional monarchy where the official Head of State is the monarch of the United Kingdom (but now their role is quite limited to a symbolic role). As for the offence of ‘rape’, see note 18 above.

⁵⁴ Thompson, *supra*, p. 172.

⁵⁵ [1977] 2 S.C.R. 680.

Canadian Bill of Rights. Six of [the nine judges] deduced this conclusion from a literal interpretation of the Declaration; three [of them] are done by seeking to define what is cruel and unusual punishment.”⁵⁶ The *Canadian Bill of Rights*⁵⁷ is a statute that came into effect in 1960. Brun opined regarding this decision that it was “disappointing because of the literal and restrictive interpretation it gives of the right to protection against cruel and unusual treatment and punishment in Article 2(b) of the Declaration.”⁵⁸ But this should come as no surprise since rights were interpreted narrowly “in most of the cases where the [Supreme Court of Canada] was asked to use the *Canadian Bill of Rights*.”⁵⁹ The rights as they are provided in the *Canadian Bill of Rights* were given a ‘static interpretation’.⁶⁰

The same right not to be subject to cruel and unusual treatment and punishment is also provided by section 12 of the *Canadian Charter of Rights and Freedoms* (hereinafter ‘Charter’)⁶¹; the *Charter* was enacted in 1982,⁶² and its interpretation “should be [...] a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection.”⁶³

In 1991, in the decisions *Ng*⁶⁴ and *Kindler*⁶⁵, the Court had to decide whether unconditional surrender to the United States where these accused could eventually face death penalty constituted a violation of their rights under sections 7 and 12 of the *Charter*, which protect the ‘right to life’ and ‘principles of fundamental justice,’ and the right not to be subjected to ‘cruel and unusual punishment,’ respectively. The Court established the test of whether their possible execution would ‘shock the conscience’. Tohme summarized the rationale of the Court in those decisions “In

⁵⁶ Brun, Henri. (1977). “Feu la D.C.D.: l’Arrêt Miller et la Peine de Mort” [The Canadian Declaration of Rights: The Miller decision and the Death Penalty], 18 *C. de D.* 567, p. 571.

⁵⁷ S.C. 1960, c. 44.

⁵⁸ *Ibid.*, p. 576.

⁵⁹ Bedi, Shruti & Sébastien Lafrance. (2020). ‘The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada’ in Salman Khurshid, Lokendra Malik & Yogesh P. Singh, *The Supreme Court and the Constitution: An Indian Discourse*, Wolters Kluwer, p. 74; Horvius, Berend. (1982). “The Legacy of the Supreme Court of Canada’s Approach to the Canadian Bill of Rights: Prospects for the Charter”, 28 *McGill L. J.* 31, p. 37.

⁶⁰ Bedi & Lafrance, *ibid.*; Elman, Bruce P. (1990). “Altering the Judicial Mind and the Process of Constitution-Making in Canada”, 28 *Alta. L. Rev.* 521, p. 524.

⁶¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act, 1982 (U.K.), 1982 c.11.

⁶² Lafrance, Sébastien. (2020). “A Brief Overview of Quebec Civil Law and Canadian Constitutional Interpretation in Canada”, *supra*.

⁶³ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, para. 117; see also *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, p. 156.

⁶⁴ [1991] 2 S.C.R. 858.

⁶⁵ [1991] 2 S.C.R. 779.

Kindler and *Ng*, the Canadian Supreme Court justified its decision for extraditing without seeking assurances by citing two main reasons. First, extradition without assurances did not violate the provisions of the Canadian Charter which prohibit cruel and unusual punishment. Second, in the absence of a customary norm that prohibits the imposition of the death penalty, and despite the trend among Western countries to abolish the death penalty, the Canadian Supreme Court is free to extradite without assurances.”⁶⁶

However, ten years later, in *Burns*⁶⁷, the Court departed from its earlier decisions, and “concluded that, subject to exceptional circumstances, Canadian officials must obtain assurances that the death penalty will not be imposed (or, if imposed, will not be carried out) prior to extradition. Support for this conclusion derived from Canada’s advocacy against the death penalty on the international stage as well as the practices of other countries that Canada regards as models in the protection of fundamental rights.”⁶⁸ Tohme pointed out that “[t]he significance of the case of *Burns* [...] is that the [...] Court, even when Canada is not a party to international and regional abolitionist protocols, has used the prohibition of applying the death penalty found in these protocols to narrow the possibility of extradition.”⁶⁹ This is a different conclusion and a shift from what the Court previously decided in *Kindler* where “the Court observed no international norm on the death penalty and therefore tilted in favour of ministerial discretion”.⁷⁰ Indeed, in *Burns*, it may be understood from the Court’s rationale that “[i]t is sufficient that a ‘significant movement towards acceptance internationally of a principle of fundamental justice that Canada has already adopted internally’ can be detected.”⁷¹

As noted by Bateman, “countries around the world have increasingly abolished the death penalty. Advanced democracies, save the US, Japan and India, have done so.”⁷² Indeed, the Supreme Court of India, for example, wrote in 1980 in its oft-cited⁷³ decision *Bachan Singh v. State of Punjab*: “the power of appeal under Article 134 of the Constitution show that the death

⁶⁶ Tohme, *supra*, pp. 73-74.

⁶⁷ *United States v. Burns*, [2001] 1 S.C.R. 283.

⁶⁸ Weinrib, Lorraine E. (2015). “Canada” in Dennis Davis, Alan Richter & Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law*, London: Hart Publishing, pp. 111-112; see also Bateman, *supra*, pp. 49-50.

⁶⁹ Tohme, *supra*, p. 74.

⁷⁰ Bateman, *supra*, p. 58.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Including recently in 2020, see, e.g., the decision of the Supreme Court of India in *Shatrughna Baban Meshram v. State of Maharashtra*, 2020 SCC OnLine SC 901.

penalty or its execution cannot be regarded as unreasonable, cruel, or unusual punishment”.⁷⁴ The apex courts of Canada and India - two Commonwealth countries that inherited the same legal tradition from the United Kingdom⁷⁵ - currently stand on two opposite sides on whether death penalty may be considered as cruel or unusual punishment.

6. Conclusion

One Vietnamese proverb says, ‘Đi một ngày đàng học một sàng khôn’ (*A day of travelling will bring a basket full of learning*), then even though the circumstances of the current pandemic do not currently allow us to meet in person to discuss the very important topic of death penalty, the author of this paper truly hopes that our minds and thoughts may still be able to travel anyhow to, maybe one day, make the sharing of our respective knowledge and experience between our countries reach new horizons so that the sun of justice may shine even stronger in the future on the lives of the citizens of our countries. As Ngu claimed about Vietnam, “the elimination of death penalty in criminal charges is unavoidable.”⁷⁶ Eleven years have passed since Ngu made that statement, and capital punishment still exists in Vietnam. Important social and legal changes often take time: ‘Có công mài sắt có ngày nên kim’ (*if you sharpen an iron rod, in the end you get a needle*) - patience comes with everything.

References

Legal Instruments

- [1] *Canadian Bill of Rights*, S.C. 1960, c. 44.
- [2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982 c.11.
- [3] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36.
- [4] *Criminal Code of Canada*, R.S.C., 1985, c. C-46.

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