

International Law and the Death Row Phenomenon

Introduction

Indonesia is a signatory to the *International Convention on Civil and Political Rights* (ICCPR) and the *Convention on Torture* and has enacted the protection therein into their domestic law. The protection against cruel, inhuman and degrading treatment found in Article 7 of the ICCPR is mirrored in Article 28G(2) of the Indonesian Constitution. A number of international forums have considered whether the Article 7 protection can be breached by the Death Row Phenomenon. The Death Row Phenomenon being the effects of the time spent on death row, the conditions while on death row and a constant knowledge of certain death. The forums have provided no certainty in relation to how these elements must converge to amount to a breach of the protections. With some only requiring extended delay while others requiring an added effect on psychological and mental health. What the jurisprudence does present is that the Death Row Phenomenon can in certain circumstances amount to a breach of the protection against cruel, inhuman and degrading treatment.

The Death Row Phenomenon in Indonesian Law

In 2006 Indonesia signed and ratified the ICCPR and the Convention against Torture in 1985 and 1989 respectively.¹ Indonesia is bound by the obligations in these treaties in regards to its laws and domestic practices. The ICCPR itself does not prohibit the use of the death penalty it does however severely restrict it. The death penalty is a punishment that is to be reserved for the most serious crimes.

The Vienna Convention offers instructions on how treaties such as the ICCPR should be interpreted. The texts of the treaties, under the international laws of interpretation, are to be interpreted in accordance with their ordinary meaning, taking into account the object and purpose of the treaty and its context.² The drafting history of the treaty as well as subsequent practices taken under the treaty can be used as aids in the interpretation.³ The practices of United Nations human rights treaty bodies can also be considered as aids to interpretation. In this case the Human Rights Committee and the Committee against Torture are the relevant bodies. What is of the most importance in relation to the recognition of the Death Row Phenomenon are the views or decisions of the Human Rights Committee given during cases submitted under the First Optional Protocol of the ICCPR.⁴ Courts and a number of state parties consider the judgments of these international forums as highly authoritative and persuasive in the interpretation of treaty provisions.⁵ Due to the persuasive nature of the comments of these bodies their precedent applies to the law of Indonesia as it relates to Indonesia's obligations under the ICCPR and the Convention on Torture.

Indonesian Law

As Indonesia is a signatory to both the ICCPR and the Convention on Torture it is bound by the obligations contained therein. It is Article 7 of the ICCPR and Article 16 of the Convention on Torture that guarantees protection from cruel, inhuman or degrading treatment for all people foreign or national

¹ Byrnes, A, *Report on international legal issues relating to the trial, conviction and sentencing of Titus Ani under the national narcotics law of Indonesia*, p. 8

² Ibid.

³ Ibid.

⁴ Ibid. p.10

⁵ Ibid. p.12

within Indonesia. It is these protections that the Death Row Phenomenon has been found to breach in some circumstances. There are a number of issues that arise when considering whether there has been a breach of these obligations for a prisoner suffering with the Death Row Phenomenon. Firstly, how long the prisoner has spent on death row and how much of that time should be attributed to them rather than the state. Secondly, when the passage of time alone is not sufficient to contravene the protections what other factors should be considered. It has been held by courts around the world that a prolonged stay on death row can breach the protection against cruel, inhuman and degrading treatment. The jurisprudence on this question in international law has bearing on Indonesian law, primarily because the constitution of Indonesia has enacted the protection against cruel, inhuman and degrading punishment after it became a signatory to the ICCPR and the Convention on Torture. This issue of whether the Death Row Phenomenon can amount to cruel, inhuman and degrading treatment has been dealt with in a number of international cases and the precedent set in these cases are persuasive in the Indonesian jurisdiction in light of the rules of interpretation for treaties previously discussed. Though the cases have been dealt with in different human rights forums they illustrate how this issue has been resolved internationally and that there is a sound basis for the existence of a breach of international obligations in a situation where delay has caused a prisoner to suffer the effects of the Death Row Phenomenon and mental degradation.

International Case Law

There is an established body of precedent dealing with the death row phenomenon and when it can or will amount to a breach of international human rights obligations. The European Court of Human Rights produced the landmark case with a finding that delay between sentencing and execution with the presence of the Death Row Phenomenon can breach a prisoner's right to freedom from cruel, inhuman and degrading treatment. Following suit the United Nations Human Rights Committee has held that delay plus other contributing factors can also breach the protections. The Privy Council in dealing with such cases has taken a wide interpretative approach allowing delay to constitute a breach on its own. The reception of this concept has been mixed in domestic court systems.

European Court of Human Rights

The first leading international case on the Death Row Phenomenon was *Soering v United Kingdom*. This case was considered by the European Court of Human Rights and is universally cited by courts when considering such claims.⁶ This case involved a challenge against extradition by a man from the United Kingdom who was being extradited to the United States. His claim was that if he were returned to the US and convicted of the murder of his girlfriend's parents he would face the death penalty. He challenged the extradition on the basis that if he were extradited to Virginia he would be charged with capital murder and be subjected to death row conditions and the Death Row Phenomenon while awaiting execution. This would be in breach of an Article similar to the one in Indonesia, Article 3 of the European Convention on Human Rights protection against cruel, inhuman or degrading treatment. At the time, the average wait on death row for a prisoner in Virginia was 6-8 years. The claim was not that the United States would be breaching its obligations but that the United Kingdom would be breaching theirs by allowing the extradition. This was a tactical move considering that the United States was not a party to the European Convention on Human Rights while the United Kingdom was. The court handed down a landmark decision that extradition of Jens Soering to Virginia would amount to a violation of Article 3 of the European Convention on Human Rights. They took into account the real likelihood of his being convicted of capital murder, the prolonged period of time he would spend in the harsh conditions of death row, with the psychological torture of awaiting unavoidable death. The court also considered the personal circumstances of the applicant. This case laid the basis for the acceptance of the Death Row Phenomenon into international jurisprudence, which is why it is the seminal case in this area.

⁶ Sadoff, D, 2008, *International Law and the mortal precipice: A legal policy critique of the 'death row phenomenon'*, p. 11

United Nations Human Rights Committee

The cases that followed the decision in *Soering* are by no means uniform. Each human rights body has dealt with the issue in a slightly different manner. The Human Rights Committee, the body created by the ICCPR to monitor states compliance with the convention, took a much more rigid approach in the case of *Kindler v Canada*. *Kindler* was another extradition case however in this case Kindler had escaped custody to Canada after already being sentenced to death in the United States. On the question of whether the Death Row Phenomenon, if proved, would constitute a breach of Article 7 of the ICCPR the committee considered it on a fact-specific basis.⁷ Taking into account the facts of this case and this appellant in particular the committee found there to be no breach. The committee relied on its existing jurisprudence that said that prolonged periods of detention in the harsh conditions of death row while the appellant took advantage of all available appeal routes did not alone constitute a breach of the protection against cruel, inhuman and degrading punishment. The appellant must show some unreasonable delay in the appeals process that is imputable to the state. There were also a number of issues that the appellant was silent on in *Kindler* that were integral to the case in *Soering* including the possible effects of the conditions on death row, the prison conditions in Pennsylvania and the age and mental state of the offender.

The Human Rights Committee has constantly reaffirmed that delay between sentence and execution alone will not constitute a breach of Article 7 of the ICCPR.⁸ In the case of *Johnson v Jamaica* the Human Rights Committee provided reasons why delay alone could not constitute a breach of the ICCPR. Firstly, that the time spent on death row is a necessary consequence of imposing the death penalty, which is not prohibited under the covenant just severely restricted. Secondly, the covenant does not prohibit the death penalty it is however an object of the covenant to reduce recourse to it as a punishment. Lastly, as the reduction of the death penalty is an object of the covenant the articles should be interpreted in light of the objects and try to avoid interpretation of provisions that might encourage states to retain the death penalty.⁹ While the Human Rights Committee has been less liberal with its interpretation of what constitutes a breach of human rights obligations resulting from the Death Row Phenomenon it has tempered its established doctrine to consider more issues. The Committee in *Francis v Jamaica* added to its established doctrine that delay alone will not suffice and that each case should be considered on its own merits, bearing in mind the imputability of delays, the psychological impact imprisonment has had on the prisoner and the specific conditions of the imprisonment.¹⁰ This restatement of doctrine has brought the jurisprudence of the Human Rights Committee in line with that of the European Court of Human Rights and the *Soering* case.

The Privy Council

The Privy Council is the most liberal forum in relation to what will constitute a breach of human rights by the Death Row Phenomenon. The Death Row Phenomenon was first acknowledged by the Privy Council in the case of *Pratt & Morgan v Attorney-General of Jamaica*. In this case the applicants were convicted of murder in 1979 and sentenced to death in Jamaica.¹¹ While on death row Pratt and Morgan took advantage of as many appeals procedures as they could. They appealed to the Inter-American Commission on Human Rights, the United Nations Human Rights Committee under section 7 of the ICCPR and to the Judicial Committee of the Privy Council.¹² They also appealed to the Supreme Court of Jamaica and the Jamaican Privy Council. The men claimed that after the 14 years they had spent on death row it would be inhuman to execute them under the Jamaican constitution. A number of times during the

⁷ Ibid p. 17

⁸ Ingle. J, *Death Row Phenomenon Research*, p. 1, 4th July 2011

⁹ Ibid. p. 1-2

¹⁰ Ibid. p. 2

¹¹ *Pratt & Morgan v Attorney-General of Jamaica*, p. 1, Para. D

¹² Ibid. p. 1-2, Para D-B

appeals process the applicants had warrants of execution passed and were moved to the special condemned cells next to the gallows before having their executions stayed by the Governor-General. After being unsuccessful in the majority of their other appeals the case was finally considered by the Judicial Committee of the Privy Council.

The Privy Council held that delay alone could constitute cruel, inhumane or degrading treatment and that in Jamaica a delay of 5 years would be strong grounds for considering the confinement to be unconstitutional.¹³ Their Lordships held that it wasn't correct to attribute the appeals process delays to the prisoners as they should not lose their constitutional entitlement to due process just because they are asserting their legally afforded rights.¹⁴ If however there were delays caused solely by the prisoners then that time would not count toward any constitutional objections. This includes delays such as frivolous appeals or escapes from custody. The Privy Council clarified their status in the subsequent case of *Guerra v Trinidad and Tobago*¹⁵ that the 5-year timeframe is not immovable and the unconstitutionality would depend on other circumstances as well. The Privy Council stated that there is no specific time that execution must take place by the time for appeals should be reasonable and all domestic appeals should be finalised within two years.¹⁶ Furthermore the 5 years should be reduced to 3.5 if the prisoner chooses not to pursue international avenues of appeal.

Other Jurisdictions

It is interesting to note that the Death Row Phenomenon has found little footing in the United States domestic courts. The courts in this jurisdiction generally deal with issues of whether a death sentence should be commuted to life imprisonment rather than questions of extradition. Focusing on whether an extended period of time on death row and the effects of the Death Row Phenomenon breach the United States Eight Amendment right against cruel and unusual punishment. Generally the courts believe that an inmate who is suffering delay while taking advantage of appeal avenues is responsible for that delay as it is not the fault of the state that there has been a delay.¹⁷

In contrast the Supreme Courts of both Uganda and Zimbabwe have found that delay resulting in affliction of the Death Row Phenomenon can breach constitutional protections against torture. The Ugandan Supreme Court in the case of *Kigula and Others v Attorney General* held that confining a person to death row beyond three years after sentencing would violate the constitutional protection against cruel, inhuman or degrading treatment.¹⁸ Likewise in Zimbabwe in the case of *Catholic Commission for Peace and Justice v Attorney-General* the Supreme Court found that when the Death Row Phenomenon is present delays of 52 and 72 months can be unconstitutional.¹⁹

India has also commuted death sentences in cases of extended delays.²⁰

Conclusion

The international jurisprudence in this area demonstrates that there is no jurisprudential certainty in international law regarding what will be considered a violation of the right to protection from cruel,

¹³ Sadoff, D, *International Law and the mortal precipice: A legal policy critique of the 'death row phenomenon'* June 2008, p. 20

¹⁴ *Pratt & Morgan v Attorney-General of Jamaica*, p. 5, Para. C

¹⁵ [1996] A.C. 397, [1995] 3 W.L.R 891

¹⁶ Byrnes, A, *Report on international legal issues relating to the trial, conviction and sentencing of Titus Ani under the national narcotics law of Indonesia*, pp. 35

¹⁷ Sadoff, D, *International Law and the mortal precipice: A legal policy critique of the 'death row phenomenon'* June 2008, p. 23

¹⁸ *Ibid.* p. 3

¹⁹ *Ibid.*

²⁰ *Vatheeswaran v State of Tamil Nadu* [1983] 2 SCR 348

inhuman and degrading punishment. The courts will take into account a number of considerations but do not prescribe a threshold test for proving a breach. In certain cases it has been sufficient to have only an extreme delay in time caused by the state. Others have required prolonged detention, plus harsh death row conditions and demonstrated psychological effects on the prisoner. What can be said however is that there is a sufficient basis of jurisprudence to conclude that the Death Row Phenomenon exists and that in the right circumstances it can amount to a breach of international protections against cruel, inhumane and degrading treatment under Article 7 of the ICCPR.