

DEATH PENALTY: AN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE

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ABSTRACT

Death penalty is one of the most debated subjects in the present. People are executed and sentenced to death by states as punishment for a variety of crimes. However, there are many arguments for and against the implementation of death penalty around the globe. This debate on implementation has called arguments including death penalty breaches human rights, especially the right to life of the person and the right to live free from torture or cruel, inhuman or degrading treatment or punishment. Several international instruments have adopted to ban the death penalty and most of countries have now abandoned the use of the death penalty. Nevertheless, there is no consensus against its use. According to the sources, still there are some countries which are executing thousands of people per year. Therefore, the main objectives of this study is; first, to obtain a comprehensive overview on the current extent of death penalty around the globe, describing restrictions under international law and the trend toward its obliteration; secondly to briefly describe the principal arguments for and against death penalty; and thirdly to analyze the human rights perspective of death penalty. This research argues, that the implementation of death penalty is a violation of the human rights standards on several reasons, such as the fundamental nature of the right to life and other related rights; existence of considerable risk of executing innocent people; and the absence of clear evidence that the death penalty serves as a deterrent to crime rate etc. This research is a qualitative research, carried out by the reference of international instruments, case law, legislation, texts of authority, existing research studies, electronic databases etc.

Keywords: death penalty, human rights, international instruments

1. INTRODUCTION

"...It is not necessarily only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilization, must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place..."

- Justice Ismail Mahomed (State V. Makwanyane,1995)

John Finnis, a neo-naturalist, who has been developed classical natural law theory, sets out 07 basic goods for the human well-being and development in his notable work of 'Natural Law and Natural Rights'. (Ratnapala, 2009) He has been pointed out 'life' as one of the essential elements in this regard. Similarly, it is observed that the right to life is the foundation of all other rights. Various International, regional and other instruments have ensured man's absolute right to life. Opposing to this, considerable number of nations still continue death penalty on several moral, political, legal and policy reasons. According to Amnesty international, most known executions take place in China, Iran, Saudi Arabia, Iraq and Pakistan. (Amnesty International, 2017) Even though, death penalty took up a significant position in the penalty system in ancient society, there is an emerging trend towards abolishing death penalty either completely or in practice in modern time. As a wide-reaching acceptance, it is observe that the death penalty is actually killing a person in name of a nation, which not only violates humanitarianism, but also is of no avail for deterring crime. (Teng, 2010) Abolition of the death penalty is generally considered to be an important element in democratic development for states. In some countries, abolition is effected by explicit reference in constitutional instruments to the international treaties prohibiting the death penalty. In others, it has been the contribution of the judiciary. Especially, Judges have applied constitutions that make no specific mention of the death penalty but enshrine the right to life and prohibit cruel, inhuman, and degrading treatment or punishment. (Schabas, 1998) In this paper, author aims to make a brief investigation on worldwide position towards implementing death penalty and analyze the human rights perspective of the same.

2. THE SCOPE OF THE STUDY

2.1 RESEARCH OBJECTIVE

The objective of this research is to obtain a comprehensive overview on the current extent, restrictions and principle arguments of death penalty. Finally, it aims to analyze the human rights perspective of death penalty with support of the above details.

2.2 RESEARCH PROBLEM

The research problem of this study is, does the existing position towards implementing death penalty all over the world is in par with fundamental and well recognized human rights standards?

2.3 LIMITATIONS OF THE RESEARCH

This research focuses on the current extent of death penalty around the globe in general. However, this research itself has been limited not to examine countries which are implementing or not implementing death penalty in detail.

2.4 RESEARCH MATERIALS AND METHODS

The qualitative research approach has been adopted in this study, which mainly carried out by reference of secondary data, such as; international conventions, country reports, judicial decisions, commentaries and observations done by international organizations and committees, academic writings, and electronic databases.

3. DISCUSSION

3.1. DEATH PENALTY AND THE RIGHT TO LIFE UNDER INTERNATIONAL LAW

It can be noted that, the most of International/regional human rights instruments discourage the death penalty. Article 3 and 5 of the Universal Declaration of Human Rights (UDHR) respectively enshrines the sanctity of human life by affirming that 'Everyone has the right to life, liberty and security of person' and 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' Similarly, the United Nations General Assembly (UNGA) finds death penalty violates both the right to life and right to free from torture or cruel, inhuman or degrading treatment or punishment.

Thus, Article 6(1) of the international Covenant on Civil and Political Rights (ICCPR) strongly suggests that abolition of the death penalty is desirable by indicating that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' ICCPR imposes two main requirements constraining the use of death penalty, namely, the strict due process requirement on the punishment and prohibition of implementing death penalty on offenders below eighteen years of age (at the time the crime was committed) and on pregnant women.

Preamble of the Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the UN General Assembly by resolution 441728 of 15th December 1989, declares that the abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights. Further, it states that parties to this convention undertake to ensure that:

1. No one within the jurisdiction of a state party to the present Protocol shall be executed.
2. Each state party shall take all necessary measures to abolish the death penalty within its jurisdiction.

In addition, the treaties aiming to end death penalty can be listed as follows; Protocol No. 6 to the European Convention for the protection of Human Rights and Fundamental Freedoms and the protocol to the American Convention on Human Rights to abolish the Death Penalty. Protocol No. 6 calls for the abolishment of the death penalty in times of peace. The other one calls for total abolishment of the death penalty, but allow to states to retain penalty in times of war. (Truskett, 2004) Therefore, it is clear that the right to life is not an absolute right. A person is only entitled to have his or her right to life protected by law and must not be arbitrarily deprived of life. This means that there are certain circumstances in which a person may be lawfully and non-arbitrarily deprived of his or her life.

Further, it is reasonable to argue that the all instruments concerned with the right to life are ambivalent in their treatment of the problem of when the life of a human being may be taken. Some documents couple the phrase 'right to life' with the term 'inalienable' or with 'inherent' right. It seems to be self-contradicting because while they describe the right to life as inalienable they permit death penalty under certain circumstances. (Byrnes, 2007)

Nevertheless, a number of national courts have come to the conclusion that the imposition of the death penalty under any circumstances amounts to cruel, inhuman and degrading treatment or punishment. Going beyond the existing state of international Instruments, which still seems to accept that the death penalty per se is not cruel, inhuman or degrading treatment, they have been accepted death penalty as a violation of their national constitutions. (Byrnes, 2007) The most prominent case in this regard is *State v. Makwanyane*. (*State V. Makwanyane*, 1995) This case can be identified as a significant decision of the South African Constitutional Court on death penalty. Following statement from Justice Mahomed in this case stated that:

"...The death penalty sanctions the deliberate annihilation of life. As I have previously said, it is the ultimate and the most incomparably extreme form of punishment ... It is the last, the most devastating and the most irreversible recourse of the criminal law involving as it necessarily does, the planned and calculated termination of life itself; the destruction of the greatest and most precious gift which is bestowed on all human kind. The deliberate annihilation of the life of a person, systematically planned by the state, as a mode of punishment, is wholly and qualitatively different ... it makes every other right ... permanently impossible to enjoy. Its inherently irreversible consequence makes any reparation or correction impossible, if subsequent

events establish, as they have sometimes done, the innocence of the executed or circumstances which demonstrate manifestly that he did not deserve the sentence of death..."

Moreover, in the case of *Furman v. Georgia* (*Furman v. Georgia*, 1972) US Supreme Court declared that 'the imposition and carrying out of the death penalty... constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the Constitution.' The Court, concentrating its objections on the manner in which death penalty laws had been applied, found the result so "harsh, freakish, and arbitrary" as to be constitutionally unacceptable. (American Civil Liberties Union, 2018) Making the nationwide impact of its decision unmistakable, the Court summarily reversed death sentences in the many cases then before it, which involved a wide range of state statutes, crimes and factual situations. (American Civil Liberties Union, 2018)

On the whole, in view of international and comparative jurisprudence, it is reasonable to argue that there is a solid acceptance that the death penalty amounts to cruel, inhuman and degrading punishment and fails to respect the sanctity of human life.

3.2. OVERVIEW ON THE CURRENT EXTENT OF DEATH PENALTY AROUND THE GLOBE

It has been recognized in the previous part of this paper, there is no absolute prohibition on the imposition of the death penalty binding on all countries under present international law. Some states have accepted binding treaty obligations not to impose the death penalty in any circumstances and others have undertaken not to impose death penalty subjected to the limitations.

However, there is still a minority of states that retain the death penalty. Even for those states that retain death penalty, there are several constraints on the imposition, such as the persons on whom it may be imposed and the procedures that must be followed. The UN Secretary General's report on the death penalty presented to the Human Rights Council in 2018 states that;

"Some 170 States have abolished or introduced a moratorium on the death penalty either in law or in practice, or have suspended executions for more than 10 years." (BBC News, 2018)

According to the UN, 23 states carried out at least one execution in the past decade. (BBC News, 2018) However, Amnesty says that 142 countries have either abolished the death penalty in law or in practice and that in the past five years 33 countries have carried out at least one execution. (BBC News, 2018) Amnesty collects its statistics using official figures, media reports and information passed on from individuals sentenced to death and their families and representatives. According to those reports, four countries were responsible for 84% of executions in 2017 (Saudi Arabia, Iraq, Pakistan and Iran). That doesn't include China, where the statistics are a state secret. Amnesty estimates that China carries out thousands of executions each year. (BBC News, 2018)

According to the Amnesty International, 2,591 death sentences carried out in 53 countries in 2017. But in some cases the death sentences will be commuted, where countries are reluctant to enforce the punishment.

Although, the death penalty is not imposing on children, there are still a number of countries which are imposing death sentences on persons who are minors at the time they committed the crime. For instance, people in South Sudan and Iran were executed under 18 years of age. (Amnesty International, 2017) The imposition and execution of the death penalty against people who are under age 18 is a violation of International Law. Similarly, people with mental or intellectual disabilities were executed or remand under sentence of death in several countries including Japan, Maldives, Pakistan, Singapore and USA contrary to the international law.

The methods of execution of offenders vary considerably around the world. They include beheading, electrocution, hanging, lethal injection, shooting and stoning. (Byrnes, 2007)

3.3. BRIEF OVERVIEW OF THE SRI LANKAN CONTEXT

Although the capital punishment is a legal penalty in Sri Lanka, there have been no executions since 1976. In practice, death sentences handed down by the High court and Supreme Court were automatically commuted to life imprisonment. Unluckily, the government of Sri Lanka has tried to reinstate capital punishment in several times. For instance, it has been suggested to reinstate death penalty in 2004 and Sri Lankan Courts continue to impose the death penalty under several statutes which provide for the imposition of the death penalty, including the Penal Code of Sri Lanka. Perjury that results in execution of an innocent person, treason, armed robbery, some military offences and certain crimes committed with the use of a gun can also result in the death penalty. (Deathpenaltyworldwide.org, 2018) However, due to significant opposition to the move no executions have been carried out.

Nevertheless, Media reported that the Cabinet approval has been granted to re-implement capital punishment against those drug traffickers who have been convicted and are under death sentence. Arguably, the death penalty cannot be accepted in any circumstances, regardless of the crime. Since the capital punishment is an ineffective, extreme and irreversible form of punishment that does not help to reduce crime, it is reasonable to oppose on this decision. Especially, this decision is confront to the Sri Lanka's international commitments, including its repeated votes in favour of a moratorium on the implementation of the death penalty at the UN General Assembly, including most recently in 2016. (Amnesty.org, 2018)

3.4. PRINCIPLE ARGUMENTS FOR AND AGAINST OF DEATH PENALTY

The justifications for the death penalty derived from two main arguments, namely, the retributive argument and the deterrence argument. (Byrnes, 2007) Some would believe death penalty as an effective deterrent and it is needed as a means of retributive justice. Retributivists have relied on the lex talionis doctrine. This concept can be explained as the law of retaliation, whereby a punishment resembles the offence committed in kind and degree. In other words, retributive justification for death penalty has its roots in the notion of 'an eye for an eye, a tooth for a tooth, and so on'. Under this principle, penalties are justified on the basis of the offender is morally culpable and deserves punishment. However, it is reasonable to argue that, the essence of this concept is revenge. According to Dane Archer, one of social psychologists explains the underpinning reasoning of this principle as follows;

"Revenge is a powerful undercurrent in all societies I believe that the deterrence hypothesis is frequently nothing more than a veneer for revenge." (Wilkes, 1987)

Likewise, most of the critics have stated that the literal interpretation of the lex talionis doctrine is unreasonable on several grounds. Professor Finkelstein argues that 'an exact application of the doctrine is absurd because the state does not 'rape rapists, assault assailants, or burgle the home of burglars in the name of the people.' (Truskett, 2004) Another argument is, since the purpose of this 3,000- year-old law was to limit revenge, the principle of lex talionis is based upon weak tradition. (Truskett, 2004)

Furthermore, some are justified death penalty on the basis of its deterrent value. Countries who implement death penalty generally cite it as a way to deter people from committing crime. They believe that, it is more effective when the punishment happens soon after the crime. They try to explain this position by demonstrating practical examples. For instance, a child learns not to put his/her finger in to the fire, because the consequence is instant pain and suffering.

However, there are several rational arguments against the deterrent value of the death penalty. Especially, the statistical evidence doesn't confirm that the death penalty has a unique deterrent effect and there is no evidence that the death penalty is any more effective in reducing crime than life imprisonment. (Amnesty International, 2017) Arguably, universal homicide rates don't show the countries which implement death penalty have a significantly lesser crime rate than countries which doesn't implement death penalty. This crucial point shows a consistent lack of deterrent effect when the state imposes executions. Nevertheless, retentionist nations assert deterrence justifies capital punishment. For instance, Saudi Arabia and China claim their crime rates have diminished because of the deterrent death penalty factor. Thus, since the results reveal homicide rates are consistently greater in retentionist nations, the results bolster the argument that death as a punishment fails to deter. Therefore, abolition does not result in a dramatic rise in the homicide rate, contrary to what some retentionists argue.

Another main arguments against death penalty is, where the death penalty has been imposed and carried out, there is nothing that can be done to reverse the deliberate killing of an innocent person. In a significant number of murder cases in different countries, defendants convicted of murder have subsequently been shown to be innocent of the crime.

Another concern about the imposition of the death penalty is, it is often used within prejudiced and unfair justice systems. In many cases reported by Amnesty International, people were executed after being convicted in grossly unfair trials.

According to the findings in this paper, author strongly believes that the death penalty violates human rights and it can never be justified. As mentioned above, this view has been founded growing acceptance in national constitutions and a number of judgments. Similarly, surveys conducted by Amnesty International have revealed that most of the countries have a trend in prohibiting death penalty. According to the Amnesty International, 142 countries have abolished the death penalty in law or practice. Especially, in the Asia-Pacific region, 19 countries have abolished the death penalty for all crimes and a further seven are abolitionist in practice. (Amnesty.org, 2018) Almost all of these prohibitions are on human rights grounds. (Amnesty International, 2017)

4. CONCLUSION

Unbeatably, capital punishment is an intolerable denial of civil liberties and is contradictory with the fundamental values of a democratic system, especially, when it kills with premeditation, in the name of the law or in the name of its people, and when it does so in an arbitrary and discriminatory manner.

On the whole, implementing death penalty incorporates the following fundamental concerns. Such as death penalty system in the world is applied in an unfair and unjust manner against people, largely dependent on how much money they have, the skill of their attorneys, race or the other discriminatory factors of the victim and where the crime took place. (American Civil Liberties Union, 2018) Thus, the vast majority of law enforcement professionals surveyed agree that capital punishment does not deter violent crime. Further, innocent people are too often sentenced to death. According to the statistics, since 1973, over 156 people have been released from death rows in 26 states because of innocence in USA. (American Civil Liberties Union, 2018) They have been calculated that, at least one person is exonerated for every 10 that are executed.

Although the death penalty seems to provide immediate pain and suffering on someone who harms the victim, the standard of a matured society demand a more measured response. The objections to this approach include the position that the deliberate taking of life by the state undermines the sanctity of life, has a brutalizing effect on society, and sees the offender as beyond rehabilitation. (Byrnes, 2007) Instead of that, it can be recommended a series of strong and long term policies including strengthening of institutions and procedures aimed at reducing and/or eradicating serious crimes. Over half the world's nations have abolished capital punishment in law or practice because they are mindful that alternative punishments are effective. William Schabas has been stated that "The death penalty's abolition has been envisaged for at least two centuries, and with the accelerating progress of the movement for abolition, the end of this dark tunnel is now in sight." (Truskett, 2004) Any legal system in a country must be solidly founded upon the realm of moral and human rights.

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