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International Law on Capital Punishment

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Abstract

From a retentionist policy, most countries are now moving towards abolition of the death penalty. When the UN was formed in 1945, only 7 countries had abolished capital punishment. Through sustained efforts of International organizations such as the United Nations and Amnesty International, this number has risen to 159 countries (de jure and de facto). In this research paper, I have endeavoured to trace back the steps taken to curb the use of the death penalty which is growingly being regarded as a gross violation of 'right to life' globally.

Keywords: International Law, United Nations, Capital punishment, Death penalty, Deterrence, Abolition, Right to Life.

1. Introduction

"The death penalty has no place in the 21st century. Together, we can finally end this cruel and inhumane practice everywhere around the world."

United Nations Secretary-General, Ban Ki-moonⁱ

Globally, there has been a paradigm shift in relation to capital punishment. At one point, reinforced by the research work of Issac Ehrlichⁱⁱ it was believed that capital punishment had a deterrent effect on crime. However, subsequent in-depth studies have pointed out the flaws in his methodology, suggesting that Capital punishment is no more or no less deterrent than life imprisonment, raising questions on the efficacy of capital punishment vis-à-vis 'right to life'.

There has been a growing consensus worldwide on the need to abolish death sentence altogether. This movement has gained momentum over decades of persistence and efforts of International organizations such as the United Nations (hereinafter referred to as "UN") and Amnesty International. Today, when 159 countries (de jure and de facto)ⁱⁱⁱ have either abolished the death sentence or do not carry out executions, let us trace back the footprints on this trail.

2. Providing a framework:- Efforts of the UN

The Universal declaration of Human rights is a sacrosanct international declaration which seeks to protect the 'right to life' of one and all. This declaration being the guiding factor, the UN through various conventions and resolutions has endeavoured to scrap off the provision of 'death penalty' from the statute books worldwide.

Although International law does not have the same binding force as municipal law but once countries ratify any treaty of the UN; such countries become obligated to undertake enforcement of the same in their respective nation-states by means of legislative action, making it as effective as municipal law for the ratifying countries (*Starke, 1977*)^{iv}.

The key measures taken by the UN in its quest to abolish the death penalty have been discussed below-

2.1. Conventions of the UN

2.1.1. The International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR")^v

The ICCPR was signed in 1966 and has been effective since 1976. The importance attached to this covenant is fathomable from the fact that it is part of the 'International Bill of Human Rights'. Currently, 168 countries are parties to this document.

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Though the covenant does not explicitly abolish the death penalty, Article 6 seeks to preserve the 'right to life' and limit the use of the death penalty.

The safeguards relating to death sentence enumerated under article 6 of the ICCPR are as under-

- No arbitrary deprivation of 'right to life'.
- Death sentence may be imposed only for the 'most serious offences', in accordance to the law of the land. Provided that the sentence imposed be not contrary either to the ICCPR or to the Convention on the Prevention and Punishment of the Crime of Genocide.
- Execution not to be carried out unless judgment is final.
- Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.
- Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
- Death sentence not be imposed for crimes committed by persons below eighteen years.
- Death sentence shall not be carried out on pregnant women.
- Nothing contained in article 6 shall be invoked to delay or to prevent the abolition of capital punishment.

The UN Human Rights Committee, an authority on interpreting the ICCPR delved deeply into article 6 in its general comment of 1982^{vi}. It noted-

- 'Most serious crimes' shall be interpreted restrictively; States continuing with death penalty must resort to it as an exceptional measure.
- Before imposing the death sentence, the procedural guarantees prescribed by the state must be followed including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, the right to review by a higher tribunal and the right to seek pardon or commutation of the sentence.

2.1.2. The Second Optional Protocol^{vii} to the ICCPR, aiming at the abolition of the death penalty

1991 was a momentous year for the abolition of the death penalty as the second protocol to the ICCPR came into force. This is the only UN treaty directly and wholly committed to the cause of abolition of the death penalty. It has a total of 81 state parties.

The key points of the protocol are submitted under:-

- No executions by state parties.
- Abolition of death penalty by state parties.
- Reservations permissible at the time of ratification for executions pursuant to conviction for 'a most serious crime' of military nature committed during wartime.

2.1.3. The Convention on the Rights of the Child (CRC)^{viii}

The CRC has been effective since 1990. Currently, 195 nations have ratified the convention. Article 37(a) prohibits capital punishment for persons below 18 years of age.

As per the clarification submitted by the 'Committee on the Rights of Child, (*General Comment 10, 2007*)'^{ix}, death penalty may not be imposed on any person who committed a crime when he was below 18 years, irrespective of his age being above 18 years at the time of trial, sentencing or execution.

2.2. Resolutions by the organs of the UN

2.2.1. General Assembly Resolutions

Over the years, the General Assembly through several resolutions (2007, 2008, 2010, 2012, and 2014)^x has called

for a 'Moratorium on the use of the death penalty'. These resolutions appeal to the states continuing with capital punishment-

- To respect the safeguards guaranteeing protection of rights of persons facing death penalty, especially those enumerated in the annex of the ECOSOC resolution no 1984/50.
- To progressively restrict the use of the death penalty.
- To reduce the number of offences carrying death sentence as punishment.
- To establish a moratorium on death sentence until it is abolished.
- To accede to/ ratify the second optional protocol of the ICCPR, aiming at the abolition of the death sentence.

These resolutions have been gaining ground over time. For instance, the 2007 resolution got 104 votes in its favour, the number rising to 117 votes in the recent 2014 resolution. It suffices to say, the international trend is leaning more towards abolition by the day.

2.2.2. The Economic and Social Council Resolutions (hereinafter referred to as "ECOSOC") Resolutions

(a) 'Safeguards guaranteeing protection of the rights of those facing the death penalty', ECOSOC resolution 1984/50^{xi}-

- Countries where Capital punishment has not been abolished may impose it only for 'most serious crimes'. It limits classification of the 'most serious crimes' as those which are 'intentional crimes with lethal or other extremely grave consequences'.
- Capital punishment may be imposed only for those crimes which at the time of commission prescribe the death penalty by law.

However, it further states that subsequent to the commission, if a lighter sentence is introduced for that offence, the offender must get such benefit instead of the death sentence.

- Persons below 18 years at the time of commission, pregnant women, new mothers or persons who have become insane must not be executed or awarded the death penalty.
- Capital punishment to be awarded only when the crime is established beyond the shadow of doubt and not where there is scope for any alternate explanation.
- Death penalty to be carried out only when:-
Final judgment is awarded by competent court.
Such judgment is to be given after fair trial, the minimum standard being *article 14 ICCPR*. Article 14(3) contains the minimum guarantees in the determination of a criminal charge.

They are:-

- (a) "To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt".
- Right to appeal in higher court against death penalty, when awarded.
- Right to seek pardon and commutation of sentence in all cases where capital punishment is awarded.
- Capital punishment not to be carried out where any kind of recourse is pending i.e. appeal, pardon or commutation of sentence.
- Execution to be carried in such a way so as to inflict least suffering.
- (b) The 1989/64^{xii} ECOSOC resolution enumerates additional safeguards regarding capital punishment-
 - Allowing time and facilities to prepare defence and availability of counsel at all stages of proceedings.
 - Introducing provisions for mandatory appeals/Review/Clemency/pardon.
 - Providing a maximum age beyond which death sentence may not be imposed or executed.
 - Eliminating death sentence or execution for the mentally retarded or those with extremely limited mental competence.
 - Encouraging transparency on the subject of death sentence including publication of statistics and information.

This becomes relevant because in some countries the data on the use of the death penalty continues to be classified as a State secret and such disclosure amounts to a criminal offence. (*Report of the Secretary-General*^{xiii} E/2015/49)

- Greater cooperation with NGOs and other institutions for purpose of research on death penalty.
- (c) The 1996/15^{xiv} ECOSOC Resolution further enumerates additional safeguards regarding capital punishment-
 - In addition to what has been stated in the previous ECOSOC resolutions, including the safeguards enlisted under article 14 ICCPR, the 1996 resolution urges nation-states to effectively apply the 'Standard Minimum Rules for the Treatment of Prisoners' so as to keep to a minimum, the suffering of prisoners under sentence of death in states where death penalty has not been abolished as yet.

3. Current Position

All these concrete steps taken by the UN, reinforced by the initiatives of other International organizations such as the 'Amnesty International' has gone a long way in curbing the use of the death penalty.

The latest quinquennial report^{xv} (*E/2015/49*) of the UN Secretary General on Capital punishment states "The report confirms the continuation of a very marked trend towards abolition and restriction of the use of capital punishment in most countries". There has been a decline of 17% of the states retaining the death penalty during the period of 2009-2013 when compared with the previous quinquennial report of 2004 to 2009. This is indeed a welcome trend for protection of human rights.

Statistics in the report(*E/2015/49*) throw light on the status of capital punishment world-wide^{xvi} as on December 2013:-

- (a) Abolitionist for all crimes: 101 Countries
- (b) Abolitionist for ordinary crimes: 007 Countries
- (c) Abolitionist de facto: 051 Countries
- (d) Retentionist in practice: 039 Countries

4. Is the death penalty really deterrent?

Deterrence forms the basis of the argument supporting retention of the death penalty.

In *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978, p. 9), the American National Research Council (hereinafter referred to as "NRC") arrived at the conclusion that "available studies provide no useful evidence on the deterrent effect of capital punishment."

More than three decades later, in *Deterrence and death penalty*^{xvii} (*NRC Report*) 2012 when the NRC decided to review the plethora of reports available on the subject; it found no real evidence conclusively suggesting that capital punishment indeed does have a deterring effect on society.

For instance, in the U.S between 1976 and 2009, Texas carried out 447 executions while California carried out only 13 executions. Had there been a direct linkage between death penalty and deterrence, the difference in the homicide rates between the two would have been startling but the NRC report points to just the opposite. The homicide rates in the two states remained identical despite their different approaches to the death penalty.

It concluded in the following words "The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently.....(such studies)should not influence policy judgments about capital punishment."

Even research conducted on behalf of the UN goes to show that the retentionist countries continue to harp on the utilitarianism of the death penalty despite evidence to the contrary. A recent report, *Moving away from the death penalty: Arguments, trends and perspectives*^{xviii}, states "Those governments that still favour capital punishment.....argue that the death penalty is a general deterrent, not because the academic studies show this to be the case, but because, despite the evidence to the contrary, they believe it can be deduced from human nature".

5. Concluding Remarks

As submitted above, research on death penalty is inconclusive. It cannot be said to have or not have a deterrent effect on crime. In such circumstances, is it moral to impose death penalty given that once an execution is carried out, such a person cannot be brought back from the dead, making it impossible to undo a wrongful conviction?

In 1993, Kirk Noble Bloodworth became the first person in the U.S.A to be exonerated from a capital conviction through DNA testing. At the time of release, he had already spent about 8 years in prison (including 2 on death row). This clearly points to the inadequacies of the justice system.

The mere possibility of a wrongful conviction is reason enough to abolish the death penalty. Inversely, inconclusivity on the issue of deterrence makes the argument proposing retention of capital punishment rather moot since deterrence is the *raison d'être* for the continuation of the death penalty.

Liechtenstein conducted its last execution in the year 1785(E/2015/49), becoming the first de facto abolitionist country in the world. When the outmoded practice of 'capital punishment' becomes extinct from the globe is a question that only time will answer. Nevertheless, it is heartening to see that greater number of countries are adopting a more humane approach and moving towards abolition of capital punishment.

6. References

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ⁱⁱ Isaac Ehrlich is an American academic, economist and researcher. His work on capital punishment was published in 1975, 'The Deterrent Effect of Capital Punishment: A Question of Life and Death'.

ⁱⁱⁱ De jure refers to countries which are (a) abolitionist for all crimes and (b) Abolitionist for ordinary crimes whereas de facto refers to countries which have not carried out executions in the last 10 years.

^{iv} Starke JG. an introduction to International Law, 8th Edition, 1977

^v International Covenant on Civil and Political Rights (ICCPR) Retrieved from the official website of UNHR, Office of the high commissioner for Human Rights, 1966. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>

^{vi} Human Rights Committee, General Comment No 6 on Article 6 of ICCPR, 1982. Retrieved from [http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9\(Vol.I\).\(GC6\)_en.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9(Vol.I).(GC6)_en.pdf)

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^{xi} Economic and Social Council resolution, 1984/50, Safeguards guaranteeing protection of the rights of those facing the death penalty, 1984. retrieved from https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1980-1989/1984/ECOSOC_Resolution_1984-50.pdf

^{xii} ECOSOC Resolution 1989/64, Implementation of safeguards guaranteeing protection of the rights of those facing the death penalty, 1989. retrieved from https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1980-1989/1989/ECOSOC/Resolution_1989-64.pdf

^{xiii} Report of the Secretary-General E/2015/49. Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, 2015.

<http://www.ohchr.org/Documents/Issues/DeathPenalty/E-2015-49.pdf>

^{xiv} ECOSOC Resolution 1996/15, Safeguards guaranteeing protection of the rights of those facing the death penalty, 1996. retrieved from

<http://www.un.org/documents/ecosoc/res/1996/eres1996-15.htm>

^{xv} Report of the Secretary-General E/2015/49. Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, 2015.

<http://www.ohchr.org/Documents/Issues/DeathPenalty/E-2015-49.pdf>

^{xvi} The UN classifies nation-states into 4 categories with regard to their status on death penalty-(a) Abolitionist for all crimes, i.e. during peace or war;(b) Abolitionist for ordinary crimes, i.e. Abolition of death penalty during peacetime for most crimes in the criminal code including murder but retention of death penalty under exceptional circumstances such as military offences in time of war, or crimes against the State, such as treason, terrorism or armed insurrection;(c) Abolitionist de facto, i.e. remaining in force by law, where death sentence may have been pronounced but execution has not taken place in the past 10 years. (d) Retentionist in practice, i.e. States where it remains lawful and executions have taken place during the previous 10 years.

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