

Article

Capital punishment: A human right examination case study and jurisprudence

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“I am a human being and nothing pertaining to human is alien to me, so said Karl Marx (www.sociologist.com)”

At the dawn of the 21st century, the death penalty is considered by most civilized nations as a cruel and inhuman punishment. While international documents have restricted and in some cases even banned the death penalty, its application is still not against customary international law. Much debate continues as to whether the death penalty constitutes an appropriate punishment, at least to the most heinous crimes. In recent years, the debate has been further fueled by the use of new technologies which have shown that a large proportion of people sentenced to death are, indeed, innocent. This paper will look at the trend towards abolition of the death penalty as it has emerged over recent decades, alongside examining both the sides of the debate regarding death penalty which requires a presentation of the theories of punishment and finally to arrive at a conclusion as to whether in the times of the 21st century the death penalty should still be adhered to practice or not it will trace the development of capital punishment as a human rights issue in the international forum and examine recent challenges to the death penalty. The structure that this paper adopts is discussed in short herein, any paper on death penalty in the current times would be incomplete without mentioning the Saddam Hussein execution, hence the trial and execution of Saddam Hussein is examined only from the perspective of the validity or not of the sentence of death penalty awarded to Saddam in the first section. In the next section, the researcher traces the abolitionist movement in the world and presents statistically the current stand of the world on the issue of capital punishment. The next section presents the jurisprudential analysis of the death penalty and therefore examines the various theories propounded on this subject starting from the theories of punishment to the arguments for and against capital punishment. The researcher finally goes on to establish that the death penalty intersects with international law and is challenged by it and therefore defining the death penalty as a Human Rights issue is imperative. For the purpose of proving the above proposition, apart from employing relevant primary sources in the form of treaty provisions, secondary sources in the form of treatises and articles, are also used and these are enumerated in detail in the index of authorities.

Key words: Capital punishment, human right, due process of law, Saddam’s trial.

INTRODUCTION

“The deliberate institutionalized taking of human life by the State is the greatest degradation of the human personality imaginable” The capital punishment has been practiced in civilizations for over many centuries now. The instances of objections being raised against such a practice hardly occurred in the past. There were however, exceptions, individuals have reacted against the death penalty, and governments in some countries have abolished it. But despite this, it is generally speaking only

during the second part of the 20th century that a noticeable change has taken place regarding the attitude towards death penalty among some of the governments of the world. This initial movement has now spread, to the fact that several nations' governments have chosen to abolish the death penalty. This mainly is the case in Europe.

Gradually, in the course of social evolution, a consensus forms among nations and peoples that certain prac-

tices can no longer be tolerated. Ritual human sacrifice, slavery and physical torture can be cited as examples. At the dawn of the 21st century, the death penalty is considered by most civilized nations as a cruel and inhuman punishment. While international documents have restricted and in some cases even banned the death penalty, its application is still not against customary international law. A majority of countries in the world has now abandoned the use of the death penalty, but the world has not yet formed a consensus against its use. Much debate continues as to whether the death penalty constitutes an appropriate punishment, at least to the most heinous crimes. In recent years, the debate has been further fueled by the use of new technologies which have shown that a large proportion of people sentenced to death are, indeed, innocent ["The Death Penalty in the World", <http://www.derechos.org/dp> (visited on 28/12/06)].

THE EXECUTION OF SADDAM HUSSEIN

BRIEF FACTS OF THE TRIAL

Iraqi authorities put Saddam Hussein and seven other former Iraqi officials on trial on October 19, 2005 four days after the October 15, 2005 referendum on the new constitution. The first trial of Saddam Hussein began before the Iraqi Special Tribunal on October 19, 2005. In this case Hussein, along with seven other defendants, was tried for allegations of crimes against humanity with regard to events that took place after a failed assassination attempt in Dujail in 1982, Hussein and the others were specifically charged with the killing of 143 Shiites (Christian Eckart, "Saddam Hussein's Trial in Iraq: Fairness, Legitimacy and Alternatives, A Legal Analysis", Cornell Law Rev 2006).

On November 5, 2006, Saddam Hussein was sentenced to death by hanging. An appeal, mandated by the Iraqi judicial system, followed. However, on December 26, Saddam's appeal was rejected and the death sentence was given. No further appeals were possible and sentence was to be executed within 30 days of that date. On 30th December, 2006 (*Id ul-zuha* – the Muslim day of forgiveness) Saddam Hussein, embraced the gallows with face uncovered and Quran in hand at 06:05 h [Issam Saliba, "Comments On The Indictment Of Saddam Hussein" http://www.loc.gov/law/public/saddam/saddam_prin.html (visited on 2/1/07)]

The importance of Saddam's trial

With the questioning of Saddam Hussein in front of the Iraqi High Criminal Court, a trial began that has been labeled by some as "the trial of the century" [See Michael Scharf, "Grotian Moment: Is the Saddam Hussein Trial one of the most important trials of all time?" Issue # 10,

<http://www.law.case.edu/saddamtrial/>; "The Trial of the Century", CBS News, April 22, 2006, <http://www.cbsnews.com/stories/2003/12/15/news/opinion/court-watch/main588751.shtml>, (visited on 29/07/07)]. Whether this is true or not, the proceedings in Baghdad received high publicity and were under close scrutiny by major human rights organizations, legal experts, and indeed the general public. Why does the trial attract so much attention one may wonder and why do so many people care about ensuring fair proceedings for an dictator on trial for major human rights violations, a dictator that himself made extensive use of a special Revolutionary Court guaranteeing fast executions but by no means due process of law.

The answer to this is two-fold; firstly, there is the hope that this trial might serve as a model for Iraq and might help to re-establish trust in the judicial system and its protection against the deprivation of rights which has been strongly eroded by the past 23 years of Saddam's reign and to thereby allow the country a "new start" based on firm legal principles [Goldstone, "The Trial of Saddam Hussein And Others For Human Rights Abuses?" 27 Fordham Int'l L.J. 1490, 2003-2004 at 1503-1504]. Secondly, by holding Saddam accountable, the current criminal proceedings add another name to the list of recent precedents in which heads of state had to face charges for violating international law. The trial might thereby serve as another mosaic stone in establishing the rule of law and deter others from stepping over the lines drawn by international agreements and custom in the area of international criminal law [See the proceedings against General Pinochet in Spain and Chile, against Slobodan Milosevic in front of the ICTY, the Ex Rwandan Prime Minister Kambanda in front of the ICTR and now against former Liberian Head of State Charles Taylor in front of the Special Court for Sierra Leone].

Was the death penalty an option in the Saddam trial?

In its closing argument on June 19, 2006, the prosecution in the Al-Dujail trial demanded the death penalty for Saddam Hussein and three of his co-defendants. This demand and the final verdict of the Tribunal raise the issue- whether the death penalty was even available under Iraqi law for the offence of crimes against humanity. Over the last decade, the international legal community has witnessed the establishment of a variety of international and national tribunals that have had to come to terms with capital punishment. The latest tribunal formed, and perhaps the most prominent, is the Iraqi tribunal where Saddam Hussein has been accused of crimes against humanity, in order to determine whether the Iraqi Special Tribunal (IST) could actually award the death penalty, the following issues have to be examined: death penalty, the following issues have to be examined:

Offence under international law no penalty under domestic Law

Saddam Hussein and his co-defendants are charged in the present trial with the international offense of crimes against humanity. It is not clear whether the charges are based on international or domestic criminal law. While international criminal law has recognized this offense for about sixty years, Iraq is yet to incorporate this offense in its domestic law. The IST was established by the Iraqi law; therefore, matters of jurisdiction and procedure of the Tribunal should be decided by the Iraqi Penal Code. However, The Iraqi Penal Code does not include a penalty for the international offense of crimes against humanity as the offense has not been made a part of the domestic law.

Penalty according to the underlying crimes

The side arguing for the award of the death penalty stated that the penalties to be applied to those convicted of committing the international offense of crimes against humanity must be equivalent to those penalties assigned to underlying crimes which constitute the physical elements of the international offense, such as murder and rape. Penalties for such crimes include capital punishment. The logic of this argument is strengthened by virtue of the fact that it would be hard for the public to accept a decision where a lesser offense, such as murder, gives rise to capital punishment while a more serious crime, such as the offense of crimes against humanity, gives rise to only a prison sentence [Issam Michael Saliba, "Is The Death Penalty An Option In The Trial Of Saddam Hussein?" http://www.loc.gov/law/public/saddam/saddam_capi.html (visited on 2/1/07)].

The opposing argument on this count is that any interpretation suggesting that the penalties for the international offense of crimes against humanity are those assigned to its underlying crimes is misconceived on the basis that an international offense is separate and distinct from its underlying crimes. This argument is supported by the sentencing judgment in *The Prosecutor v. Drazen Erdemovic* [Case No. IT-96-22-T, T.Ch. I, Nov. 29, 1996, <http://www.un.org/icty/erdemovic/trialc/judgement/erdtjsj961129e.htm> (visited on 28/12/06)] in which the International Tribunal for the former Yugoslavia rejected the proposition that the penalties for the international offense of crimes against humanity must derive from the penalties applicable to its underlying crime [The ICTY held that, "...It might be argued that the determination of penalties for a crime against humanity must derive from the penalties applicable to the underlying crime. In the present indictment, the underlying crime is murder The Trial Chamber rejects such an analysis. Identifying

the penalty applicable for a crime against humanity - in the case in point the only crime falling within the international Tribunal's jurisdiction - cannot be based on penalties provided for the punishment of a distinct crime not involving the need to establish an assault on humanity..."]

Following international precedents

Further the Iraqi Penal Code has a provision which directs the judges to follow the precedents and penalties imposed by other international criminal tribunals if the penal code has no relevant provisions. By reviewing the statutes, precedents and penalties of international criminal tribunals, one would recognize clearly that the death penalty is not permitted in any of these international forums. As an example, Article 77 of the International Criminal Court specifically excludes the death penalty as a punishment for crimes against humanity or any other international offenses. The Court is allowed to only impose imprisonment for a specified term not to exceed thirty years or a term for life "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." [Rome Statute of International Court, July 1, 2002, Art. 77, http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, (visited on 10/03/08).]

Article 24 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) provides that "the penalty imposed by the Trial Chamber shall be limited to imprisonment." [Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, Art. 24, <http://www1.umn.edu/humanrts/icty/statute.html>, (visited on 28/11/07).] The Tribunal is not authorized, therefore, to impose the death penalty, regardless of the circumstances and the gravity of the crime. Article 23 of the Statute of the International Criminal Tribunal for Rwanda [Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Aug. 14, 2002, Art. 23, <http://www.ohchr.org/english/law/itr.htm>, (visited on 28/12/06)] contains a similar provision, which prevents the trial judges from imposing the death penalty. Article 19 of the Statute of the Special Court for Sierra Leone provides that "the Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years" [Statute of the Special Court for Sierra Leone, Jan. 16, 2002, Art.19,

<http://www.specialcourt.org/documents/Statute.html>, (visited on 28/12/06)]. Since there have been no death penalty judgments issued by any international criminal courts subsequent to those issued by the Military Tribunal of Nuremberg in 1946, it may be argued that the special court trying Saddam Hussein could not legally impose the death penalty where there is conviction for crimes against humanity [Issam Michael Saliba, "Is The Death Penalty An Option In The Trial Of Saddam Hussein?" http://www.loc.gov/law/public/saddam/sad-dam_capi.html (visited on 2/1/07)].

Death penalty in the 20th century

History of death penalty – Theological justifications

The state has inflicted death as a punishment, on its subjects since the ancient times. These were times when the state and the dominant religious establishment (in some cases, the 'church') were hand-in-glove. Hence, some conduct was interpreted as offence against the ruler, as well as an offence against God.

The separation of the state and religion, in the Enlightenment years, has seen theories of punishment incorporate many different perspectives, as why the state punishes, what it seeks to achieve thereby, and hence what method and procedure criminal punishment should take account off. Ever since, the debates on penology have consistently questioned the appropriateness of retribution and societal vengeance as a drive-force behind punishment.

Capital punishment is the lawful infliction of death as a punishment. The Bible prescribes death for murder and many other crimes including kidnapping and witchcraft. By 1500 in England, only major felonies carried the death penalty - treason, murder, larceny, burglary, rape, and arson. By 1700, however, Parliament had enacted many new capital offences and hundreds of persons were being put to death each year [<http://www.richard.clark32.btinter-net.co.uk/thoughts.html> (visited on 9/7/2007)].

Reform of the death penalty began in Europe by the 1750's and was championed by academics such as the Italian jurist, Cesare Beccaria, the French philosopher, Voltaire, and the English law reformers, Jeremy Bentham and Samuel Romilly. They argued that the death penalty was needlessly cruel, overrated as a deterrent and occasionally imposed in fatal error. Along with Quaker leaders and other social reformers, they defended life imprisonment as a more rational alternative.

The rise of the abolitionist movement

In later years, with the progress of the human rights movement worldwide, attention has been focused on the

the relative mismatch in power between the state machinery that can lawfully inflict violence, and the individual offender. The violence of the state machinery- that is routinely used by law-enforcing agencies like the police is a fact that cannot be denied under any circumstances. The fact that racial, gender, communitarian biases that exist within a society get reflected through state agencies in the procedures of the criminal justice system, is a reality. In light of these realities, the human rights movements, championed by organizations like the American Civil Liberties Union, the Amnesty International, and international setups like the European Union and the UN, have espoused the cause of humane punishment- that at the very outset, which does not measure punishment against the brutality of the crime, but the aim of punishment itself.

Venezuela (1853) and Portugal (1867) were the first nations to abolish the death penalty altogether. Today, it is virtually abolished in all of Western Europe and most of Latin America. However, the death penalty continues to be commonly applied in other nations. China, the Democratic Republic of Congo, the United States and Iran are the most prolific executioners in the world. The lethal injection, which is almost universal in America, is also used extensively now in China, the Philippines, Thailand and Guatemala. Electrocutation and the gas chamber are used only in America and seem to be disappearing slowly. Stoning for sexual offences, including adultery, may still occur in some Islamic countries. China, with a quarter of the world's population, carries out the most executions for a wide variety of offences [Abolitionist for all crimes: 88 Abolitionist for ordinary crimes only: 11 Abolitionist in practice: 30 Total abolitionist in law or practice: 129 Retentionist: 68]. The following table may facilitate the understanding of global trends on abolition and retention of capital punishment:[Data available at <http://web.amnesty.org/pages/deathpenalty-countries-eng> (visited on 10/04/2008) Table 1.

Death penalty – A jurisprudential analysis

Theories of punishment

With change in the social structure the society has witnessed various punishment theories and the radical changes that they have undergone from the traditional to the modern level and the crucial problems relating to them. In the words of Sir John Salmond -The ends of criminal justice are four in number and with regard to the purposes served by them; punishment can be divided as under:

Deterrent theory

Since the Code of Hammurabi in Babylone[<http://www.google.com/search?q=ca-che:rM4Y>

Table 1. Global trends on abolition and retention of capital punishment.

Abolitionist for All Crimes	Abolitionist in practice Countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years.	Abolitionist for ordinary Crimes only	Retentionist till date
<p>Andorra, Angola, Armenia, Australia, Austria, Azerbaijan, Belgium, Bhutan, Bosnia-Herzegovina, Bulgaria, Cambodia, Canada, Cape Verde, Colombia, Costa Rica, Cote D'ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Estonia, Finland, France, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia (Former Yugoslav Republic), Malta, Marshall Islands, Mauritius, Mexico, Micronesia (Federated States), Moldova, Monaco, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niue, Norway, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Samoa, San Marino, Sao Tome And Principe, Senegal, Serbia, Seychelles, Slovak Republic, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Timor-Leste, Turkey, Turkmenistan, Tuvalu, Ukraine, United Kingdom, Uruguay, Vanuatu, Vatican City State, Venezuela</p>	<p>Algeria, Bahrain, Benin, Brunei Darussalam, Burkina Faso, Central African Republic, Congo (Republic), Gabon, Gambia, Ghana, Grenada, Kenya, Kyrgyzstan, Madagascar, Malawi, Maldives, Mali, Mauritania, Morocco, Myanmar, Nauru, Niger, Papua New Guinea, Russian Federation, Sri Lanka, Suriname, Swaziland, Togo, Tonga, Tunisia</p>	<p>Albania, Argentina, Bolivia, Brazil, Chile, Cook Islands, El Salvador, Fiji, Israel, Latvia, Peru</p>	<p>Afghanistan, Antigua And Barbuda, Bahamas, Bangladesh, Barbados, Belarus, Belize, Botswana, Burundi, Cameroon, Chad, China, Comoros, Congo (Democratic Republic), Cuba, Dominica, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kazakstan, Korea (North), Korea (South), Kuwait, Laos, Lebanon, Lesotho, Libya, Malaysia, Mongolia, Nigeria, Oman, Pakistan, Palestinian Authority, Qatar, Rwanda, Saint Christopher & Nevis, Saint Lucia, Saint Vincent & Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, Sudan, Syria, Taiwan, Tajikistan, Tanzania, Thailand, Trinidad And Tobago, Uganda, United Arab Emirates, United States Of America, Uzbekistan, Viet Nam, Yemen, Zambia, Zimbabwe.</p>

qsiMWL8J:www.hrusa.org/thisismyhome/resources/Intro_HR_and_HRE.ppt+Philosophical+and+Legal+foundation+of+Human+Rights.+ppt.&hl=en&ct=clnk&cd=8&gl=et (visited on April 14th 2008)] the ancient history of Punishment before all things was deterrent, and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him. One of the primitive methods of punishments believes that if severe punishments were inflicted on the offender it would deter him from repeating that crime [J. Bentham, the founder of this theory, states: "General prevention ought to be the chief end of punishment as its real justification. If we could consider an offence, which has been, committed as an isolated fact, the like of which would never recur, punishment would be useless"].

Those who commit a crime, it is assumed, derive a mental satisfaction or a feeling of enjoyment in the act. To neutralize this inclination of the mind, punishment inflicts equal quantum of suffering on the offender so that it is no longer attractive for him to carry out such committal of crimes. The basic idea of deterrence is to deter both offenders and others from committing a similar offence.

Retributive theory

The most stringent and harsh of all theories retributive theory believes to end the crime in itself. This theory underlines the idea of vengeance and revenge rather than that of social welfare and security. Punishment of the offender provides some kind of solace to the victim or to the family members of the victim of the crime, who has suffered out of the action of the offender and prevents reprisals from them to the offender or his family.

Preventive theory

Unlike the former theories, this theory aims to prevent the crime rather than avenging it. Looking at punishments from a more humane perspective it rests on the fact that the need of a punishment for a crime arises out of mere social needs that is, while sending the criminals to the prisons to prevent the offender from doing any other crime and thus protecting the society from any anti-social elements.

Reformative theories

The most recent and the most humane theory, of all theories is based on the principle of reforming the legal offenders through individual treatment. Not looking to criminals as inhuman this theory puts forward the changing nature of the modern society where it presently looks into the fact that all other theories have failed to put forward any such stable theory, which would prevent the occurrence of further crimes. Though it may be true that there has

been a greater onset of crimes today than it was earlier, but it may also be argued that many of the criminals are also getting reformed and leading a law-abiding life all-together. Reformative techniques also possess some elements of deterrent techniques.

Arguments for death penalty

Incapacitation of the criminal

Capital punishment permanently removes the worst criminals from society and should prove much cheaper and safer for the rest of us than long term or permanent incarceration. It is self evident that dead criminals cannot commit any further crimes, either within prison or after escaping or being released from it [David Anderson, "The Death Penalty – A Defence", http://www.yesdeathpenalty.com/argument_1.htm (visited on 30/12/06)]

Cost

Money is not an inexhaustible commodity and the state may very well better spend our (limited) resources on the old, the young and the sick rather than the long term imprisonment of murderers, rapists, etc.(Phil Porter, *The Economics of Capital Punishment*, Clarendon Press, 1998)

Retribution

Execution is a very real punishment rather than some form of reformatory punishment, the criminal is made to suffer in proportion to the offence. Although whether there is a place in a modern society for the old fashioned principal of 'lex talens' (an eye for an eye), is a matter of personal opinion. Retribution is seen by many as an acceptable reason for the death penalty.

Deterrence

Does the death penalty deter? It is hard to prove one way or the other because in most retentionist countries the number of people actually executed per year (as compared to those sentenced to death) is usually a very small proportion. It would, however, seem that in those countries (e.g. Singapore) which almost always carry out death sentences, there is generally far less incidence of crime, because of fear psychosis in the society. This tends to indicate that the death penalty is a deterrent, but only where execution is an absolute certainty. Statistics were kept for the 5 years that capital punishment was suspended in Britain (1965-1969) and these showed a 125% rise in murders that would have attracted a death sentence. Whilst statistically all this is true, it does not tell one how society has changed over nearly 40 years. It may well be that the murder rate would be the

same today if we had retained and continued to use the death penalty. It is impossible to say that only this one factor affects the murder rate. In 1995, Singapore hanged an unusually large number of 7 murderers with 4 in 1996, 3 in 1997 and only one in 1998 rising to 6 in 1999 (3 for the same murder). [Death Penalty Information Centre, "Facts about Deterrence and the Death Penalty", <http://web.amnesty.org/pages/deathpenalty> (visited on 28/12/06).] Singapore takes an equally hard line on all other forms of crime with stiff on the spot fines for trivial offences such as dropping litter and chewing gum in the street, caning for males between 18 and 50 for a wide variety of offences, and rigorous imprisonment for all serious crimes.

Arguments against death penalty

The death penalty is often opposed on the grounds that, because every criminal justice system is fallible, innocent people will inevitably be executed by mistake, and the death penalty is both irreversible and more severe than lesser punishments. There is a virtual certainty that genuinely innocent people will be executed and that there is no possible way of compensating them for this miscarriage of justice. Often the only people who know what really happened are the accused and the deceased. It then comes down to the skill of the prosecution and defense lawyers as to whether there will be a conviction for murder or for manslaughter. It is thus highly probable that people are convicted of murder when they should really have only been convicted of manslaughter [Stuart Banner, *The Death Penalty - An American History*, Sweet and Maxwell, New York, 2002, p. 292-293].

The death penalty is also most commonly argued to be a violation of the right to life or of the "sanctity of life." Many national constitutions and international treaties guarantee the right to life. The right to life demands that a life only be taken in exceptional circumstances, such as in self-defence or as an act of war, and therefore that it violates the right to life of a criminal if she or he is executed, since this is purely murder by the State. Critics often hold that, because life is an unalienable right, the criminal cannot forfeit the right by committing a crime.

However gruesome the act of offence may be, most convicts undergo the most harrowing time, awaiting the outcome of numerous appeals and their chances of escaping execution are better if they are wealthy or powerful. The psychological agony inflicted on the convict and his near and dear ones is unavoidable and inhuman. The brutalising effect, also known as the brutalization hypothesis, argues that the death penalty has a brutalising or coarsening effect either upon society or those officials and jurors involved in a criminal justice system which imposes it. It is usually argued that this is because it sends out a message that it is acceptable to kill in some

circumstances, or due to the societal disregard for the 'sanctity of life'. An extension of this argument is that the brutalising effect of the death penalty may even be responsible for increasing the number of murders in jurisdictions in which it is practiced [Stephen B. Bright, "Will the Death Penalty Remain Alive in the Twenty-first Century?", *Wisconsin Law Review*, Volume 2001. 1(1).].

There is no such thing as a humane method of putting a person to death. Every form of execution causes the prisoner suffering, some methods perhaps cause less pain than others, but be in no doubt that being executed is a terrifying and gruesome ordeal for the criminal. What is also often overlooked is the extreme mental torture that the criminal suffers in the time leading up to the execution. (Roger Hood, *The Death Penalty: A World-wide Perspective*, Clarendon Press, Oxford, 1996)

What mode of punishment achieves what result on the psyche of the offender, and what impact (if any deterrent impact at all) it has on the society at large, is a question to be considered by those resourceful in social analysis. These are practical dimensions of the criminal justice system that will differ from society to society, and change over time. The specific question of legal ethics that I wish to delve into is simply whether it is in consonance with the role of the modern democratic state, which commits itself to the ethos of human rights, to inflict lawfully, punishment upon a person that ends his/her life. It may be variously argued that the prison system is such that life imprisonment rarely achieves rehabilitation, that life imprisonment is far more debilitating for the psyche of the offender, than death penalty, which inflicts suffering for a short period.

Death penalty and human rights

Defining death penalty in terms of human rights

The debate about the death penalty does not usually employ the terminology of human rights. Nevertheless, the use of the death penalty intersects with international law and is challenged by it. Hence, international law and an analysis based on human rights are useful means to address the death penalty issue. The reasons why countries have abolished the death penalty in increasing numbers vary. For some nations, it was a broader understanding of human rights (Spain abandoned the last vestiges of the death penalty in 1995 stating that "...the death penalty has no place in the general penal system of an advanced, civilised society...") Similarly, Switzerland abolished death penalty because it constituted "a flagrant violation of the *right to life and dignity*..." See, Roger Hood, *The Death Penalty: A Worldwide Perspective*, Clarendon Press, Oxford, 1996)

Defining the death penalty as a human rights issue is a critical first step, but one resist by countries that aggres-

sively use the death penalty. When the United Nations General Assembly considered a resolution in 1994 to restrict the death penalty and encourage moratorium on executions, Singapore asserted that “capital punishment is not a human rights issue”. In the end, 74 countries abstained from voting on the resolution and it failed. (Richard C. Dieter, “The Death Penalty and Human Rights: U.S. Death Penalty and International Law”, <http://www.deathpenaltyinfo.org/Oxfordpaper.pdf>, (visited on 29/07/07)).

However, for an increasing number of countries the death penalty is a critical human rights issue. In 1997, the U.N High Commission for Human Rights approved a resolution stating that the “abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights [United Nations High Commission for Human Rights Resolution, E/CN.4/1997/12 (April 3, 1997)]”. This resolution was strengthened in subsequent resolutions by a call for a restriction of offences for which the death penalty can be imposed and for a moratorium on all executions, leading eventually to abolition.

Challenging the death penalty is not seen solely as an internal matter among nations. Many European countries, along with Canada, Mexico and South Africa have resisted extraditing persons to countries like the United States unless there are assurances that the death penalty will not be sought. The European Union has made the abolition of the death penalty a precondition for entry into the Union, resulting in halting of executions in many eastern European countries which have applied for membership. [Death Penalty Information Centre, <http://www.deathpenaltyinfo.org/dpicintl.html> (visited on 29/07/07).]

International norms regarding death penalty

The right to life is not as inviolable as it might seem at first sight. There are a number of situations where states may deprive individuals of life itself and to which international human rights law does not raise an objection. The use of the death penalty is one such example. Human rights law does not prohibit the use of the death penalty as a punishment for crimes but does encourage its abolition and seek to limit its use [William A. Schabas, *The Abolition of the Death Penalty in International Law*, OUP, Oxford, 1997].

Critics of the death penalty commonly argue that the death penalty specifically and explicitly violates the right to life clause stated in most modern constitutions and human right treaties. Hereunder are enlisted few of the important international instruments which enshrine this right:

Universal declaration of human rights (1948), Article 3: The Universal Declaration of Human Rights (UDHR) is

a resolution of the UN General Assembly and was adopted in 1948. As a resolution, it is not itself formally legally binding despite common assumptions to the contrary. However, the UDHR did establish important principles and values which were later elaborated in legally binding UN treaties. Moreover, a number of its provisions have become part of customary international law. Article 3 of this Declaration upholds the right to life, liberty and security of the person. [The article 3 says in full: “Everyone has the right to life, liberty and security of person.”] There is no mention either that death penalty make an exception to this article or that the article make death penalty unacceptable.

International Covenant on Civil and Political Rights (1966), Article 6, 4

This main international treaty on civil and political rights, also known as ICCPR, is very specific about the right to life and the death penalty: Article 6 reads as follows:

“1. 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.”

The ICCPR specifically allows for the implementation of the death penalty and incarceration as a part of a criminal justice system. [Article 6 clause 2 provides that “...In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. Clause 4 of the same Article also states that “... 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.” Article 4 of the ICCPR further asserts that states are not able to derogate from the article 6 even in times of a public emergency].

International treaties providing for abolition of the death penalty

The community of nations has adopted four international treaties providing for the abolition of the death penalty. One is of worldwide scope; the other three are regional. Following are short descriptions of the four treaties [States may become parties to international treaties either by acceding to them or by ratifying them. Signature indicates an intention to become a party at a later date through ratification. States are bound under international

law to respect the provisions of treaties to which they are parties, and to do nothing to defeat the object and purpose of treaties which they have signed

Second optional protocol to the international covenant on civil and political rights

The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted by the UN General Assembly in 1989, is of worldwide scope. It provides for the total abolition of the death penalty but allows states parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. Any state which is a party to the International Covenant on Civil and Political Rights can become a party to the Protocol.[A total of 60 countries have ratified this Protocol till date].

Protocol to the American Convention on Human Rights: The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organization of American States in 1990, provides for the total abolition of the death penalty but allows states parties to retain the death penalty in wartime if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. Any state party to the American Convention on Human Rights can become a party to the Protocol.[Currently a total of 8 States have ratified this Protocol].

Protocol No. 6 to the European convention on human rights

Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ["European Convention on Human Rights"] concerning the abolition of the death penalty, adopted by the Council of Europe in 1982, provides for the abolition of the death penalty in peacetime; states parties may retain the death penalty for crimes "in time of war or of imminent threat of war". Any state party to the European Convention on Human Rights can become a party to the Protocol.[45 Countries have ratified this Protocol]

Protocol No. 13 to the European convention on human rights

Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights] concerning the abolition of the death penalty in all circumstances, adopted by the Council of Europe in 2002, provides for the abolition of the death penalty in all circumstances, including time of war or of imminent threat of war. Any state party to the

European Convention on Human Rights can become a party to the Protocol. [So far, 37 Countries have ratified it.]

Conclusions

More than Fifty years after the adoption of the Universal Declaration of Human Rights, the compatibility of the death penalty with international human rights norms seems less and less certain. The second generation of international criminal tribunals - the ad hoc tribunals for the former Yugoslavia and Rwanda and the nascent international criminal court - rule out the possibility of the death penalty, even for the most heinous crimes. The basic international human rights treaties have been completed with additional protocols that prohibit capital punishment. Fiftyone states are now bound by these international legal norms abolishing the death penalty, and the number should continue to grow rapidly.

The death penalty might appear to constitute a violation of the right to life but human rights law falls short of insisting that it does. It leaves States the option to impose the death penalty but urges them to move towards abolition and also imposes certain limits on the way in which the death penalty can be imposed.

Capital punishment

May only be imposed for the most serious crimes, pursuant to a final judgement rendered by a court and providing it is not contrary to the provisions of human rights law e.g. not a crime of genocide.

Anyone sentenced to death has the right to seek pardon or commutation of the sentence; Death sentence is not to be imposed on anyone below the age of 18 or carried out on pregnant women.

Even for states which have agreed to abolish the death penalty, human rights law appears ambiguous, allowing them in some statutes to make reservations maintaining the right to use the death penalty at times of war for example. At the same time, the use of the death penalty is totally prohibited from use by the various international criminal courts, like the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.

On having examined both sides of the arguments regarding death penalty, I have arrived at my conclusion, but this is not based on either jurisprudential or ethical reasons but on Human Rights. To elaborate further, assume a situation where the offender has committed the gravest, his conviction shows no infirmity, all constitutional safeguards have been respected, there are no mitigating factors for his punishment (youth, first offence, delay in execution, etc.), and the offender fits the case for the highest possible punishment in a penal system. I

argue that in a case fit for the highest possible punishment that punishment should not be the death penalty because a state that respects life as being sacrosanct should not lawfully murder, however grave the offence and circumstances surrounding it may be. It is, indeed, a moral question as to whether the state should adopt the feeling of vengeance that a society or a victim may feel for the offender. Even though the society may be abhorrent to the criminal and want him to die, ethically, I think it is not for the state to assume feelings of retribution and vengeance and commit an act that it regards as a crime.

The modern human rights movement and the prevalent global order is moving towards a morality that condemns lawful murder by the state, It is for an individual state, as a policy decision, to decide what moral stand it will take. Most judiciaries can adjudicate upon particular sentences to see if constitutional safeguards and other criminal justice considerations have been taken into account. The Indian judiciary has advocated high level of caution in confirming a death sentence, to the extent that it will not shy away from scrutinising a President's word on pardon, if it resonates arbitrariness or mala fides.

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