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Revisiting the Death Penalty in Covid Times

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The death penalty as a form of punishment has widely been used around the world since time immemorial. However, the concept of the death penalty is evolving. While some countries are pro-death penalty, many countries and organizations criticize its use as being opposed to human rights and the safeguards manifest in core international treaties with respect to the same. The article aims to examine the recent developments in this context so as to ascertain whether there is a need to change perspectives on the death penalty and if it is serving as an effective deterrent. It is vital to take note of the happenings around the world and gain a better understanding of the approach being taken with regard to capital punishment.

Keywords: *death penalty, capital punishment, human rights.*

INTRODUCTION

“Justice is often a matter of perception on which opinions can generally differ.”

- Fali S. Nariman¹

With the advent of the Covid pandemic, the world has witnessed a major transformation in way of life which is also true with regards to developments in the law. The use of Capital

¹ Fali S. Nariman, *Before memory fades: An Autobiography* (Hay House 2018)

punishment is a criminal justice issue that goes overlooked and has undergone marked changes, especially around the world.

WORLD AND DEATH PENALTY

In a recent decision, the Supreme Court of the appeal of Malawi, in *Charles Khoviwa v The Republic MSCA*² has ruled the death penalty as unconstitutional to its entirety, thereby abolishing it in the Southeastern African country. In this judgement, the court perused the ratio decidendi in decisions of *Kafantayeni and Others v Attorney General (2007)*³ and *Yasini and another v Republic (2005)*⁴, respectively wherein 'mandatory death penalty was regarded as unconstitutional. It was held that "The Constitution of Malawi makes right to life as a non-derogable life, so much so that the laws under it cannot legislate for the death penalty. The essence of the right to life is life itself." Justice Mwaungulgu opined, "The right to life is the mother of all rights. Without the right to life, other rights do not exist-the sanctity of life. The death penalty not only negates, but it also abolishes the right."⁵ International Law does not make any explicit prohibition of the death penalty as that scenario may not be viable, but attempts have been made to substantially reduce the use of this form of punishment as it is opposed to the concept of human rights. 70% of the world's countries have abolished capital punishment as a form of punishment but this still exists in a firm manner, majorly in authoritarian countries. The question that is relevant in contemporary times is whether such a form of punishment is a violation of human rights, especially with respect to democratic nation-states.

Some countries are resorting to the reformative or restorative forms of punishment and completely abandoning the use of the death penalty. The Right to life has been recognized in Article 3 of the *Universal Declaration of Human Rights*.⁶ Article 6 of Part III of the *International Covenant on Civil and Political Rights* recognizes the universal right to life, adding that this right

² Malawi, in *Charles Khoviwa v The Republic MSCA* (2017)

³ *Kafantayeni and Others v Attorney General (2007)*

⁴ *Yasini and another v Republic [2005] TZHC 7*

⁵ 'Right to Life is the Mother of All Rights: Malawi Supreme Courts Holds Death Penalty Unconstitutional' (*Live Law*, 1 May 2021) <<https://www.livelaw.in/foreign-international/death-penalty-unconstitutional-malawi-supreme-court-173451>> accessed 17 January 2022

⁶ Universal Declaration of Human Rights, 1948

"shall be protected by law" and that "no one shall be arbitrarily deprived of life"⁷. Clause 2 of Article 6 provides that in countries that have not yet abolished the death penalty, a sentence may be imposed only on the most serious offences in accordance with the law at the time of enforcement. *Amnesty International Global Report of Death Sentences and Executions*⁸ suggests that there is a decrease in the use of this form of punishment. Especially in the year 2020, mainly due to the Covid-19 pandemic, there has been a decline of 26% which is the lowest in 10 years. The drop was attributed to two countries that saw major reductions in executions, Iraq and Saudi Arabia that have historically reported high execution figures. Developments since 2020 have reaffirmed the trends of recent years that have seen the world make continuous and steady progress towards abolition of the death penalty. Chad abolished the death penalty, becoming the fifth African country to do so in the preceding decade.⁹ Kazakhstan has taken steps to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, which aims to abolish the death penalty. No executions were recorded in Bahrain, Japan, Belarus, Pakistan, or Sudan.

The Saudi Arabian authorities have announced that the country will end the use of the death penalty for those below the age of 18 years at the time of the crime in cases that do not include anti-terror law. The authorities of Sudan abolished the use of the death penalty for renunciation of religion or political beliefs. For the first time, Djibouti, Jordan, Lebanon, and South Korea have backed, a UN call for a moratorium on executions. Congo, Guinea, Nauru, and the Philippines, who had previously abstained or voted against the 2018 resolution, have also supported it, while Yemen and Zimbabwe moved from opposition to abstaining. OHCHR¹⁰ has been constantly advocating the abolition of the death penalty, stating that there is no place for it in the 21st century. It has been acknowledged by several states that the use of such form of punishment undermines human dignity and its use in extreme should be prohibited so as to promote the enhancement and progressive development of human rights.

⁷ International Covenant on Civil and Political Rights, 1966, art 6

⁸ Amnesty International Death Sentences and Executions, 2020

⁹ 'Civil society organizations pave the road to end capital punishment in Chad' (UNHR, 9 October 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/chad-death-penalty.aspx>> accessed 17 January 2022

¹⁰ United Nations Human Rights Office of the High Commissioner

The mandatory death sentence is contrary to human rights protection but is still prevalent in some countries.

INDIA AND THE DEATH PENALTY

The constitutionality of the death penalty in India is a moot issue but it is imperative to shed light on various perspectives so as to bridge the gap between constitutional morality and popular morality. The death penalty has long prevailed as a form of punishment, having its mentions even in Kautilya's Arthashastra to ancient codes of criminal punishments. The demand for death as punishment is common, especially with respect to heinous crimes. India has retained the application of the death penalty in case of ordinary crimes and most certainly for abhorrent & grave crimes. The Supreme court in *Jagmohan v State of Uttar Pradesh*¹¹ and various other judgments has upheld the constitutional validity of the death penalty and stated capital punishment is not violative of Articles, 14, 19, and 21. However, capital punishment can be applied only in "Rarest of Rare" cases. This doctrine was established in the *Bachan Singh v State of Punjab*¹² case. On analyzing this case in later judgments, it has been noticed that at times the exercise of balancing, the aggravating and mitigating circumstances is not adequately performed.¹³ Justice KS Radhakrishnan and Madan B Lokur referred to the landmark case of Bachan Singh and highlighted that there was little or no uniformity in the application of the principle. It was also observed that the mitigating and aggravating circumstances approach is not effectively implemented, therefore, this needs a fresh approach in the light of conclusions set out in the Bachan Singh case.

As per Article 6 Clause 4 of the International Covenant on Civil and Political rights, anyone sentenced to death shall have the right to seek pardon or commutation of the sentence, and Amnesty, pardon, or commutation of the sentence of death may be granted in all cases.¹⁴ India also seems to be taking a reformist approach more than a punitive one in recent times except for certain cases that demand exemplary punishments. Most prisoners on death row come

¹¹ *Jagmohan v State of Uttar Pradesh* (1973) AIR 947

¹² *Bachan Singh v State of Punjab* (1980) SC 898

¹³ *Anshad v State of Karnataka* (1994) SCC (4) 381

¹⁴ International Covenant on Civil and Political Rights, 1966, art 6(4)

from extremely poor economic conditions and have had to forego their education, at young ages.¹⁵ Justice Muralidhar has pointed out that you need to acknowledge the person you are dealing with at the stage of sentencing the person to death.¹⁶ One of the conditions or mitigating circumstances is the probability of the accused being reformed or rehabilitated before sentencing him to death and the court will have to provide clear evidence as to why the convicted person is not eligible for any form of correctional and rehabilitation scheme. In *Mofil Khan and anr. v The State of Jharkhand*,¹⁷ the Supreme Court observed that it is well-settled law that the possibility of reformation and rehabilitation of the convict is an important factor that should be considered to be a mitigating circumstance before he is sentenced to death. There is a bounden duty placed on the Courts to elicit information on all the relevant aspects and to consider those regarding the possibility of reform, even if the accused remains silent.¹⁸ The Supreme Court in *Bhagchandra v State of Madhya Pradesh*¹⁹ observed that we must not forget that a criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is up to the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. Finding and analysing this information is certainly not an easy task but must be undertaken. If that should happen, the option of a long duration of imprisonment is permissible.²⁰

In *State of Maharashtra v Vijay Mohan Jadhav & Ors*,²¹ the court set aside the death penalty and upheld rigorous life imprisonment of convicts in the gang rape case and observed that while rape is a serious offence, the punishment could not be based upon public outcry and it is the duty of the court to view cases dispassionately and ensure the procedure under the law is followed. Indian courts continue to award the death penalty in various cases wherein it is

¹⁵ 'Deathworthy: A Mental Health Perspective of the Death Penalty' (*Live Law*, 22 October 2021) <<https://www.livelaw.in/news-updates/project-39-a-releases-deathworthy-a-mental-health-perspective-of-death-penalty-nlu-delhi-184137#:~:text=39A%20At...-Project%2039A%20At%20National%20Law%20University%20Delhi%20Releases%20'Deathworthy%3A%20A,Perpective%20Of%20The%20Death%20Penalty'&text=The%20report%20reveals%20a%20severe,intellectual%20disability%20are%20alarmingly%20high>> accessed 17 January 2022

¹⁶ *Ibid*

¹⁷ *Mofil Khan and Anr. v The State of Jharkhand* (2021) SC 1136

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ *State of Maharashtra v Vijay Mohan Jadhav & Ors* (2021)

established that the case falls within the rarest of rare doctrine. Recently, in, *State v Phoolchand Kanaujiya and Roshan Lal* 2021²² the court held that “the crime committed by the convict continuously and the effect it has on the victim brings it in the purview of rarest of rare. The girl was brutally raped and murdered by Phoolchand and by his act, he made such an adverse effect on society and the victim side which will never be removed from their mind.

CONCLUSION

As the world continues to remain divided with respect to the abolition of the death penalty, in pre-covid times, India has failed to accept the call for the abolition of a moratorium on capital punishment and the ratification of the Second Optional Protocol as well as revision of the armed Forces Special Powers Act. The Calcutta High court has observed there is no statistical data to conclusively establish that the imposition of the death penalty leads to the reduction of crime²². The death penalty is not deterrence and the Law Commission in its 262nd Report on the Death Penalty²³ observed that “death penalty does not serve the penological goal of deterrence any more than life imprisonment. Retribution has an important role in punishment; however, it cannot be reduced to vengeance. The notion of an eye for an eye, and a tooth for a tooth has no place in our constitutionally mediated criminal justice system. Capital punishments fail to achieve any constitutionally valid penological goals.” The death penalty is not the only deterrent to crime but one of its facets and its efficacy to dissuade a person to commit crimes has not been certainly established. The concept of the death penalty needs to be re-evaluated. Other punishments such as life imprisonment may also serve the purpose. A reformist approach should be taken where there is a scope of change. There is a requirement to have a strong and effective justice system in place. We must consider the legal and practical problems such as unfair trials, police abuse, lack of availability of defence councils, an excessive amount of time spent on death row, discrimination, a risk to innocents, etc. Awarding the death sentence must only be in extreme circumstances and it requires the highest degree of application of mind and law. The safeguards in place are in need of constant scrutiny and

²² *State of West Bengal v Ansar Rahman* (2019)

²³ Law Commission of India, *The Death Penalty* (Law Com. No. 262 2015)

<<https://lawcommissionofindia.nic.in/reports/report262.pdf>> accessed 17 January 2022

revision to prevent any arbitrary or miscalculated sentence against the inviolable right to life of a person. Therefore, in unprecedented times, a fresh perspective has to be accorded and see whether capital punishment is truly serving its purpose of acting as a deterrent to crimes and the circumstances under which it should be used in light of the international covenants and transitioning perspectives in the legal system.