

CAPITAL PUNISHMENT IN THE 21ST CENTURY

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Abstract

Capital punishment is often considered as an evil to human rights which plagues the society. This article studies the dichotomy between capital punishment and human rights. It delves into international instruments aiming to abolish capital punishment and the world's position on capital punishment. The article also studies India's position on death penalty and protections guaranteed under Indian Constitution. The article deals with fundamental questioning of capital punishment vis- a- vis human rights. It addresses the key issue pertaining to justifiability of judicial execution in context with international framework and constitutional guarantees. The article closes with weighing death penalty on the golden scale of justice to determine its position in the 21st century and the way forward.

Keywords: *Capital Punishment, Human Rights, International Instruments, Indian Constitution.*

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INTRODUCTION

“Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars”.

- Martin Luther King Jr.

(I’ve been to the Mountaintop)

The incessant emphasis on blissful human existence, carving principles of liberty and freedom are not just fictions but contemporary reality. The ideas of free and unbridled lifestyle have found a way to cherish the values of a free man. However, these freedoms are not absolute they are accompanied by blocks of state control. States having control over the lives of people within their territory in order to fulfil duty entrusted to it i.e. maintain peace and security. There are various mechanisms through which a state exercises its control, the most important being legislations. In case there is derogation of legislation it is accompanied by punishment. State also has the capacity to impose a punishment leading to loss of life of an individual. This phenomenon has been refereed as Capital Punishment.¹

Capital Punishment or Death Penalty is a legal process whereby life of a person is taken away by state as a punishment for crime committed by them. The person is put to death as measure to deter the crime committed by him and create fear in minds of possible offenders. Infliction of death by state has been practiced popularly in all world regimes. The recent development and realization of human rights have led to taking a diverging view by abolishing age old practice of capital punishment. A major part of the world has completely abandoned death penalty leading to abolition of this archaic practice. Infliction of death penalty has been seen as fundamental violation of basic human rights mainly right to life and right not to be subjected to cruel, inhuman and degrading punishment. These rights are considered as the foundation of human existence and have been vividly embodied in Universal Declaration of Human Rights, in Charters of International and Regional Organizations and also in Constitutions of all states. According to latest report of Amnesty International of 2017 a major portion of the world i.e. 142 countries have abolished death penalty either in law or in practice.² The major retentionists of this form of punishment remain China, Pakistan, Iran,

¹ Gopalkrishna Gandhi, *Abolishing The Death Penalty* (2016)

² Abolitionist and Retentionist Countries, Death Penalty Information Center, Available at: <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries>

Iraq, and Saudi Arabia as surfaced from the latest figures declared by Amnesty International in 2017.³ India is also one of the 53 countries which have retained capital punishment within its Penal Code.⁴ India though a supporter of capital punishment has restricted infliction of death only in “rarest of rare” cases.⁵ The doctrine which was developed in the landmark judgment of *Bachan Singh* still holds a significant position in contemporary times and is inevitably applied in all cases which have shaken the human conscience.

Death penalty has been a controversial issue igniting debates among supporters and opponents over the viability of this practice. Many international organizations like Amnesty International have referred to it as cruel and degrading to human existence. The practice of judicial murder is contradictory and ironical as when a man kills he infringes the law but when the state penalizes by death it upholds the law. A human rights based approach does not take issue with the accuracy, technique, or timeliness of an execution. It provides a strict standard with which to say simply and unequivocally the death penalty is wrong. The Universal Declaration of Human Rights though not having an exclusive provision dealing with issue of capital punishment but emphatically suggests the provision of right to life is profound enough to conclude that taking away of human life is against the very existence of human rights.⁶ The UN General Assembly, the representative body of recognized States, through resolutions⁷ has called for an end to the death penalty and human rights organizations agree that its imposition breaches fundamental enshrined under human rights norms.

DEATH PENALTY versus HUMAN RIGHTS

The constant battle of capital punishment and human rights has called for an intricate study to address the viability of death penalty vis-a-vis human rights. Human rights are the foundation for all other rights attributed to humans. The most important right of humans lies in their existence. When this right is taken away by state agencies in order to punish the person for

³ The Death penalty in 2016: Facts and figures, Amnesty International, Available at: <https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures/>

⁴ Oliver Smith, mapped: The 53 places that still have the death penalty- including Japan, The Telegraph, Jul 6, 2018, Available at: <https://www.telegraph.co.uk/travel/maps-and-graphics/countries-that-still-have-the-death-penalty/>

⁵ The Death Penalty in India, Cornell Center on Death Penalty Worldwide, Available at: <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=India>

⁶ Article 3, UDHR.

⁷ UN Resolutions on moratorium on death penalty, A/RES/62/149(2007), A/RES/63/168(2008), A/RES/65/206(2010), A/RES/67/176(2012), A/RES/69/186(2014), A/RES/71/187(2016).

crimes committed by him it is referred as capital punishment. It is important to analyze if such state sanctioned deaths are free from human rights violations or they too come within the ambit of infringing the most integral right of humans. Capital punishment as an instrument of punishment violates the core guarantees of human existence is a matter of discussion and deliberation.

DEATH PENALTY AND HUMAN RIGHTS VIOLATION

Death penalty, an outcome of the deterrent school of thought for punishments and high headedness of the dated sovereign powers, still has many of the states in its clutches. While some of the countries follow it as a tradition, some follow it because of religious purposes, and while some because nothing instrumental has changed in the judicial system of their respective countries.⁸

Wherever any form of capital punishments is found in a system, the international community unequivocally has condemned the same as such punishments directly hit and affect the very basic right of an individual which is guaranteed by the Universal Declaration of Human Rights (UDHR) as right to life under Article 3. Taking away a right, which has been termed as the basic essence of the human rights is not only the highest violation but it also curtails the idea of providing any further rights as the individual no more survives to enjoy the same.⁹ The international community in pursuance to abolish the capital punishments from its roots has emerged with various instruments and charters that ban the use of judicial capital punishments in any form; each and every one shall be illustrated and demonstrated at length in the coming paragraphs.¹⁰

Studies¹¹ several times have shown that death penalty does not answer the problem per se, but barbarically hunts the question down from its existence. The problems that evolve from such type of punishments are many folds. The basic problem is though the justice delivery system in almost all the nations cannot be challenged in its efficiency, but the fact of the matter is,

⁸ V. R. Krishna Iyer, *The barbarity of Death Penalty*, The Hindu, Feb 22, 2014, Available at: <http://www.thehindu.com/opinion/op-ed/the-barbarity-of-the-death-penalty/article5714209.ece>.

⁹ Vincent Warren, *The Death Penalty Is a Human Rights Abuse*, Huff Post, Nov 10, 2010, Available at: https://www.huffingtonpost.com/vincent-warren/the-death-penalty-is-a-human-rights-abuse/article_757004.html

¹⁰ Death Penalty and International Law, International Commission against Death Penalty, Available at: <http://www.icomdp.org/death-penalty-and-international-law/>.

¹¹ Study: 88% of criminologists do not believe that death penalty is an effective deterrent, Death Penalty Information Center, Available at: <https://deathpenaltyinfo.org/study-88-criminologists-do-not-believe-death-penalty-effective-deterrent>.

cases are contested and defended by humans and to top it off, decided by the statutes of justices who are embodied in, again human beings, which creates the fraction of possibility of commission of error. The punishment of death penalty is one, where such errors or mistakes create an irreversible situation, where, at a later stage if the final outcome of the trial is reversed, no judicial entity, having plenary jurisdiction can blow life into an accused-convict.¹²

The usage of such punishments are also discriminatory as in the countries where it is being practiced, sometimes, can also be used to settle scores of personal vendetta, which obviously has precedents established in China, Iran, Sudan and the British India.¹³

More than 160 Members States of the United Nations with a variety of legal systems, traditions, cultures and religious backgrounds, have either abolished the death penalty or do not practice it.¹⁴ Yet, prisoners in a number of other countries continue to face execution arbitrarily without allowing them a fair trial.

INTERNATIONAL INSTRUMENTS AND POSITION ON CAPITAL PUNISHMENT

International Covenant on Civil and Political Rights (ICCPR): The International Covenant on Civil and Political Rights is one of the core United Nations human rights Treaties.¹⁵ From the inception of ICCPR, the treaty was committed to upholding human rights of individual all across the globe. It recognizes core values necessary for human existence and proliferation. It recognized the need to strengthen the fabric of right to life of an individual, thereby enacting Article 6 of the Convention. Article 6 permitted the use of death penalty in difficult of the difficult cases. It also provided that nothing in that framework would stop countries to amend the same in order to speed things in the motion of abolishing capital punishments. The Convention considered abolition of capital punishment as a desirable option. The multilateral treaty in a rhetoric manner urged the states to not delay the movement towards abolition of

¹² James Q Wilson, *What Death-Penalty Errors?*, NY Times, July 10, 2000, Available at: <https://www.nytimes.com/2000/07/10/opinion/what-death-penalty-errors.html>.

¹³ Death Penalty: 2390 executions in 2008 Worldwide, 72 % in China, Amnesty International, Available at: <https://www.amnesty.org/en/press-releases/2009/03/death-penalty-2390-executions-2008-worldwide-72-cent-china-20090324/>.

¹⁴ Death Penalty, UN Human Rights, Available at: <https://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIIndex.aspx>.

¹⁵ Summary: International Covenant on Civil and Political Rights, Canadian Civil Liberties Association, Available at: <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/>.

death sentence.¹⁶

Second Optional Protocol to the International Covenant on Civil and Political Rights:

State Parties to this Protocol have solemn faith that abolition of the death penalty contributes to enhanced human dignity and progressive development of human rights¹⁷.

The second optional protocol embarks upon the Article 6 of the International Covenant on Civil and Political Rights which mandates to the covenant which makes the death penalty mandatorily be discontinued as it strongly suggests death penalty to be disconcerted, it also refers to all the steps which should be considered as progression towards the enjoyment of ultimate right to life by abolishing death penalty. The members of this treaty are committed towards abolition of death penalty from their legal system as they consider it as an impediment in exercising basic human entitlements.

All the member states have undertaken a pledge of not executing any individual within the territories of their respective states and immediate measures towards abolition making their countries death free zone.¹⁸

The optional covenant also mandates that there shall be no exceptions, other than war times, in which permissions should be sought and granted to execute individuals. The member also has to intimate the Secretary General of the United Nations about the relevant legislations which the member country aims to implement during the wartimes. The Covenant also lays down that as per Article 40 of ICCPR the present member countries to intimate the measures that are adopted by them to effectuate the protocol through directives and legislations in their respective countries. Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights are also to be governed by the Second protocol unless they make a statement deferring from it, the articles of the second protocol are only an addition to the articles and covenants of the first protocol. Article 41 ensures such parties to be governed by the Human Rights Committee and the Human rights committee can give directives with

¹⁶ International Covenant on Civil and Political Rights, Article 6, Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

¹⁷ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, UN Human Rights Office of High Commissioner, Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>.

¹⁸ Elaboration of a second optional protocol to the International Civil and Political Rights, aiming at the abolition of the death penalty, General Assembly, Available at: <http://www.un.org/documents/ga/res/44/a44r128.html>.

regard to the same on the issues pointed out by individuals.¹⁹ The Convention has been ratified by 85 state parties which is a large number depicting the success of movement towards global abolition.²⁰ This international treaty has reaffirmed rights of a man to live his natural life without being impeached by state authorities. The Convention has persuaded states to categorically move away from primitive practice of executing individuals.

Impact of the Second Optional Protocol to the Covenant on Civil and Political Rights

The impact of was at two levels, first at national level where the signee country resorts to capital punishments' complete ban in its jurisdiction where the only exceptions remains of serious war times where it is unavoidable, however in general conditions it makes sure that that the rights which are guaranteed are non-revocable and unmistakably banned. Secondly at international level, it creates a critical mass of the countries where right to enjoyment of life becomes a quintessential form.²¹ The Convention helps in preventing re introduction of death sentence in member states. Some Flagrant examples of the second protocol are Azerbaijan, Brazil, Chile, Salvador, these states may not be prominent states of the world but they have committed themselves to cause of recognizing individual freedom and preventing arbitrary execution of people.

Protocol No. 6 to the Convention for Protection of Human Rights and Fundamental Freedoms concerning abolition of the Death Penalty²²: European Council is committed to embrace right to life, prohibition of torture and degrading treatment and the Convention is a mark of this commitment. The Convention has laid down various freedoms which need to be recognized for an honourable living. The Council comprises of 47 member states.

¹⁹ Eric Neumayer, *Death Penalty Abolition and the Ratification of the Second Optional Protocol*, 12 (1) International Journal of Human Rights, 3-21(2008), Available at: http://eprints.lse.ac.uk/6202/1/Libfile_repository_Content_Neumayer%2C%20E_Death%20penalty%20abolition%20and%20the%20ratification%20of%20the%20second%20optional%20protocol_Death%20penalty%20abolition%20and%20the%20ratification%20of%20the%20second%20optional%20protocol%20%28LSE%20RO%29.pdf.

²⁰ Second optional protocol to the International Civil and Political Rights, aiming at the abolition of the death penalty, UN Treaty Collection depositary; Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-12&chapter=4&clang=en.

²¹ Key Issues on International Legal Obligations under the ICCPR and Second Optional Protocol related to death penalty, Available at: http://bangkok.ohchr.org/files/Legal%20Arguments_ICCPR_Second%20Op%20Protocol_Feb%202017.pdf.

²² Protocol No. 6 to the Convention for protection of Human Rights and fundamental freedoms concerning abolition of the Death Penalty, Available at: https://www.echr.coe.int/Documents/Library_Collection_P6_ETSI14E_ENG.pdf.

The Protocol No. 6 to the convention accedes for the abolition of capital punishments in the limited territorial jurisdiction of the European Council where the protocol finds its routes. Though the protocol only refers to the signatories to abolish such punishments, its non-implementation on war crimes creates a vacuum making it relatively weak. But the efforts to remove death penalty cannot be undermined. The protocol per se, as under Article 1 abolishes the death penalty and directs that no one should be exposed to such punishments. The protocol also, in its Article 4 & 5 prohibits any kind of reservations from the signatory states and any state may at the time of deposition of the instrument undertakes to abolish such laws in its territories.²³

The protocol marked the decision of the European Council to unanimously abolish the death penalty as a whole and aimed at achieving the goal at a much larger perspective in the Europe. With introduction of the same more and more countries made parties to the protocol and abolished the gore punishment schemes from their respective countries.²⁴

The main objective under the protocol was to achieve the concept of fair trial which can only be possible by keeping the accused convict alive and its right to minimum representation before the various forums within its territory.

With the limited scope and ambit of the protocol, the protocol helped countries at mass to take steps and administer the right to life concept in a standardized way. The Convention has been ratified by all European Council members except Russia which though signed but has not yet ratified.²⁵

Protocol No.13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all Circumstances²⁶: This 2002 Protocol is a further step towards absolute abolition of death penalty from European Council. After the No.6 Protocol there was hue and cry over allowing death penalty in wartime in order to make reparations to that this Protocol has come to existence. The Convention was a

²³ Council of Europe Treaty Series, Available at: <http://www.worldlii.org/int/other/COETS/1983/6.html>.

²⁴ Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Council of Europe, Available at: <https://rm.coe.int/1680083746>.

²⁵ Rudolf Hnidka, *European perspective and legal framework of death penalty*, 1(4) Challenges of the Future, 159–171(2016), Available at: http://www.fos-unm.si/media/pdf/ip/death_penalty_hnidka_10.pdf

²⁶ Protocol No.13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all Circumstances, Council of Europe, Available at: https://www.echr.coe.int/Documents/Library_Collection_P13_ETSI187E_ENG.pdf.

step forward to keeping human dignity above all in a democratic set up. The Convention has been ratified by 42 state parties to the Convention.²⁷ The Convention does not permit any derogation even in times of war. It has reiterated its aim of complete abolition war being no exception.²⁸ The protocol became a benchmark in EC's attempt to completely abolish death penalty from their region.

European Union Guidelines on Death Penalty²⁹: Another significant step for reinstating its position of defiance against capital punishment EU came up with its guidelines on the issue. The European Union, being the flag-bearer of the anti-death penalty world has shown its credence towards the ultimate objective of eradication by being an active signatory to the ICCPR, Second Optional Protocol and some of its countries being successful in taking the nascent steps towards reducing the number of offences for which death penalty can be awarded and complete irrevocable ban on the same.

The countries of the European Union and EU in its capacity have voted in favour of General Assembly the resolution on abolition and moratorium of death penalty between 2007 to 2014. In all the resolutions invoked for moratorium of death sentence so far by the General Assembly, European Union countries have supported it unequivocally. Except Belarus all EU states have abolished capital punishment from their criminal justice system.

The European Union by accession of the document ensured; firstly, for working in the motion which supports complete eradication of capital punishments from all the members of the esteemed European Union, as its ultimate objective, in which the Union can be safely said to have progressed. Belarus and Russia being the only countries of the Union where capital punishments still exists³⁰ and Secondly, in the member countries, where it still survives, advocate the immediate establishment of a moratorium on the use of death penalty; ultimately leading to abolition and provide minimum guidelines for the same.

²⁷ Abolition of the death penalty, OSCE Human Dimension Implementation Conference, Available at: <https://www.osce.org/odihr/83116?download=true>.

²⁸ Article 2, Protocol No.13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all Circumstances

²⁹ EU Guidelines on Death Penalty, Available at: https://eeas.europa.eu/sites/eeas/files/guidelines_death_penalty_st08416_en.pdf.

³⁰ The Death Penalty in 2017: Facts and Figures, Amnesty International, Available at: <https://www.amnesty.org/en/latest/news/2018/04/death-penalty-facts-and-figures-2017/>

Protocol to the American Convention on Human Rights to abolish Death Penalty³¹: The protocol has been adopted in 1990. It expresses that each individual has the basic ideal to life, that can't be contradicted for any reason; the propensity among the American States is to be agreeable to abrogation of capital punishment. The use of capital punishment has unavoidable results, abandons the remedy of legal blunder, and blocks any probability of changing or restoring those sentenced. Nullification of capital punishment guarantees more viable security of the privilege of life. The Convention has not been very successful as it has been ratified by only 13 states out of 23 states.

That States Parties to the American Convention on Human Rights have communicated their aim to receive a universal concurrence with a view to uniting the act of not holding a candle to the current situation of capital punishment in their territories. Reservations have been prevented but death penalty is permitted to apply in wartime in extreme situations.³²

The Convention on the Rights of the Child³³: The UN Convention protects and recognizes various rights of child including civil, political, economic and cultural. The Convention was drafted in 1989 and came into existence in 1990. The Conventions aims to promote child rights within all members and prevent ill treatment of children. It recognizes that a child needs special care and attention for personal development to which he is not deprived of. It prohibits subjecting a child to cruel, inhuman and torturous treatment. Article 37 (a)³⁴ specifically ensures that child below the age of 18 years is not subjected to cruel treatment and prohibits punishing a child with death penalty and life imprisonment. The express prohibition on death penalty for children has enhanced human values by denouncing brutal practices.

The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment³⁵: This Convention exuberating principles of freedom and justice and prohibiting torture, inhuman treatment came into existence on 26 June 1987. Capital punishment has been referred as a degrading inhuman treatment which is violating principles

³¹ Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Human Rights Library, Available at: <http://hrlibrary.umn.edu/oasinstr/zoas8pdp.htm>.

³² Article 2, Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

³³ Convention on the Rights of the Child, Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

³⁴ Article 37 (a), Convention on the Rights of the Child.

³⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

lay down under this Convention.³⁶ The Convention does not contain express provision on death penalty but certain phenomenon's associated with it have been considered degrading like agony of convicts on death row. Certain forms of execution have also been referred as torturous violating the fabric of this Convention.³⁷ United Nations itself has referred putting people to gallows torturous.³⁸

Economic and Social Council (ECOSOC) Safeguards: UN organization ECOSOC has laid down Safeguards guaranteeing protection of the rights of those facing the death penalty. There are series of safeguards the first one came in 1984 and the most recent one in 1996. According to the guidelines the states which have retained death penalty can only apply it in only in exceptional cases.³⁹ The safeguards have tried to ensure justice to those facing trial. Safeguards require transparency and fair trial to be ensured to those facing death trials.⁴⁰

United Nations General Assembly Resolutions on Death Penalty: The United Nations from time to time has ascended various resolutions in order to eradicate the death penalty from judicial systems worldwide. In a series of four resolutions adopted in 2007, 2008, 2010, 2012 and 2014, the General Assembly urged States to respect international standards that protect the rights of those facing the death penalty, to progressively restrict its use and reduce the number of offences which are punishable by death. Resolution has also attempted to urge states retaining death penalty to put a moratorium.

In 2007, resolution demanded states to slowly limit the use of capital punishment by reducing the number of offences for which death is sanctioned and initiate a moratorium on execution with the aim of ending practice of putting people to gallows.⁴¹

³⁶ Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Human Rights Council (2009), Available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.44AEV.pdf>.

³⁷ The Committee against Torture should take a stronger stance against the death penalty, OMCT, Available at: <http://blog.omct.org/committee-torture-take-stronger-stance-death-penalty/>

³⁸ UN Calls Death Penalty "Torture", Death Penalty Focus, Available at: <http://deathpenalty.org/blog/un-calls-death-penalty-torture/>

³⁹ Safeguards guaranteeing protection of the rights of those facing the death penalty, 1984, Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx>.

⁴⁰ Safeguards guaranteeing protection of the rights of those facing the death penalty, 1996, Available at: <http://www.un.org/documents/ecosoc/res/1996/eres1996-15.htm>.

⁴¹ General Assembly adopts landmark text calling for moratorium on Death Penalty, UN Press Release, and Available at: <https://www.un.org/press/en/2007/ga10678.doc.htm>.

In 2007, the UNGA called on states to “progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed” and “establish a moratorium on executions with a view to abolishing the death penalty.

Another resolution was adopted in the year 2008 for reinforcing the previous resolution. This again opened the floor for welcoming decisions of state parties to progress in direction of abolition.⁴² The resolutions were said to be in pursuance of furthering and securing human rights. In 2010, another UN resolution reaffirmed the principles set out in previous resolutions. The UN resolution as adopted in 2014⁴³, on the touchstone of the resolutions of 2008, 2010, 2012 and all the previous resolutions the assembly on 18.12.2014 as the Moratorium on use of the death penalty, by reaffirming to the UDHR, ICCPR and CRC. The General Assembly also urged that it is essential for the member countries to restrict and not to reintroduce the death penalty and to ratify the Second Optional Protocol.

By the use of the resolutions referred hereinabove, the United Nations General Assembly has on various occasions has created the international iron-hand to reduce and abolish death penalty from the judicial establishments of all the member countries by active use of legislations.

The General Assembly, as only being a pressure group has failed to substantiate the fact that many of the countries (member-states) have opposed the resolutions mentioned in the foregoing paragraphs and has continued to practice the heinous practice of death penalty.

The countries already being governed and adhering the second optional protocol have consolidated their view on capital punishments, however, the resolutions with regard to a majority of VETO holders, have only proven to be an eye-wash, as the so called VETO holders have continued to award and execute the sapiens on regular basis. The same has been followed by some of the developing as well as third world countries.

India's Position on UN General Assembly Resolutions on Death Penalty: India, though being an active member of the UN has at various times in past strongly opposed all the resolutions of the General Assembly on death penalty. The secular state has not always

⁴² Resolution adopted by the General Assembly, Moratorium on the use of the death penalty, Available at: <http://www.refworld.org/docid/49a2b8952.html>.

⁴³ Resolution adopted by the General Assembly, Moratorium on the use of the death penalty, Available at: http://dag.un.org/bitstream/handle/11176/158748/A_RES_69_186-EN.pdf?sequence=3&isAllowed=y.

rejected the resolutions, nor did it adhere to the Second Optional Protocol's norms as referred above. Also India voted against the latest 2016 Record of Votes on the UN General Assembly Moratorium Resolution and has continued retain capital punishments.

On the contrary, India never made changes to its penal statutes in order to abolish death penalty nor it decreased the number of offences in which death penalty was to be awarded, more so, the country, a few months back, introduced death sentences in other offences, child sexual abuse, in particular.

DEATH PENALTY AND PROTECTIONS UNDER INDIAN CONSTITUTION

Indian Constitution embraces the spirit of nation. It lays down the moral values which the country cherishes and upholds. The Preamble has been specifically dedicated for giving a brief account of core values which the country recognizes and preaches.⁴⁴ They are the aspirations which the country strives for. The framers of the Constitution have very delicately framed the Preamble in a manner which reflects ideas of modern independent India.⁴⁵ The Preamble of India cherishes great values like liberty, equality, justice⁴⁶. But these ideas are jeopardized when application of death sentence come to fore. Capital punishment hinders the sanctity of values enunciated under Preamble of the nation. In reality India has never seen any development for the annulment of capital punishment. This does not imply that no endeavour has been made for its cancelation. The sacred values of the nation are offended by legitimacy of capital punishment.

Death Penalty and Article 21: The Constitution of India, guarantees many fundamental rights to its citizens, the most significant being fundamental right of Protection of life and personal liberty, as promulgated by the Article 21.

So far as the paradox of death penalty with the constitutional right is concerned, the legislation, itself has provided for an exception to the right, i.e. the same can be taken away by the procedure established by law, which not only empowers but also provides mostly bridled powers to the criminal judicial courts to grant death penalties in certain cases,

⁴⁴ Dr (Prof) K.L. Bhatia, *Preamble: Spirit of Constitution*, Available at: <https://klbhatia.wordpress.com/2016/01/09/preamble-spirit-of-the-constitution/>.

⁴⁵ Sanjay Srivastava, *Is India faithful to the spirit of Constitution?* DNA, Available at: <http://lawcommissionofindia.nic.in/reports/report262.pdf>.

⁴⁶ Preamble to The Constitution of India, Available at: https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf.

interpreting it to be just and essential in the rarest of rare cases. However, a pseudo protection against the same has been provided for, by the constitution itself by establishing a procedure for application before the Hon'ble President of India for grant of pardon, which, if granted, converts the sentence of death, into the one of life sentence. As interpreting Article 21, judiciary has maintained constitutionality of death penalty as the same has been sanctioned by the Constitution. Article 21 apart from guaranteeing right to life also recognizes branches attached to it like due process of law and procedure established by law. There have been instances where this has not been ensured to those on death row thereby leading to miscarriage of justice. The fine line is hard to achieve as there are all possibilities of a decision which fail to ensure fair trial to a convict due to his disadvantageous position.⁴⁷ Right to life has been of primary importance to the Constitution as it caters to existence of person in case of wrongful conviction the person loses the utmost guarantee which has been promised to him.⁴⁸

Efforts have been made by judiciary to prevent wrongful convictions by introducing various concepts but again they fail to provide a straightjacket formula to be applied in all cases leading to unbridled discretion failing which a person loses his right of existence.⁴⁹

Death Penalty and Article 14: Article 14 is a cornerstone for equal rights. It does what preamble in its vision claims i.e. it ensures all members within Indian Territory are treated equally. The Article also ensures that all are protected equally without giving any one special privilege over the other.⁵⁰ This non-discrimination policy is the foundation stone for a progressive democracy to ensure all members can develop themselves without setbacks. While considering these principles capital punishment infringes the idea as arbitrariness seeps in the process where discretion has been allowed. The lack of clear provision and obsolete "rarest of rare" doctrine fails to ensure equality in similar cases. The arbitrary decision making in similar cases infringes the right to equality thereby leading to conflicting

⁴⁷ Innocence and Wrongful Conviction, Cornell Center on Death Penalty, Available at: <http://www.deathpenaltyworldwide.org/wrongful-convictions.cfm>.

⁴⁸ Neetika Vishwanath, *Criminal Justice and the Death Penalty in India: An Opinion Study with 60 Former Supreme Court Judges*, Oxford Human Rights Hub, Feb 14, 2018, Available at: <http://ohrh.law.ox.ac.uk/criminal-justice-and-the-death-penalty-in-india-an-opinion-study-with-60-former-supreme-court-judges/>.

⁴⁹ Suhrith Parthasarathy, *India's muddled thinking on death penalty*, The Hindu, Sept 16, 2013, Available at: <http://www.thehindu.com/opinion/lead/indias-muddled-thinking-on-punishment/article5131843.ece>.

⁵⁰ Article 14, The Constitution of India.

decisions.⁵¹

Therefore, it can be concluded that apparently death sentence does not seem to violate fundamental right guarantee under Article 14 but uneven application leads to implicit violation. Also it is to be noted that once a life is lost the same cannot be retrieved, in case of discriminatory conviction it creates a bloat on the image of the nation.⁵²

Death Penalty and Article 19: Article 19 of the Constitution provides a series of rights to citizens of India which includes free speech and expression, free movement, right of assembly; freedom to practice any profession, to become a part of a union etc.⁵³ The Article per se does not mention anything about capital punishment but in case of execution a person loses all his freedoms under this Article. Here there is indirect violation of guarantees under Article 19.⁵⁴ The person losing life will not be able to enjoy these freedoms which have been promised by the state.

Death Penalty and Article 51: Article 51 of the Constitution is a commitment towards international law and treaty obligation. Indian ideology believes in promoting its international relations and respecting its duties under international conventions.⁵⁵ It encourages obedience towards international frameworks. While this Article does not per se deal with capital punishment it refers to those treaties which have been ratified by India prohibiting death penalty. India has ratified ICCPR and Convention on Rights of the Child. While both these treaties refer to promoting human dignity and desirability of abolition of death sentence, India has failed to do so. In a landmark judgement of *National Legal Services Authority v. Union of India*⁵⁶, the Hon'ble Supreme Court observed that international frameworks should be read in a manner to enlarge the freedoms guaranteed under Article 14, 19 and 21 as it will strengthen the aim of constitutional protections. India's international obligation also calls for steps to be taken towards abolition of death sentence in the country.

Besides what is discussed above, the basic stepping stones of the rule of law that even a

⁵¹ Constitutional Validity of Death Penalty, Shodhganga, Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/132600/8/08_chapter%203.pdf.

⁵² Available at: Constitutional validity of Death Penalty, Lex Khoj, <https://lexkhoj.com/2015/08/22/constitutional-validity-of-death-penalty/>.

⁵³ Article 19, The Constitution of India.

⁵⁴ Death Sentence: A critical analysis, Shodhganga, Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/12841/10/10_chapter%204.pdf.

⁵⁵ Article 51, The Constitution of India.

⁵⁶ (2014) 5 SCC 438

single innocent should not be held guilty, even if in achieving the same a hundred of guilty are set free. The capital punishment or death sentences not only shreds the concept down but also violates the individual's liberty. As discussed, the death penalty, though being evolved from the deterrent ideology of punishments, has proven to be failing in deterrence and till date there is no substantive proof of it being affecting the society in the correct way. The only objective it achieves is the canal satisfaction of the systems to put an end to the personal life and liberty of the individual, which it deems to be involved in so called heinous crimes.

The invocation of the ICCPR, the second optional protocol, the condition, that a county can only be a part of the European Union, only when it completely restricts death penalties and the Resolutions of the General Assembly has created a concrete path for the pure-eradication, and it gathered shoulders of many member states of the UN which resulted in irrevocable ban on capital punishments in as many as 140 nations across the world, safeguarding the rights of international citizens.

However, the same is not being followed in countries like India, which desisted from the Second optional protocol and the resolutions of the general assembly and has been a retentionist throughout. The world forum, time and again, has requested the countries to reduce the number of offences for which capital punishments can be given; however, on the contrary the republic of India has increased the number in recent past.

Time has come, when the leading nations, irrespective of their status of being developed, developing or under-developed to approve the correct jurisprudence of non-activism of the death sentences as the same has no place in the civilized society and only denotes the feudal characteristic. The need of the hour must not go unanswered. As rightly stated by the EUEA⁵⁷, *"the death penalty is incompatible with human dignity". "It comprises inhuman and degrading treatment, lacks deterrent proof and allows judicial errors to become irreversible and fatal."*

CONCLUSION

There are a number of protections against capital punishment accorded at both international and domestic level. The above discussion has made it clear that position of retention will be

⁵⁷ EU strongly and unequivocally opposes death penalty, European Union External Action, Available at: https://eeas.europa.eu/headquarters/headquarters-homepage/33622/eu-strongly-and-unequivocally-opposes-death-penalty_en.

very difficult to defend considering international obligations. A growing number of nations against this archaic practice have raised concern towards the other retentionists member states. UN on various occasions has placed its view of supporting abolition of death sentence. All the international obligations and highest charter of the nation provides evidence that capital punishment is an infliction on core human rights which needs to be protected by all states. It can be concluded that capital punishment is a violation of human rights as it not just bereaves a person of living a natural life but also because the punishment is cruel and inhuman. Moreover, the manner of reaching the decision is arbitrary depriving the individual of right to equality. All these rights have been protected by international treaties as well as domestic legislations.

Capital punishment remains a controversial point even as India embarks on 73rd year of independence. This relic from past has weakened the visions envisaged by framers of the Constitution. Death penalty remains a popular choice among the masses but it cannot outdo constitutional principles and ethos. Majoritarian view cannot sabotage the visions of vibrant constitution of the nation. The movement towards abolition is picking up momentum in all parts of the world India being no different. The abolition of judicial execution is a reasoned choice as inferred from the research, carrying forward this would only weaken the foundation of right to life. India being a progressive nation needs to be free from clutches of this age old form of punishment. Positive steps taken by judiciary⁵⁸ in this regard are noteworthy. The block in the path of abolition lies at the level of legislature which sways in the direction of popular beliefs keeping vote bank their priority. The law makers of the country look out for easy and quick fix in times of social crises. Death penalty serves as a go to option to deal with serious offences negating the need of better criminal justice system. In order to create a niche for itself among nations respecting human rights India needs to give up its position on capital punishment and follow the league of abolitionists.⁵⁹ True spirit of a modern progressive democracy lies in respecting core values of human existence and cherishing them through underlining laws. Law makers and enforcers have to positively strive towards achieving greater goals in upholding right to life and abolishing archaic practice which has become termite eating the constitutional ethics of liberty, equality and justice.

⁵⁸ *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498

⁵⁹ Indulekha Aravind, *So what is India's human rights record really like?*, The Economic Times, May 14, 2017, Available at: <https://economictimes.indiatimes.com/news/politics-and-nation/so-what-is-indias-human-rights-record-really-like/articleshow/58662843.cms>.