

LIFE FOR LIFE OR LIFE FOR LESS: VOICES AGAINST THE DEATH PENALTY?

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Abstract

In this age, there is a growing sentiment to protect human rights in broad ramifications across the globe. A major sign of this deepening interest is the emerging consensus for the unrestricted demand for the protection of right to life, championed by the United Nations and supported by its numerous affiliate organizations and groups. It has even extended to the point of seeking total abolition of the death penalty without recourse to the gravity of offences involved and the consequences of a loose society. Granted that there have been, and are likely to continue, errors in the strict application of death penalty as a result of human fallibility, it cannot be denied that there are clear cases where capital offenders can be identified and the imposition of capital punishment justified. Essentially therefore, the pressure for unconditional abolition of death penalty does not appear to be fair, considering the danger inherent in granting heinous criminals a clear coast to carry out their nefarious activities. This article applied the analytical method of research to dig into the criticisms of death penalty, and the possible effects of allowing unrepentant criminals the open access to their acts against society. In addition, it assessed the value of the lives of capital punishment victims in comparison to those of the culprits who are subtly protected through the clamour for right to life as the ultimate human right. The study found that under cover of avoiding mistakes and discouraging arbitrary executions, society is on the verge of sacrificing victims of capital offences for lives of culprits in a bid to apply a lopsided human right to life. The study therefore recommended, *inter alia*, that the death penalty debate be reviewed in this age with some more dispassionate considerations to strike a balance between the harm done to the victims and the error intended to be averted. Even if it has to be conceded that capital punishment should be reserved for only the most serious offences, and that crimes which do not involve loss of life need not be included in this category, it will still be unfair to rule that all offences should be excluded from death penalty. For, perpetuation of orderly living in society dictates that some form of punishment be framed to deter intending offenders from committing egregious crimes.

Key words: *Right to life, death penalty, human rights, abolition of capital punishment.*

Introduction

The sanctity of human life has been the most important principle that has influenced the content, weight and scope of rules and laws enacted to promote order in society over generations. From ancient times, and especially during the concerted opposition to crime against humanity, it served as the inherent force delineating cornerstones of morality and insulating them from skepticism and criticism. Modern society has benefited immensely from its belief and application as can be confirmed by the unanimity of its entrenchment in the constitutions and equivalent statutes of

States. In all, it was certain that the international community had the conviction, that instilling universal respect for the inviolable right to life was the surest means of minimizing fatal attacks on persons. At one time or the other in history, death penalty has been imposed by most States to prevent the extreme criminality of taking human life unlawfully. It was understood as a demonstration of global acceptance of the sacred obligation to protect human life from invasion. There is also evidence that, on the average, it yielded positive result. However, without recourse to its effectiveness, there is a mounting campaign by some scholars and notable organizations across the globe to abolish it. The acclaimed rationale is that it is a violation of the ultimate and inalienable right to life enshrined in the Universal Declaration of Human Rights, and so is tantamount to the cruel, inhuman and degrading punishment of the convict.¹ The sentiment being circulated to consolidate its condemnation is contained in, among others, the text of the Executive Director, US Death Penalty Information Centre, to the effect that progressively as societies evolve, people and countries come to an agreement that time has come to eradicate some of the old practices. Among them are ritual human sacrifice, slavery and physical torture. Even though vestiges remain, they serve to confirm that the world has condemned those practices in principle.² This triggers the consideration of the totality of the beneficiaries of the hallowed “right to life”. Along that line, this article is focused on the true interpretation of this term as to facilitate its unbiased application to appropriate subjects. This is necessary in order to balance the contentions between the protagonists and antagonists of death penalty who both draw their strengths from this cardinal entitlement. It will also illuminate their points of divergence as to justify the merit of their support or the weak points attracting condemnation, opposition and rejection. The validity of this whole debate is sourced more from this appraisal than the number of supporters on each side of the divide, as it has a formidable influence on the sustenance of the pending resolution.

¹ Art 3, Universal Declaration of Human Rights 1948; Second Optional Protocol to the International Covenant on Civil and Political Rights, 1989; Protocol No. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1982; The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 1990; Protocol No. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2002; Article 4 of the African Charter on Human and Peoples’ Rights, 1981; UN Human Rights Office of the High Commissioner, *Moving Away From the Death Penalty: Arguments, Trends and Perspectives* (New York: United Nations 2015) 8 – 84; W A Schabas, ‘International Law and Abolition of the Death Penalty: Recent Developments’, (1998) (4: 535) *ILSA Journal of Int’l & Comparative Law*, 535-572; Centre for Constitutional Rights, ‘The Death Penalty is a Human Rights Violation: An Examination of the U. S. from a Human Rights Perspective’, <http://www.ccRjustice.org> accessed 10 September 2021; International Bar Association, *The Death Penalty Under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty* (London: International Bar Association 2008) 1 -16; European Union External Action, ‘Good Reasons to Oppose the Death Penalty’, <http://www.deathpenalty.org> accessed 12 July 2021; Portuguese Presidency of the European Union, ‘International Conference on the Death Penalty’, www.2021portugal.eu/pt accessed 20 September 2021; R C Dieter, ‘The Death Penalty and Human Rights: U. S. Death Penalty and International Law’, Oxfordpaper.pdf accessed 10 September 2021; ACLU, ‘The Case Against The Death Penalty’, www.aclu.org accessed 28 September 2021; A Y Supti, ‘Death Penalty Should Be Abolished’, [researchgate.net/publication](https://www.researchgate.net/publication) accessed 4 September 2021. ²R C Dieter, ‘The Death Penalty and Human Rights: U. S. Death Penalty and International Law’, <http://files.deathpenaltyinfo.org> accessed 20 September 2021.

Meaning of Death Penalty

Death penalty, otherwise known as capital punishment, is the execution of an offender upon conviction of a crime by a court of law. It is generally distinguished from extra-judicial execution which is carried out without due process of law.³ It therefore involves the untimely death of a person convicted of a crime for which this punishment had been prescribed at the time it was committed. The termination of life in compliance with this sentence takes various forms in different countries, but the common ones are by hanging, firing squad, electrocution, stoning and lethal injection, as may be specified in the enabling statute. In Nigeria, the law provides for death by hanging and lethal injection.⁴

Historical Background

In ancient Greece, capital punishment for rape, arson, treason and murder was commonly employed under the laws of Draco (also known as Dracon).⁵ It also featured during the Roman era covering a wide range of offences.⁶ The major religions in the world had sanctioned it at various times. For instance, both Judaism and Christianity have traced its justification to the scripture's strict penalty for a murderer.⁷ In most societies of old, the interpretation of 'eye for eye', and 'life for life' from the holy books appears to be designed to avoid a disproportionate application of capital punishment. Islamic law expressed in the Quran condones capital punishment but the balancing of punishments with offences is not total. Accordingly, although the Quran prescribes the death penalty for several fixed crimes, including robbery, adultery, and apostasy of Islam, murder is not among them. Instead, murder is classified as a civil crime covered by the law of *qisas* (retaliation), which allows the relatives of the victim to decide whether the offender should be punished with death by the authorities or made to pay '*diyah*' (wergild) as compensation.⁸ In the 17th and 18th centuries, death used to be the penalty for a wide range of offences in England, but was rarely applied. Juries and courts, reluctant to pronounce the ultimate sentence, pardoned victims on condition of their conceding to banishment in some cases, and transportation to the then American colonies and even Australia.⁹

In the Middle Ages, the 'benefit of clergy' was an escape route for most offenders guilty of capital crimes. That way, all of them who proved that they were ordained priests, secular clerks and penitent by being able to recite the first verse of the fifty-first psalm (known as the 'neck verse' for

3R Hood, 'Capital Punishment', www.britannica.com accessed 10 September 2021; B O Igwenyi and others, 'Abolition of Death Penalty in Nigeria: Juristic Issues and Solutions', (2019) (7) (7) *Global Journal of Politics and Law Research*, 53-65; C Soanes and A Stevenson, *Concise Oxford English Dictionary* (New York: Oxford University Press 2004) 369 described it as 'punishment by execution'.

⁴ Administration of Criminal Justice Act 2015, s. 402; D I Njoku, 'A Critical Appraisal of Capital Punishment in Nigeria Judicial System', (2019) (8) (11) *International Journal of Humanities and Social Science Invention*, 47-62.

⁵ R Hood, *supra*, n. 3

⁶ *Ibid*

⁷ Genesis 9: 6

⁸ R Hood, *supra*, n. 3

⁹ R Hood, *supra*, n. 3

its power to save one's neck) were usually set free although the Judge had power to sentence them to prison for one year, or to transportation for seven years.¹⁰

During Japan's peaceful Heian period,¹¹ it was customary for the Emperor to commute every death sentence and substitute it with deportation to a remote area. In Roman and other ancient empires before the 19th century, many societies administered extremely harsh forms of capital punishment. In Rome the condemned were thrown from the Tarpeian Rock or drowned in a sealed bag with a dog, cock, ape, and viper (for patricide), or crucified. Executions in ancient China used to be by painful methods like sawing the condemned in half, flaying him while still alive, and boiling.¹² In Europe generally, cruel forms of execution included "breaking" on the wheel, boiling in oil, burning at the stake, decapitation by the guillotine or an axe, hanging, drawing and quartering, and drowning.¹³ Records show that the old practice allowed executions to be performed as public events attended by large crowds, with the mutilated bodies displayed until they rotted. In 1868, England banned public executions, and adopted the recommendation of the Capital Punishment Commission that executions be done within the private precincts of the prison walls.¹⁴ Through the transportation of European settlers and other means, Britain influenced America's use of the death penalty. In 1608, the execution of Captain George Kendall in the Jamestown colony of Virginia was the first recorded case of death penalty in the new colonies. Kendall was executed for being a spy for Spain.¹⁵ In 1612, Virginia Governor, Sir Thomas Dale enacted the Divine, Moral and Martial Laws, which enshrined death penalty for trivial offences like stealing grapes, killing chickens and trading with Indians.¹⁶

In ancient Egypt, the death penalty was executed through some gruesome forms. For instance, Prisoners of War (POWs) were impaled on enormous spikes. Pharaoh Akhenaten (1353 – 1470 BCE) reportedly impaled 225 Nubian POWs during his reign. Another Pharaoh, Merenptah, treated a great number of Libyans the same way in 1213 – 1203 BC.¹⁷ Soldiers were beheaded and emasculated, children were dismembered and burnt alive on a bed of thorns, particularly as

¹⁰R Hood *supra*, n. 3

¹¹ 794-1185

¹²C Kim and T R LeBlang, 'The Death Penalty in Traditional China', (1975) (5) (77) *Ga. J. Int'l & Comp L.*, 77-105; O G Usmonovna, 'In the History of the Ancient World, The Death Penalty', <http://media.neliti.com>, accessed 20 March 2021.

¹³R Hood, *supra*, n. 3; G Abbott, *Execution, A Guide to the Ultimate Penalty* (West Sussex: Summersdale Publishers 2005) 161-2

¹⁴Capital Punishment (Amendment) Act 1868.

¹⁵A L Klein, 'The Beginning of the End: Abolishing Capital Punishment in Virginia', (2021) (77) *Wash. & Lee L. Rev.*, 375

¹⁶B Tarter, 'Dale, Sir Thomas' in S B Bears, *The Dictionary of Virginia Biography* (Vol. 3 Richmond: Library of Virginia 2006) 661-664.

¹⁷K Muhlestein, 'Violence' in E Froot and W Wendrich (eds.), *UCLA Encyclopedia of Egyptology* (Los Angeles: eScholarship 2015) 1- 20; D Lorton, 'The Treatment of Criminals in Ancient Egypt', (1977) (xx) (1) *Journal of the Economic and Social History of the Orient*, 2 - 64

punishment for patricide; servants were slain and buried as human sacrifices;¹⁸ enemy forces were burnt alive; and citizens were brutally killed for not being good Samaritans.¹⁹

Crimes that Attract Death Penalty in Modern Times

In contemporary society, there is similarity, though not uniformity, in the choice of offences that deserve to be sanctioned with the death penalty. Their placement in some countries are examined below.

1. Nigeria

1. Criminal Code Act, Cap C38, LFN 2004, section 319(1) for murder; section 37 for treason and treasonable felony; section 38 for instigating invasion of Nigeria. In these cases the punishment is death penalty.
- (b). Armed Forces Act, Cap A20, LFN 2004, section 114(3) (a) provides for death penalty for treason and kindred offences.
- (c). Robbery and Fire Arms (Special Provisions) Act, Cap R11, LFN 2004, section 1(2) stipulates death penalty for participating in armed robbery in any part of Nigeria. When so sentenced, the convict is to die by hanging or lethal injection.

2. India

In the Indian Penal Code, the following offences attract capital punishment –

1. Criminal conspiracy to commit a capital offence (s. 120 B); Treason for waging war against Government of India (s. 121); Abetment of mutiny actually committed (s. 132); Giving or fabricating false evidence with intent to procure conviction of a capital offence (s. 194); Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person (s. 195 A); Murder (s. 302); Abetting suicide by a minor, an insane or intoxicated person (s. 305); Attempted murder by a serving life convict (s. 307); Kidnapping for Ransom (s. 364); Rape and injury causing death or leaving women in a persistent vegetative state (s. 376 A); Rape of a child below 12 years (s. 376 AB); Gang rape of a child below 12 years (s. 376 DB); Certain repeat offences in the context of rape (s. 376 E); Dacoity (i.e. banditry or criminal activity involving robbery by groups of armed bandits) with murder in cases where 5 or more persons commit dacoity and one of them commits murder in the course of that crime, all members of the gang are liable for the death penalty. Others are organised crime causing death of a person (s. 3 (1); Andhra Pradesh Control of Organized Crime Act, 2001; Offences in relation to enemy and punishable with death (s. 34 Army Act, 1950); Mutiny (s. 37 Army Act); Desertion (s. 38 (1) Army Act); Offences in relation to enemy and

¹⁸T Wilkinson, *The Rise and Fall of Ancient Egypt* (New York: Random House Trade Paperbacks 2013) 12-100;

¹⁹K Burnside, '10 Gruesome Ways People Died in Ancient Egypt', ranker.com/list accessed 28 September 2021; A Leahy, 'Death by Fire in Ancient Egypt', (1984) (27) *Journal of the Economic and Social History of the Orient*, 199-206.

punishable with death (s. 21 Assam Rifles Act 2006); Mutiny (s. 24 Assam Rifles Act); Desertion (s. 25(1) (a) Assam Files Act); Death caused by consumption of Laththa (s. 65 A (2) Bombay Prohibition (Gujarat Amendment) Act, 2009; Grave breaches of Geneva Conventions (s. 3 The Geneva Convention Act 1960); Repeated commission of offences involving commercial quantity of any narcotic drug or psychotropic substance (s. 31 A (1) The Narcotics Drugs and psychotropic Substances Act, 1985.

3. **Egypt**

In Egypt, Article 230 of the **Panel** Code makes premeditated murder punishable by death penalty. In addition, under Article 235 partners in a murder carrying death penalty for the perpetrator shall be sentenced to death, or to hard labour for life. In ancient Egypt, the death penalty was executed through ten principal forms of gruesome death, to wit, impalement;²⁰ beheading and emasculation; burning alive; burying as human sacrifices;²¹ among others.²²

4. **Malaysia**

The law in Malaysia provides for the imposition of death penalty for drug trafficking (section 39B, Dangerous Drugs Act 1952); Murder (section 302 of the Penal Code), certain firearms offences (section 3 Firearms Increased Penalties Act, 1971); and Treason (section 121A, Penal Code, Act No. 574, 1997.²³

5. **China**

Mainland China, also known as Chinese Mainland, is the geopolitical area under the direct jurisdiction of the People's Republic of China since 10 October 1949. It excludes Hong Kong and Maccao. There are 46 offences which attract death penalty under its criminal law.²⁴ They are categorised into Crimes Endangering National Security (Treason; Separatism; Armed rebellion, Rioting; Collaborating with the enemy; Spying or espionage; Selling state secrets; providing material support to the enemy); Crimes Endangering Public Security (Arson, Flooding, Manslaughter, Bombing, Spreading poisons, spreading hazardous substances such as radioactive, toxic, pathogenic materials; seriously endangering public safety, broadly construed; sabotaging electricity; sabotaging gas, fuel, petroleum, or other flammables or explosives; hijacking aircraft; illegal possession, transport or selling of explosives or firearms, illegally manufacturing, selling, transporting or storing hazardous materials; theft of explosives or dangerous material; theft of firearms, ammunition or other dangerous material); Economic Crimes (Production or Sale of Counterfeit Medicine, production or sale of hazardous food products); Crimes against people (Intentional homicide, Intentional assault, Rape, Kidnapping, human trafficking); Crimes against property (Robbery); Crimes against Public Order (Prison escape, Jailbreaking, Raiding a prison,

²⁰ K Muhlestein, *supra*, n.17; D Lorton, *supra*, n. 17.

²¹ T Wilkinson, *supra*, n. 18

²² K Burnside, *supra*, n. 19; A Leahy, *supra*, n. 19.

²³ R Hood, *The Death Penalty in Malaysia* (London :The Death Penalty Project 2013) 1-10

²⁴ Criminal Code 1997, as amended in 2011 and 2015.

smuggling, dealing, transporting or manufacturing drugs); Crimes against national defence (sabotaging weapons, military installations, or military communications, providing substandard weapons or military installation); Corruption and bribery (embezzlement); Breach of duty by soldiers (insubordination, concealment or false reporting of military intelligence, refusing to pass or falsely passing orders, surrender, defection with air-craft or ships, selling military secrets, theft of military weaponry or supplies, illegally selling or transferring military weaponry or supplies, killing innocent inhabitants of war zones or plundering their property, and cowardice).²⁵

6. United States of America

In the United States of America death penalty is a legal punishment under the criminal justice system. While the Federal Government imposes and executes a small part of the death sentences, majority of the cases are carried out by States.²⁶ On 1 July 2021, U. S. Attorney-General, Merrick Garland placed a moratorium on all federal executions,²⁷ concerning 45 offenders on the federal death row all condemned for aggravated murder.²⁸ Capital punishment was stopped in 1972 after the *Furman v Georgia*²⁹ decision, but was continued in 1976 when *Gregg v Georgia*³⁰ judgment was delivered. The Crimes Act of 1790 named some capital offences, to wit, treason, murder, robbery, piracy, mutiny, hostility against the United States; counterfeiting, and aiding the escape of a capital prisoner.³¹ It also covered drug offences, some types of murder,³² and terrorism,³³ as well as attempted murder of a witness, juror, or court officer in certain cases³⁴

The Death Penalty Debate

As a result of differences in the purposes for which state authority is applied in the execution of capital punishment in the present age, it is no longer surprising that opinions are sharply divided on the utility of the practice and the essence of its perpetuation. Consequently, it is important to appraise the opinions on both sides of this debate to shape the conclusion of this study and possible contribution by way of recommendation.

²⁵ H Lu & T Miethe, *China's Death Penalty: History, Law and Contemporary Practices* (New York: Routledge, 2007) 50-51; L Zhang, 'China: Death Penalty Crimes to Be Further Reduced', loc.gov accessed 1 December 2021.

²⁶ T Ove and C Huffaker, 'Death Penalty Cases Rare in Federal Court; Executions More Rare', post-gazette.com accessed 12 January 2020

²⁷ US, 'Attorney-General Merrick B. Garland Imposes a Moratorium on Federal Executions; Orders Review of Policies and Procedures', www.justice.gov accessed 1 September 2021

²⁸ Death Penalty Information Center, 'List of Federal Death-Row Prisoners', deathpenaltyinfo.org/state accessed 2 September 2021

²⁹ 408 U. S. 238, 239 – 40 (1972)

³⁰ 428 U. S. 153, 177 (1976)

³¹ Crimes Act, 1790, ch. 9, 1, 3, 8 – 10, 14, 23, 1 Stat. 112, 112-15, 117.

³² Anti-Drug Abuse Act, 1988, Pub. L. 100-690, 120 Stat. 4181

³³ Violent Crime Control and Law Enforcement Act 1994, H. R. 3355, Pub. L. 103-322; Anti-terrorism and Effective Death Penalty Act, 1996, Pub. L. 104-132, 110 Stat. 1214

³⁴ R Hertz & R Weisberg, 'In Mitigation of the Penalty of Death: *Lockett v Ohio* and the Capital Defendant's Right to Consideration of Mitigating Circumstances', (1981) (69) *California Law Review*, 317.

(a). Abolition

The crux of the contention of contemporary international human rights law, consolidated by the disgusting Holocaust and various atrocities perpetrated in the course of the Second World War, is that torture is wrong in all ramifications and that its prohibition and the right not to be subjected to it are therefore 'absolute'. Proponents of this view draw enormous strength from the provision of the Universal Declaration of Human Rights concerning the sanctity of right to life and its enjoyment by all persons.³⁵ Incidentally this has been broadened and amplified in regional instruments which even appear closer and more compelling, shrouding the need to weigh other rights that are occasionally compromised whenever full expression of this entitlement is contested. One major effect of this approach is that the school of thought is using the ordinarily neutral text of this right to skew global interpretation of morality and idea of justice in favour of persons who go to the extreme by taking life. As a result, society is conditioned to assume a world where the pain of torture is only felt when the life of a grave offender who is responsible for the harsh, untimely and undignified death of his victim and fellow human being is lawfully adjudged due for termination. The demand to save the life of the culprit by abolishing death penalty is generally anchored on, among others, the following reasons –

(i). Arbitrariness

It is alleged that the application of death penalty is arbitrary and so it violates the prohibition against cruel and unusual punishment. For instance, while the American Eighth Amendment prescribed that in capital cases sentencing discretion be framed to suit fixed objective standard to eliminate arbitrariness and discrimination, the humanitarian bias tilts towards a sentencing discretion allowing sentencers to personalise justice by accepting mitigating circumstances that justify a sentence less than death as a matter of their choice.³⁶

An extension of this criticism is that in the new bid to combat terrorism and related crimes, international standards on the restriction of death penalty to crimes which are categorised as the 'most serious' in international law are breached; and that the right to the guarantees of due process is not observed.³⁷ It is also linked to the controversy flowing from the directive of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions that the death penalty should not be imposed in respect of economic crimes, drug-related offences, victimless offences, and actions

³⁵UDHR 1948, Art. 6

³⁶*Jones v. Mississippi* 593 U. S. 2021; P J Larkin, 'The Eighth Amendment and the Execution of the Presently Incompetent', (1980) (32) (4) *Stanford Law Review*, 765-805.

³⁷U K aid and Penal Reform International, 'The Death Penalty, Terrorism and International Law', www.penalreform.org accessed 12 July 2021; UN Human Rights Council, 5th Session, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 29 January 2007, A/HRC/4/20; UN Human Rights Council, 24th Session, Question of Death Penalty: Report of the Secretary-General, 1 July 2013, A/HRC/24/18.

relating to moral values including adultery, prostitution and sexual orientation.³⁸ Some countries are unable to comply with it due to differences in value system. For instance, a number of Islamic States regard adultery and apostasy among the most serious crimes, while others list political offences and economic crimes among them.³⁹ Variation and modifications of trial and sentencing provisions in the ICCPR also feature in the arbitrariness claim. They include prompt and detailed information of charges, translation into one's own language, counsel of one's choice, independence and impartiality of the tribunal, and the right of review by a higher tribunal,⁴⁰ public execution,⁴¹ and use of gas chamber.⁴² Even the interval between sentencing and execution, commonly known as 'death row phenomenon' in the United States, is criticized as arbitrarily applied to constitute criminal, inhuman and degrading treatment.⁴³ It will take some time for the international community to provide precise conditions on these issues.⁴⁴ This is mostly because the bias against the punishment is increasingly leading to condemnation of every method of its execution.⁴⁵

(ii). Discrimination

Another reason is that the punishment is administered in a selective and discriminatory manner to the detriment of racial and religious minorities, and the indigent class. The emphasis of critics is that all over the world it targets members of marginalised groups disproportionately. The aggregate result is that in numerous instances innocent persons are convicted and executed mostly because of their inability to engage the services of competent and experienced attorneys in liaison with forensic profiling experts. There is also the prejudice factor which aggravates suspicion, working against certain classes of society to whittle down the weight of their innocence in the face of persecutive prosecution.⁴⁶

³⁸E Prokosch, 'The Death Penalty versus Human Rights' in *Death Penalty: Beyond Abolition* (Strasbourg: Council of Europe Publishing, 2004) 23-35; W A Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Cambridge University Press, 2002) 373.

³⁹W A Schabas, *supra*, n.38

⁴⁰*Reid-vs-Jamaica Communication No. 250/1987*.

⁴¹W A Schabas, *supra*, (n. 38) 376.

⁴²*NG v- Canada* (No. 469/1991); W A Schabas, *supra*, n. 38 375; L Abour, In the Matter of Sentencing of TAHA Yassin Ramadan, Application for Leave to Intervene as Amicus Curiae and Application in Intervention of Amicus Curiae of United Nations High Commissioner for Human Rights (Iraqi Tribunal: 8 February 2007).

⁴³*Soering v. United Kingdom and Germany*, 7 July 1989 Series A Vol 161 11 Ehrh 439; *Pratt v. Attorney-General for Jamaica* [1993] A All ER 769.

⁴⁴International Bar Association, 'The Death Penalty Under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty', Death penalty-Paper. Pdf accessed 16 July 2021; W A Schabas, International Law and the Abolition of the Death Penalty: Recent Developments', (1998) (4) *ILSA Journal of Int'l & Comparative Law*, 535.

⁴⁵W J Bowers and G L Pierce, 'Deterrence or Brutalization: What is the Effect of Executions', (1980) (26) *Crime & Delinquency*, 453-484; C D Bader and others, 'Divine Justice: The Relationship Between Images of God and Attitudes Towards Criminal Punishment', (2010) (35) *Criminal Justice Review*, 90-106.

⁴⁶UNHR Office of the High Commissioner, *Moving Away From The Death Penalty: Arguments, Trends and Perspectives* (New York: United National 2015) 100-182.

It also leads to breaches of constitutionally-guaranteed protection of mental retardation through different and conflicting gradations of intelligence quotient.⁴⁷ In some countries, especially U. S. A., the death penalty serves as the most prominent vestige of slavery and racial oppression.⁴⁸ The decision-making process in the court system is thus designed to favour the dominant race (whites) to ensure perpetual oppression of minority citizens.⁴⁹ The choice of prosecutors and jury is always tilted against the target minority class or race to achieve premeditated results.⁵⁰ Protection of women is another aspect of discrimination. In India, and some other nations this is prevalent, instigating demands for abolition of the death penalty.⁵¹ In outstanding cases, even where the guilt of female convicts was glaring, the apex court had commuted the punishment to life imprisonment.⁵²

The allegation of bias is also linked to the court's approach to mental incapacitation in the determination of guilt in capital offences. The nagging question concerns how much uncertainty is acceptable with regard to executing people of low intelligence and those who are mentally ill. It connects the ability of jurors to evaluate accurately the degree of culpability of an intellectually retarded person. Doubts abound that a jury is not capable of determining profoundly whether mentally ill persons are so impaired that their culpability is reduced, to warrant their exoneration, or so dangerous that they should be executed. This leaves a vital vacuum which is usually filled more by discretionary opinion than satisfactory evidence. In the end, the display of discrimination gets exacerbated by the choice of jury. Among other factors, this doubt is heightened by the fact that intellectual disability is not precisely measurable for which reason even Psychiatrists and Psychologists disagree on their existence, severity and influence on behavior.⁵³

(iii). Failure of Deterrent Effect

It is also contended that the death penalty does not have a verifiable deterring power on the commission of serious crimes. With repugnancy to morality standing as a barrier to the practical

⁴⁷ *Hall v. Florida*, 134 S. Ct. 1986, 1991 (2014); A Cohen, 'Supreme Court Case May Stop States That Still Execute Mentally Disabled', *The Atlantic* (28 February 2014) 1 or www.theatlantic.com/health/archive/2014/02/supreme-court-case-may-stop-state-that-still-execute-the-mentally-ill/283969/7.

⁴⁸ S B Bright, 'Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty', (1995) (35) *Santa Clara Law Review*, 443-483.

⁴⁹ C E Jones, 'Give Us Free: Addressing Racial Disparities in Bail Determination', (2013) (16) *New York University Journal of Legislation and Public Policy*, 919.

⁵⁰ *People v. Randall*, 671 N. E. 2d 60, 65 (Ill. App. 1996); M W Bennett, 'Unravelling The Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated *Voir Dire*, The Failed Promise of Batson, And Proposed Solutions', (2010) (4) *Harvard Law & Policy Review*, 149; *State v Golpin, Cumberland Co.*, NC Superior Nos. 97 CRS 42314-15, 98 CRS 34832, 35044, 01 CRS 65079, at 73-74 (December 13, 2012).

⁵¹ R Kumar & A Saxena, 'Gender Bias in Execution of Death Penalty in Post-Independence India: A Reason for Abolition', (2021) (4) (2) *International Journal of Law Management & Humanities*, 2285-2295.

⁵² *State v Nalini*, AIR 1999 SC 2640; *Anamma v State of Andhra Pradesh*, AIR 1974 SC 799; S Atrey, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15', (2016) (16) *The Equal Rights Review*, 160.

⁵³ UN OHCHR, *supra*, (n.46) 124-125; *Ford v Wainwright*, 477 U. S. 399, 412 (1986); *Solesbee v Balkcom*, 339 U. S. 9,23 (1950); Amnesty International, 'Caribbean: Death Penalty in the English-Speaking Caribbean. A Human Rights Issue', (AMR 05/001/2012, 30 November 2012), www.amnesty.org/en/library/info/AMR_05/001/2012/EN.

study of the use of capital punishment empirical data on the deterrent effects of the threat of death penalty capable of completely persuading an ardent proponent of this punishment to change his mind are generally not available. What serves as the standard is the deterrent effect of capital punishment on the murder rate in the United States.⁵⁴ A review of the deterrence studies in the United States, Singapore, and Hong Kong has also been carried out.⁵⁵ Critics buttress their opposition with those results and the 2012 report of the Committee on Deterrence and the Death Penalty of the National Research Council in the United States⁵⁶ to challenge the prudence of accepting the hypothesis that death penalty deters murder to a reasonably greater extent than the lesser punishment of life imprisonment. Furthermore, they take credit for homicide rate analyses before and after abolition of the capital punishment. For instance, the last executions in Australia occurred in the mid- 1960's, yet the cases of murder have dropped on the average.⁵⁷ In Canada, homicide rate increased before the abolition of death penalty, but in 2003, 27 years after abolition, the rate dropped to 1.73 per 100,000 population, 43 percent below the 1975 level (3.02 per 100,000), the year before abolition.⁵⁸ From a 2011 study by the United Nations Office on Drugs and Crime of Global Trends in Homicide, while the homicide rate increased soon after abolition of the death penalty in Eastern European countries, it retained a considerable drop after the mid-1990s. Accordingly, the homicide rate in five nations of Central and Eastern European (the Czech Republic, Hungary, Moldova, Poland and Romania, which all abolished the death penalty in the 1990s) fell by 61 percent from 4.5 to 1.6 per 100,000 between 2000 and 2008, decreasing particularly in respect of male victims. The study therefore concluded that in almost all countries in Europe where the rule of law has been upheld through abolition of death penalty, there has been a decline in the homicide rate.⁵⁹ From 2006 to 2010, there was an informal moratorium on executions in Taiwan, which created an opportunity to observe the impact of withdrawal of the threat of execution on rate of violent crimes reported to the police. Analysis by Taiwan Alliance to End the Death Penalty indicated that violent crime rate per 100,000 of the population dropped during those four years from 62.9 in 2005 (when there were three executions) to 53.6 the following year and 29.3 in 2009.⁶⁰ However, in line with the 2009 finding made by Richard Berk, a distinguished statistician, the general impression is that it is not possible to determine the deterrent

⁵⁴UN OHCHR, *supra*, (n. 46) 70

⁵⁵E Cohen-Cole, and others, 'Model Uncertainty and the Deterrent Effect of Capital Punishment', (2008) (7) (2) *American Law and Economic Review*, 335-369; F Zimring and others, 'Executions, Deterrence and Homicide: A Tale of Two Cities', (2010) (7) *Journal of Empirical Legal Studies*, 1-29.

⁵⁶D S Nagin and J V Pepper (eds.), *Deterrence and the Death Penalty* (Washington, DC: National Academies Press 2012) 3

⁵⁷UN OHCHR, *supra*, (n. 46) 71.

⁵⁸ S Munroe, 'Abolition of Capital Punishment in Canada: Canadian Murder Rate Stays Low Without Capital Punishment', <http://canadaonline.about.com/od/crime/a/abolitioncappun.htm> accessed 30 December 2012.

⁵⁹United Nations Office on Drugs and Crime, *2011 Global Study on Homicide: Trends Contexts, Data* (Vienna: UN, 2011) 33.

⁶⁰Taiwan Alliance to End the Death Penalty, *A Blow to Human Rights: Taiwan Resumes Executions, The Death Penalty in Taiwan 2010* (Taipei: Taiwan Alliance to End the Death Penalty, 2011) 15.

impact of the death penalty.⁶¹ These and other findings concur with the research conducted in 1988 by a leading authority on the death penalty which was updated in 2002 that it may not be right to accept the hypothesis that the death penalty has a strong deterrent to the commission of murder.⁶² Another point raised by proponents of abolition is that certain categories of offenders would never be deterred by the threat of being executed for the reasons that they already had mental health issues or were under the influence of alcohol or drugs when committing the offence. It was thus likely that they were unable to think through the consequences of their actions or the possibility that they might be executed.⁶³ The crux of this argument is that it will not be right to enforce the law on such persons who were momentarily incapable of controlling their mental potency at the material time they committed the grievous crime.⁶⁴

(iv). Erroneous Convictions

The inevitability of erroneous convictions is another reason cited by advocates of global abolition of the death penalty. They contend that even in countries that operate a sophisticated criminal investigation machinery, the possibility of error cannot be completely eliminated.

Thus, in the United States, with a transparent approach to the trial and conviction of brutal crimes, there are persons who were wrongly sentenced to capital punishment but were exonerated through DNA testing.⁶⁵ The Death Penalty Information Center collated 144 death – row inmates who were exonerated as at 2015.⁶⁶ There are increasing proofs too that, generally, convictions of capital punishment are not all fool-proof;⁶⁷ even the U. S. Supreme Court has acknowledged this.⁶⁸ Apart from the cases of inevitable error, there is a strong suspicion of overbearing prejudices underlying and triggering numerous wrongful executions of innocent persons in several countries. In the United States, for instance, the death penalty statistics fall disproportionately on people of colour and those of limited means. Data collected from 2011 show that a person facing trial where the victim is white is thrice more likely to be sentenced to death than one whose victim is African American, and four times more likely than someone whose victim is Latino. Thus, white murder victims are only 27.6 per cent but 80 per cent of prisoners executed in California have been connected to killing whites.⁶⁹

⁶¹ R Beck, 'Can't Tell: Comments on "Does The Death penalty Save Lives?" (2009) (8) (4) *Criminology and Public Policy*, 845-851.

⁶² R Hood and C Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2008) 230.

⁶³ UNHR, Office of the High Commissioner, *supra*, n. 46.

⁶⁴ *Kahler v Kansas*, 589 U. S. (2020); A Ogunwale & O Oluwaranti, 'Pattern of Utilization of the Insanity Plea in Nigeria: An Empirical Analysis of Reported Cases', (2020) (1) *Forensic Science International: Mind and Law*, 1.

⁶⁵ UN OHCHR, *supra*, (n. 46) 24 -30

⁶⁶ UN OHCHR, *supra*, (n. 46) 30

⁶⁷ S R Gross and B O' Brien, 'Frequency and Predictors of False Conviction: Why We Know so Little, and New Data on Capital Cases', (2008) (5) *Journal of Empirical Legal Studies*, 927; D A Blackmon, 'Louisiana Death – row Inmate Damon Thibodeaux Exonerated With DNA Evidence', *Washington Post* (28 September 2012)1.

⁶⁸ *Atkins v Virginia*, 536 U. S. 304, 320 n. 5 (2002)

⁶⁹ UN OHCHR, *supra*, (n. 46) 44

Factors which have commonly led to wrongful executions include eyewitness error, false confessions, false testimonies, prosecutorial misconduct and poor forensic evidence. As a result, between 1973 and 2011, not less than 138 people had been exonerated and released from death rows all over the United State.⁷⁰ Most of the mix-ups and inaccuracies stemmed from cases where the culprits were not caught in the act – constraining the police to rely on eyewitnesses, forensics and confession – evidence that could be wrong, due to missteps and unethical practices in the early stages of investigation. The danger is that as soon as the key evidence is compromised during the investigation, it becomes extremely difficult for subsequent trial, appeals, and post-conviction courts to identify or correct the errors. The saving grace for some fortunate convicts is the DNA, through which wrongfully convicted persons are increasingly being exonerated.⁷¹

Renewed Debate

Exonerations in capital cases arising from DNA tests have stirred fresh concerns in the subject with tremendous impact on the public and policy makers especially in the U. S.⁷² The exposure of condemnation of innocent people to death in some cases has strengthened the debate for abolition of the death penalty. For instance, in *Baze v Rees*,⁷³ in his dissenting judgment, U. S. Supreme Court Justice Stevens relied on evidence from DNA exonerations in criticising the death penalty for the risk of error and the irrevocable nature of its consequences. In another case, *Atkins v Virginia*,⁷⁴ it was observed that a worrisome lot among inmates on death row has been exonerated. On the contrary, another legal luminary, Justice Antonin Scalia, pointed out that declared exonerations constituted an insignificant minimum.⁷⁵ Above all, there is a strong point in the contention that following a federal inquiry conducted in the mid-1990s in the U. S., there is need to use DNA tests to promote accuracy in the investigation of criminal cases.⁷⁶

Administration of Justice in Capital Cases

Due to the fundamental importance of life and the concern of the international community to eliminate wrongful death sentences, attention has also shifted to the regulation of standards in the administration of justice in capital crimes. Some egregious erroneous – but not always blatantly wrongful convictions in this category – have ignited this disposition in the Caribbean, Africa and Asia. As a result of indigence, most prisoners in the Caribbean are unable to pay for legal services,

⁷⁰P Lauenstein, 'Approximately 4 Percent of Death Row Inmates are Innocent', *The Boston Globe* (25 March 2019) 1; S R Gross, 'Exonerations in the United States 1989 Through 2003', (2005) (95) *J. Crim. L. & Criminology*, 523.

⁷¹B L Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge: Harvard University Press, 2011) 1-50.

⁷²J Liebman, 'The New Death Penalty Debate', (2002) (33) *Columbia Human Rights Law Review*, 527; C Starger, 'Death and Harmless Error: A Rhetorical Response to Judging Innocence', (2008) (108) *Columbia Law Review Sidebar*,

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⁷³553 U. S. 35, 85-86 (2008)

⁷⁴536 U. S. 304, 320 n. 25 (2002)

⁷⁵*Kansas v Marsh*, 548 U. S. 163, 194-195 (2006); S R Gross, 'Souter Passant, Scalia Rampant: Combat in the March', (2006) (105) *Michigan Law Review First Impressions*, 67

⁷⁶E Connors and others, *Convicted By Juries, Exonerated By Science: Case Studies in The Use of DNA Evidence to Establish Innocence After Trial* (Washington. DC: US Department of Justice, 1996) xxviii - xxix, 20.

for which reason they are provided with attorneys through an untrusted legal aid system, without a conscientious commitment to the defence or expert forensic support. In *R v Bethel*,⁷⁷ the Court of Appeal of Trinidad and Tobago quashed the Appellant's conviction for murder and his death sentence and ordered a retrial on the ground that his lawyer failed to take proper instruction before the trial. In another case, Ann – Marie Boodram was sentenced to a mandatory death penalty in Trinidad for the murder of her husband. When the Court of Appeal rejected her appeal, she further appealed to the Judicial Committee of the Privy Council which allowed it on the ground of her lawyer's gross incompetence. Their Lordships frowned at his cynical dereliction of the most elementary professional duties which deprived the Appellant of due process.⁷⁸ In another death penalty case the ultimate appeal of the defendant was allowed as the Privy Council quashed her conviction as her alleged incriminating statement to the police which was admitted in evidence, was dubious.⁷⁹ In 2012, the Eastern Caribbean Court of Appeal allowed the appeal of Mr. Shorn Samuel, a prisoner under sentence of death in Saint Vincent and the Grenadines, when fresh psychiatric evidence revealed that he was suffering from a severe mental disorder at the time of the murder, which materially reduced his responsibility for the offence. A conviction of manslaughter was therefore substituted, and the death sentence reduced accordingly.⁸⁰ Medical evidence adduced after trial and judgment also saved the life of Sheldon Isaac, a prisoner under death sentence in Saint Kitts and Nevis in 2012. Relying on psychiatric and psychological evidence showing he was severely brain-damaged and ought not to have stood trial, the Privy Council remitted the case to the Eastern Caribbean Court of Appeal for review.⁸¹

In Africa, there are apprehensions that due process is not observed in death penalty cases. In the countries which practise English common law, murder trials are held in the High Court with a single Judge determining guilt and imposing sentence, depriving the system of the benefit of the Jury's contribution.⁸² In Uganda, Edmary Mpagi spent more than 18 years on the death row, on accusation of the murder of a man who was later found to be alive. Apart from the fact that the proceedings were marred by fabricated evidence, coerced testimony and a generally slipshod trial, his state-appointed lawyer spent very little time with him to plan his defence compounded by language barrier as his knowledge of English was lower than basic.⁸³ In Sierra Leone, "MK", an illiterate lady unguided by a lawyer, was made to thumb-print a confession. The State-engaged lawyer who conducted her defence in the murder of her stepdaughter only met with her thrice - not more than 15 minutes on each occasion. Ignorant of the 21-day time limit to appeal against her conviction,

⁷⁷ Unreported, 23 March 2000 (the Court of Appeal of Trinidad and Tobago, Republic of Trinidad and Tobago).

⁷⁸ *Boodram v The State*, paragraph 40, 1 Criminal Appeal Reports 12 (2002), Judicial Committee of the Privy Council, Republic of Trinidad and Tobago.

⁷⁹ *Dookran v The State*, UKPC 15 (2007), Judicial Committee of the Privy Council, Republic of Trinidad and Tobago

⁸⁰ *Samuel v The Queen*, Criminal Appeal No. 22 of 2008 (2012), Eastern Caribbean Court of Appeal, Saint Vincent and the Grenadines.

⁸¹ *Isaac v Director of Public Prosecutions*, Criminal Appeal No. 19 of 2008 (2012), Eastern Caribbean Court of Appeal, Saint Kitts and Nevis.

⁸² UN OHCHR, *supra*, (n. 46) 50

⁸³ M E Edmary, 'Mpagi Edward Edmary, Our Friends in Prison', www.ourfriendsinprison.weebly.com/lifestoryof-mpagi-edward-edmary.html accessed 20 June 2015.

and lacking the resources, it took 10 months before a state-provided Prison Welfare Officer filed her appeal. The Court of Appeal's decision rejecting her appeal on the ground of time bar, was overturned by the same court in 2011 in that the procedural irregularities in the form of lack of legal advice assistance and resources to file an appeal were fundamental; the court thus released her after quashing her conviction.⁸⁴

The United Nations previously published a reliable report that many countries in Asia flout the right to fair trial with laws that deny due process in death penalty cases.⁸⁵ Another source even alleged that countries which adopted due process safeguards in their statutes fail to apply them in practice.⁸⁶ In Taiwan, for instance, public opposition to execution is founded on common knowledge of unfair trial.⁸⁷ For example, in January 2011, Ministry of Justice admitted that Chiang Kuo-ching was erroneously executed in 1997 for raping and murdering a 5-year old girl 15 years previously. A campaign by Chiang's parents moved the Military Supreme Court Prosecutor's Office to file an extraordinary appeal with the Military Supreme Court to reopen the case in 2010. The authorities admitted that Chiang's confession resulted from stern torture by military investigators and that the trial ignored his plea of innocence in hastily convicting him.⁸⁸ A military court formally acquitted him in September 2011, and President Ma Ying-Jeou publicly apologized to his mother after the Ministry of Defence agreed to pay US \$3.4 million in compensation to his relatives.⁸⁹ In Japan the criminal justice system does not have any provision for effective and appropriate defence counsel's assistance in capital cases unlike the automatic appeal system in the Caribbean.⁹⁰ In South Korea and parts of Pakistan, it is not mandatory to appeal to a higher court in death penalty cases, and in North Korea it is not possible to appeal.⁹¹ Japan has refused to uphold universally-agreed standards for special protection and fair trial guarantees exceeding those offered in non-capital cases.⁹² In effect, the lay Judge tribunals do not pay proper attention to the Defendant's psychological condition and developmental problems.⁹³ Another flaw is that the nation does not require unanimous or even super majority concurrence before the death penalty can be imposed. A bare 'mixed majority' – five votes with at least one from a professional judge – out of the nine members

⁸⁴ UN OHCHR, *supra*, (n. 46) 58

⁸⁵ 'Moratorium on the Use of the Death Penalty', Report of the Secretary-General (3 August 2012), UN Doc. A/67/22, paragraph 34.

⁸⁶ Anti-Death Penalty Asia Network, *When Justice Fails, Thousands Executed in Asia After Unfair Trials* (Amnesty International ASA 01/023/2011) 6.

⁸⁷ The Death Penalty Project, *The Death Penalty in Taiwan: A Report on Taiwan Legal Obligations Under the International Covenant on Civil and Political Rights* (London: The Death Penalty Project, 2014) 1020

⁸⁸ Amnesty International, 'Death Sentences and Executions, 2013', <https://www.amnesty.org> accessed 10 May 2020.

⁸⁹ The National, 'Taiwan "child rapist" Cleared 14 years After His Execution', www.thenational.ae/news/world/asia-pacific/taiwan-child-rapist-cleared-14-years-after-his-execution accessed 12 May 2015.

⁹⁰ The Death Penalty Project, *The Death Penalty in Japan: A Report on Japan's Legal Obligations Under the International Covenant on Civil and Political Rights, an Assessment of Public Attitudes to Capital Punishment* (London: The Death Penalty Project 2013) 7-8; www.deathpenaltyproject.org/legal-resources/research-publications/the-death-penalty-in-japan accessed 12 March 2016.

⁹¹ Anti-Death Penalty Asia Network, *supra*, (n.86) 31.

⁹² International Federation for Human Rights, 'The Death Penalty in Japan: The Law of Silence', (2008), www2.ohchr.org/English/bodies/hrc/docs/ngos/FIDHJapan94.pdf

⁹³ The Death Penalty Project, *The Death Penalty in Japan*, *supra*, (n. 90) 21-22

on the panel, is enough to condemn a person to death. Many scholars reject the country's claim to be 'extremely cautious' about capital punishment because of the mixed majority rule.⁹⁴

Violation of Human Rights

Advocates of death penalty abolition who initially framed their argument in the context of theoretical conceptions of criminal justice up till the early second half of the 20th century have broadened it to a more potent and sensitive dimension by adding the human rights perspective. The increasing attention the discourse is attracting and the support for the view are products of the deepening human rights consciousness that graduated from marginality to the focal point of international politics towards the end of the 20th century.⁹⁵

It began to be debated openly how human rights values which proclaim the inherent right of every person to life could be reconciled with the action of the State, as prime guarantor of human rights, to deprive a citizen of his life. The point the group made to challenge supporters of the retention was to question the rationale in killing people to prove that killing people is wrong.⁹⁶ To fortify their contention, they relied on Article 5 of the Universal Declaration of Human Rights (UDHR) which is a command against subjecting a person to torture, cruel, inhuman or degrading treatment or punishment as a clear condemnation of deliberate State order of capital punishment.⁹⁷

The human rights dimensions of the application of the death penalty are sourced from relevant resolutions of the United Nations General Assembly. For instance, General Assembly Resolution 2393 (xxiii) of 1968, applying Articles 3 and 5 of the UDHR, urge governments of retentionist countries to ensure the most careful legal procedures and the greatest possible safe-guards for the accused in capital cases. Again, in 1980 General Assembly Resolution 35/172 made it a duty for States to respect as a minimum standard the content of the provisions of Articles 6, 14 and 15 of the International Covenant on Civil and Political Rights. Others include UN General Assembly Resolution 62/149 of 18 December 2007 which called for general suspension of capital punishment all over the world; 63/168 of 18 December 2008; 65/206 of 21 December 2010; 67/176 of 20 December 2012; 69/186 of 18 December 2014; 71/187 of 19 December 2016 and 73/175 of 17 December 2018 and 75/183 of 16 December 2020 all on the question of a moratorium on the use of the death penalty. The anticipation of the waning support for death penalty and the shrinking scope of its coverage began in 1971 when the United Nations General Assembly emphasised in Resolution 2857 (XXVI) that as a means to fully guarantee right to life, the principal objective is to target the

⁹⁴The Death Penalty Project, *The Death Penalty in Japan*, *supra*, (n. 90) 22; D T Johnson, 'Progress and Problems in Japanese Capital Punishment', in R Hood and S Deva, (eds.), *Confronting Capital Punishment in Asia: Human Rights, Politics, Public Opinion, and Practices* (Oxford: Oxford University Press, 2013) 176.

⁹⁵M Ansel, *Capital Punishment* (New York: UN Dept of Economic and Social Affairs 1962) para 1; L E Landerer, 'Capital Punishment As A Human Rights Issue Before the United Nations', (1974) (4) *Human Rights Journal*, 511.

⁹⁶C Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (April 2012) [A/HRC/26/36], paras. 70-75.

⁹⁷K N Bojosi, 'The Death Row Phenomenon and the Prohibition Against Torture and Cruel, Inhuman or Degrading Treatment', (2004) (4) *African Human Rights Law Journal*, 303; L E Landerever, 'Capital Punishment as a Human Rights Issue Before the United Nations', (1971) (4) *Harvard Law Journal*, 511.

progressive restriction of the number of offences for which capital punishment is to be imposed, with the hope of abolishing the punishment in all countries later. All along, the trend has been for the UN and its entire support outfits to target the abolition of death penalty as a contribution to the enhancement of human dignity and the progressive development of human right.⁹⁸ Several groups in support of the cause have been pursuing it vigorously since then. For instance, through Protocol 6 to the European Convention on Human Rights, the member states of the Council of Europe are calling for the abolition of the death penalty.⁹⁹ In like manner, the American Convention on Human Rights has been beefed up with an optimal protocol supporting the end of the death penalty.¹⁰⁰

The European Union has even made the abolition of the death penalty a prerequisite for admission into the Union, leading to the halting of executions in several eastern European nations seeking membership. Thus Poland, Yugoslavia, Serbia and Montenegro have voted to end the punishment.¹⁰¹ The contest against the death penalty is no longer considered an internal matter among nations. A lot of European countries, as well as Canada, Mexico, and South Africa, have declined extraditing persons to countries like United States without assurance that the death penalty will not be sought. In 2001, the Council of Europe threatened to revoke the U. S.'s observer status if it did not take action on the death penalty.¹⁰² Paraguay and Germany had to seek relief at the International Court of Justice in the Hague for their foreign nationals facing execution in the U. S., after Mexico started a programme to provide legal assistance to its foreign nationals facing the same charges in the U. S.¹⁰³

Over the years, especially since 2007, there has been visible tact in international approach to the abolition question. It accounted for the 2007 absolute majority that voted for the moratorium on executions with a view to abolishing the death penalty¹⁰⁴ with 104 for, 54 against and 29 abstentions. The adopting majority for the same proposal in 2014 (General Assembly Resolution 29/186) improved in 2014 with 117 votes in favour, 37 against and 34 abstentions. An important development in the resolutions is the sweeping invocation of human rights, without specific reference to the right to life or any other right. The preamble usually invokes the UDHR and ICCPR broadly by stating that “the use of the death penalty undermines human dignity” and a moratorium “contributes to the enhancement and progressive development of human rights.” The implication is that in addressing the right to life through the abolition of death penalty, other rights related to

⁹⁸ UN High Commissioner for Human Rights Resolution, E/CN.4/1997/12 (April 3, 1997); E/CN.4/2001/L.93 (April 25, 2001).

⁹⁹ European Treaties Series (ETS) 114 (Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (1955).

¹⁰⁰ Organization of American States Treaty Series 73 (Protocol to the American Convention on Human Rights, 1144 UNTS 123 (1979).

¹⁰¹ Death Penalty Information Center, ‘Death Penalty Information’ <http://www.deathpenaltyinfo.org/dpicintl.html> accessed 5, August 2002.

¹⁰² R C Dieter, ‘The Death Penalty and Human Rights: U. S. Death Penalty and International Law’, <https://files.deathpenaltyinfo.org> accessed 12 October 2021.

¹⁰³ R C Dieter, *supra*, (n. 102) 5.

¹⁰⁴ General Assembly Resolution 62/149.

human dignity are at stake. This interpretation was confirmed by Austrian Justice Minister, Christian Broda, in a speech in Strasbourg while accepting the Council of Europe's 1987 Human Rights Prize that anyone who opposes torture must favour abolition of the death penalty.¹⁰⁵ Consequently, most abolitionists openly express the view that in violating human rights, death penalty goes beyond right to life and extends to the right to live free from torture or cruel, inhuman or degrading treatment or punishment as protected under the UDHR, 1948.¹⁰⁶

A Tool of Political Repression

The practice it also criticized for being used by some Governments as a tool of political repression against their opponents and perceived enemies. For instance, findings made by Amnesty International revealed that Iran increasingly used the punishment against dissidents, protesters and 'enemies' of the Government.¹⁰⁷ In December 2020, dissident journalist Ruhollah Zam was executed because of his anti-establishment social media news channel, *Amad News*. Zam fled Iran during the 2009 post-election protests but was abducted in a visit to Iraq in October 2019 and forced back to Iran. In June 2020, after a grossly unfair trial, the Branch 15 of the Revolutionary Court in Tehran sentenced him to death for "spreading corruption on earth" linked to *Amad News*. The channel, working through the mobile app Telegram with over a million followers, disseminated videos of protests and news about alleged involvement of several Government personnel in corruption. The authorities thus accused him publicly and in court processes of using his media outfit for espionage to aid "Israel and France", "Cooperation with the hostile state of the United States", "Crimes against national security", and "Spreading propaganda against the system".¹⁰⁸ Generally, the Government framed bogus and unduly vague crime charges against protesters. Many of those who participated in the 2019 protests were arraigned for "enmity against God", "spreading corruption on earth" or "armed insurrection against the state." After unfair trials that relied on torture-tainted "confessions", several of them were sentenced to death.¹⁰⁹

Yemen also recorded a substantial increase in death sentences in 2020. On 11 April, four journalists – Akram al-Walidi, Abdelkhaleq Amran, Hareth Hamid and Tawfiqal-Mansouri -were convicted and sentenced to death by the Huthi-run Specialized Criminal Court of Sana'a on trumped-up allegations related to opposition to the Government, after grossly unfair trial and inhuman detention.¹¹⁰ In Taiwan, despite the possibility of appeal against conviction in capital punishment

¹⁰⁵ Council of Europe, *Press Release* (28 January 1987) Doc. (87) 3.

¹⁰⁶ Amnesty International, 'Death Penalty', <http://www.amnesty.org> accessed 2 October 2021; J D Bessler, *The Death Penalty as Torture: From The Dark Ages to Abolition* (Durham: Carolina Academic Press 2017) 217-224; C D Bradford, 'Waiting to Die, Dying to Live: An Account of the Death Row Phenomenon from a Legal View Point', (2011) (5) *Interdisc J. Hum. Rts. L.*, 77; J E Mendez, 'The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman and Degrading Treatment or Punishment', (2012) (20) (1) *Human Rights Brief*, 2-6

¹⁰⁷ Amnesty International, *Death Sentences and Executions 2020* (London: Amnesty International Ltd, 2021) 40

¹⁰⁸ Amnesty International, *supra*, (n.107) 40.

¹⁰⁹ Amnesty International, Iran: Trampling Humanity – Mass Arrests, Disappearances and Torture Since Iran's 2019 November Protests (Index: MDE 13/2891/2020, 2 September 2020, [amnesty.org/en/documents/mdel13/2891/2020/en](https://www.amnesty.org/en/documents/mdel13/2891/2020/en) accessed 2 August 2021.

¹¹⁰ Amnesty International, 'Yemen: Court Sentences Four Journalists to Death', (Index: MDE31/2139/2020), 21 2020, [amnesty.org/en/documents/mde31/2139/2020/en](https://www.amnesty.org/en/documents/mde31/2139/2020/en) accessed June 2021.

cases, prisoners are sometimes abruptly executed with their mercy petitions and appeals pending. In 2011, President Ma Ying-jeou personally rendered a public apology to an airman who was exonerated by a Military Court after being wrongfully convicted and executed in 1997 at age 20 for the rape of a 5-year old girl.¹¹¹

Social Control

Pro-abolition sociologists have also argued that the death penalty plays another negative role by being used by the elite in society against the lower classes. The reasoning is that since the practice is the ultimate demonstration of the State's claim over the citizen's life, it is implemented to protect the ruling bourgeoisie against the proletariat whenever the latter poses a threat.¹¹²

Arguments in Favour of Retention of the Death Penalty

Proponents of the death penalty hold the firm opinion that it serves a useful purpose in society and so should be retained when necessary. Below are major grounds of their argument.

(i). Deterrence

One of the most common arguments for the death penalty, and about the most contested, is that it is needed to deter commission of future unlawful killings. The contention is that irrespective of the number of persons that will not be deterred from committing the crime, this factor is helpful to society as far as it has an effect by way of reducing this category of criminals.¹¹³ Therefore, proponents argue, applying the general probability that the death penalty deters and the underlying deterrence theory, the death penalty is justifiable in that there is absolutely no tenable rebuttal to it. There is also the reliable conjecture that, in general, people would be deterred by the threat of death.¹¹⁴

(ii). Erroneous Convictions

Retentionists concede that humanity in general is fallible and so in the course of pursuing the death penalty as a practice, some innocent persons get executed. However, they contend, the instances

111 Taiwan Association for Human Rights, 'The Hidden Face of Taiwan', <http://www.tahr.org.tw> accessed 1 July 2021.

112 J H Wyman, 'Vengeance is Whose? The Death Penalty and Cultural Relativism in International Law', (1997) (6) (2) *Journal of Transnational Law & Policy*, 543-570; A Sarat, *When The State Kills: Capital Punishment and the American Condition* (Princeton: Princeton University Press, 2001) 154; L Radzinowicz, *Adventures in Criminology* (London: Routledge, 1999) 286; D Jacobs & J T Carmichael, 'Ideology, Social Threat, and the Death Sentence: Capital Sentences Across Time and Space', (2004) (83) (1) *Social Forces*, 249-278.

113 C W Flanders, 'The Case Against The Case Against Death Penalty', (2013) (16) (4) *New Criminal Law Review*, 595; C R Sunstein & A Vermeule, 'Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs', (2005) (58) *Stan. L. Rev.*, 703.

114 G Becker, 'Further Comments on Capital Punishment', <http://www.becker-posner-blog.com/2005/12/further-comments-on-capital-punishment-becker.html> accessed 12 July 2006; B O Igwenyi and others, 'Abolition of Death Penalty in Nigeria: Juristic Issues and Solutions', (2019) (7) (7) *Global Journal of Politics and Law Research*, 53-65; *Akinyemi v. State* (1999) 6 NWLR (pt. 465) 605; *Obidike v. State* (2014) 10 NWLR (pt. 1414) 53.

of this mistake are so rare that, relatively, it is more helpful to society to have the death penalty with necessary modifications than to abolish it totally.¹¹⁵

(iii). State Survival

Another reason given for the retention of capital punishment is that it is a formula applied by States to secure their survival. The explanation is that if the punishment is not imposed to check egregious crimes, the human community stands the risk of extinction.¹¹⁶ They defend it as a necessary machinery to protect the majority of the citizens who, because of their sobriety and sense of morality, are at the mercy of few deviants.

(iv). Protection of Human Rights

Retentionists of death penalty also challenge the submission that it is a violation of the human rights of convicts who get sentenced. They rather argue that the practice is a protection of the rights of innocent persons who would have fallen victim to the excesses of certified outlaws if they were not stopped by the law.¹¹⁷

In the United States, for instance, the point has been made that if the death penalty was an undisputed violation of human or unalienable rights, it would have been the basis for amendment of the Constitution to ensure that the Government does not take a person's life as punishment for a crime.¹¹⁸ The Supreme Court plays an oversight role of the death penalty through procedural rules although the contention that the taking of life makes the punishment cruel and unusual failed.¹¹⁹ The position of the apex court is that the punishment should only be imposed appropriately. Consequently, it ruled that it was a disproportionate punishment for the crime of rape in which the victim did not die,¹²⁰ and armed robbery.¹²¹ The interpretation that it is not a cruel and unusual punishment in the context of human rights is driven by the fact that it existed as a legal punishment at the time the Eighth Amendment was adopted in 1791, a confirmation of its approval by the founding fathers as being constitutionally acceptable. Apart from that, the Fifth Amendment (as well as the Fourteenth Amendment, adopted in 1868) explicitly anticipated the deprivation of life, provided 'due process' is accorded the Defendant.¹²²

¹¹⁵J O' Sullivan, 'Deadly Stakes: The Debate Over Capital Punishment (2002) *National Review Online*, 380; R G Lantin, 'The Death Penalty Debate: A Look at the Main Arguments' (2017) (7) (3) *Int'l Journal of Hum. and Soc. Sc.*, 43.

¹¹⁶B O Ogwenyi and others, *supra*, (n. 114) 63; O O C Uche & B O S Udezo, 'Implications of Capital Punishment in Nigeria Society', (2011) (5) (4) *African Research Reviews*, 423-438.

¹¹⁷ J Fagan and others, *Getting to Death: Fairness and Efficiency in the Processing and Conclusion of Death Penalty Cases After Furman* (New York: Columbia Law School, 2002) 62-65; T Volpe, 'Capital Punishment: Does Death Penalty Equal Justice?', <http://www.jmu.edu/evision> accessed 1 June 2021.

¹¹⁸R Dieter, 'The Death Penalty and Human Rights: U.S. Death Penalty and International Law', Oxford paper. pdf accessed 6 March 2021.

¹¹⁹*Gregg v. Georgia*, 428 U. S. 153 (1976).

¹²⁰*Coker v. Georgia*, 433 U. S. 584 (1977).

¹²¹*Hooks v. Georgia*, 433 U. S. 917 (1977).

¹²²R Dieter, *supra*, (n.118) 8.

Balancing the Arguments

Given the increasingly sensitive nature of the death penalty and the depth of controversy it continues to invoke, the approach of this article is to evaluate the arguments proffered by the two groups on the scale of three vital parameters, to wit, Deterrence, Human Rights and Erroneous Conviction. The objective is to cultivate an independent opinion that will fairly consider the rights of both the victim and the murderer, but as they relate to the impact the rest of society will have when “the law” is enforced or modified. This aspect of the death penalty debate has become a necessary task because of the waxing sentiment against the punishment sponsored by the UN and powerful affiliates to score unanimous support for abolition. Most of the time the argument does not proffer superior grounds for abolition upon a fair analysis of the injustice done by the murderer to the victim, but concentrates only on the sacred right of the murderer to life in the context of human imperfection while administering the settled punishment. Thus, like the United Nations, it is the view of Amnesty International that the death penalty violates human rights, in particular the right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment which are both protected under the UDHR 1948 and other outstanding international and regional human rights instruments.¹²³ By various modes in recent history the UN has been echoing the pronouncement that the death penalty has no place any more in our society,¹²⁴ and that it should be wiped out by all nations.¹²⁵ It needs to be ascertained whether or not the death penalty is being opposed in this era because it is unjustified, unpopular or abused. The ideal response to this issue will be determined by which of these puzzles is correct, and provide the clue to this quandary with the aid of the aforementioned parameters.

Deterrence

A major point of criticism against the death penalty is its inability to deter intending criminals from committing homicide, although retentionists disagree. Notwithstanding the cogency or feebleness of the arguments on the deterrence impact of the death penalty, it cannot be controverted that the early disposition to crime and drift into recidivism are traits differently exhibited by people.¹²⁶ As a result, the factors which determine their attachment to grave illegality and the unlawful killing of their victims vary beyond consistent conjecture. Yet it cannot be ruled out that the average human being would more readily refrain from committing capital crimes that can take his life than venture

¹²³ Amnesty International, ‘UN: Opposition to the Death Penalty Continues to Grow’, [amnesty.org/en/latest/press](https://www.amnesty.org/en/latest/press/) accessed 3 October 2021; Amnesty International, ‘Death Penalty’, <https://www.amnesty.org> accessed 20 August 2021.

¹²⁴ J E Mendez, *supra*, n.106.

¹²⁵ UN Human Rights Office of the High Commissioner, *Moving Away From The Death Penalty: Arguments, Trends and Perspectives* (New York: United Nations, 2015) 115; UNCHR Resolution 1997/12 of 3 April 1997; UNCHR Resolution 1998/8 of 3 April 1998; UNCHR Resolution 2005/59 of 20 April 2005; UN Doc. E/CN.4/2005/7; UN Human Rights Office of the High Commissioner, *Moving Away From The Death Penalty, Lesson From National Experiences* (New York: United Nations, 2021) 1-36.

¹²⁶ Z Chang and others, ‘Psychiatric Disorders and Violent Reoffending: A National Cohort Study of Convicted Prisoners in Sweden’, (2015) (2) (10) *The Lancet Psychiatry*, 891-900; H G Kiwi & A Sadeghi, ‘Investigating the Prevalence of Personality Disorders in Relation with Recidivism Among Prisoners’, (2015) (2) (4) *European Journal of Forensic Sciences*, 6-9.

into it recklessly. On that premise it will be fair to give credit to the positive impact of the death penalty as a deterrent even if it is not possible to evaluate the ratio of the population that will yield to the restraint.¹²⁷

Human Rights Violation

Pro-abolitionists hinge their campaign on the violation of human rights as one of their major points. Relying on right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment they cite flawed convictions,¹²⁸ discriminatory prosecution and sentencing,¹²⁹ disproportionate crimes,¹³⁰ and its use as a tool for political suppression,¹³¹ to prove this point. However, concentrating the challenge against the fairness of the death penalty on the absolute right of the convict to life is an open declaration of injustice as it rides on the presupposition that the convict's victim had less right to life and that the termination of his life did not impress any meaningful impact on the law. That trend can neither benefit the individual nor society. It cannot be disputed that every person – including the murderer and his victim – is entitled to live, but it is very important to delineate the conspicuous point of distinction in the access to this right as it affects a capital crime convict. While, under normal circumstances, the Constitution guarantees the right of every person to life, it must be recognised that a convict in this category has waived it on the principle of “*volenti non fit injuria*.” Having contravened the law in circumstances that put his life on the line, he loses the *locus standi* - and the rest of society is without moral justification to demand the rigid protection of the law - to his right to life.¹³²

¹²⁷D Baldus & J Cole, ‘A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment’, (1975) (85) *Yale Law Journal*, 170-184; W J Bowers and G Pierce, ‘Deterrence or Brutalization? What Is the Effect of Executions?’ (1980) (26) *Crime and Delinquency*, 453-484; D Cloninger and R Marchesini, ‘Execution and Deterrence: A Quasi-Controlled Group Experiment’, (2001) (35) (5) *Applied Economics*, 569-576; H Dezhbakhsh and J M Shepard, ‘The Deterrent Effect of Capital Punishment: Evidence From A “Judicial Experiment”’, (2006) (44) *Economic Inquiry*, 512; J Grogger, ‘The Deterrent Effect of Capital Punishment: An Analysis of Daily Homicide Counts’, (1990) (85) (410) *Journal of the American Statistical Association*, 295-303; J M Shepherd, ‘Deterrence versus Brutalization: Capital Punishment’s Differing Impact Among States’, (2005) (104) *Michigan Law Review*, 203.

¹²⁸A Cohen, ‘Freedom After 30 Years on Death Row’, *The Atlantic* (11 March 2014) 1; S B Bright and S M Sanneh, ‘Fifty Years of Defiance and Resistance After *Gideon v Wainwright*’, (2013) (122) (8) *Yale Law Journal*, 2150-2174; H Haines, ‘Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment’, (1992) (39) (2) *Social Problems*, 125-138.

¹²⁹T J Keil & G F Vito, ‘Race and the Death Penalty in Kentucky Murder Trials: 1976-1991’, (1995) (20) (xx) *The Journal of Politics*, 402-424; R L Young, ‘Race, Conceptions of Crime and Justice, and Support for the Death Penalty’, (1991) (54) (1) *Social Psychology Quarterly*, 67-75; J H Wyman, ‘Vengeance is Whose? The Death Penalty and Cultural Relativism in International Law’, (1997) (6) (2) *Journal of Transnational Law & Policy*, 543-570.

¹³⁰G Girelli, *The Death Penalty for Drug Offences: Global Overview 2018* (London: Harm Reduction International, 2019) 1-10; P Gallahue and others, *The Death Penalty for Drug Offences: Global Overview 2012 – Tipping The Scales For Abolition* (London: Harm Reduction International, 2012) 9; FFR, *Optimising Pakistan’s Drug Law: Making The Control of Narcotic Substances Act Stronger, Fairer and More Effective* (Islamabad: Foundation for Fundamental Rights, 2018) 3.

¹³¹ Amnesty International, ‘The Death Penalty Questions and Answers’, <https://www.amnestyusa.org> accessed 1 June 2021; D T Johnson and F E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford: Oxford University Press, 2009) 197; H Tailin, ‘White Terror Exhibit Unveils Part of the Truth’, *Taipei Times* (20 May 2005) 1.

¹³²UN Resolution 217, 1948.

The value of human life as a sacred treasure is a constant standard for all ages. It will not yield to inter-generational and inter-racial differentials in the appreciation of the source and purpose of life. This accounts for the theory of uniformity and equality of life in connection with its protection and personal enjoyment. Consequently, it is fundamental for the consideration of penal imposition on a violator of this sacred right, that the society's feeling of sympathy for his life be equated to the life of his victim while apportioning the appropriation of his "unalienable right to life." For, in the context of human rights, all things being equal, the introduction of the modifier, "absolute" should not be understood as creating an immutable status for legal insulation where a person breaches another citizen's absolute right to life. In that case, the absolute right of the culprit will be eroded by the guilt of his offence. This background suits a review of the viewpoints of a legion of abolitionists. In 1995, while shedding the final vestiges of capital punishment, Spain condemned it as the most degrading and afflictive punishment and declared that the general penal system of advanced, civilised societies has no place for it.¹³³ Switzerland regarded it as a flagrant violation of the right to life and dignity, for which it was abolished.¹³⁴ Several other nations have already taken decisions against it.¹³⁵ Amnesty International insists that the death penalty should not be imposed on a person irrespective of the gravity of offence committed.¹³⁶ The generality of this opinion was summarised by Ban Ki-moon, Secretary-General of the United Nations – "Globally, there is a firm trend towards abolition, with progress in all regions of the world. Member States representing a variety of legal systems, traditions, cultures and religious backgrounds have taken a position in favour of abolition of the death penalty... The death penalty has no place in the 21st century. Leaders across the globe must boldly step forward in favour of abolition..."¹³⁷

The abolitionists' passion for the promotion of human rights and the protection of the right to life is evident but incomplete. It is so engrossed in the bid to salvage the life of convicts that there is no trace of consideration of redress for the victim. In all history, the success achieved by law in maintaining order in society has been through the even application of its twin facilitators – rights and obligations. In the dispensation of both civil and criminal justice they regulate social harmony by underpinning the people's benefits and restraints on the fundamental principle of equality of persons. The modern urge for protection of the life of a death penalty convict should not single him out for projected attention beyond all others. It should not be forgotten that no life is worth more value than the other. It is significant that the preamble of the UDHR begins with the proclamation that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."¹³⁸ Dignity, equality and justice are simple, unambiguous semantics used therein for appreciation and compliance of humankind for all ages. Delegates at the Third General Assembly of the United

¹³³ R Hood, *The Death Penalty*, (London: The Death Penalty Project 1996) 8.

¹³⁴ R Hood, *supra*, (n.130) 14

¹³⁵ W A Schabas, *supra*, (n. 38) 20.

¹³⁶ Amnesty International, 'Death Penalty', <https://www.amnesty.org> accessed 2 October 2020.

¹³⁷ United Nations Human Rights Office of the High Commissioner, *supra* (n. 125) 6.

¹³⁸ UN Resolution A/RES/ 217 (III) [A], 1948.

Nations meant well for humanity when, on 10 December 1948, they adopted the UDHR – a blend of suitable, dynamic and progressive rights transcending generations, cultures, race and belief.¹³⁹ The combination of the concepts of right to life and equality of persons is embedded in Articles 1, 2 and 3 of the UDHR. Thus, Article 3 provides that “Everyone has the right to life, liberty and the security of person.” To complement it, Article 2(1) states that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status.” The reiteration of balance in benefit, and respect for the person is supplied in Article 1: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” By providing that everyone has the right to life,¹⁴⁰ and that all the rights and freedoms are for the benefit of all without discrimination,¹⁴¹ the UDHR contains the inherent intendment to protect anyone whose rights, especially to life, is violated as well as to impose appropriate sanction on the culprit. There is also the corroborative provision that the entitlement to protection of the law is without discrimination.¹⁴² It follows that, like the living, a man who was killed unlawfully, deserves the protection of the law under the UDHR. Devoid of the inequities of abuse, the death penalty is a recognised sanction for unlawful homicide in protection of the right of the victim. However powerful the disenchantment against the practice may seem, the truth is that it is yet to be abolished. In drafting, the International Covenant of Civil and Political Rights of 1966, abolitionist and retentionist States had a compromise to prohibit arbitrary deprivation of life (in paragraph 1 of Article 6), while reserving space for the punishment (in paragraph 2) for States that have not abolished it, on condition that it be imposed only for the “most serious crimes,” subject to further restrictions.¹⁴³ To argue that the death penalty should only be imposed on very serious crimes, in particular those that claim lives, sounds discreet when justice is closely examined. However, to insist on its abolition irrespective of the gravity of the offence and the circumstances of its commission will set a dangerous precedent. Apart from brewing apprehension in people that they have lost protection, it will embolden criminals to dare society with the mindset of spending life in prison even after committing mass killing. With the threatening potentials of technology as guide, the international community should look beyond the present and imagine how life without the death penalty would be in the years ahead. Human rights need to be expansive, not restrictive; comprehensive, not parochial. Its scope should,

¹³⁹S Waltz, ‘Universalizing Human Rights: The Race of Small States in the Construction of the Universal Declaration of Human Rights’, (2001) (23) *Human Rights Quarterly*, 60; R Normand and S Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Bloomington: Indiana University Press 2008) 190; S P Marks, ‘From The “Single Confused Page” to the Decalogue For Six Billion Persons: The Roots of the Universal Declaration of Human Rights in the French Revolution’, (1998) (20) *Human Rights Quarterly*, 459-514; M A Glendon, ‘The Rule of Law in the Universal Declaration of Human Rights’, (2004) (2) *Northwestern Law Journal of Human Rights*, 1; J Morsink, *The Universal Declaration of Human Rights and the Challenge of Religion* (Columbia: University of Missouri Press 2017)

13.

¹⁴⁰ Art. 3

¹⁴¹ Art. 2(1)

¹⁴² Art. 7

¹⁴³ International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (xxi) of 16 December 1966.

to earn maximum respect, be wide enough to protect everybody alive and stretch on to those killed in defiance of the law. Importantly, it cannot be forgotten that this whole philosophy won unprecedented acclaim because it was devised to redress the grave wrong done to the dead. Death penalty is also an arm of human rights. Its dynamism, spurred by deep criticism, ought not to kill it, but prune its procedure and identify only the culprits because of its rare uniqueness. There is no better means of accomplishing equal human rights and justice in this field than the simultaneous dispensation of all entitlements to both the murdered and his murderer. By all fair judgments, unlawful homicide is egregious and totally condemnable. It ranks alone despite being grouped with other lesser offences in some States' imposition of the death penalty. It is apposite to isolate it in the debate whether or not to abolish the death penalty on the ground of unpopularity, justification or abuse. For instance, its justification extends to comparison with the gravity of offences that attract the imposition, principally. Were the category of capital offences restricted to the most serious crimes which cause loss of life, such as first-degree murder, the wave of opposition would, very likely, have been lessened. This opinion is premised on the fact that the most forceful contention against the punishment is that it is also applied to minor wrongdoings like drug dealing,¹⁴⁴ opposing Government,¹⁴⁵ matrimonial misdemeanours,¹⁴⁶ and rape.¹⁴⁷ To the extent that these grounds of criticism stand against abuse of the practice in broad terms, they are valid. Yet justification, in its real sense, is not a judgment of misapplication. It is not ethically, legally or socially correct to incite the international community to condemn the death penalty because, generally, it is abused. What this revelation calls for, at best, is the rigid reformation of the system to eliminate the excesses of erring Governments and enhance peaceful coexistence. It is only then there can be an even evaluation of the justification of this punishment with a dispassionate consideration of the brutal actions of 'killers', the fate of innocent victims, and the right of society to decide whether any life should be sacrificed for another. After all, the quintessence of the abolition crusade is that human life is sacred and so even the State lacks the moral authority to take it, albeit unlawfully.¹⁴⁸

However, the obligation of the State to administer order in society demands, among others, the application of the rule *ibi jus ibi remedium*. Consequently, Government and international institutions would be inadvertently sabotaging the perpetuation of order in the world if mean culprits are perpetually shielded from genuine penal formulae for any reason. Where an offence as horrible as homicide is committed, the proper remedy is to apply capital punishment devoid of

¹⁴⁴G Girelli, *supra* (n.130) 1-48; G Sande, 'The Death Penalty for Drug Offences 2018', (2017) *Global Overview*, 42; HRW and JPP, *Caught in a Web: Treatment of Pakistanis in the Saudi Criminal Justice System* (New York: Human Rights Watch and Justice Project Pakistan, 2018) 25; P Gallahue, *The Death Penalty for Drug Offences: Global Overview 2011 – Shared Responsibility and Shared Consequences* (London: Harm Reduction International, 2011) 34.

¹⁴⁵ADHRB, *Sacrifice to the State: Capital Punishment in Bahrain and Saudi Arabia* (Washington DC: Americans for Democracy and Human Rights in Bahrain, 2018); Working Group on the Death Penalty in Africa, *Study on the Question of the Death Penalty in Africa* (Banjul: African Commission on Human and Peoples' Rights, 2012) 36.

¹⁴⁶Communication 269/03, *Interights (on behalf of Safiya Yakubu Husaini et al. v Nigeria*

¹⁴⁷Hands Off Cain 2018, 'India: Man Gets Death Sentence for Raping 4-yr-old girl in MP', *Hands Off Cain*, 2018, 1; or <http://www.handsoffcain.info/notizia/india-man-get-death-sentence-for-raping-4-yr-oldgirl-in-mp-40310-350>

¹⁴⁸B Stevenson, *Just Mercy: A Story of Justice and Redemption* (New York: One World, 2015) 1-80; Human Rights Watch, Philippines: Don't Reinstate Death Penalty', <https://www.hrw.org> accessed 2 July 2021.

sentiment and abuse. It is not a subject to be decided by mere number of votes cast by nations although it is imperative to sanitise the administration. In view of the sophistication of violence and the deepening irrationality of its attraction and control, this era is suitable for a review of opinions on the death penalty. In any case, abolition is not the panacea.

Conclusion

To a very great extent the effort of human rights activism has been driven towards the protection of the capital punishment offender under cover of right to life. Several factors contribute to the increasing support the objective has been enjoying. The most important is the incontrovertible argument that some innocent persons are bound to be convicted because of the imperfections in human nature. Consequently, the sentiments have over-shot their purpose by demanding immediate global unconditional abolition of the death penalty for the benefit of the ‘murderer’ and the rest of the living. Beyond that step there is need to redress the wrong done to the murdered. Balancing the two tasks calls for a tight but transparent procedure to trace the culprit of capital crimes and the restriction of this category of offence to assuage the dead and protect society.

Recommendations

The study makes the following recommendations –

1. That the death penalty should be restricted to the most serious offences involving loss of life.
2. Before trial there should be a thorough and transparent investigation to ensure, prima facie, that all identification and preliminary discrepancies are resolved.
3. There should be adequate preparation for defence.
4. In the case of conviction, the Defendant should be given at least two levels of appeal.