Legitimate Capability of Executing the Death Penalty under Human Rights Law and Values

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Abstract - The debate whether the death penalty should be carried out or not has been continuing from time to time in different parts of the world. Death penalty is creating an unnatural way of ending life and it is opposite to the recognized human norm of right to life. This right to life has been recognized in many international conventions and there are some international instruments which specifically focus on abolishing the death penalty. In this context the main research issue/problem for this research is to analyze whether a state is legitimately capable of carrying out the death penalty. This legal research has used the doctrinal method which has utilized a critical, philosophical and comparative study method as the main means of coming to a conclusion. Under this method International conventions, declarations, Constitution of Sri Lanka, other legislations and regulations have used as primary sources and journal articles, text books and case laws have used as the secondary sources. Under the provisions put forward by the international instrument the state is positively obliged to protect the right to life and if a state allows carrying out the death penalty it amounts to the violation of state obligations. On the other hand, the state is bound to protect the life of individuals till people die of natural causes. The death penalty is considered an unnatural mode of death and therefore, the state has no legal and moral obligation to do it. Furthermore, the beneficiaries of any human rights treaty are individuals and the state is responsible for granting these benefits to them. Similarly there are many other arguments that have arisen from human rights values which render a State legitimately incapable of executing the death penalty against wrong doers.

Key words: Death Penalty, Right to Life, State's Capability

I.INTRODUCTION AND RESEARCH PROBLEM/ISSUE

The discussion whether the death penalty should be supported or not has endured from time to time in different parts of the world. Sri Lanka is not an exception to this discourse and it can be noted that, this debate re-erupts when a serious crime takes place. Particularly when sensitive murders take place this discourse erupts and in such situations most of the stake holders are of the opinion that the death penalty should be re-introduced in Sri Lanka. It must be mentioned however that according to the human rights regime, many of international instruments, such as Right to Life, is considered the supreme right among all other human rights, since violation of the right to life can result in violation of many other rights and this right has been recognized in many of the international conventions. Further, giving the utmost protection to the right to life is considered as the main obligation the state party should perform towards its citizens. On the other hand, there are some international instruments which specifically focus on the abolishing of death penalty.

In this context the main research issue/problem for this research is to analyze the feasibility of carrying out the death penalty which is totally against human rights values. Therefore this research is mainly focused on the philosophical ideas forwarded by the human rights regime, in order to identify whether the states are legitimately capable of carrying out the death penalty for wrong doers

II.RESEARCH METHODOLOGY

This law research used the doctrinal method which utilized the critical, philosophical and comparative study methods as the main means of coming to a conclusion. Doctrinal research Legal rules are normative in character as they dictate how individuals ought to

behave (Kelsen, 1967). They make no attempt either to explain, predict, or even to understand human behaviour. Their sole function is to prescribe it. In short, doctrinal research is not therefore research about law at all. In asking 'what is the law?' it takes an internal, participant-orientated epistemological approach to its object of study (Hart, 1961) and, for this reason, is sometimes described as research in law (Arthurs, 1983). Under this method International conventions, declarations, Constitution of Sri Lanka, other legislations and regulations have been used as primary sources and journal articles, text books and case laws have used as the secondary sources of this study.

III.RESULTS AND FINDINGS.

A.How death penalty opponent to human rights Law

Right to life has been recognized and protected under many international instruments and state parties are under obligation to protect and ensure this right in their respective domestic arena. Article 03 of the Universal Declaration of Human Rights (UDHR) has mentioned that "Everyone has the right to life, liberty and security of person"(United Nations(UN)General Assembly,1948). Further in the Article 6 of the International Covenant on Civil and Political Rights (ICCPR), this right is recognized and it is specifically mentioned that the execution of death penalty only for the most serious crimes in countries which have not abolished the death penalty (UN General Assembly,1966). Moving forward, Article 2 of the ICCPR mentioned that the state should take all appropriate means adequate to ensure the rights which are guaranteed under ICCPR (UN General Assembly,1966). Therefore, if the right to life of any individual is arbitrarily taken by legislature, executive or judiciary, it amounts to the violation of Article 2 of the ICCPR. Additionally, the right to life has been recognized in the all major regional international human rights instruments including, African Charter on Human and Peoples' Rights, American Convention on Human Rights, American Declaration of the Rights and Duties of Man, Arab Charter on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms and Inter-American Convention on the Forced Disappearance of Persons.

When discussing the international instruments which specifically focus on the abolishing of death penalty, the second Optional protocol to the ICCPR (1989) plays a vital role in this regard. Further, Protocol 6 to the European Convention on Human Rights focus about abolishing of death penalty in peace time and Protocol 13 to the same convention focus on abolishing of death penalty even in war time. Again, there is a protocol to the American convention on Human Rights to Abolish the Death Penalty. The United Nation Economic and Social Council (ECOSOC) adopted safeguards guaranteeing protection of the rights of those facing the death penalty in 1984. The General Assembly, as a main organ of the United Nations, also has passed resolution in this regard in years of 2007, 2008, 2012 and recently in 2014 Resolution 69/186 was passed under the theme of Moratorium on the use of death penalty.

All collection of instruments has paved the way to take a decision for state parties to take actions to abolish the death penalty in their respective countries. According to the current statistics more than 160 Members States of the United Nations with a variety of legal systems, traditions, cultures and religious backgrounds, have either abolished the death penalty or do not practice it. As pointed out by Richard C.D (n.d), the reasons why countries have abolished the death penalty in increasing numbers vary. For some nations, it was a broader understanding of human rights. Spain abandoned the last vestiges of its death penalty in 1995, stating that: '*the death penalty has no place in the general penal system of advanced, civilized societies*….'(Hood,2009) Similarly, Switzerland abolished the death penalty because it constituted "*a flagrant violation of the right to life and dignity"* (Hood,2009) . In the famous case *Makwanyane & Mchunu v. The State(*16 HRLJ 154 (Const. Ct. of S. Africa 1995)*)* Justice Chaskalson of the South African Constitutional Court, stated in the historic opinion banning the death penalty under the new constitution that: "*The rights to life and dignity are the most important of all human rights . . . . And this must be demonstrated by the State in everything that it does, including the way it punishes criminals*. When discuss about the Sri Lankan situation it can be noted that, though Sri Lanka has not practice death penalty for more than 40 years as a sanction, it is still in the black letter of the penal code (section 52) of Sri Lanka for many crimes. The last execution was in 1976. On the other hand, from the human rights aspect Sri Lankan Judiciary has recognized the right to life as a fundamental right in Sri Lanka although it is not explicitly mentioned in the 1978 Constitution of Sri

Lanka in cases like *Sriyani Silva Vs Iddamalgoda, Officer in Charge, Polica Station Payagala* ((2003) 2 SLR 63). However, Sri Lanka has not ratified the second Optional Protocol to the ICCPR yet.

With the above description it is very clear that the execution of death penalty has been banded and limited by many of the international and domestic instruments.

B. How death penalty adverse to human rights value.

The main value of human rights is the 'dignity' of an individual. The word dignity has undefined and it is considered as the basic understanding of human rights values, and furthermore, the state should take both positive and negative actions to protect the dignity of the individual. Without dignity none of the protections of the various legal human rights mechanisms can have real meaning. Right to Life is also in line with the right to live with dignity and until a person meets a natural death, the state should not take any action which would violate the dignity of individuals. The death penalty is considered as an unnatural form of death and therefore a state is incapable legitimately of causing an unnatural death.

In this context, some would argue the implementation of the death penalty only for serious crimes as a solution. Then the question arises, about the way of defining the seriousness of a crime. Some would decide according to the domestic law, while others will look for regional interpretations. Some will go further and will search for meaning given at the international level. Therefore it is obvious that, all the people would be unable to come to a consensus and most of the time it would be defined according to the context in which the crime took place. Then again, this would challenge the universalistic approach of human rights which means that all human rights should equally apply to all of countries and every human being. Human rights are set at universal level and it is obvious that all human rights cannot be given equal universalistic weight age in practical contexts. However, as mentioned earlier the right to life is a supreme right and it should not be given to the ruler's hand for bargaining.

Human rights treaties should always be identified by differentiating them from other treaties which require obligations from the country. This is because the main beneficiaries of any form of human rights treaty are the individuals and government is made responsible for protecting and fulfilling these human rights obligations to its peoples. Human rights are safeguarded as fundamental rights by the Constitutions of countries and people should be capable of taking any action against a government if the government is failing in its obligations. According to the right to life also, the obligation by the state is to protect the right to life and not to deprive it by any means. Therefore it is again visible that the state does not have the power to cause an unnatural death even at a wrong doer.

The main purpose of building a state is to make sure that the people are safe within their jurisdictions. In very early stages of societies the survival of individuals is determined by the fact that who is having the power. It was the fitters of the survival situation. However, all human beings had to live with fear and none of them felt the safety for their life. Therefore, with the emerge of the social contract concept the people handed over their power to the ruling party to obtain protection for life, liberty and property by allowing ruler to make rules and procedures on behalf of them. Consequently it is obvious the government is incapable of making a rule which helps to kill people. In this context someone would argue that the implementation of the death penalty would make the feeling of safety for others of the society according to the deterrent theory of punishment. However, research findings on the relation between the death penalty and homicide rates, conducted for the United Nations (UN) in 1988 and updated in 1996 and 2002, concluded: "...research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. Such proof is unlikely to be forthcoming. The evidence as a whole gives no positive support to the deterrent hypothesis." For example in Sri Lanka we had the Penal Code from 1983 with all the prescribed punishments. We also had a time where death penalty was executed. However, according to the prison statistics through past periods it is noted that prisons are overcrowded by large amount of number of prisoners who are imprisoned for different reasons and reconvictions and recidivism rate in Sri Lanka is high. In the year 2014, out of the total prisoners, 28.4 % were reconvicted and 17.1 % were recidivists. (Prison statistics 2015) Hence, what is expected from state party is the protection of right to

life and not the destruction of human rights. If a country is executing the death penalty it can be considered a failure of the state positive obligations towards human rights obligations which they undertook to perform.

IV.CONCLUSION

From all arguments forwarded in the section on results and findings, it can be noted that the state does not have legitimate power to execute the death penalty against wrong doers. It is totally against the human rights obligations which were undertaken by a state party. Under human rights law and human rights, value this death penalty is not allowed. The state's duty is to ensure the safety and rights of human beings and not to violate their rights.

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