

REDUCING THE SCOPE OF THE DEATH PENALTY

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PROJECT 39A
EQUAL JUSTICE
EQUAL OPPORTUNITY

Death Penalty & International Law

- Death Penalty is the only exception to 'Right to Life' recognised under Article 6 of ICCPR
- The scope of the death penalty has been restricted on three counts:
 - Crimes that may be punishable by death
 - Persons who cannot be sentenced to death
 - Procedure for imposition of the death sentence

Crimes eligible for death penalty

- Article 6 (2) ICCPR – Death penalty may be imposed only for “the most serious crimes.”
- “Progressively restrict” the number of offences for which capital punishment may be imposed, with a view towards abolition (UNGA Res 2857, 1971)
- “Intentional crimes with lethal or other extremely grave consequences.” (ECOSOC 1984/50)
- “Offences should be life threatening, in the sense that this is a very likely consequence of the action.” (UN Secretary General Report E/2000/3)
- “Intention to kill which resulted in the loss of life.” (2007 UN Special Rapporteur Report A/HRC/4/20)

Most Serious Crimes

- “Most serious crimes” should be restricted to
 - (1) Crimes directly resulting in a loss of life and;
 - (2) Crimes committed with an intention to kill
- Cannot include crimes which evoke moral outrage or may be deterred with the death penalty which do not satisfy the above requirement

Persons who cannot be sentenced to death

Article 6(5) ICCPR states that following persons shall not be sentenced to death:

- *Persons below age of 18* at the time of the offence; and
- *Pregnant women*

Persons who cannot be sentenced to death

List expanded in General Comment 36 (2018) to include:

- Persons with *serious psycho-social and intellectual disabilities*;
- Persons with *diminished ability to understand* the reasons for their sentence;
- Persons at an *advanced age*;
- Persons who have *suffered human rights violations* in the past;
- Persons with families such as *parents and children dependent* on them;
- Persons, with or without disability, that have *reduced moral culpability*

Procedure for imposition of death sentence

Crimes which may be punishable with death

- Only for crimes punishable by death at the *time of commission*;
- *Cannot be reintroduced* for a crime for which it was abolished;
- *Retroactive application of abolition* to those on death row;
- Cannot be imposed for crimes which are *vaguely defined*;

Procedure for imposition of death sentence

Procedure during conviction and sentencing proceedings

- Guilt must be based on clear and convincing evidence leaving no room for an alternative explanation of facts;
- Cannot be imposed if fair trial rights are violated. For example:
 - Use of forced confessions,
 - Non-examination of relevant witnesses,
 - Lack of adequate time, facilities or documents necessary for defence,
 - Failure of presumption of innocence,
 - Lack of independence or impartiality of judiciary

Procedure for imposition of death sentence

Procedure during conviction and sentencing proceedings

- Cannot be mandatorily imposed for any crime;
- Circumstances of the crime and the offender must be considered;
- Re-evaluation of conviction based on new evidence or scientific studies questioning validity and reliability of evidence;
- Families of victims should not have a preponderant role in determining imposition of death sentence;

Procedure for imposition of death sentence

Rights of those suspected, charged or convicted of capital offence

- Adequate legal assistance at all stages of the proceedings, starting from interrogation;
- Appeal to a court of higher jurisdiction;
- Seek pardon or commutation of the death sentence;

Procedure for imposition of death sentence

Safeguards before execution of death sentence

- Timely notification of date of execution
- Cannot be executed if:
 - Extreme delay in the implementation of the death penalty;
 - Judicial or executive proceedings are pending;
 - Incarcerated in harsh conditions such as solitary confinement;
- Mode of execution should inflict minimum possible suffering

Emerging challenges

- **Widening scope** of “most serious crimes” by different jurisdictions
 - For example: Surge of death sentences imposed in India as death penalty introduced for rape of a minor girl in 2018
- **Exceptionalism** around death penalty – harder to challenge imposition of death sentences in certain cases
- **Lack of framework and resources** to follow the rigorous safeguards for the imposition of death sentence by all courts and authorities