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A Critical Analysis of Right to Life and Judicial Intervention in South Asian Countries

Prakash K.C.¹

Concept of Right to Life

Right to life is a phrase that describes the belief that a human being has an essential right to live, particularly that a human being has the right not to be killed by another human being. The concept of right to life is central to debates on the issues of capital punishment, self defense, abortion and war. Pro-life is a term representing a variety of perspectives and activist movements in medical ethics. It is most commonly used, especially in the media and popular discourse, to refer to opposition to abortion. More generally, the term describes a political and ethical view which maintains that human fetuses and embryos are persons and therefore have a right to live. Less commonly, it can be used to indicate abortion. Right to life is based on three things as food, cloth and shelter.

Views of Right to Life

Hobbes argued that each human being has a fundamental duty of self-preservation, and hence a natural right to do whatever conduces to it. In Hobbes's social contract, however, rational individuals hand over all their rights to the person or body they nominate as their sovereign, all of whose actions they are thereby deemed to authorize.²

Hobbes's absolutism has just one exception: that, as the purpose of signing the social contract was to preserve oneself; the Sovereign cannot order a subject to kill him- or herself either from conception or implantation until natural.

Locke described civil society as an association for the 'mutual preservation of their lives, liberties, and properties and this assertion is the ancestor of the claim in the American Declaration of Independence that 'We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, and liberty.'³

¹ Associate Professor at Kathmandu School of Law.

² See Jean Hampton, *Hobbes and the Social Contract Tradition* (Press Syndicate of University of Cambridge 1995).

³ 'Social Contract Theory' (*Internet Encyclopedia of Philosophy*) < <http://www.iep.utm.edu/soc-cont/>> accessed 1 March 2013.

Religious views: Right to life proponents based their views upon their religious convictions that life is sacred. In western religions, this concept is based on the belief that all human beings have soul and are created in God's image.

Political Views: The controversies around right to life consistently energize voters with many being single issue voters. Around abortion issues, it also plays a large role in powerful appointed positions, especially judicial appointments in the United States with the charge from both sides of it being a 'litmus test'.

Protection of Right to Life under International Instruments

In 1776, the United States Declaration of Independence declared that all men are endowed with certain inalienable rights, and that 'among these are life, liberty, and the pursuit of happiness.'⁴

In 1948, the Universal Declaration of Human Rights, adopted by the United Nations General Assembly declared in article 3, 'Everyone has the right to life, liberty and security of person.'⁵

In 1950, the European Convention on Human Rights was adopted by the Council of Europe, declaring a protected human right to life in Article 2. There are exceptions for lawful executions and self-defense, arresting a fleeing suspect, and suppressing riots and insurrections. Since then protocol 6 of the Convention has called for nations to outlaw capital punishment except in time of war or national emergency, and at present this pertains in all countries of the Council except Russia. Protocol 13 provides for the total abolition of capital punishment and has been implemented in most member countries of the Council.⁶

In 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child (CRC), stating that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth....States Parties recognize that every child has the inherent right to life."⁷ The only two non-parties to this Convention are the United States and Somalia. While Madeleine Albright, at the time the US Ambassador to the United Nations, signed the Convention in 1995, it was not ratified by the Senate. President Bill Clinton chose to submit the Convention to the Senate for ratification by a two-thirds majority; nevertheless, this never happened. In September of 2001, the US. presented a document to the UN that stated in part:

⁴ United States Declaration of Independence(1776).

⁵ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res. 217 A (III).

⁶ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14) (4 November 1950) ETS 5.

⁷ Convention on Rights of the Child (entered into force 2 September 1990) 1577 UNTS.

‘The Convention on the Rights of the Child may be a positive tool for promoting child welfare for those countries that have adopted it. But we believe the text goes too far when it asserts entitlements based on economic, social and cultural rights. ... The human rights-based approach ... poses significant problems as used in this text.’ Despite not having been ratified by the United States, the CRC was used in 2005 by the United States Supreme Court to help justify banning the juvenile death penalty, in the case of *Roper v. Simmons*.⁸

Article 6 of the International Covenant on Civil and Political Rights, making it a legally enforceable right in every United Nations member, states ‘Every human being has right to life. That right shall be protected by law. No one shall be arbitrarily deprived of his /her life’.⁹ Maximum number of countries has acceded and ratified ICCPR but still some authoritarian government are not ready to accede and ratify this convention. In Asia, Republic China, maximum Arabian countries are still to ratify ICCPR and its Optional Protocol.

ICCPR has great scope in regards to the protection and promotion of human rights. Human rights are basic rights of the people universally. The applicability of the human rights instruments is therefore not dependent on the choice of the rulers.

Execution of Death Sentence

The worldwide trend towards abolition of the death penalty recorded further progress in 2010. One more country, Gabon, abolished the death penalty for all crimes and the President of Mongolia established an official moratorium on executions. For the third time, the UN General Assembly adopted with more support than ever before a resolution on a moratorium on the use of the death penalty. In 2010, 23 countries carried out executions and 67 imposed death sentences.¹⁰ Methods of execution in 2010 included beheading, electrocution, hanging, lethal injection and shooting.¹¹ Countries that retain the death penalty defended their position by claiming that their use of the death penalty is consistent with international human rights law. Their actions blatantly contradicted these claims.

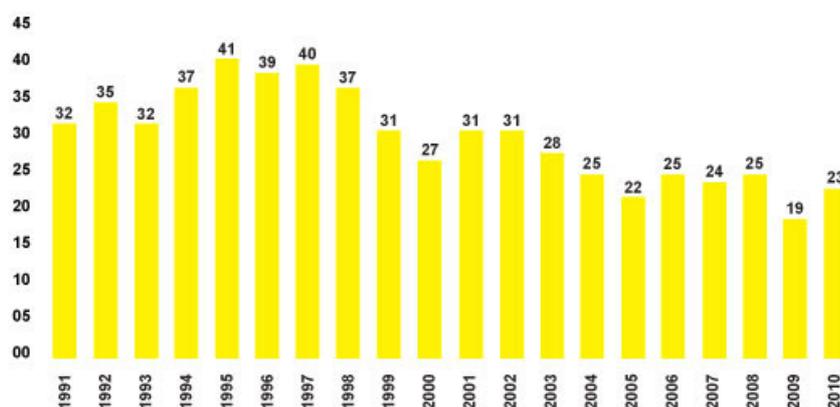
⁸ *Roper v. Simmons*, 543 US 551 (2005).

⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.

¹⁰ Amnesty International Report, *Death Penalty in 2010* (2010) < <http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2010> > accessed 1 March 2013.

¹¹ *Ibid.*

The number of countries carrying out executions 1991–2010



Source: Amnesty International, *Death Penalties in 2010*

In 2010, the country statistics on execution were: China (10000) Iran (252) North Korea (60), Yemen (53), USA (46), Saudi Arabia (27), Libya (18), Syria (17) Bangladesh (9), Somalia (8), Sudan (6), Palestine (5), Equatorial Guinea (4), Egypt (4), Japan (2), Bahrain (1) and Botswana (1)¹². This data shows that China, Iran, North Korea, Yemen, and USA have the maximum executions. Both China and USA are both permanent members of the Security Council of the UN, but the ratio of capital punishment is still higher in these two countries.

Consequences of death penalty

Capital punishment brutalizes society. It legitimizes extreme violence. The brutalizing effect of the death penalty may even be responsible for increasing the number of murders. Miscarriages of justice are impossible to correct since the death penalty is irreversible. Death Penalty makes it impossible for the perpetrator to redeem and rehabilitate him or her. There is obvious racial discrimination in the application of the death penalty in many countries and it has often been misused politically to silence opposition to dictatorial regimes.¹³

Abolition of Death Penalty

The death penalty is the ultimate denial of human rights. It is the premeditated and cold-blooded killing of a human being by the state. This cruel, inhuman, and degrading punishment is done in the name of justice. It violates the right to life as proclaimed in the Universal Declaration of Human Rights. Capital

¹² Ibid.

¹³ 'Capital Punishments, Some Facts and Figures' (*Amnesty International*) <<http://filipsagnoli.wordpress.com/2008/05/07/human-rights-fact-6/>> accessed 1 March 2013.

punishment, or better the death penalty, is obviously a human rights violation. Article 5 of the Universal Declaration states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Killing someone, and announcing the date of someone's death, is clearly cruel, inhuman and degrading.¹⁴The wordings of article 3 are infallible: everyone the right to life.¹⁵

Judicial Intervention in Bangladesh

Bangladesh liberated from Pakistan in 1971, following a war with Pakistan. Even after the liberation, many laws from the Pakistan era still remain in force. Subsequent legal developments have been distinct with a constitution adopted on the 4th November 1972. Article 11 of the constitution states that the 'Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed.'

The Judiciary is organized at two levels, with subordinate court below and a Supreme Court comprising of the appellate and high court division. The Supreme Court of Bangladesh has held that 'National Courts should not straightway ignore the international obligations which a country undertakes. If the domestic laws are not clear enough or there is nothing therein, the national court should draw upon the principles incorporated in the international instruments.'¹⁶

In the case of *Bangladesh Society for the Enforcement of Human Rights et al v. Government of Bangladesh et al*, Supreme Court of Bangladesh has made a landmark decision in the protection of right to life people involved in sex-trade.¹⁷ It said that as the sex workers are now confined in Vagrant Home are illegally terming them vagrant, the respondent have to release them forthwith so as to enable them to go on their own which is their fundamental guarantee under the Constitution of Bangladesh 1972 article 11, 31 and 32.¹⁸ In this case Supreme Court of Bangladesh has established right of sex workers to an occupation and residence under the notion of right to life, and guidelines on the rehabilitation of sexworkers.

¹⁴ UDHR (n 4) art 5.

¹⁵ Ibid 3.

¹⁶ *Ain O Salish Kendra et al v Government of Bangladesh et al* 19 BLD (HCD)488 (1999).

¹⁷ *Bangladesh Society for the Enforcement of Human Rights et al v. Government of Bangladesh et al* (14 March 2000).

¹⁸ See USAID, *Land Mark Judgment on Violence Against Women and Children from South Asia* (2007).

Similarly the High Court in the first landmark decision on this issue in its judgment of *ASK v. Government of Bangladesh*¹⁹ considered a petition by two slum dwellers and other three NGOs working in the area, following mass forced evictions and house demolitions in formal settlements in the Dhaka carried out wholly without notice. Referring to the landmark Indian decision in *Olga Tellis v. BMC*, The High Court concluded that although the right to livelihood and shelter, which had been severely impacted were not judicially enforceable, they could be derived from the fundamental right to life, dignity and equal protection under the law.

Judicial Intervention in India

India was governed under the British rule and until 1947 when was liberated. In 1950, a constitution was made under the chair of Dr. Ambedkar. After that, Indian courts developed 'doctrine of public interest litigation'.

Supreme Court of India has also established a landmark decision in the case of *Francis Coralline Mullin v. The Administrator, Union Territory of Delhi* that the right to life includes the right to live with human dignity and with all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing shelter and facilities for reading, writing and expressing oneself in diverse form, freely moving about and mixing and comingling with fellow human beings²⁰

Similarly in the case of *Olga Tellis v. Bombay Municipal Corporation* the India Supreme Court delivered that right to livelihood from Article 21 of Indian Constitution [1950] is not only restricted to the mere nominal existence of a person but extends to inhabiting deprivation of all those limits and faculties by which life is enjoyed. The ambit and scope right to life embodied in Article 21 is wide and far reaching. It does not mean only that life cannot be extinguished or taken away but it also embraces the right to livelihood within its scope. No person can live without livelihood or means of living. If the right to livelihood is not regarded as a part of right to life, the easiest way of depriving a person of his right to life would be deprive his of his means of livelihood to the point abrogation.²¹

In the case of *Parmanand Katara v. India*, the Supreme Court has considered a very serious problem existing at present: in the medico-legal case (such as an accident) the Doctors usually refuse to give immediate medical aid to the victim till legal formalities are completed. In some cases, the injured die for want of medical aid pending the completion of legal formalities. Supreme

¹⁹ *ASK v. Government of Bangladesh* 19 BLD 488 (1999).

²⁰ *Francis C. Mullin v Administrator, Union Territory of Delhi* 2 SCR 516 (1981).

²¹ *Olga Tellis v. Bombay Municipal Corporation* AIR SC 180 (1986).

Court has very specifically clarified that preservation of life is of paramount importance. Once life is lost, *status quo ante* can not be restored. It is duty of the doctors to preserve life whether the concerned person is a criminal or an innocent person.²²

Similarly in the case of *Madhu Mehata v. India*, the Supreme Court commuted the death sentence of the prisoners to life imprisonment because of delay in executing it due to inordinate delay in the disposal of mercy petition by President of India. The accused was sentenced to death sentence by session judge on October 19, 1978. The High Court confirmed the death sentence on 28 February 1979. The Supreme Court dismissed the appeal on March 17, 1981. Mercy was field on behalf of convict by his wife to the President of India on December 18, 1981, but no decision was reached on the petition till August 9, 1989.²³ Later in the case of *Shivaji Jaising Babar v. Maharashtra* Supreme Court changed the death sentence into one of life imprisonment because of undue delay in disposal of the Mercy Petition.²⁴

Judicial Intervention in Nepal

In the case of *Madhav Kumar v. Nepal Government* Supreme Court observed that from the part of the investigation, various ministries of the government, i.e. the ministry of finance, health, it is found that the delivery of food stuff and necessary service are being done, in the areas affected by starvation of Nepal. The Government is doing this with fullest degree of concern and as per the capacity of resources. Thus, keeping in view of the urgency of the situation, government's involvement to protect people's lives is clearly observed and is therefore, very much appreciated.²⁵

Similarly in the case of *Surya Sharma Dungal v. Godavari Marble Industries*, Supreme Court established new jurisprudence on right to life. Court held that the clean and healthy environment is the part of the life under the Article 12(1) of the Constitution of the Kingdom of Nepal (1990). In this case *locus standi* of the NGOs or individual working for the protection of the environment was enunciated very clearly. The Supreme Court issued directives in the name of respondents to enact necessary legislation for protection of air, water, sound and environment and to take action for protection of the environment of Godawari area.²⁶

²² *Parmanand Katara v. India* AIR SC 2039 (1989).

²³ *Madhu Mehata v. India* AIR SC 2299 (1989).

²⁴ *Shivaji Jaising Babar v. Maharashtra* AIR SC 2147 (1991).

²⁵ *Madhav Kumar Basnet v. PM Girija Pd. Koirala et al* NLR 761 (2055).

²⁶ *Surya Sharma Dungal v. Godavari Marble Industries* WN 35/1992 (31 October 1995).

In the case of, the petitioner has demanded had invalidation and annulment of the 'capital punishment'. The extra-judicial jurisdiction under Article 88 would be invoked for the purpose of constitutional and legal rights *Krishna Prasad Siwakoti v. HMG* and the petitioner demanded that this may not be invoked to pacify a suspicion, concern or confusion. To exercise Article 88(1), there is a pre-condition that the law in question is the same as the one which would have been legislated after the commencement of the Constitution of the Kingdom of Nepal, 1990. It seems that the petition has not demanded as such and circumstances do not necessitate any further interpretation of Article 12(1) of the Constitution.²⁷ Supreme Court held that article 131 the existing law executed by the time of commencement of the Constitution would remain active for one year if not amended or repealed otherwise.

Judicial Intervention in Pakistan

Pakistan was liberated from British rule from 14 August 1947 and was able draft its Constitution in 1973 provides a number of socio-economic fundamental rights under the part two, including outlawing of slavery, forced labor, trafficking and employment of children under age of 14 in hazardous industries and also various rights.

The Supreme Court of Pakistan began to expand access to justice through PIL in the early 1990s when it started that every citizen had the right to obtain justice and this could be facilitated through PIL, allowing simple and direct petition to the Supreme Court as well as potentially widening the scope of justiciable rights.

In *Shoukat Ali v Government of Pakistan* the Pakistan Supreme Court held that the right to livelihood is guaranteed under the laws of Pakistan and Islam²⁸ and similarly in the case of *Darshan Masih v State*, the Supreme Court on the basis of a letter sent by bonded labors in the brick kiln industries gave *suo motu* recommendation as the laws and rules ought to be formulated for regulating the relationship between employers and employees.²⁹

Pakistan Supreme Courts have heard a wide variety of cases concerned with environment and health protection. In the case of *Shehla Zia v. WAPDA*,

the Supreme Court was required to consider a petition from a group of local residents seeking to halt construction of an electricity grid station based on potential health hazards of electromagnetic transmissions.

²⁷ *Krishna Prasad Siwakoti v. HMG* WN 6387/2050.

²⁸ *Shoukat Ali v. Government of Pakistan* PLD SC 342 (1997).

²⁹ *Darshan Masih v State* PLD SC 513 (1990).

Referring to Indian jurisprudence, the Court, holding that the right to live in a clean environment is based on the constitutional right to life and dignity, applied the precautionary principle set out in the 1992 Rio Declaration which it found, although not binding, to be of persuasive and commands respect; The Court on to hold that although it lacked expertise to adjudicate on the different scientific and policy arguments at stake, this did not prevent it from ordering the authorities to initiate a public consultation process for all such projects, including establishing a scientific commission to examine the health risks.³⁰

Judicial Intervention in Sri Lanka

In comparison with other SARC Countries, the legal system of Sri Lanka is different than others. The Legal System of Sri Lanka is based on a complex mixture of English common law combined with Roman-Dutch-Sinhalese-Muslim and customary law. The current Constitution was adopted on 16 August 1978. Relevant fundamental rights provisions include equality and freedom of association but Sri Lankan Constitution contains no express guarantee of the right to life.

The Supreme Court of Sri Lanka has adjudicated on relatively few economic and social rights regarding to right to life claims, and where they have done so, they have invoked fundamental rights, such as right to equality. Similarly there has been only little reference to international standards. In the case of *Bulankulama*, the Supreme Court noted that 'as a member of the United Nations, Sri Lanka can hardly ignore the Declaration of the United Nations Conference on the Human Environment (1972) and the Rio Declaration on Environment and Development (1992) even though they are not legally binding.'³¹

Conclusion

The quest for justice has been one of several important inspirations for human being to desire and defend an organized structure of the society. The administration of justice of is therefore an institution or instrument developed by human being for the protection of its rights, and to provide safeguards for the dignified life, and prompt and convincing remedy wherever and whenever her/his right and dignity are violated. The administration of justice is therefore a touchstone of the human rights in the practical life.

³⁰ *Shehla Zia v WAPDA* PLD SC 693 (1994).

³¹ *Bulankulma et al v The Secretary, Ministry of Industrial Development et al* SC Application No. 884/99 (1999).

This secures the human rights for every by way of balancing the interest between the public safety and procedural safeguards of individual under state's deprivation of liberty for her/his unacceptable behavior. Right to life is an inherent right of people and it is universally accepted but capital punishment is still in practice in many countries. Capital punishment is a violation of human right because death sentence eliminates the dignity of person and also against the notion as inherent rights. Many SAARC countries have not abolished the capital punishment till today but are protecting right to life in other issues. Courts of SAARC countries are rolling out many progressive and established landmark decisions. In that sense we can conclude that south Asian judiciaries are more progressive rather than States in the realisation of right to life.
