

Nepal's Experiences with the Abolition of Death Penalty

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"Capital punishment, also known as the death penalty is a government-sanctioned practice whereby a person is put to death by the state as a punishment for a crime"

This definition is sufficient to understand capital punishment or death penalty worldwide. There is still a big debate around the world whether death penalty should be abolished or continued. Arguments are in favor and against. But as the civilization has grown, death penalty has become less popular among the states. More and more countries are embracing the abolition of death penalty.

Today my presentation does not follow (or make any comments on the contemporary) debate about death penalty. It however focuses on the sharing of Nepal's experiences as to why and how the capital punishment was abolished in all forms in my country.

At the outset, let us look at the history of Nepal at a glance to understand the development, which has brought us today at this stage as 'death penalty free country'.

1. Background

Two hundred and thirty two years back, King Prithivi Narayan Saha of Gorkha Principality expanded his territories defeating the neighboring states and laid foundation of present day Nepal. King Prithvi and his descendants ruled Nepal with the help of religion, customs, decrees etc. There was no codified set of rules to govern the state. And in those earlier years, the death penalty was prevalent in Nepal.

In 1853 AD (1910 BS) the then Prime Minister Jung Bahadur Rana enacted the Mulki Ain (National Code of the country). Both substantive as well as procedural parts of law were put together in the Mulki Ain. It is believed that Jung Bahadur was inspired and encouraged by the legal systems of Britain and Continental Europe, where he visited and received the firsthand knowledge of the governance system prevailing in that part of the world. After his return in Nepal, he invited few legal experts and religious leaders of the day, and with their held, he enacted the law and enforced it.

Hence, Jung Bahadur Rana, a powerful prime minister of the day, laid down the foundation of rule of law in Nepal. He established the courts and pursued the governance based on the codified law.

The Mulki Ain had provisions of death penalty imposed on several conditions. Bhim Shumsher, brother of Jung Bahadur, the fifth Prime Minister of Rana family ruled Nepal for 3 years. He discouraged the death penalty during his rule. After consulting the religious leaders and taking the cue from Manu Smriti and Yagyabalk Smriti (memoirs of the religious saints) he suspended the death penalty for five years on 1931.07.19 A.D. Only exception was Army and Sedition related cases. And it was declared in the decree that the effect of suspension of the law and order would be examined after the expiry of five years. But he died earlier.

His successor, Prime Minister Juddha Shumshere, wanted to evaluate the impact of suspension order made by his predecessor. However, due to the unhelpful attitude of the bureaucracy, he could not properly evaluate the status and impact of death penalty on the society. He had to continue the suspension order for another five years with strict warning to the civil servant that every year the report on the status of death penalty should be reported before him or else, face dire consequences. After completion of five years, Prime Minister Juddha Shumshere again extended the suspension order for another five years. Unfortunately death penalty remained continued.

But I would like to bring to your notice that four persons were executed on sedition charge during his premiership.

After Juddha Shumshere, two more Rana Prime Ministers ruled Nepal. During that period whether the suspension order of their predecessor was continued or not could not be ascertained, due to absence of written decrees. But one good thing that resulted was: 'no execution of any case during their rule'.

2. History of Modern Nepal

In 1947, India became independent from British Empire and declared itself a Democratic Republic. Its direct impact was felt all over South Asia. Nepal was no exception; its direct but positive impact appeared in Nepal's politics also. Youths of Nepal, who were studying in India, and some of them who took part in the Indian Freedom Movement became instrumental to organize Political Parties and started waging armed struggle against the Rana regime. Also, inside Nepal youngsters were very much agitated. Dissatisfaction within the country and armed struggle by the Nepalese in exile combined, forced the Ranas to bow down to the revolutionaries. Of

course, moral and indirect support of India to the movement was decisive. Nepal also entered into a new democratic era in 1951.

Eventually, with the promulgation of an interim constitution, a democratic process was formally introduced and the political system based on the rule of law was initiated. The interim constitution backed by Personal Freedom Act guaranteed civil rights to the people. A High Court Act creating an independent High Court, as apex court, was then promulgated in tune with the notion of the separation of power. A legal scholar and practicing Advocate from India, Mr. Hari Prasad Pradhan, was appointed as the Chief Justice of the High Court (now Supreme Court) in Nepal to facilitate the functioning of Judiciary under nascent democracy.

Institutions were in the developing process. But the old laws were not replaced immediately. The death penalty mentioned in Mulki Ain, Army Act, and Sedition Act was intact and continued even in new order. It was only in 1964, a major breakthrough was made through an amendment in the Mulki Ain, i.e., the National Code. The provision of death penalty was removed from Mulki Ain. The provision of death penalty, however, remained only in the Army Act 1959 and Sedition Act. But later in 1985.10.09 A.D. a Section 13A was inserted in the chapter of Homicide in Mulki Ain. In certain grievous crimes the death penalty provision was introduced again. But within span of five years time it was repealed again.

3. Panchayat Era and Death Penalty

King Mahendra in 1960 dissolved the Parliamentary System and promulgated a new non-party based authoritarian constitution with all state power vested unto the king himself. The new constitution, inter alia, retained the death penalty. The banned political parties, especially the Nepali Congress, waged an all out war against the new undemocratic political set up created by the king. During the armed struggle, somebody threw a bomb at the motorcade of the king in Janakpur which lies in the south of Nepal. A young man Durgananda Jha was arrested and a case of sedition was filed against him in the court. The court, very much influenced by the autocratic regime, found him guilty of treason and death penalty to Durgananda was awarded. He was later hanged inside the jail.

Similarly in 1974 two persons, Captain Yagya Bahadur Thapa and Bhim Narayan Shrestha were convicted of sedition in different cases. Both of them were executed by the firing squad in 1976. Both people were the cadres of Nepali Congress Party and

involved in armed struggle against King's Panchayat Regime. Besides these, it is believed that some military personnel also had been executed, but the number is still unknown.

4. Extra Judicial Killing

Compared to the atrocities and extra judicial killings committed by the Panchayat regime, the number of people formally convicted and given death penalty through legal process is very few. In the name of transfer from jail, many detainees were killed by the security forces alleging that they tried to flee on the way. In Sukhani, Jhapa district of far eastern Nepal, youths of the leftist leanings were killed by the security forces in the nearby jungle in the pretext of transfer from one jail to other in early 70s. Exactly in the same fashion, four Nepali Congress workers were shot at night by the security forces in Kathmandu valley and they were found hand-cuffed and dead next morning in the nearby paddy field.

In both cases, the government gave statements that all of them tried to flee. Nobody in Nepal believed the government's statements because those were cold blooded murder by the state. How could handcuffed detainees flee from the clutch of security personnel? It was never explained properly. No media could fully investigate the incidents and report fully due to lack of press freedom.

Parallely the state heavily crushed the dissidents and killed at several places of the country. Be it in Chitwan district or Dhankuta or Sindhupalchowk or Dhanusa, the security forces silenced the dissidents with bullets. The state brutally exercised power unnecessarily. It was easy to understand that the government simply wanted to spread fear psychosis through such atrocities. During Panchayat days, therefore, court-imposed death penalties did exist in practice although extra judicial killings exceeded far more in number than expected.

5. UN & Amnesty International

In the meantime, Nepal became full fledged member of UN in January 1955. As a member state it became party to Universal Declaration of Human Rights (of 1948) and later to several International Human Rights instruments.

Amnesty International a London based organization became popular among liberal democracies all over the world in a very short span of time. It championed the cause of prisoner of conscience and stood against capital punishment. Mr. Nutan Thapalia, a

human right activist introduced Amnesty International activities in Nepal. Mr. Thapalia and likeminded friends started working for Amnesty International in Nepal and through their efforts and persistent campaign an atmosphere congenial to the abolition of death penalty was created.

Since 1960 the banned political parties were in struggle with the king. The struggle took 29 years for Nepal to return to democracy from king led party-less Panchayat polity. Big uprisings all over the country by the banned political parties forced the king to be a constitutional monarch and impelled him to allow formation and operation of political organizations. Former speaker Mr. Krishna Prasad Bhattarai became the Prime Minister, who served continuously more than 11 years in jail without trial during the king's rule.

During the Bhattarai's premiership, human rights activist Nautan Thapaliya impressed the government to sign and ratify the International Covenant on Civil and Political Rights (ICCPR) and optional protocol of the same. Nepal acceded to ICCPR and First Optional Protocol on 1991.05.14. But accession to Second Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty, 1989 by Nepal was on 1998.03.04. Also he lobbied to abolish the death penalty in all forms in the upcoming new constitution. In 1990, when the new constitution was promulgated, there was no provision of death penalty. Article 12(1) of the Constitution of the Kingdom of Nepal stated that "No person shall be deprived of his personal liberty save in accordance with law and no law shall be made which provides for capital punishment." Also the Interim Constitution of Nepal 2007 in Article 12(1) stated "Every person shall have the right to a dignified life and no law shall be made which provide for the death penalty." Similarly Article 16(2) of the present Constitution of Nepal states: "No law shall be made providing for the death penalty to anyone."

6. Developments Since 1990

After a long struggle of over 30 years, Nepal could eventually promulgate a democratic constitution and restore parliamentary democracy in 1990. Civil rights of the people were fully restored and death penalty constitutionally prohibited (and fully abolished). Unfortunately, however, within a span of about 3 years, the newly emerged political force started armed struggle in the name of Maoist Party against the parliamentary system. During ten years of Maoist insurgency, people's problem reached such a

height that there was exodus of the people in thousands from village in extraordinary way, as common people's lives were threatened both from the state security system and Maoist insurgents.

As stated above, the death penalty was prohibited through the constitutional mechanism. But more than 12000 persons were killed during these years. Around 2500 persons are still missing and recorded in the list of disappeared. Among the people who were killed were common folks of the villages, political activists, Maoist cadres, and personnel of security forces.

After several months of negotiations and talks, On 21 November 2006, Government of Nepal on the one side and Maoist Party on the other, signed the Comprehensive Peace Accord (CPA) in November 2006 which promised to incorporate several human rights provisions in the new legal charter to be framed soon. By now, it is known to everyone in Nepal and elsewhere that the facilitation of negotiations for peace was done by good offices of India.

As a follow up of CPA, a new Interim Constitution was adopted in 2007 and death penalty was outright disallowed. And through the elected Constituent Assembly, a new constitution has been promulgated in September 2015 and the country has become a federal democratic republic now. In the new constitution there is no provision of death penalty.

In order to amicably conclude the peace process and assure the victims and their families' restoration of peaceful life, The Truth and Reconciliation Commission and Commission of Investigation on Enforced Disappeared Persons are set up. They are trying to find the truth and concluded the peace process through an alternative transitional justice mechanism.

7. Lesson Learned

When we talk about the status of death penalty in Nepal, we have witnessed that thousands and thousands of people have been killed extra judicially even though a very few people were convicted to death penalty through formal judicial verdicts. If the political process is not stable and democratic, agreeable to the political parties of the day, the peace of the society gets disrupted and the country plunges into serious conflict resulting into anarchism and nobody can check the brutal killings.

We could prohibit and manage death penalty through constitutional and legal provisions. But we are unable to check extra judicial killings if we fail to manage state politics. That means extra judicial killings, caused and engineered by unmanaged state and non-state actors, outnumber the death penalties many times more than legally permissible killings officially executed by the state through judicial verdicts. The question is – Do we want such a proposition to continue?

If the inequalities among the people increases, if the society is divided or polarized in a diametrically opposite way, and if a section of people feel marginalized and lose hope to get justice from the government system and its apparatus – violence is bound to erupt. Once violence erupts, once violence is accepted by some section of the society, whatever laws there could be, the discussions and debates on death penalty become meaningless. Hence unless the root cause of discrimination, violence and conflict in a society is identified and efforts made to address them, mere legal instruments alone cannot prevent ‘death penalty’.

In addition, Nepal is a party to many more international human rights instruments, and the constitution as well as the very powerful court system, further guarantee the effective implementation of fundamental human rights ensuring social justice as are incorporated in the constitutional provisions. Although multi-order federal governance system may initially appear to be a complex constitutional design, Nepal however is committed to secure ‘right to life’ and ensure prosperity through development for each citizen. Experiences of other countries would certainly be helpful for Nepal to benefit from good practices as well as lessons learned.

References

1. The Constitution of Nepal
2. The Interim Constitution of Nepal 2007
3. The Constitution of Kingdom of Nepal 1990
4. Some Historic Documents Related to Law, edited by Prakash Osti
5. Mulki Ain (National Code)
6. Wikipedia