



The Intersection of Death Penalty with LGBTI Rights at the 36th Session of the Human Rights Council

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Introduction

The appointment of the first Independent Expert on Sexual Orientation and Gender Identity in the 32nd session of the Human Rights Council marked an important milestone in the LGBTI struggle. However, the distance yet to be travelled was brought home in a stark fashion in the 36th session of the Human Rights Council in the debate around the death penalty. The death penalty is currently on the statute books for consensual same sex conduct in thirteen states (or parts of). The states are Sudan, Iran, Saudi Arabia, Yemen, 12 northern states in Nigeria, Southern parts of Somalia, Mauritania, Afghanistan, Pakistan, Qatar, UAE and ISIS held territories in Iraq and Syria.¹ This pressing issue was sought to be tackled through Resolution 36/17 which was titled 'The question of the death penalty'. What is unique about Resolution 36/17 was that it did not see the death penalty for same sex conduct as an egregious violation to be dealt with separately but rather saw the death penalty for same sex conduct as a part of a wider continuum of the unjust imposition of the death penalty. It thus signposted the death penalty as an issue which intersected with multiple forms of marginalization and required an intersectional approach.

Understanding Resolution 36/17 of 2017 on 'The question of the death penalty'

Resolution 36/17 is the third resolution passed at the Human Rights Council on 'the question of the death penalty' with the first resolution being 26/2 of 2014 and the second being 30/5 of 2015. The 'question of the death penalty' has also been the subject of numerous resolutions at the predecessor body of the Human Rights Council, the Commission of Human Rights, including in 2003², 2004³ and 2005⁴.

The death penalty has also been the subject of resolutions at the General Assembly. The Resolutions at the General Assembly are generally entitled, 'moratorium on the use of the death penalty' and aim to 'establish a moratorium on executions with a view to abolishing

¹Aengus Carroll, *State Sponsored Homophobia 2016: A world survey of sexual orientation laws: Criminalisation, protection and recognition*, Geneva, ILGA, 2016. p.37.

² E/CN.4/RES/2003/67

³ E/CN.4/RES/2004/67

⁴ E/CN.4/RES/2005/59

the death penalty’ and also interalia, seeks to ‘progressively restrict the use of the death penalty and ‘reduce the number of offences for which it may be imposed’.⁵

While both series of resolutions are connected, the aim of the resolutions at the Human Rights Council are narrower than a moratorium. These series of resolutions aim at crystallizing state practice on the specific question as to what are the legal limitations to the imposition of the death penalty in those cases where states do have the death penalty on the statute books.

The legal framework which is referenced by these resolutions is Article 6 of the International Covenant on Civil and Political Rights (ICCPR) which while recognizing that human beings have the right to life, also lays down the conditions under which the sentence of death may be imposed.⁶

Article 6(2) clearly states, that the death penalty can only ‘be imposed for the most serious crimes’ and cannot be imposed for ‘crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women’. However, the critical question as to what are the ‘most serious crimes’ remains undefined and these resolutions seek to capture the international law understanding of what these crimes are.

As early as 2002, the then Commission on Human Rights passed a Resolution which urged states which still maintain the death penalty to ‘ensure that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences, and that the death penalty is not imposed for non-violent acts such as financial crimes, non-violent religious practice or expression of conscience and sexual relations between consenting adults’.⁷ The language of this resolution was mirrored in subsequent resolutions of the Commission on Human Rights in 2003⁸, 2004⁹ and 2005¹⁰.

⁵ Resolution 69/186 of 2014. Also see 67/176 of 2013; 65/206 of 2011; 63/168 of 2009 and 69/149 of 2008.

⁶ Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

⁷ E/CN.4/RES/2002/77

⁸ E/CN.4/RES/2003/67

⁹ E/CN.4/RES/2004/67

¹⁰ E/CN.4/RES/2005/59

The resolutions at the Human Rights Council 26/2 of 2014 and 30/5 of 2015 did not specifically define the concept of ‘the most serious crimes’. Resolution 36/17 of 2017 was the first resolution of the Human Rights Council which sought to state what were the ‘most serious crimes’ for which death penalty should not be applied by urging ‘states that have not yet abolished the death penalty to ensure that it is not imposed as a sanction for specific forms of conduct such as apostasy, blasphemy, adultery and consensual same sex relations’.

The difference in the wording between the resolutions of the Commission and the Council when it came to what were considered to be ‘the most serious crimes’ is the dropping of financial crimes from the listing by the Council and the re-categorization of what the Commission referred to as ‘non-violent religious practise or expression of conscience and sexual relations between consenting adults’. Resolution 36/17, in effect defined what the Commission called ‘non-violent religious practise or expression of conscience’ as ‘apostasy and blasphemy’. The category of ‘sexual relations between consenting adults’ which was used by the Commission was divided into ‘same sex relations’ and ‘adultery’ by the Council.

The nuancing of the understanding of what are ‘the most serious crimes’ is based upon the Report of the Secretary General on ‘Capital Punishment and the implementation of safeguards guaranteeing the protection of the rights of those facing the death penalty’ which is invoked in Resolution 36/17.¹¹

The Secretary General’s Report states the current legal position on the interpretation of Article 6 of the ICCPR:

Article 6 of the International Covenant on Civil and Political Rights regulates the imposition of the death penalty. Under article 6 (2), in States parties that have not abolished the death penalty, the application of the death penalty is strictly limited to the most serious crimes. In 2002, the Human Rights Committee adopted the view that the contents of paragraph 2 should be read as narrowly construed. The application of the death penalty must also be in a manner consistent with all other provisions of the Covenant, in particular the right to fair trial, as provided in article 14 of the Covenant, and the non-discrimination requirements of articles 2 (1) and 26 of the Covenant.

¹¹ A/HRC/36/26

The Report then goes on to note the ‘disproportionate impact of the application of the death penalty on individuals exercising the right to religion or beliefs and freedom of expression’:

Several States continue to criminalize forms of non-religious beliefs, including 13 States that impose the death penalty for blasphemy or apostasy. Furthermore, persons criticizing religious faith, carrying out academic studies of the origins of religions and persons belonging to minorities manifesting religious or non-religious convictions other than the religion practised by the majority of the population, may run the risk of being accused of “blasphemy”, a charge still punishable by death in many States.

The Report then stresses the ‘discriminatory use of the death penalty based on gender or sexual orientation’:

The imposition of the death penalty for offences relating to consensual homosexual conduct continues to be provided for in the legislation of many States. While few cases of executions for consensual same-sex conduct have been carried out recently, the existence of such laws discriminates against the conduct of lesbian, gay, bisexual and transgender persons. Those laws also send a social message. They have an intimidating effect and can create an enabling environment for acts of violence and stigma.

The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have expressed concern at the fact that consensual same-sex relations remain a crime punishable by death in some countries and have concluded that the application of the death penalty in that context represents a grave violation of human rights, including the rights to life, privacy and non-discrimination. The Special Rapporteur on extrajudicial, summary or arbitrary executions has reiterated that death sentences may be imposed only for the most serious crimes and that offences related to homosexual conduct and sexual relations between consenting adults do not meet that threshold. The European Union guidelines on the death penalty also emphasize that the death penalty must not be applied or used in a discriminatory manner on any ground, including sex or sexual orientation.

Resolution 36/17 is an attempt to capture the essence of the above noted concepts through the formulation of ‘urging all states that have not yet abolished the death penalty to ensure

that it is not imposed as a sanction for specific forms of conduct such as apostasy, blasphemy, adultery and consensual same-sex relations'. However, Resolution 36/17 omits to mention the concept of gender identity when it comes to the listing. This omission needs to be rectified in the next Resolution as the two notions of sexual orientation and gender identity are closely related. Even if the death penalty is only for same sex conduct, it is often a person's visible gender expression or identity which triggers the process of both vigilante action as well as state prosecution.

It should also be noted that Resolution 36/17 has a strongly intersectional component. It specifically addresses the disproportionate impact of the death penalty on poor, disabled, racial and ethnic minorities, persons of diverse sexual orientations and gender identities, religious dissenters and women through the following paragraphs:

4. *Calls upon* States to ensure that all accused persons, in particular poor and economically vulnerable persons, can exercise their rights related to equal access to justice, to ensure adequate, qualified and effective legal representation at every stage of civil and criminal proceedings in capital punishment cases through effective legal aid, and to ensure that those facing the death penalty can exercise their right to seek pardon or commutation of their death sentence;

5. *Urges* States that have not yet abolished the death penalty to ensure that the death penalty is not applied against persons with mental or intellectual disabilities and persons below 18 years of age at the time of the commission of the crime, as well as pregnant women;

6. *Also urges* States that have not yet abolished the death penalty to ensure that it is not imposed as a sanction for specific forms of conduct such as apostasy, blasphemy, adultery and consensual same-sex relations;

8. *Also calls upon* States to undertake further studies to identify the underlying factors *that* contribute to the substantial racial and ethnic bias in the application of the death penalty, where they exist, with a view to developing effective strategies aimed at eliminating such discriminatory practices;

Resolution 36/17 has to be understood as trying to limit the application of the death penalty through capturing the current state of international law and policy on the point. What Resolution 36/17 unequivocally captures is that the death penalty is a punishment which

impacts minorities of various stripes and hues. The less social and economic power a person has, the more vulnerable the person is to the imposition of the death penalty. By specifically referencing 'economically vulnerable persons', 'persons with mental and intellectual disabilities', the notion of 'racial and ethnic bias' as well as the fact that persons engaging in conduct such as 'apostasy, blasphemy, adultery and consensual same-sex relations', the resolution indicates the death penalty targets both dissenters and those who lack social and economic power.

The Amendment Strategy

Resolution 36/17, triggered strong opposition especially among those countries which still had the death penalty on their statute books. The strategy of those opposing Resolution 36/17 unfolded through proposing eight hostile amendments.¹² All proposed amendments sought either to dilute the language of the resolution, divert the focus of the resolution, or render the resolution meaningless. Some of the more egregious of the proposed amendments sought to render the development of international law and policy to restrict the use of the death penalty nugatory. While Russia withdrew the first amendment, the rest of the amendments were voted on and defeated. Some of the key amendments proposed, which would have altered the resolution substantially included:

Egypt¹³ along with other co-sponsoring states¹⁴ proposed that:

Before paragraph 1, insert a new paragraph *reading*

1. *Recognizes* that the application of a moratorium on the death penalty, abolishing the death penalty or retaining it should be a decision based on domestic debates at the national level;¹⁵

Saudi Arabia along with other co-sponsoring states¹⁶ proposed that:

After paragraph 1, insert a new paragraph *reading*

1 bis. *Reaffirms* the sovereign right of all States to develop their own legal systems, including determining appropriate legal penalties, in accordance with their international law obligations;

¹² All proposed amendments along with the details of the vote are available at <http://ilga.org/un-resolution-death-penalty-same-sex-relations/>

¹³ The states which sponsor a resolution do not have to be members of the Human Rights Council. Thus, Egypt even while it sponsored Resolution 36/17 was not a member of the Human Rights Council.

¹⁴ Bangladesh, China, Nigeria, Saudi Arabia and the United Arab Emirates.

¹⁵

<https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/36thSession/Resolutions/Forms/ResolutionDS/docsethomepage.aspx?ID=148&FolderCTID=0x0120D520005A4381ABFFD48642897E02288D058A2200F5BF1C967A4FD040BB4E3F1D6EF4BA3C&List=ed7d2c05-a988-4fd8-b955-6723de83ebf2&RootFolder=%2Fsites%2Fhrc%2FHRCSessions%2FRegularSessions%2F36thSession%2FResolutions%2FA%5FHRC%5F36%5FL%2E41>

¹⁶ Azerbaijan, Bahrain, Bangladesh, Brunei Darussalam, China, Egypt, Iran, Kuwait, Malaysia, Maldives, Morocco, Nigeria, Oman, Pakistan, Saudi Arabia, Singapore, United Arab Emirates

Egypt along with other co-sponsoring states¹⁷ proposed that after paragraph 7, insert a new paragraph *reading*

7 bis. *Urges* States that have abolished the death penalty or have subjected it to a moratorium to study the impact of the discontinuation of the application of the sentence on the rights of the victims and the effective accomplishment of redress, including its elements of satisfaction and guarantees of non-recurrence, and encourages the States to share and exchange information concerning the impact of the abolition or retention of the death penalty on the rates of prevalence of serious crimes;¹⁸

The most egregious of the amendments were the ones focused on national sovereignty with the implication being that the decision on whether to give content to the legally binding commitment to restrict the use of the death penalty was something to be determined within the national context. The reference to sovereignty is in effect an attempt to minimize the role of international law both as a tool of persuasion and as a tool which can continue to develop the normative framework around the abolition of the death penalty.

Some of the amendments were only narrowly defeated. For example, the amendment stressing that the moratorium or abolition of the death penalty 'should be a decision based on domestic debates at the national level' was defeated by a narrow margin of 18 for, 19 against, 9 abstentions and one Did Not Vote. It's also interesting to note that some countries like South Africa though they voted for the resolution abstained on all amendments including the amendments noted above, indicating that South Africa was not opposed to the resolution being diluted through the amendment process.

An analysis of the voting on the amendments, highlights the serious reservations expressed by a number of states on any attempt based upon international law to even minimize the range of offences for which the death penalty can be imposed. However, the fact that the language which allowed national sovereignty to trump international law and policy was defeated, indicates that at present a majority of the Human Rights Council, is committed to minimizing the use of the death penalty.

Analysing the vote on Resolution 36/17

¹⁷ Saudi Arabia, United Arab Emirates and China

¹⁸

<https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/36thSession/Resolutions/Forms/ResolutionDS/docsethomepage.aspx?ID=150&FolderCTID=0x0120D520005A4381ABFFD48642897E02288D058A2200F5BF1C967A4FD040BB4E3F1D6EF4BA3C&List=ed7d2c05-a988-4fd8-b955-6723de83ebf2&RootFolder=%2Fsites%2Fhrc%2FHRCSessions%2FRegularSessions%2F36thSession%2FResolutions%2FA%5FHRC%5F36%5FL%2E42>

The Human Rights Council has 47 members who are elected to the Council from all members of the United Nations.¹⁹ The members are elected based upon equitable geographical distribution.²⁰ Resolution 36/17 passed with a vote of 27 countries voting for the resolution, 13 against and seven abstentions.²¹

The resolution was introduced by two countries which recently abolished the death penalty, namely Benin²² and Mongolia²³. Both countries made the point that the death penalty is discriminatory in its application vis a vis poor persons and racial minorities. Egypt and Saudi Arabia spearheaded the opposition to the resolution through the proposal of amendments stressing the 'sovereign right of states' as well as the need for moratoriums on death penalty to be decided by local and national debates. By contrast, the UK highlighted the fact that responding to violence by executions risked the violence spreading further. Brazil noted the non-discrimination injunction in international law and how the death penalty violated this tenet. Around 25 countries took the floor to put forward their positions on the death penalty before the vote took place.²⁴

Understanding the 'Yes vote'

The support for the resolution came from Latin and Central America and Europe. This unanimous support from the region (excluding Cuba which abstained and Russia which voted against) was buttressed by both African and Asian countries who joined in support. Among the African Group, Congo, Cote D'Ivoire, Ghana, Rwanda and South Africa also joined the yes vote (with Kenya, Tunisia and Nigeria abstaining). Asian countries like Kyrgyzstan, Mongolia were also supportive (with Korea and Philippines abstaining). All countries which voted for the resolution have either abolished the death penalty or have been de facto abolitionist. The abolitionist landscape is a changing one, with most of the shifts (from retentionist to abolitionist) happening in the last twenty years. For example, Mongolia reformed its penal law in 2017 to abolish the death penalty and Congo has been

¹⁹ The current members of the Human Rights Council are Albania, Bangladesh, Bolivia, Botswana, Congo, El Salvador, Ghana, India, Indonesia, Latvia, Netherlands, Nigeria, Paraguay, Portugal, Qatar, Belgium, Burundi, Côte d'Ivoire, Ecuador, Ethiopia, Georgia, Germany, Kenya, Kyrgyzstan, Mongolia, Panama, Philippines, Republic of Korea, Slovenia, Switzerland, Togo, United Arab Emirates, Venezuela, Brazil

China, Croatia, Cuba, Egypt, Hungary, Iraq, Japan, Rwanda, Saudi Arabia, South Africa, Tunisia, United Kingdom and United States of America

²⁰ The distribution of members is based upon the following regions: Group of African States (13); Group of Asia-Pacific States (13), Group of Eastern European States (6), Group of Latin American and Caribbean States (8), Group of Western European and other States (7).

²¹ The countries which voted yes were Albania, Belgium, Bolivia, Brazil, Congo, Cote D'Ivoire, Croatia, Ecuador, El Salvador, Georgia, Germany, Ghana, Hungary, Kyrgyzstan, Latvia, Mongolia, Netherlands, Panama, Paraguay, Portugal, Rwanda, Slovenia, South Africa, Switzerland, Togo, United Kingdom, Venezuela

The countries which voted no were Bangladesh, Burundi, Botswana, China, Egypt, Ethiopia, India, Iraq, Japan, Qatar, Saudi Arabia, United Arab Emirates and the USA.

The countries which abstained were Cuba, Indonesia, Nigeria, Philippines, Republic of Korea and Tunisia.

²² <http://blog.deathpenaltyworldwide.org/2017/08/benin-abolished-death-penalty-in-2016-but-14-prisoners-remain-on-death-row.html>

²³ <https://www.amnesty.org/download/Documents/ACT5066462017ENGLISH.pdf>

²⁴ <http://webtv.un.org/search/ahrc361.6-vote-item3-40th-meeting-36th-regular-session-human-rights-council/5592217906001/?term=&lan=english&cat=Regular%20Sessions&page=2#>

de facto abolitionist since 1982.²⁵ In contrast to the voting on SOGI issues at the Human Rights Council, the African Group did not have a unified position on the death penalty. This lack of a unified position resulted in six African countries supporting the resolution with three voting against.

Understanding the ‘No vote’

The core of the ‘No vote’ was a coalition of African and Asian states including Bangladesh, Burundi, Botswana, China, Egypt, Ethiopia, India, Iraq, Japan, Qatar, Saudi Arabia, United Arab Emirates joined by the USA. All these countries retain the death penalty as a punishment and includes the countries which are the top executing countries today.

The figures for 2016 indicate that at least 1,032 people were executed in 23 countries in 2016. Most executions took place in China, Iran, Saudi Arabia, Iraq, Pakistan, Egypt and USA – in that order.²⁶

It’s not surprising that China, Iraq, Saudi Arabia, Egypt and the USA voted against the resolution considering their domestic record of being the world’s top executioners.

The countries that vote ‘no’ vote on death penalty resolutions also generally vote ‘no’ on resolutions on sexual orientation and gender identity. The three exceptions are the USA, India and Japan. The USA (under the Obama Administration) and Japan have been supporters of SOGI resolutions and India has generally abstained on SOGI resolutions.

The USA’s Vote

While Resolution 36/17 was a resolution which impacted a range of groups and minorities, the only part of the resolution which caught the attention of the global media was the fact that this resolution prohibited the death penalty for ‘consensual same-sex relations’. This aspect of the resolution which was not a topic of controversy during the voting in the Human Rights Council, ignited a controversy particularly within the USA with the US government being asked as to how the USA could have voted against a resolution which sought to prohibit the death penalty for ‘consensual same sex relations’.

The explanation for the vote by the USA in the Human Rights Council did not seem to have anticipated this controversy.

²⁵ The other African and Asian countries with voted for Resolution 36/17 and are either de jure or de facto abolitionist are: Congo (1982), Cote D’Ivoire (2000), Ghana (1993), Kyrgyzstan (2007), Mongolia (2017), Rwanda (1994), South Africa (1995), Togo (1978). The only exception to this story of steady progress is the case of the Philippines. Philippines was the first country in the Asia Pacific region to abolish the death penalty in 1983 but in 2017 a Bill has been passed by the House of Representatives which reinstates the death penalty for drug related offences.

²⁶ <https://www.nytimes.com/2017/03/01/world/asia/philippines-death-penalty.html>
<https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures/>

The United States is disappointed that it must vote against this resolution. As in previous years, we had hoped for a balanced and inclusive resolution that would better reflect the position of states that continue to apply the death penalty lawfully. We reaffirm our longstanding position on the legality of the death penalty, when imposed and carried out in a manner consistent with a state's international obligations.

We are deeply troubled whenever an individual subject to the death penalty is denied the procedural and substantive protections to which he or she is entitled. We, likewise condemn any instance in which a method of execution or treatment during confinement is applied in such a manner as to amount to torture or cruel, inhuman or degrading treatment in violation of a state's international obligations. We cannot accept the implication, however, that all methods of execution have such a result.

The United States is committed to complying with its constitution, laws, and international obligations, and we encourage other countries that employ the death penalty to do so as well.²⁷

Susan Rice, the former US Ambassador to United Nations under President Obama, in some ways initiated the controversy by tweeting:

Shame on US! I was proud to lead U.S. efforts at UN to protect LGBTQ people, back in the day when America stood for human rights for all.²⁸



In response to the backlash in the US media, in a press briefing, State Department spokesperson Heather Neuter said:

We voted against that resolution because of broader concerns with the resolution's approach in condemning the death penalty in all circumstances.... The United States unequivocally condemns the application of the death penalty for conduct such as homosexuality,

²⁷ <https://geneva.usmission.gov/2017/10/03/u-s-explanation-of-vote-resolution-on-the-question-of-the-death-penalty/>

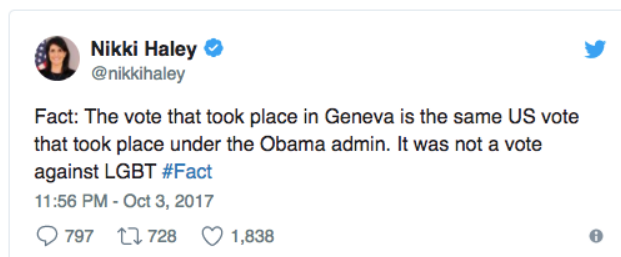
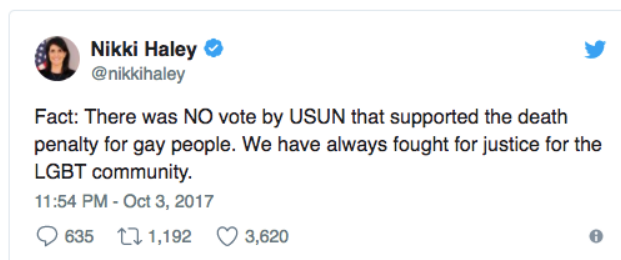
²⁸ <https://twitter.com/ambassadorrice/status/915265109768982528?lang=en>

blasphemy, adultery, and apostasy. We do not consider such conduct appropriate for criminalization.²⁹

Nikki Haley, the U.S. ambassador to the U.N., also responded to the backlash following the death penalty vote. In two tweets, Haley said:

Fact: There was NO vote by USUN that supported the death penalty for gay people. We have always fought for justice for the LGBT community.

Fact: The vote that took place in Geneva is the same US vote that took place under the Obama admin. It was not a vote against LGBT³⁰



Was the US voting an example of the Trump administration’s turning away from a global championing of human rights? To understand whether Susan Rice is right in making the case that this was a new shift in foreign policy or Nikki Haley was justified in making the case that this was no change but merely a continuation of existing US policy, the US votes on previous resolutions on the death penalty will have to be examined.

In all previous General Assembly resolutions on a moratorium on the death penalty, beginning from 2008, the USA has voted against. As recently as 2016, in GA Resolution 71/187 of 2016 the USA was one of the 40 countries voting against the resolution which was passed by 117 countries.

²⁹ <https://www.advocate.com/world/2017/10/03/state-dept-elaborates-position-homosexuality-and-death-penalty>

³⁰ <https://www.advocate.com/world/2017/10/04/nikki-haley-misleads-un-vote-death-penalty-gays>

In the resolutions at the Commission on Human Rights, on the 'question of the death penalty' the USA has voted against. In the three resolutions at the Human Rights Council, the USA has voted against two of them and abstained on one. In Resolution 30/5 of 2015 on the question of the death penalty the USA voted against and in Resolution 26/2 of 2014 the USA abstained. The US abstention in Resolution 26/2 of 2014, seemed to indicate a softening of opposition, especially as articulated by Ambassador Harper in the Explanation of Vote:

The United States is disappointed that it was not able to join consensus on this resolution. We had hoped for a balanced and inclusive resolution that would better reflect the position of states that continue to apply the death penalty lawfully. In particular, we cannot agree with the slant of this resolution in favour of a moratorium or abolition, nor with the generality expressed that use of the death penalty inevitably leads to violations of human rights. We are deeply troubled whenever an individual subject to the death penalty is denied the procedural and substantive protections to which he or she is entitled, but we cannot accept the implication that such a denial of legal protections follows from use of the death penalty. For this reason, we supported the amendment that would have removed this problematic language. International law does not prohibit capital punishment when imposed and carried out in a manner that is consistent with a state's international obligations. We therefore urge all governments that employ the death penalty to do so in conformity with their international human rights obligations. With respect to the imposition of the death penalty for offenses committed by persons below eighteen years of age, the United States Supreme Court has barred as unconstitutional the use of the death penalty in such circumstances. We would likewise encourage all States to do the same, but interpret the references in the resolution to related provisions of the ICCPR and the Convention on the Rights of the Child as addressed to those States Parties who have accepted such obligation under those conventions. As to the question of abolition of the death penalty or moratoriums on its use, the United States' position is equally well known. The ICCPR, its Second Optional Protocol and other relevant conventions leave this question to be decided through the domestic democratic processes of each individual Member State. We believe that these domestic processes may be enhanced by open debate on all sides of the issue and that this resolution can contribute to such debate. For that

reason, we have chosen to abstain rather than oppose this resolution, despite its flaws.

While we could have read the vote on 26/2 as well as the explanation provided by Ambassador Harper as a general softening of position of the USA on the death penalty, on the vote which followed in Resolution 30/5 of 2015 the USA reverted to an oppositional stance.³¹ Thus the only way to read the Obama administration's record is that in 2014 there seemed to be a softening of position but for whatever reason, the small window was rapidly shut by the vote in 2015. The vote in 2017 by the Trump administration exhibits a continuity of US policy with the 2014 vote being more of an exception in an otherwise unswerving commitment to preserving the death penalty.

Japan's vote

The only two countries of the G8 which still retain the death penalty are the USA and Japan. Japan's retention of the death penalty remains an anomaly in a country which has otherwise been in the forefront of capitalist modernity. While embracing modernity, the one area where Japan has demurred is with respect to the progressive abolition of the death penalty.

The death penalty in Japan is carried out in secret and the entire process is shrouded in secrecy. Death row prisoners are held in solitary confinement and there are only a bare minimum of visitors permitted with the press being barred. The date on which execution is to take place is not known by the prisoner, who is forced to imagine that each day he lives may be his last.³² It is this stark domestic reality which makes Japan such a strong opponent of the death penalty resolutions at the Human Rights Council as well as the General Assembly.

The discourse around the death penalty in Japan contrasts unfavourably with the resolutions on SOGI with respect to which Japan has expressed unqualified support. In both Resolution 17/19 of 2011 and Resolution 27/32 of 2014, Japan voted 'yes'. In its votes on these resolutions, Japan has shown a desire to be seen to be on the 'right side of history'.

The abolition of the death penalty and voting for resolutions seeking the eventual abolition of the death penalty would be in conformity with Japan's self-image of being a modern progressive nation. Japanese support for the resolutions on the death penalty depends upon the success of the abolitionist campaign within Japan.³³

³¹ The USA in an explanation of the vote said that it was disappointed that it could not abstain on this resolution. It was concerned at the language of the calls for a moratorium, and could not accept that all manners of executions amounted to torture or inhumane treatment. The United States would have preferred a more balanced approach. [https://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/2E09FC4729710CCEC1257ED1005C9C1C?OpenDocument](https://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/2E09FC4729710CCEC1257ED1005C9C1C?OpenDocument)

³² <https://www.hrw.org/legacy/worldreport99/asia/japan.html>

³³ <https://www.japantimes.co.jp/news/2016/09/22/national/crime-legal/lawyers-campaign-abolition-capital-punishment-japan/#.WfBuMIpx1-U>

India's vote

India has traditionally voted against resolutions which seek to limit the use of the death penalty both in the Human Rights Council and in the General Assembly. This support for the death penalty seems to derive from the fact that the death penalty is on the statute books and is a punishment which is applied by India.

However, the Indian Supreme Court has strongly articulated that the death penalty should only be applied in the 'rarest of the rare' cases and the Indian legal position seems to converge with the key objectives of Resolution 36/17. If India had voted for 36/17 it would have been in line with the Constitutional mandate as clearly imposing the death penalty for 'apostasy, adultery and consensual same sex relations' would undoubtedly fall foul of the Indian Constitution as interpreted by the Supreme Court.

It has been argued that, 'The obligation which flows from being a constitutional democracy requires that positions India takes at the international level [should not be] mere coinage in realpolitik but rather [should] derive from and reflect constitutional values. Till such time as those crafting India's international policy positions, see fidelity to the Constitution as a virtue, we are likely to witness contradictions such as that of a democracy voting to preserve the death penalty in all its manifestations'.³⁴

In both Resolution 27/32 of 2014 and Resolution 32/2 of 2016 on sexual orientation and gender identity, India chose to abstain. Recent developments make India's abstention an outdated position as the Indian Supreme Court has advanced a powerful defence of LGBT rights as human rights. In *Puttuswamy v Union of India* the Court held:

Yet in a democratic Constitution founded on the rule of law, their [LGBT persons] rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.³⁵

³⁴ <https://scroll.in/article/852859/contradicting-the-constitution-what-indias-vote-against-un-resolution-on-death-penalty-means>

³⁵ <https://indiankanoon.org/doc/91938676/>

If India aspires to be a global leader, then it must play a more proactive role in defence of human rights at the international level. The policy position must be derived from the Constitution and voting at the Human Rights Council must reflect constitutional values. This would include voting for resolutions akin to 37/17 and for resolutions defending SOGI rights.

Conclusion: Towards an intersectional approach?

The death penalty is currently on the statute books for consensual same sex conduct in thirteen states (or parts of). Regardless of whether people are executed for engaging in same sex relations, the existence of the death penalty on the statute books sends out the chilling message to LGBT persons, that their right to life could be at stake if they engage in intimate sexual conduct. The abolition of this penalty is a matter of pressing importance. Resolution 36/17 is to be welcomed for clearly stating that the punishment of death for same sex conduct, falls outside existing human rights law.

Resolution 36/17 takes a deeply intersectional approach to the abolition of the death penalty. By specifically referencing 'economically vulnerable persons', 'persons with mental and intellectual disabilities', the notion of 'racial and ethnic bias' as well as the fact that persons engaging in conduct such as 'apostasy, blasphemy, adultery and consensual same-sex relations', the resolution indicates that the struggle against the death penalty must encompass an understanding of all of these grounds.

The 'no' votes of India, Japan and the US indicate that it's unlikely that there will any progress on the question of the death penalty for same sex conduct until and unless there is progress on the death penalty per se. The US vote is indicative that the US will not soften its position on the death penalty, even if the global promotion of LGBT rights was (under the Obama administration) an aspect of the US foreign policy. This only indicates that LGBT advocates cannot hope to advance a key aspect of the LGBT agenda, namely the ending of the death penalty without a shift in the position on the death penalty as a whole.

The struggle for the removal of death penalty for consensual same sex conduct should be seen as part of a wider continuum of struggle. It's important that future advocacy regarding the death penalty recognizes that those who are vulnerable to the death penalty include both those who lack socio economic power and those who are dissenters. In this sense, Resolution 36/17 points the way forward.