

IS THE DEATH PENALTY A SUCCESSFUL DETERRENT TO CRIME?

By Mahuva Shetty¹⁴⁵ & Serah Jacob¹⁴⁶

Introduction:

When dealing with the question how deterrent a death penalty, also called capital punishment, it is essential to understand what exactly the term Capital punishment refers to and the history behind the punishment. The death penalty is a legal process whereby a person is put to death by the state as a punishment for a crime. The judicial decree that someone be punished in this manner is a death sentence, while the actual process of killing the person is an execution. There has been a global trend towards the abolition of capital punishment; however, India has not adopted this position. What makes this form of punishment different from the others is the obvious element of irreversibility attached to it.

With regards to the origins of the death penalty, it has been observed that death as a punishment has been in practice for many years. Various ancient civilizations have made use of the death penalty to ensure peace in their society. An example of this would be Rome's law in the 5th century B.C., death was the penalty for publishing "insulting songs and disturbing the peace of the city at night, as well as Greece's draconian legal code in the 7th century B.C., where death was the punishment for every crime. [¹⁴⁷]The first established death penalty laws date back to as far as the Eighteenth Century B.C. in the Code of King Hammurabi of Babylon, which codified the death penalty for 25 different crimes. [¹⁴⁸]

In the Tenth Century A.D., hanging became the usual method of execution in Britain. In the following century, William the Conqueror would not allow persons to be hanged or otherwise executed for any crime, except in times of war. Under the reign of Henry VIII, as many as 72,000 people are estimated to have been executed. Executions were carried out for such capital offenses as marrying a Jew, not confessing to a crime, and treason.[¹⁴⁹]

¹⁴⁵ 5th Year BA LLB Student, School of Law, Christ University Bangalore, Karnataka

¹⁴⁶ 5th Year BA LLB Student, School of Law, Christ University Bangalore, Karnataka

¹⁴⁷ Retrieved from: <http://newindialaw.blogspot.in/2012/11/constitutional-validity-of-capital.html> (on 28th August 2015)

¹⁴⁸ Retrieved from: <http://www.deathpenaltyinfo.org/part-i-history-death-penalty#intro> (on 27th August 2015)

¹⁴⁹ *Supra*

The number of capital crimes in Britain continued to rise throughout the next two centuries. By the 1700s, 222 crimes were punishable by death in Britain, including stealing, cutting down a tree, and robbing a rabbit warren. Because of the severity of the death penalty, many juries would not convict defendants if the offense was not serious. This resulted in the reform of Britain's death penalty. From 1823 to 1837, the death penalty was eliminated for over 100 of the 222 crimes punishable by death. ^[150]

With regard to America, it was seen that when the European settlers came to the new world, they brought the practice of capital punishment. The first recorded execution in the new colonies was that of Captain George Kendall in the Jamestown colony of Virginia in 1608. Kendall was executed for being a spy for Spain. In 1612, Virginia Governor Sir Thomas Dale enacted the Divine, Moral and Martial Laws, which provided the death penalty for even minor offenses such as stealing grapes, killing chickens, and trading with Indians. ^[151]

In the wake of the American Revolution, the U.S. Constitution gave both the states and the federal government the right to set their own criminal penalties. The very first congress of the United States passed federal laws making death penalty for rape and murder and other crimes. ^[152]

Thus it can be seen that the concept of capital punishment has been around for a very long time and has been practiced by many countries.

Effectiveness of the Death Penalty:

The fact that this punishment results in the death of an individual has raised crucial debates as to whether the death penalty should be allowed in today's modern society.

A recent study by Professor Michael Radelet and Traci Lacock of the University of Colorado found that 88% of the nation's leading criminologists do not believe the death penalty is an effective deterrent to crime. The study, 'Do Executions Lower Homicide Rates? The Views of

¹⁵⁰ *Supra*

¹⁵¹ Retrieved from: <http://www.deathpenaltyinfo.org/part-i-history-death-penalty#intro> (on 28th August 2015)

¹⁵² Retrieved from: <http://newindialaw.blogspot.in/2012/11/constitutional-validity-of-capital.html> (on 28th August 2015)

Leading Criminologists', published in the Journal of Criminal Law and Criminology, concluded, "There is overwhelming consensus among America's top criminologists that the empirical research conducted on the deterrence question fails to support the threat or use of the death penalty." [153]

There have also been various Indian cases which have spoken against the capital punishment stating that it was not deterrent and went against the constitution. In a Supreme Court of India case the judgment stated that a

"barbaric penalty of death should not be awarded to any person as it had no deterrent effect; that the penalty of death sentence had a dehumanising effect on the close relations of the victims and it deprived them of their fundamental rights under Article 21 of the Constitution, to a meaningful life" [154]

It has been found that the death penalty does not make communities safer. Wisconsin, which has not had the death penalty for 150 years, has a murder rate that is half that of states like Texas and Florida that use the death penalty frequently. [155]

The murder rate in Canada has dropped by 27% since the death penalty was abolished in that country in 1976, according to Amnesty International sources, and a New York Times survey demonstrated that the homicide rate in states with capital punishment have been 48% to 101% higher than those without the death penalty. [156]

According to Michael L. Radelet and Ronald L. Akers of Northern Illinois University, 84% of current and former presidents of the country's top academic criminological societies reject the notion that research shows any deterrent effect from the death penalty. [157] it is also seen that,

¹⁵³Retrieved from: <http://www.deathpenaltyinfo.org/study-88-criminologists-do-not-believe-death-penalty-effective-deterrent> (on 28th August 2015)

¹⁵⁴ Smt. Shashi Nayar vs. Union of India And Ors 1992 AIR 395, 1991 SCR Supl. (2) 103

¹⁵⁵ Retrieved from:

<http://www.nodeathpenaltywi.org/PDF/Deterrence%20Fact%20Sheet%209%2020%2006.pdf> (on 28th August 2015)

¹⁵⁶ RAYMOND BONNER AND FORD FESSENDEN, "ABSENCE OF EXECUTIONS," NEW YORK TIMES, SEPTEMBER 22, 2000)

¹⁵⁷ Retrieved

from:<http://www.nodeathpenaltywi.org/PDF/Deterrence%20Fact%20Sheet%209%2020%2006.pdf> (on 28th August 2015)

2 out of every 3 law enforcement officers do not believe that capital punishment decreases the rate of homicides. [¹⁵⁸]

Another factor to consider is the fact that once a death penalty is carried out there is no way to reverse it, should an innocent person be given a death penalty there is no way of remedying the punishment.

The concept of Death penalty, according to many scholars goes against the basic right to life that is guaranteed under Article 21 of the Indian Constitution. The fact that Capital punishment forcibly takes away the life of an individual makes it a violation of article 21, Protection of life and personal liberty.

A survey of experts from the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Law and Society Association showed that the overwhelming majority did not believe that the death penalty is a proven deterrent to homicide. Over 80% believe the existing research fails to support a deterrence justification for the death penalty. Similarly, over 75% of those polled do not believe that increasing the number of executions, or decreasing the time spent on death row before execution, would produce a general deterrent effect. [¹⁵⁹]

Landmark case regarding the Constitutional validity of the Death Penalty:

Bachan Singh v. State of Punjab, AIR 1980 SC 898: 1982 (1) SCALE 713: (1980) 2 SCC 684: (1983) 1 SCR 145

Bachan Singh, the appellant in this case, was tried and convicted and sentenced by the Sessions Judge to death under section 302, Indian Penal Code for the murders of Desa Singh, Durga Bai and Veeran Bai. The High Court confirmed his death sentence and dismissed his appeal. He appealed to the Supreme Court by special leave. A Bench of the Supreme Court consisting of Sarkaria and Kailasam, JJ. heard the appeal and directed the records of the case to be submitted to the Hon'ble Chief Justice, for constituting a larger Bench to resolve the question of

¹⁵⁸ Retrieved from: <http://www.nodeathpenaltywi.org> (on 28th August 2015)

¹⁵⁹ M. RADELET AND R. AKERS, DETERRENCE AND THE DEATH PENALTY: THE VIEWS OF THE EXPERTS, 1995 (retrieved from: <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6901&context=jclc> on 29th November, 2015)

constitutional validity of death penalty for murder provided in section 302 of the Indian Penal Code, and the sentencing procedure embodied in sub-section (3) of section 354 of the Criminal Procedure Code, 1973.

The issue in question in the case of Bachan Singh is the Constitutional validity of death penalty for murder. The Judgement highlighted Article 21 which clearly brings out the implication that the Founding Fathers recognized the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. There are several other indications also in the Constitution which show that the Constitution makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Indian Penal Code. Entries 1 and 2 in the Concurrent List of the Seventh Schedule specifically refer to the Indian Penal Code and the Criminal Procedure Code as in force at the commencement of the Constitution. Article 72(1)(c) specifically invests the President with power to suspend, remit or commute the sentence of any person convicted of any offence, and also "in all cases where the sentence is a sentence of death". Likewise, under Article 161, the Governor of a State has been given power to suspend, remit or commute, *inter alia*, the sentence of death of any person convicted of murder or other capital offence relating to a matter to which the executive power of the State extends. Article 134, in terms, gives a right of appeal to the Supreme Court to a person who, on appeal, is sentenced to death by the High Court, after reversal of his acquittal by the trial court. Under the successive Criminal Procedure Codes which have been in force for about 100 years, a sentence of death is to be carried out by hanging. In view of the aforesaid constitutional postulates, by no stretch of imagination can it be said that death penalty under section 302 of the Indian Penal Code, either *per se* or because of its execution by hanging, constitutes, an unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates, it cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile "the dignity of the individual" within the contemplation of the Preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the Basic Structure of the Constitution. Sections 432 and 433 of the Code of 1973 continue sections 401 and 402 of the Code of 1898, with necessary modifications which brings them in tune with Articles 72 and 161 of the Constitution. Section 432 invests the "appropriate Government" as defined in sub-section (7) of that section with power to suspend or remit sentences. Section 433 confers on the appropriate Government power to commute sentence, without the consent of the person sentenced. Under

clause (a) of the section, the appropriate Government may commute a sentence of death, for any other punishment provided by the Indian Penal Code.

Section 354 (3) mandates the Court convicting a person for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, not to impose the sentence of death on that person unless there are "special reasons" to be recorded for such sentence. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.

The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from sections 354(3) and 235(2) of the Code of 1973, namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability; (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also.

That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures *albeit* incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency—a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter.

The case of Bachan Singh held that Section 302 of the Indian Penal Code insofar as it provides for the death sentence as also section 354(3) of the Code of Criminal Procedure, 1973 is constitutionally valid. Exercise of discretion under section 354(3), Criminal Procedure Code should be in exceptional and grave circumstances and imposition of death sentence should only be in rarest of rare case.

Law Commission Report of 2015 on Death penalty:

The Law commission of India in its two hundred and sixty second report in August 2015 dealt with the application of death penalty in India. The Commission clearly stated that there was a need for re-examining the 35th report of the commission that had felt that the death penalty was still required in India, keeping in mind the extensive development and improved living conditions that are seen in present India. With the number of countries who have abolished death penalty as a punishment rising to 140^[160] and the number of countries that have remained “active retentionists”, namely they have executed at least one person in the last ten years, has fallen from 51 in 2007 to 39 (as of April 2014)^[161] there is a severe need to rethink and examine the use of the death penalty in India.

The Commission made an in depth study into the death penalty, tracing its historical aspects as well as highlighting the International perspectives and trends and identifying the justifications used to support the same. However, the Law commission reached the conclusion that the death penalty does not serve its purpose in deterring crime, instead it has caused various infirmities to creep into the legal system as there is inconsistency in application of the death sentence.

The report has also provided the recommendations made by the Law commission where it has clearly stated that in light of the path that the Indian judicial system is heading to with the decreasing reliance on the death penalty and with the development of the rarest of rare principle, it is time to take a step forward and abolish the death penalty for all crimes. However, keeping in mind the concerns of the legislators especially with respect to national security in case of offences related to terror they have recommended an exception, wherein the death penalty would be applicable only for such offences related to terrorism.

Conclusion:

After looking through all the information put forward it is seen that the argument of the death penalty is an effective deterrent does not hold good. It then brings up the question what use does the penalty have? It is clearly proved that the methods used for carrying out the death penalty are cruel and cause a lot of pain to the individuals who are subjected to it.

¹⁶⁰ LAW COMMISSION REPORT No. 262, August 2015 pg. 12. (retrieved from: <http://lawcommissionofindia.nic.in/reports/Report262.pdf> on 29th November, 2015)

¹⁶¹ LAW COMMISSION REPORT No. 262, August 2015 pg. 12. (retrieved from: <http://lawcommissionofindia.nic.in/reports/Report262.pdf> on 29th November, 2015)

It is seen that many scholars and academicians are of the belief that the Death penalty has not been effective in deterring crime. Through their studies it has been noticed that there has been no substantial decrease in the commission of criminal activities that would lead to a death penalty.

In a society that claims to be extremely modern and civilized is there any need to resort to barbaric ways of killing people to punish them for the crime they commit. It would seem that the concept of life imprisonment would be more viable as it takes away many of the rights granted to them, thereby punishing them by taking away certain liberties. There is also a scope to ensure that the wrong person is not put to death.

There have been various cases where there has been reasonable doubt after the individual was executed about their guilt.

When taking all of this into consideration, it is in our opinion, obvious that the Death penalty is not very effective. Instead it has quite a few drawbacks and tends to be quite inhumane and should therefore be discouraged from being used.



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