

CAPITAL PUNISHMENT IN INDIA: WHETHER IT IS SERVING ITS DETTERENT PURPOSE?

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ABSTRACT

Capital punishment remains a contentious issue of our time, with passionate supporters and detractors, which is as it should be, since justifying the state's power to take away a citizen's right to life is indeed a crucial enough issue that it should be debated vigorously to ensure that such a weighty power is not handed over lightly. This paper seeks to contribute to this impassioned debate by laying out arguments for the justification of capital punishment as an effective and indispensable mode of punishment in the rarest of rare cases. The legitimacy of capital punishment is argued not only by presenting abstract arguments but also through case laws that substantiate its practicality. Even the manner in which the Rarest of Rare principle to be made applicable has been discussed analytically and finally the critical analysis has been portrayed with logical reasoning.

INTRODUCTION TO THE CONCEPT OF "CAPITAL PUNISHMENT"

Capital punishment, also known as death penalty, is the execution of an offender who is sentenced to death after conviction by a court of law for a criminal offense. Capital punishment should be distinguished from extrajudicial executions carried out without due process of law. The phrase death penalty is sometimes used interchangeably with the term capital punishment, though infliction/imposition of the penalty is not always followed by capital punishment (even when it is upheld on appeal), because of the likelihood of commutation to life imprisonment¹. The term "Capital Punishment" stands for most stern/stringent form of punishment. It is the kind of punishment which is to be awarded for committing the most heinous, detestable and grievous crimes against humanity. While the definition and scope of such crimes vary from one nation to another nation, state to state, age to age, however the implication of capital

punishment has always meant to be death sentence. By common usage and practice in jurisprudence, criminology and penology, capital sentence means a sentence of death.

LEGITIMACY OF CAPITAL PUNISHMENTⁱⁱ

The author of the current articleⁱⁱⁱ is of opinion that Capital punishment is an ancient practice and is supposed to be employed for its deterrent effect on criminals. However, many detractors see the practice as draconian and illegitimate and seek to eradicate it. Those who support it point out its necessity in maintaining law and order in society and take the help of deterrence theory to justify their stance. This theory stipulates that the motive behind awarding punishment is to deter potential/future criminals from committing similar crimes. Humans have a natural, primal, and undeniable instinct for self-preservation, which is why capital punishment is the most feared sentence, and thus serves as a perfect tool of deterrence. If people realize that death is a possible consequence for their actions they are less likely to act on their criminal inclinations.

However before relying on the fact of deterrence theory it must be critically analyzed that first being-what good is deterrence theory if it is not applicable in real-life scenarios & doesn't deter future/ potential criminals from committing crimes? Thus, there is a need for systematic studies to analyze whether the deterrent effect of capital punishment is greater than that of life imprisonment. And secondly the morality factor, the constitutional validity, the reformation factor, the rarest of rare situation must be taken into account while awarding the stringent/harsh punishment of death penalty which is otherwise known as Capital Punishment.

^{iv}Ernest van den Haag, a professor studied the question of deterrence thoroughly & stated that capital punishment is expected to deter more potential criminals from committing crimes than any other sentence because people fear death more than anything else.^vWhat the participants of society fear most is death authoritatively imposed by law & scheduled by the courts. Thus, the threat of death may deter certain murderers who otherwise would have preferred taking the wrong path due to lighter and more bearable consequences. Capital punishment is certainly the only form of punishment that could prevent or deter those under life imprisonment from killing anyone, guard, or any other individual. Merely giving the sentence of life imprisonment does not protect society from repeat offenders from committing crimes once their sentence is over.

Capital punishment is the surest way of preventing this, especially considering cases in which rapists rape again after their prison sentence gets over.^{vi}

Although the author received acceptance from research of criminologists named Issac Ehrlich who favored it, whose research highlighted that for every death penalty given seven lives are protected because of the deterrence effect that it has.^{vii} But as far as the morality factor is concerned, murderers don't forfeit their right to life by voluntarily ending the life of another person. And moreover it is indeed necessary to take into consideration the constitutional validity of the application of Capital Punishment. So the first step is to gauge whether capital punishment is justified and further examine its constitutional validity. The Article 21 of the Indian Constitution secures the fundamental right to life & liberty. It says that no person shall be deprived of his life or personal liberty except according to the procedure established by law. This has been legally interpreted to mean that if there exists a procedure that is fair and licit, then the State by formulating a law can deprive a person of his life. Thus, capital punishment is consistent with the constitution of the country. The government has constantly assured it's people that it keeps the death penalty in the statute books to deter potential/future criminals from any wrongdoing and is strictly meant for those who are a threat to the society. Examining a series of cases to ascertain if awarding the death penalty violates any fundamental rights like article 21 of the Indian constitution is the most constructive way of resolving the apparent contradiction between the fundamental rights like the right to life and capital punishment.

In *Jagmohan Singh v State of Uttar Pradesh*^{viii}, it was argued that the death penalty violates certain freedoms given to the citizens of India through the Constitution under Article 19 & that power bestowed to the judges was in violation of article 14 of the Constitution. Five judges bench dismissed the arguments presented before it, and advocated the constitutional validity of the death penalty & held that the death penalty is awarded after the completion of trial which was conducted per the rules and regulations as provided under Criminal Procedure Code & Indian Evidence Act, making death penalty awarded by courts completely constitutional. To support its decision Court relied on 35th Law Commission Report, 1967 & further relied on the fact that Parliament rejected the bill which called for the abolition of the death penalty not once but four times.

In *Sher Singh & Ors v State of Punjab*^{ix}, bench of three judges stated that the death penalty is constitutionally valid & admissible within the restraints of the rule of *Bachan Singh*.^x

The issue of constitutional validity of the death penalty arose in the case of *Rajendra Prasad Vs. State of UP*^{xi}. The Hon'ble Court was asked to look into the situations in which capital punishment could be awarded. Even though the judgement dispensed in *Rajendra Prasad* was overruled by the bench presiding over the *Bachan Singh* case, the principles put forth by Justice Krishna Iyer are noteworthy here.^{xii} It can be seen that Section 302 of the Indian Penal Code empowered judges to either award capital punishment or life imprisonment on the individual on trial for the crime of murder without specifying any regulations to be followed. Justice Iyer further specified that unregulated discretion to the judges in cases that are a matter of life & death was too high a risk. This is so because once the judge passes the judgement of capital punishment, it is irreversible. The capital punishment was said to violate a number of constitutional provisions like the Preamble, Article 14, 19, 21, Part III & Part IV. Finally, stress was put on its limited application & Court stated that under Article 19, the Court could award death penalty only when it is absolutely required.

Although the author has stated a valid point in his article ^{xiii}“Every right like the right to life is accompanied with corresponding duties, thus, it is not outside the realm of imagination to state that by committing a heinous crime, the murderer's act makes it morally permissible for the state to forfeit their duty to protect the correlative right to life of that criminal by not killing them, as the act has already made the criminal forfeit his right to life as stated above. Thus capital punishment cannot be considered as a violation of offenders' right to life or morality as the offender forfeited that right the moment he took the right to live from another individual. The death penalty is an ethically acceptable way to handle hardcore offenders to protect other members of society”.

But the above mentioned author has not taken into consideration about the main objective of sentencing, main objective of awarding legally sanctioned punishment is to reform the offender/convicted person through individual treatment as stated by the author in the article^{xiv}. The main aim of the reformatory theory is to educate or reform the offender by himself. An

offender is punished for his own benefit^{xv}. This theory has been supported from various sides. Reformatory theory of punishment supports criminology. Criminology says every crime is a diseased phenomenon, a mild form of insanity, criminal anthropology, criminal sociology and psychoanalysis supports Reformatory theory. This theory aims to correct the criminal minds into a good manner and they can lead a life like normal citizen. This theory criticises all kind of corporal punishment.

1. Criminal Anthropology :The modern criminal anthropology says crime is a disease. Criminal anthropology says it is necessary to treat a criminal instead of punishing him. Hospitals and welfare homes are better adoption place to decrease crime than prisoners. Some crimes happened by the normal persons due to willful violation of moral law. Sometimes crimes are caused due to mental or physical defect.
2. Criminal sociology: Criminal sociology says to improve social and economic conditions to remove inequalities, than to punish the criminal. Punishment cannot change the crimes and crimes can be changed by justice and equality.
3. Psychoanalysis: psychoanalysis is related to criminal anthropology and criminal sociology. Psychoanalysis support reformatory theory. Instead of punishment, education and psychoanalytic treatment is needed for preventing crimes.

Reformatory theory is superior among theories of punishment.

However the authors of the article “A Critical Study on Capital Punishment in India”^{xvi} has clearly emphasized on the fact that India pursues Preventive theory of Punishment for the prevention of crime and have given valid arguments to support the fact that preventive theory explains Capital Punishment as the most severe form of punishment because of its detriment effect and the main purpose of preventive theory is to take steps that accused person does not repeat the crime after enjoyment of Punishment. A man has taken the life of another man, so he is responsible to be deprived of his life.

CAPITAL PUNISHMENT IN INDIA: A RAREST OF RARE DOCTRINE

The author of the article “Capital Punishment-A Comparative Study”^{xvii} emphasized that in India, the case for death penalty/Capital Punishment is decided by relying upon the doctrine of “rarest of the rare test” which was stated in the case of *Bachan Singh V. State of Punjab*^{xviii}. Which means that death penalty will only be awarded in rarest of rare cases only⁴. Further, in the case of *Macchi Singh & Others V. State of Punjab*^{xix} - the Three Judge Bench followed the decision of *Bachan Singh* and stated that only in rarest of rare cases when collective conscience of community is in such a way that it will expect the holders of the judicial powers to inflict capital punishment then it can be awarded if-

- 1.) When the murder is committed in an extremely brutal, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
- 2.) When a murder of a member of a Scheduled caste is committed which arouse social wrath.
- 3.) In case of “Bride Burning” or “Dowry Death”.
- 4.) When the crime is enormous in proportion.
- 5.) When the victim of murder is-
 - An Innocent child
 - A vulnerable Women or a Person rendered unaided by mature epoch or illness.
 - Once the injured party is an individual in relation to whom the slaughterer is in point of authority or reliance.
 - As soon as the injured party is a civic figure as well as murder is committed for political or similar reason rather than personal reason.

The author also enlisted the fact that The Law Commission in its previous review in the year 1967, concluded that India couldn't risk the “experiment of abolition of capital punishment”.

But however in 2015 the Commission stated that “the commission feels that the time has come for India to move towards abolition of the death penalty”. Despite the fact that death sentences are rarely executed in India, still the commission suggested that the penalty should be abolished.

The commission gave following reasons:-

- 1.) Times have changed.

- 2.) It's not a Deterrent.
- 3.) India's justice system is flawed.
- 4.) Rate of Execution is very low in India and Commutation of Capital Punishment provision in India empowers the Governor of any State and President of India to award pardons, reprieves, respites or remissions of penalty or to suspend, remit or commute the sentence of any person convicted of any offence^{xx}.
 - (a) in all cases where the punishment or sentence is by a Court Martial;
 - (b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union/State extends;
 - (c) in all cases where the decree is a verdict of fatality.

In India, the concept of death penalty is present but there were only 7 executions done from year 1998-2018. And in the past 14 years only 4 have been hung till death:

- 1.) Dhananjay Chatterjee (August 14, 2004).
- 2.) Mohammad Ajmal Amir Kasab (November 21, 2012).
- 3.) Afzal Guru (February 9, 2013).
- 4.) Yakub Memon (July 30, 2015).

So the author of this article ^{xxi} is of the view that the concept of capital punishment is ancient and barbaric and should be abolished as it involves killing of a human being which is immoral as life is precious and death is irrevocable. Democracies should thrive more on reformatory theory rather than deterrent theory as it provides a chance of improvement which can change the life of an individual and can offer him a chance to get back in the society and hence reformatory theory has its advantage over deterrent theory.

ANALYSIS AND CONCLUSION

"Life is precious and death is irrevocable"

When a death penalty is awarded to the accused it is more than mere a punishment, we are ending or killing a person in name of justice and law. Killing a person is immoral and it demonstrates the lack of respect towards human life. And opposing death penalty doesn't mean that someone is supporting the criminal. When a death penalty is awarded it eliminates the scope of improvement which could have changed the life of an individual, this is the reason why democracies around the world are supporting reformatory theory of punishment and abolishing deterrent theory of punishment.

“Even the vilest criminal remains a human being possessed of common human dignity” as a result one be supposed to esteem each one and all individual . We are no one to decide who gets to live and who gets to die on the basis of rules and regulations which we made ourselves. It is true that a criminal needs to be punished for the crimes he committed but we as a civilization need in the direction of eliminate the offense not the illegal. This is the main difference between human being and animals. We have been given a precious gift – ‘we are human’ and killing another human being falsify the mere purpose of being a human being. We call ourselves a ‘civilized society’ but we kill another human being in the name of justice. The principle of death penalty is based on deterrent theory which in generic terms set an example by inflicting fear on the mind of others but there are certain other ways by which a leading example can be set such as in reformatory theory.

Many countries have abolished capital punishment. When we look at our India's national crime statistics capital punishment has not proved to be deterrent for doing offence, the crimes rates are increasing only. We have to reform our laws especially for death penalty in India. Our laws should reform and the punishment should be so rigorous that it should be an example for people around him, about his unlawful acts. There is a punishment worse than death penalty i.e. to make the offender continuously realize each day and night the sufferings, hardships, isolating him from the societal life and educate him, make him believe that the repercussions of heinous crime is so tormenting, so that in this manner his reformation will be done and he'll be ready to be restored back to society. The capital punishment is not effective to reduce crimes in Society.

Elaborate & precise statutory laws should be laid down. There are certain judicial precedents regarding what kind of cases qualify as rarest of rare cases, however, without a clear and definite law coming from the legislature, there is too much judicial discretion available to judges adjudicating on capital punishment. The death penalty/capital punishment is a severe mode of punishment, and as such should not be left up to judicial discretion. The death penalty is a severe and irreversible form of punishment and hence should only be awarded after the most rigorous analysis of the aggravating and mitigating circumstance, to ensure that it is truly given in the rarest of rare circumstances, as this is a punishment that should not be given lightly or in haste.

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