

IS DEATH PENALTY A TERROR DETTERENT? AN OVERVIEW OF DEATH PENALTY IN INDIA

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The Death penalty is a process, where the life of a person is taken by the State by following the due procedure of law and is basically the lawful infliction of death as a punishment for a wrongful act. Capital punishment or death penalty is, given for the most heinous of crimes. During recent times, there has been a global trend to abolish the capital punishment because of the issues like retribution justified and deterrent effect successful in providing justice remains a debatable issue. The cost of execution of an accused is again debatable and is considered among other various reasons whether to execute or not. The proponents and opponents argue if it leads to cruel and unusual punishment violating a nation's constitution. However, India has yet not abolished the capital punishment (though the Court awards the capital punishment in rarest of the rare case). The capital punishment is different or unique from other form of punishment, is because of the nature of irreversibility attached to it. If any error has been committed to awarding the death penalty or if there has been some mistake to reach the judgement, it cannot be undone after the person has been executed. (Many countries and their respective judicial system give this argument for abolishing the capital punishment.)

Although the death penalty has existed from time immemorial, the movement to abolish it has gained a lot of momentum in the recent times. This movement can be traced back to the works.¹ Cessare Beccaria, one of the great criminologist, who convinced many people that death penalty should be abolished because it is inhuman, useless and a public assassination. In the year 1846, Michigan became the first State to abolish the capital punishment, followed by Portugal and Venezuela in 1867. Abolition of the death penalty was also supported by the United Nations during the drafting of Universal Declaration of Human Rights in the year 1948. Around the world, 58 countries still awards capital punishment. 102 countries do not award capital punishment for any crime, i.e. total abolition². In the recent years, according to the reports of Amnesty International China, Iraq, and Iran have awarded highest number of death penalties. In Europe, the death sentence has been almost abolished completely, except The Republic of Belarus retaining it.

¹ Dei delitti et DellePene (On Crimes and Punishment), written in 1764

² <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140#1976>

HISTORICAL BACKGROUND

The Death Penalty has been given to the wrongdoers since time immemorial. In the 18th century, the code of King Hammurabi of Babylon codified the death penalty for twenty five different crimes, although murder was not one among them. The first death penalty, historically recorded was in 16th century in Egypt, where the wrongdoer was accused of magic and was ordered to take his own life. In 14th century BC, the Hittite code had death penalty for heinous crime and so does the Draconian code of Athens in 7th century BC, wherein the Draconian law provided death penalty for every crime committed. In 5th century BC, the Roman law of twelve Tablets codified death penalty. The most infamous execution of history occurred approximately 29 AD with the crucifixion of Jesus Christ outside Jerusalem. Later, after 300 years, the Emperor Constantine abolished crucifixion after converting into Christianity. Through the 19th and 20th centuries, more and more capital punishments were abolished, not only in Britain, but also all across Europe. The first recorded execution in America took place in 1608, Daniel Frank was the accused and execution was held in Virginia for the crime of theft.

AROUND THE WORLD

From time immemorial, there had been attempts made in different judicial system globally to liberalize capital punishment and reduce the number of crimes for which capital punishment may be given. The present scenario focuses on whether capital punishment should be totally banned. Many nations of the world have completely banned capital punishment from their penal code. Yet, there are nations who still follow the system of capital punishment and support it. More than two thirds of the countries in the world are in favour of abolishing death penalty in law and practice.

PRESENT CONDITION IN INDIA

In India, constitution is the ground norm, the supreme authority, is the touchstone for all the laws made. Article 21 of the Indian Constitution titled 'Protection of life and personal liberty' says:

No person shall be deprived of his life or personal liberty except as according to procedure established by law.

This article of the Constitution enshrines the Right to Life guaranteed to every individual in India. The constitutional validity of capital punishment has been questioned several times in the Indian judiciary.

The Indian Penal Code, 1860 awards death sentence as a punishment for various offences. Some of these capital offences under the IPC or the offences which are punished with death penalty are:-

- Criminal conspiracy (s. 120B)
- Murder (s. 302)
- Waging or attempting to wage war against the Government of India (s. 121)
- Abetment of mutiny (s.132),
- Dacoity with murder (s. 396) and others. Apart from this there are provisions for death penalty in various legislations like the NDPS Act, anti – terrorism laws etc-.

The validity of death penalty is again supported under Art.21 of the Constitution as an alternative punishment. But the punishment of death penalty is only to be provided only in cases of exception, rather being used as a rule and is imposed only in the ‘gravest of cases of extreme culpability’ or ‘rarest of the rare’ cases. This is because the State has the right to deprive a person from his life or personal liberty in accordance with fair, just and reasonable procedure as being stated in the Art.21 as ‘according to the procedure established by law’. Thus, provision established in the Criminal Procedure Code for imposing capital punishment does not adhere unfairness and unreasonable code. Supreme Court in the case of *Allauddin Mian*³, reiterated that only in exceptional cases where the crime is so brutal as to shock the collective conscience of the community, would be permissible to award death sentence. Again in *Machhi Singh v. State of Punjab*⁴, the Supreme Court held that capital punishment need not be inflicted except in the rarest of the rare cases and stated life imprisonment to be a rule and death penalty an exception. Further, Supreme Court laid down guidelines for determining rarest of the rare cases for awarding death penalty.

1. Whether there is something uncommon about the crime which renders life imprisonment sentence inadequate and calls for a death sentence?

³ Allauddin Mian v. State of Bihar, 1989 SCR (2) 498

⁴ Machhi Singh v. State of Punjab, (1983) 3 SCC 470

2. Whether the circumstances of the are such that there is no alternative but to impose death sentence even after giving maximum weightage to the mitigating factors ,which speak in favour of the offender?

The Indian Constitution has provision for clemency of capital punishment by the President. Once the Sessions Court has awarded death sentence to a convict in a case, it must be confirmed by the High Court. Even after that the convict may prefer an appeal to the Supreme Court. If this also fails the accused is always open for submitting a 'mercy petition' to the President of India and the Governor of the State. Detailed instructions regarding procedure is to be observed by the states for dealing with petitions for mercy from or on behalf of convicts under sentence of death and with appeals to the Supreme Court and applications for special leave to appeal to that court by such convicts are laid down by the Ministry of Home Affairs.

Similarly the pardoning powers of the Governor of a State are mentioned in Article 161. These provisions ensure that the accused is sentenced to death only after there is no room for error left. The culprit gets multiple avenues to appeal and now life imprisonment has become the rule while death sentence is the exception.

DISCUSSION OF LANDMARK CASES DEALING WITH DEATH PENALTY

In the judicial pronouncement of *Ediga Anamma v State of Andhra Pradesh*⁵, Justice Krishna Iyer commuted the death sentence of the accused to life imprisonment considering mitigating factors like gender, age and socio-economic background of the accused. In this case, the Court held that apart from looking into the circumstances of the crime, the Court should also look into the socio, economic condition of the accused. This case was followed by some important developments. Section 354 (3) was added to the Code of Criminal Procedure, 1973 which stated that in cases where capital punishment was being awarded, the Court has to give special reasons for it. This made life imprisonment a rule, and death penalty an exception, which was the other way round earlier.

In the case of *Jagmohan Singh v. State of Uttar Pradesh*⁶, the question on the constitutional validity of death sentence had been challenged before the Supreme under Art14, Art19 and Art 21. It was argued that right to live; under Art.19 is a base to the enjoyment of all the

⁵ Ediga Anamma v State of Andhra Pradesh, AIR 1973 S.C. 774

⁶ Jagmohan Singh v. State of Uttar Pradesh, 1973 1 SCC 20

freedoms and thus, freedom to live could not be denied by a law unless it is reasonable and is in public interest. The Court's response to this argument was that assuming the arguments to be correct, Sec. 302 of IPC, which prescribes death sentence for murder, passes this test. Therefore it is difficult to say that capital sentence as such is unreasonable or not in public interest. Adequate procedural safeguards have been provided to the accused under the Criminal Procedure Code.

In 1979, India also became a signatory to the International Covenant on Civil and Political rights (ICCPR)⁷. In the case of *Rajendra Prasad v State of U.P.*⁸, the Apex Court, stated that the question whether capital punishment should be abolished or retained was a question for the Legislature and not for the Courts to decide. Here the constitutional validity of the death penalty questioned was upheld. The court here agreed with the propositions that, as death penalty finally deprives the accused of his right to life and other fundamental rights, the validity of such punishments can be tested with reference to Arts. 14, 19 and 21 of Indian constitution.

The case of *Bachan Singh v State of Punjab*⁹ again brought up the question of the validity of capital punishment and in this case, the doctrine of "rarest of the rare" was formulated. The five Judge Bench stated that the taking of human life shouldn't be encouraged even in the form of punishment except in "rarest of the rare" cases where no alternative method can be used and is foreclosed.

When the validity of capital punishment was questioned, the bench (majority decision) opined that capital punishment did not violate either Article 19 or Article 21 of the Constitution. They also pointed out to the fact that the makers of the Constitution were fully aware that the capital punishment may be awarded in some cases, and it was proved by the existence of the provision of appeal and provision of pardoning powers of the President and the Governor. It was also laid down that mitigating and aggravating factors should be considered while deciding the matter.

⁷ Article 6(2) of the ICCPR says: "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 the Convention on the Prevention and Punishment of the Crime of Genocide."

⁸ *Rajendra Prasad v State of U.P.*, 1979 3 SCR 646

⁹ *Bachan Singh v State of Punjab*, AIR 1980 SC 898

In the judicial pronouncement of *Mithu v. State of Punjab*¹⁰, mandatory death sentence, under Section 303 of IPC was declared unconstitutional and deleted from the IPC. This section was based on the logic that any criminal who has been convicted for life and has committed a murder while in custody is beyond reformation and do not deserve to live.

The case of *Macchi Singh v State of Punjab*¹¹ elaborated the doctrine of “rarest of rare.” The Court gave guidelines regarding the factors to be considered when deciding the issue that, whether the case falls under the category of “rarest of rare” or not.¹²

The following are-

1. **Manner of Commission of the Crime:** The Court stated that if the crime were committed in extremely brutal and diabolic manners so that it arouses the intense indignation of the society, it would fall under the rarest of the rare case.
2. **Motive for Commission of the Crime:** When the crime is committed in furtherance to betray the nation, or assassins are hired to kill the victim, or any deliberate design is made to kill the victim in a cold-blooded manner, it'll also fall under the said category of rarest of the rare.
3. **Magnitude of the Crime:** When the crime is humongous in proportion, for example, killing all the members of the family or a locality is done.
4. **Socially Abhorrent Nature of Crime:** When the crime is such that it is socially abhorred, such as killing a person belonging to the backward classes of the community, or burning of a bride in case dowry wishes are not met, or murdering a woman to remarry again.
5. **Victim of the Crime:** If the victim of the crime is a small child, who couldn't have provided any reason to the accused to commit the crime, or the crime is committed against a helpless woman, or an old person, and if the victim was mentally challenged, or the victim was a public figure who was loved by the society, the crime will fall under rarest of the rare case.

¹⁰ Mithu v. State of Punjab, (1980) 2 SCC 684

¹¹ Macchi Singh v State of Punjab, (1983) 3 SCC 470

¹² <http://blog.ipleaders.in/capital-punishment-india-overview/>

In the case of *Allauddin v State of Bihar*¹³, the Court stated that in case the Court was unable to give a special reason for awarding the capital punishment, the Court should go for a lower sentence.

In the case of *Kehar Singh v Union of India*¹⁴, Assassins of the then Prime Minister, Indira Gandhi, were sentenced to death. Kehar Singh was one of the conspirators who took part in the planning of the murder but did not commit it. The Court stated that even this fell in the rarest of rare category.

The case of *Santosh Kumar Bariyar v State of Maharashtra*¹⁵, is one of the landmark cases where a major step towards abolition of the death sentence was taken. In this case, the accused along with three other people kidnapped a person and then demanded a ransom of 10 lakh rupees. When the demands were not met, the kidnappers killed the victim and chopped his body into pieces and then disposed of the victim's body by throwing, the pieces at various locations. Although the manner in which the crime was committed was extremely brutal, the Court considered the mitigating factors and opined that the case was outside the ambit of "rarest of the rare" category. The reasoning of the Court was that the accused were not professional killers, and they committed the crime with the sole motive of collecting money. The Court opined that in such circumstances, there was a chance that they might be reformed and opted for the lesser punishment of life imprisonment.

In the year 2012, the judicial system had to suffer two major embarrassments. The first instance was when fourteen retired judges asked for thirteen cases of capital punishment to be commuted admitting that the capital punishment was awarded out of ignorance or error in these cases. The second instance was where, the then President Pratibha Patil commuted the death penalty of a convict to like imprisonment, and it was later known that he had already died five years previously.

Law Commission Report –

A discussion on death penalty cannot be complete without taking into consideration the 36th Report¹⁶ of the Law Commission of India, which was submitted by the Law Commission in 1967. The Report stated that the issue of abolition or retention of capital punishment should

¹³ *Allauddin v State of Bihar*, AIR 1989 SC1456

¹⁴ *Kehar Singh v Union of India*, AIR 1962 SC 955

¹⁵ *Santosh Kumar Bariyar v State of Maharashtra*, JT 2009(7) SC 248

¹⁶ <http://lawcommissionofindia.nic.in/reports/report262.pdf>

be decided after balancing the arguments given in favour and in against of death penalty. A single factor cannot decide the question of abolition or retention of death penalty in the country, all the factors has to be considered. The Report also vocally stated that the question of protecting the society to be given prime consideration while deciding the issue.

The Commission considered strong arguments given for abolition of capital punishment. They considered the concept of irrevocability attached with the punishment of a death penalty. Nor did they ignore the fact that capital punishment was very severe, and a modern approach was required to deal with criminals. But considering the state of the nation, the Commission stated that, having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

FACTORS TO BE CONSIDERED FOR GIVING DEATH PENALTY

Overview of Aggravating and Mitigating Factors

If a judge or jury finds a defendant guilty at the end of a criminal trial, the court must determine the defendant's punishment. State and federal criminal statutes often set maximum penalties based on the offense classification, with felonies having the most serious possible punishments. Judges have some discretion with regard to sentencing, and a sentencing hearing allows both prosecutors and defendants the chance to present evidence for the court to consider.

Aggravating Factors

Prosecutors can offer evidence of aggravating factors that would merit a harsh sentence during trial. Criminal statutes often identify specific factors that should result in harsher punishments. A common aggravating factor is a prior record of similar convictions. Other aggravating factors typically relate to the circumstances of the offense itself, such as the use of a weapon or the severity of the injuries suffered by a victim. With the exception of prior convictions, a court may not use aggravating factors to impose a harsher sentence than usual unless the jury found those factors to be true beyond a reasonable doubt.

- **Repeat Offenses:** A court may impose a harsher penalty on a defendant with multiple prior convictions. In states that have a “three strikes” law, such as California, a relatively minor offense may result in a lengthy jail or prison term if the defendant has two or more prior convictions. In India system of Habitual offender is taken into consideration.
- **Vulnerability of Victim:** In some jurisdictions, court may impose a harsher sentence if the victim is found to be vulnerable, either according to an objective standard or in relation to the defendant. Vulnerability based on age, such as a crime of violence against a child or a fraudulent scheme targeting the elderly, may be an aggravating factor. Other factors may include physical or mental disability, illness or injury, and incapacitation.
- **Leadership Role:** If the defendant played a prominent role in a criminal scheme, such as a leadership or managerial role or he was the main outline of the crime, some jurisdictions allow courts to consider that as an aggravating factor. This is particularly true if the defendant influenced or controlled others involved in the offense.

Mitigating Factors

The defence may put on evidence of mitigating factors that would support leniency in sentencing. Criminal statutes devote far less attention to factors that might mitigate a defendant’s punishment, but courts have held that evidence relating to a defendant’s character may be introduced provided that it is relevant to the sentencing process. As stated in *Lockett v. Ohio*¹⁷, Common mitigating factors include:

- Social and economic background
- Lack of a prior criminal record
- Culpability of the victim;
- Circumstances at the time of the offense, such as provocation, stress, or emotional problems that might not excuse the crime but might offer an explanation;
- Past circumstances, such as abuse that resulted in criminal activity;
- Minor role in the offense

¹⁷Lockett v. Ohio, 438 U.S. 586 (1978)

- Mental or physical illness; and
- Genuine remorse.
- Educational background

CONCLUSION

The penal system of any country or states is based upon its punishment system. The basic concept behind punishment is that it should discourage people committing crimes; it should give a deterrent effect. If the punishment is inadequate, it will not act as a deterrent. And all cases involving political assassinations, terrorism, or pre-planned mass murder of any kind are deserving of the death sentence. Keeping such criminals alive poses greater dangers to society and it outweighs the moral compunctions involved in hanging them. The case for keeping such criminals alive after such conviction is based on flawed reasoning. Even, Arun Jaitley, the present finance minister and an eminent lawyer himself, has publicly defended his government's position that death penalty should stay. He articulated his government's stand by stating that India faced different law and order situation, as compared to those prevailing in many developed countries such as the US and EU as a whole. He further stated the fact that none of the countries faced the kind of threat emanating from cross border terrorism. And as the country has to deal with militant and terror attacks in J&K, Maoist attacks in state like Chhattisgarh, MP, AP, the insurgency in the north east etc. And talking about the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.