

CAPITAL PUNISHMENT: AN INTERNATIONAL AND INDIAN PERSPECTIVE

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ABSTRACT:

Capital punishment or death penalty is the highest level to punish a person or to the society and to maintain law and order. But is it justifiable for society? Killing someone in the name of justice is also killing of another human being and infringing his human rights. In India, there are no specific provisions written under constitution to make capital punishment constitutional or unconstitutional. But still India followed the doctrine of Rarest of the rare rule to execute few life imprisonments. Starting from Bachchan Singh's case till now the argument of it being constitutional or not is on. There has always been a debate between retentionists: who supports capital punishment and abolitionists who is against capital punishment. The death penalty infringes the most basic human right of an individual as stated "right to life" in the Indian constitution. Is it immoral still arises a question of fact?

Keywords: Capital punishment, Constitution, Death sentence, Murder, Abolitionists, Retentionists.

1.INTRODUCTION

In India, the nation has huge number of crimes which leads to lot number of criminals. But the punishments are also given accordingly based on the intention of the wrongdoer as well as wrongful act. There are different types of punishments for example capital punishment, imprisonment, imprisonment for life, fine etc. The main purpose of punishment is to make the wrongdoers suffer, to give justice to the victims and demotivate others who are like minded to wrongdoer. Punishment is a compulsion to enforce the "Law of Land". The state has obligation to punish the offenders to maintain law and order among citizens.

One of the most important aspect of the criminal justice system of India is death penalty. The capital offences are the offence which brings capital punishment. The word "capital" come from the Latin word "Capitalis" which means head. Capital punishment is a punishment given for most heinous offences against humankind. It basically means a legal killing of a wrongdoer for committing certain crime which are prohibited by law. Death penalty is given by the state on account of the offences which is committed as a heinous crime. Death penalty given for the most heinous offence varies from state to state or nation to nation. Different countries have different opinions regarding death penalty with different laws. There has been always a dispute for death penalty as whether it is

served as justice or it is an infringement of human rights. The arguments are still on. Many human rights movements has been taken for influence of human rights over death penalty.

In India, the death penalty is given for murder, robbery with murder, waging war against the legislature and abetting mutiny, etc. and apply doctrine as 'Rarest of Rare' case which means at the last stage where the court concludes imprisonment for life as insufficient as per circumstances given under case. The President and Governor of India, on the other hand, have the discretionary power to suspend or pardon death penalty under the Indian constitution.

2. ORIGIN OF CAPITAL PUNISHMENT

The death penalty was first codified in King Hammurabi of Babylon's code in the 18th century B.C, for a total of 25 crimes. At that time punishments were served such as burning alive, drowning, beat till death. The customary method of hanging till death came up into 10th century A.D in Britain.

The capital punishment is very old as human beings are. In western world, death penalty was given for blasphemy seems to be "Law of mosses". In 1179 B.C, murder was a capital crime in most of the countries including India which have epics as Ramayana and Mahabharata which includes punishment as vadha-dandha means amputation bit by bit. Fourteen modes were mentioned to amputation of criminals till death.

In the beginning capital punishment was given on basis of religion and morality but after the societies have kingdoms and criminals changes accordingly. Then, offences against king is more serious and along with religion and morality, political offences is also added. Capital offences were defined as crimes against property and the human body with the advent of industrialization and civilization. In modern times, capital offences include drug trafficking, hijacking planes, bribery and so on. Retributive theory, deterrent theory, preventive theory, and reformatory theory are the four types of punishment theories. It has been categorized in two groups as those who supports capital punishment with a motive of peace in world as it acts deterrent to offender are called retentionists and who is against capital punishment and believe that it is a failure of deterrent as such no impact is they're upon society and the offenders are known as abolitionists. Further they believe that the punishment is mostly given to the poor, minority, uneducated. This has created heated argument between abolitionists and retentionists around the world which also has mentioned and discussed human rights of the offenders. UDHR gave criticism about death penalty and suggests an alternative punishment to it. Due to this, it gave spotlight to the abolition of capital punishment and many countries abolished death penalty but there is no less number in execution of deaths. Even after so many human rights movements still there was no change in execution of death.

Capital punishment has been used in India since time immemorial. It predates the Hindu society. In India, criminal justice administration does not appear to have arisen until the Smriti period as an inherent element of the sovereign duty of the state. Smritis, notably Manu, are credited, followed by Kautilya's Artha Shastra

In Buddhists also, there was an occurrence of death penalty. In Idu Batuta, one of the writings, painted picture of India which shows capital punishment is for offences related moral turpitude.

In the traditional Muslim criminal law, the death penalty was imposed for crimes such as public disorder, highway robbery, extortion based on the collection of public taxes, and, of course, murder. The Britishers interfered little bit in Muslim penal code and motive found to be the most important component for committing offences. The case of Nand Kumar is the best example of miscarriage of justice.

In 1846 the Indian penal code was prepared and it was adopted on 6th October 1860, where offences for capital punishment was mentioned. The method in which the execution was carried out was found to be in violation of the 80th Amendment's prohibition on cruel and unusual punishment. The death sentence was challenged in Wilkerson 1 and Kemmler 2 as "cruel and usual" punishment since it was carried out by gunshot and electrocution. In both the case, the court dismissed the claim, ruling that the manner did not violate the guarantee guaranteed by the eighth amendment.

In terms of the Indian Supreme court, multiple times after the country's independence, bills were introduced in both houses to change the law governing capital punishment. They were all turned down, claiming that the time was not yet right to abolish capital punishment in this country. After attempts failed to abolish death penalty in both houses, like the US famous case of Furman held the death penalty unconstitutional in the Supreme Court, the abolitionists did the same thing by appealing in the Supreme Court as their last hope.

The Supreme Court, on the other hand, concluded in Jagmohan's case that the death penalty is legally permissible and does not contradict the essential rights guaranteed by article 14,19,21.

3. CONSTITUTIONALITY OF DEATH PENALTY:

DOCTRINE OF RAREST OF RARE

The capital punishment in India is based on this doctrine of the rarest of rare cases. Accordingly, sentence of death of the offender is based on the crime test which should be fully satisfactory without any favor to the accused. The court should consider few important factors as motive and manner of committed crime, society's abhorrence, personality of the criminal, extreme indignations to certain crime such as rape of minor girls etc. The court gives death penalty on demand of its constitution compulsion of the case as the will of the society.

The concept of doctrine of Rarest of Rare was first introduced in landmark case of *Bachchan Singh v.State of Punjab*(AIR 1980 SC 898), in which the question of constitutionality of the death penalty arise among the constitution bench for murder which is charged under section 302 of IPC. The session court sentenced death penalty to the appellant in criminal appeal who was convicted for 3 murders. After appealing in the High court, it also sentenced him to death. Special Leave appeal was file in Supreme court which raised question whether the facts of the case fulfills the conditions of sentencing death penalty as he got awarded with death penalty under section 353(3) of CRPC. The Supreme court dismissed challenges arises constitution of death penalty under section 302 of IPC, 353(3) of CRPC. The provisions of section 302 IPC, does not violates article 19 and abide concern for the dignity of human life. It ought not to take such decisions which infringe human rights except in case of Rarest of Rare.

The court provides grounds to be considered for giving death penalty as follows:-

1. Murder with fully planning and brutally.
2. Murder with exceptional depravity committed on public duty.
3. The death sentence should be given on basis of culpability which taking consideration of the situation of criminal and the crime.
4. The punishment of death penalty will be only given on comparison of life imprisonment which seems less as compared to intensity of the crime committed by the offender.

Basis on the doctrine, the Apex court stated:

The main purpose of the doctrine is a sign of disprove of crime committed in the society and if it is abolished then it may risk the whole society.

Therefore, the death penalty is followed in India and considering the fundamental right of an offender which is not absolute in power. The situations and facts are also included for punishing death penalty and it is not given until the crime is more serious, cruel and harms the society principle to set as example, so that people indulge in fear of committing the same offence again.

India is country which has never abolished death penalty nor gave it's a specific legality and validity. As a Indian constitution established many challenges were raised for constitutionality of death sentence through petitions filed in Supreme court. Seven crimes were decide under which the offender may punished with death penalty as follows: -

1. Murder
2. Dacoity with completion of committing murder.
3. Abetment of suicide of intoxicated person, insane or minor.

In *Jagmohan Singh v. State of Uttar Pradesh* (AIR 1973 SC 947) the legitimacy of the death punishment was confront for the first time.

In this case, it was claimed under article 14,19,21 of the Indian constitution, that judges misuse their power of sentencing capital punishment, that the procedure of sentencing capital punishment is unfair. The bench held judgment said that the death penalty does not violate fundamental rights and hence proved, it Was constitutional.

The further challenge arise of constitutionality of capital punishment was in *Maneka Gandhi v. Union of India* (AIR 1978 SC 597) which stated two essential components: one is that not all fundamental rights are mutually

contradictory and if an regulation to be considered constitutional then it must go through test of article 14,19,21 collectively.

4. JUDICIAL OPINION ON CONSTITUTIONALITY OF CAPITAL PUNISHMENT

In case of *Rajendra Singh v. State of Uttar Pradesh* (AIR 2007 SC 1019), justice Krishna Iyer stated that death penalty is infringing article 14,19,21 mentioned in Indian constitution. He further said that two essentials needed for imposing death penalty:

1. A specific reason or fact for sentencing death penalty.
2. It should be sentenced in certain circumstances only.

“Further the Supreme court laid down as when to impose death sentence in *Macchi Singh v. State of Punjab* (AIR 1983 SCR(3) 413) Justice Thakkar stated for the court laid down 5 categories of case for applying death sentence as below:

1. The procedure of committing of a murder as when the commission of the crime was done brutally and intense.
2. When a murder is committed with a intention of enmity or depravity.
3. When a scheduled class person is murdered then his/her murder can be said to have social abominable attempt.
4. The gravity of a crime must be taken in consideration for example murdering of the entire community or caste.
5. The Personality of the murder victim must be considered.

In *Deena v. Union of India* (AIR 1983 SC 1155), it was held:

Hanging as mode of execution mentioned under section 345(3) of IPC stated fair, reasonable which is adhering to the meaning of article 21 of Indian constitution and held constitutional.

In *Mithu v. State of Punjab* (AIR 1983 SC 473):

The violation of article 14,21 of Indian constitution by section 303 IPC which was pull down as it includes the offence which only can be punished of death penalty and deprived of judicial power, it is unfair and unjust procedure for a human life.

In the case of *State of U.P v. Satish* (AIR 2005 SC 257) ,

the supreme court held that:

Because the implications of courts being more lenient in giving punishments for heinous crimes would be severe, the death sentence for rape of six years old girl appears constitutional and reasonable.

5. JURISPRUDENCIAL SCOPE OF DEATH PENALTY:

A. RETENTIONISTS VIEW:

1. PRECAUTION OF COMMISSION OF FUTURE CRIMES

The death penalty will serve as a deterrent to future criminal activity. Future chances of offences can be deterred by introducing the harshest penalty for the most atrocious offences. This has a substantial psychological impact. When a person is aware of the punishment that if engages him in the same offences then it is self evident that he may not engage himself in that commission of offence.

2. SEEKING JUSTICE

In contrast, the death penalty ensures the administration of justice. The preamble of Indian Constitution indicates to promote fairness for all citizens. The methods used to achieve such justice are critical. Isn't it only fair to sentence to death someone who is indulge in the most heinous crimes, denotes a threat to the public, has shown no remorse, and has lost all humanity? What about public faith in the legal system to make sure that the offender is punished equally to the crime committed? This question provides a strong foundation which to build elimination.

3. JUDICIAL THINKING

Finally, the death penalty is not imposed haphazardly. Due to a lack of evidence, the sentence to death is not valid in India. The death penalty is reserved for the most heinous crimes. When the sentence to death is issued, the guilty individual has the option of filing a plea for mercy or the death sentence may be reduced to life imprisonment owing to inadequate time served. The executive may reopen investigation with new evidence; if new evidence is sufficient then the executive may grant the convict's mercy plea.

4. HUMANITARIAN RIGHTS

Under the cover of human rights, a convicted criminal's potential harm to society cannot be avoided. Furthermore, granting human rights to criminals who have lost contact with humanity is ludicrous. It is specifically correct for those people who are incapable of altering their behaviour. These criminals have no rights to live because of the heinous offences they have committed and put the society in danger.

5. MORALITY QUESTION

While the abolitionists state that the state is taking someone's personal life is unethical, the opposite case can be made. When the death penalty is used, it indicates that the state treats convicts as individuals and accords them individual dignity. They are able to choose their paths and are fully responsible for their actions. If the death penalty is abolished because it is immoral, it is viewed the same way as convicts as *Morales* animals who must be acquitted of the most heinous offences committed.

B. ABOLITIONISTS VIEW

1. EXECUTION OF INDIVIDUALS

People have been executed in the past as well as would execute again in the future. Human errors will always be a risk in any legal system, no matter how modern it is. Between 2000 and 2014, a quarter of those convicted with capital punishment by courts were exonerated by the Supreme court and High courts. As many of them were sentenced to death but later found innocent.

2. INCONSTANCY

The potential of death sentence being used arbitrarily cannot be ruled out. The impoverished, minorities, and members of racial, ethnic, political and religious organizations are routinely sentenced to death. According to NLU, Delhi's capital punishment India report (DPIR), women from socioeconomically disadvantaged groups like dalits, OBCs and religious minorities account for around 0.75 percent of all convicts condemned to death in India.

3. INSENSATE

The death sentence is incompatible with human rights and dignity. The death sentence violates one of the humanity's most basic rights: the right to life. It also violates the right to be free of torture and other harsh or humiliation punishment or treatment. Furthermore, the death sentence diminishes every human being's inherent dignity.

4. DETERRENCE

The death penalty lacks the deterrence effect that its proponents believe it does. The United Nations General Assembly declared, "there is no evidence that death sentence works as a deterrent." It's worth mentioning that an increasing number of executive experts in many conservative states are seriously questioning the death penalty's effectiveness in curbing crime.

5. OPINION OF THE PUBLIC

The government does not have the jurisdiction to take someone's life based on popular moral support for the death sentence. Majorities of people have previously backed heinous human rights atrocities only to be roundly criticized for it. Leaders and politicians must call attention to the discrepancy between capital punishment and

human rights. It is vital to stress that public support for the death penalty is intrinsically tied to people's desire to live in a crime free environment. However, they are more effective strategies to prevent crime.

7. INTERNATIONAL LAW ON DEATH PENALTY

1. UN VIEWS ON THE DEATH PENALTY: One of the most fundamental human rights which are the important component of universally accepted legislation as "Right to life", can be violated by capital punishment. Abolition of Death penalty has been requested by United Nations general assembly and laying down the human rights principles. This convention directly indicates towards the global abolition of death penalty.

2. VIEWS OF UDHR ON DEATH PENALTY:

According to article 3, life being the human rights of an individual and sentencing death to an individual and it violates other human rights along with it. It also violates, harsh to an individual but there is a high rise of death sentence as an era which is again violation of basic human rights as against torture. The sentencing of death is randomly being used in their own way rather than non-disciplinary way. All this made UDHR laid down to abolition of death penalty which effected 16 that had abolished death penalty for all crimes few years back and all present the number is 164.

3. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS VIEWS ON DEATH PENALTY :

Other International Treaties along with big support of International covenant on civil and political rights are in support of death penalty and they are also involved while some international instrumental law one in against of death penalty.

Article 6 says:

1. According to article 6 of ICCPR, every individual has an intrinsic right to life. This right will be protected by legislation. No one's life shall be snatched arbitrarily from him.
2. In countries that supports death penalty, they may use death penalty only for the most egregious crime, in accordance with current legislation and not in breach of the present covenant and the genocide prevention and punishment convention. Only once a competent court has delivered a definitive ruling may this penalty may be carried out.
3. It is understood that nothing in this article allows any state party to the present covenant to diverge in any way from any promise made under the rules of the convention on the prevention and punishment of genocide when the laws of life is considered genocide.
4. Anyone punished with death penalty the option of petitioning for a pardon or commuting of their sentence. Amnesty, pardon or commutation of death sentence may be granted in any scenario.
5. Death penalty are not imposed on anybody under the age of eighteen who commits a crime and they are not carried out on pregnant women.
6. Nothing in this article shall be utilized to prevent or delay the abolition of death punishment in any state signatory to the present agreement.

8. CONCLUSION AND SUGGESTIONS

The death sentence like life imprisonment, does not achieve the penological purpose of deterrence. Furthermore, in Indian law, life imprisonment implies incarceration for the rest of one's life, subject to just remissions, which are granted only after many years of imprisonment, ranging from 30 to 60 years in some states in situations of major crimes. Punishment includes a significant amount of retribution. It cannot, however, be reduced to vengeance.. No constitutionally admissible penological goals are achieved by capital punishment.

The death penalty has become as the final measure of justice for the victims. The use of death penalty has diverted the focus of other issues as investigation, crime prevention, victim rights. The state must rehabilitate the victims by establishing victim's compensation programmes. Restraints and other intimidation employed by powerful accused persons frequently muffle the voices of victims and witnesses. The need for police reform for a better and more efficient police force.

The Supreme court has voiced concern over inconsistently imposing death penalty cases several times in the recent decade. The court stated that it is hard to differentiate between cases in which the death sentence was given and situations in which the alternative of incarceration was used. The court said that the sentence to death was erroneously imposed in violation of Bachchan Singh rules. As a result, the constitutional limit of death penalty proposed in Bachchan Singh has been unsuccessful to prevent” inconsistently and bizarrely and inconsistently applied” death sentences.

There is no principled way to end such arbitrariness in the death penalty. A strict standardization or categorizing of offences that ignores the differences between situations is arbitrary because it treats all cases equally. Anything less specific, such as the Bachchan Singh framework, has proven ineffective.

Delay in trials, appeals, and executive clemency continue to be a problem for the death row inmates. As an outcome of an impending but uncertain execution, the death row inmate suffers excruciating agony, worry, and crippling fear during this time. The Supreme Court recognized that the death row convict is exposed to near torture conditions as a result of such exceptional circumstances. Moreover, the demoralizing and oppressive effects of jail sentences imposed on the criminal such as solitary confinement as well as current terrible prison circumstances increase the death penalty problem. In India’s death sentence system, the death row phenomenon has become a terrible and distinguishing aspect. Furthermore, the infliction of additional, unjustified, and judicially unjustified pain on death row inmates.

1. The poor, uneducated, underprivileged, and minorities are frequently subjected to the death penalty. A legal struggle in a court of law is rare for them to prevail. Legal aid is currently available in India for poor lawyers who cannot afford to earn as much as senior lawyers. When presenting a case in which one’s life is on the line, the state’s advocate for the accused should have at least seven years of legal experience.
2. The government shall pay an advocate’s fees generally in accordance with his ordinary rates, but not a statutory fee, if he is thus engaged. This would pique the interest of the advocate arguing on behalf of the accused in the case.
3. Rather than devising a complex method of execution that is timeless, less painful, and simple, it is preferable to abandon from the death penalty in favor of an alternative punishment that does not jeopardise the ‘right to life’.
4. The alternative to death penalty is life imprisonment. As a result, policymakers are advised that open prisons, the invention of 20th century, where the life convicts live for the rest of their life as a life imprisonment denotes essence of reformatory theory but also provide a significant source of revenue for the government. Retentionists no longer have to argue that putting the killers in prison would be more costly to the public purse.
5. In few circumstances, such as when a country is engaged in either international or civil combat, killing an individual may become unavoidable. Police officers may be forced to kill in order to protect themselves or the offenders. In such circumstances, rigorous legal safeguards must be established for enforcement authorities from abusing their powers.
6. Instead of spending millions of rupees on the construction of gas chambers or gallows, the funds could be used to train effective law officers as well as address judicial system mistakes.
7. All efforts aimed at abolishing capital punishment should be viewed as advancements in the pursuit of the human right to live.
8. Without resorting to executions, dangerous criminals can be kept away from the general public. This kind of segregation is used by many abolitionists’ countries. It’s the same as putting the mentally ill in a mental institution without causing difficulty to the healthy.

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