

CAPITAL PUNISHMENT: AN EFFECTIVE DETERRENT?

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Abstract

The concept of death penalty is a controversy that has prevailed for years due to the nature and gravity of its implementation and its consequences. Countries around the world have seen recent legal developments which have led to the abolishment, reinstatement and enactment of death penalty as a form of punishment. The issue is largely debated pertaining to the various advantages and disadvantages that is accompanied with imposing capital punishment. This essay will look into the effectiveness of death penalty as a deterrent to crimes in the society and will address the likely consequences of such penalties such as, whether its imposition violates the criminal's human rights and whether abolishing such punishments could lead to the violation of the victim's rights and lead to societal outrage. It will also look into various cases that attempted in abolishing such punishments in India although it still remains legal. A comparison has also been made with Bhutan where the constitution forbids capital punishment.

I. INTRODUCTION

Capital punishment is the most extreme form of punishment whereby a person convicted of certain crimes is executed by means of shooting, hanging, etc. According to Amnesty International, in 2012, 141 countries have abolished death penalty and Burkina Faso is the most recent country to abolish death penalty in 2018.¹ Modern legal systems as opposed to traditional ones are now steadily supporting the abolishment of such penalties. On 18th December 2008, United Nations resolution 63/168 was passed in support of abolition of executions. Yet, there are still some countries in which capital punishment is still legal. In India, such form of punishment has not been abolished yet, but it is imposed sparingly in exceptional cases, through the application of the rarest of the rare test.² Death penalty or capital

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¹ "Death Penalty in 2018: Facts and figures", Amnesty International, (April 10, 2019), <https://www.amnesty.org/en/latest/news/2019/04/death-penalty-facts-and-figures-2018/>.

² Bachan Vs Sate of Punjab, AIR 1982 SC 1325.

punishment is given for heinous crimes like murder,³ waging of war against the Government of India,⁴ abetment of suicide of a minor, insane or intoxicated person,⁵ etc.

The ancient Hindu religious scriptures prove the existence of such punishments in the Indian system. Similarly, capital punishment was known to have existed in the traditional Bhutanese legal system as opposed to the current scenario, attributing to the role of religious moral values and philosophies which acts as one of the core elements in the legislation of the country. Capital punishment has been practiced by most of the societies around the world, in the past, which generally was accompanied by torture and carried out in front of the public. However, imposing capital punishment does not necessarily deter the crimes committed, instead it goes against the rights of the offender. Also, it is unconstitutional, immoral, and contradicts certain religious ideals and philosophies. This position regarding abolishing death penalty is highly debated and different viewpoints were expressed.

II. HISTORY OF CAPITAL PUNISHMENT IN INDIA AND BHUTAN

The existence of capital punishment can be traced back to the earliest periods in Ancient India. The essence of capital punishment has been written down in scriptures such as the Manu and other religious texts which provides for the existence of such punishments during those period. In the Yajnavalkya, capital punishment was to be given to a person who has helped a person escape a prison by executing him.⁶

During the reign of King Ashoka in Ancient India, there existed the concept of unreformed imprisonment, where brutal and barbaric measures of torture were inflicted on the prisoners and hardly any prisoner came out alive.⁷ This however was changed with the introduction of reformatory measures owing to influence of Buddhism which could have substantially impacted the form and measures of punishing criminals. Nothing much changed during the

³ Indian Penal Code, §301 (1860).

⁴ Indian Penal Code, §121 (1860).

⁵ Indian Penal Code, §305 (1860).

⁶ Amarendra Mohanty & Narayan Hazary, "Indian Prison System", 19 (1st ed., S.B Nangia for Ashish Publishing house, New Delhi) (1990).

⁷ A.L Basham, "The Wonder that was India", 119, (Fontana, Calcutta) (1975).

medieval and mughal period. Imprisonment as a form of punishment was not very common, instead the more common forms were death, mutilation and fine.⁸

During the British period, after the enactment of the Indian Penal Code and the Criminal Procedure Code, death as a punishment was still given. Post independence, India to this day has capital punishment as a form of punishment. The first case of death penalty after independence was given in the Gandhi Assassination case⁹ in 1949. The most recent death penalty was given in 2015 in the case of Yakub Memon¹⁰. It is evident from history and case laws that capital punishment is still legal and practiced in India. However, does its long held practice and implementation, render it ethical and moral?

In contrast, Bhutan, its immediate neighbor abolished capital punishment in 2004 and also the constitutional provisions strictly prohibit such practice.¹¹ Bhutan being a religious country, with majority of its population following Buddhism, strongly opposes such harsh and severe punishments owing to their beliefs in Buddhist values and ideals of non-violence and tolerance. This could likely explain how the last death penalty imposed was during the reign of the third king of Bhutan, in 1964. The harshest mode of punishment is imprisonment for life.

III. CONSTITUTIONALITY OF CAPITAL PUNISHMENT; COMPARATIVE ANALYSIS.

India did not abolish capital punishment yet, it is still in use even to this day on the basis of being applied only in ‘rarest of the rare’ cases. There are no provisions under the Constitution of India, that directly prohibit the use of capital punishment, but questions were raised as to its constitutionality due to the brutal, cruel or degrading nature of the punishment.¹²

⁸ Mohanty & Hazary, *supra* note 6, at 2.

⁹ Nathuram vs Godse vs Crown, AIR 1949 East Punj 321, Criminal Appeal No.66.

¹⁰ Yakub Abdul Razak Memon vs State of Maharashtra.

¹¹ Const. of Bhutan (2008) art.7, §18.

¹² Shivam Dubey & Pooja Agarwal, “Capital Punishment in India: The Unending Conundrum”, International Journal of Law and Legal Jurisprudence Studies, (Jan. 19, 2020, 4.25 PM), <http://ijlljs.in/capital-punishment-in-india-the-unending-conundrum/>.

Jagmohan Singh vs State of Uttar Pradesh,¹³ was the first case to question the constitutionality of death penalty, wherein it was challenged to be in violation of Articles 14, 19 and 21 of the Constitution of India. The contentions put forward by the appellant were, that execution of a person with death sentence puts an end to all the fundamental rights guaranteed under Article 19 of the Constitution. The contentions, however, were rejected and the Supreme Court had decided unanimously that capital punishment was not unreasonable and that it does not go against public interest. Justice Krishna Iyer in Rajendra Prasad vs State of U.P.,¹⁴ ruled that death penalty violates Articles 14, 19 and 21. However, this decision was overruled in Bachan Singh Vs State of Punjab,¹⁵ which reaffirmed the decision of Jagmohan Singh. Justice P.N Bagwati gave a dissenting opinion and observed that “death penalty is not only unconstitutional being violative of Articles 14 and 21 but also undesirable from several points of view.”¹⁶

Series of cases were decided in favour of death penalty, with courts emphasizing on the role of capital punishment in penalizing the convicts of the serious crimes and the Supreme court in Machhi Singh vs state of Punjab,¹⁷ has laid down the categories of cases for which death penalty can be imposed. These include, the manner in which such crimes are committed, the motive behind such crimes, whether such crimes are socially abhorrent in nature, the gravity of the crime, and the personality of the victim.¹⁸

The number of instances in which such punishments are given are extremely low. Enormous limitation and proper guidelines of the ‘rarest of the rare case’ doctrine ensure that it is applied only in very exceptional cases. Thorough regards must be given before inflicting the punishment arbitrarily. However, questions were still raised as to its constitutionality and the inadequacy of the courts in balancing the aggravating and mitigating circumstances.¹⁹ In cases like Laxman Naik vs State of Orissa²⁰ and Kamta Tiwari vs State of Madhya Pradesh²¹, death sentence was imposed to those accused who were charged for raping and murdering the victims. In certain cases, on the other hand, the convicts for similar crimes were given the benefit of

¹³ AIR 1973, S.C 947.

¹⁴ 1979 AIR 916.

¹⁵ AIR 1980, S.C 898.

¹⁶ Tatheer Fatima, “Constitutionality of death penalty”, Indian National Bar Association, (Jan. 15, 2020, 11.30 AM), <https://www.indianbarassociation.org/constitutionality-of-death-penalty/>.

¹⁷ AIR 1983, S.C 957.

¹⁸ *Ibid.*

¹⁹ K.D Guar, “Textbook on the Indian Penal Code”, 483 (4th ed., Universal Law Publishing Co. Pvt. Ltd., Delhi) (2009).

²⁰ AIR 1995 SC 1387.

²¹ AIR 1996 SC 2800.

commutation of death sentence to life imprisonment.²² Situations like these raise doubts in the minds of the people, as to the vast discretion in the hands of the judges and the far fetched distinction between life and death between two similar cases. Despite the various attempts made to abolish capital punishment, it is still constitutional in India.

Bhutan, on the other hand, is one of the countries that have abolished the use of capital punishment. The Constitution of Bhutan envisages the principles and provisions that directly prohibits the imposition of death penalty. Article 7, section 17 of the Constitution of Bhutan prohibits torture, cruel, inhuman or degrading treatment or punishment. Even though punishment is legal, torturing or degrading treatment is considered to be a sin and legally abhorrent. Therefore it is a duty on the state to prevent clandestine transgressions that may endanger peace.²³ Likewise, section 18 of Article 7 provides that a person shall not be subjected to capital punishment. Death penalty is opposed by various human rights activists as it is considered to be the ultimate denial of human rights, also corresponds to Buddhists principle.²⁴ Also, more importantly, Article 7, section 1 provides the fundamental 'Right to life, liberty and security'. No one is given the right or authority to take someone else's life.

IV. CRITICAL ANALYSIS

The concept of capital punishment as a form of punishment is highly debated and controversial. The question still remains as to its effectiveness and ethicality; Does its use and imposition actually serve as an effective deterrent and has it brought about significant decrease in criminal activity or has it instead made an opposite impact?

The Indian Penal Code was enacted with the sole object of imposing adequate, appropriate and proportionate sentence. It describes crime as a mere manifestation of a criminal's deep rooted maladjustment both physically and socially. Often, criminals are borne out of extreme social inequalities, dysfunctional families, deprivation of a healthy environment etc. Social and cultural conditions in which a person grows up are major contributing factors in his development and ability to co-exist in the society due to which reformative measures may likely bring substantial improvement and development to the criminal's life and his outlook.

²² Kumudi vs State of U.P.

²³ Lyonpo Sonam Tobgye, "The Constitution of Bhutan, Principles and Philosophies", 163.

²⁴ Lyonpo Sonam Tobgye, "The Constitution of Bhutan, Principles and Philosophies", 164.

This prerogative has to be given to every person alike so that he realizes his actions and its consequences on himself as well as the society at large rather than sentencing him to death.

The ‘rarest of the rare case’ test is applied while inflicting capital punishment on a convict, with its imposition carried out only in exceptional cases. The society fully supports the hanging and execution of offenders of brutal and harsh crimes like murdering of a minor girl after being raped. They believe that it is only right that these criminals be executed considering the seriousness of the crimes they have committed. Also, according to the punitive approach of punishment, a criminal is graded as notoriously dangerous to the society and severe punishment must be given to protect the society from his criminal assaults.²⁵ However mistakes can happen and the likelihood of killing an innocent person can always be there. Death penalty is an irreversible process. Once the person has been executed, there is no taking back. The main problem is that it is very gruesome when the person imposed with capital punishment has been wrongly accused or framed with ill intention. There are so many possibilities, of evidences being tampered or witnesses being bribed. In 2004, Cameron Todd Willingham²⁶ was executed for the allegation of setting fire that killed his daughters. However, new evidences were gathered which proved his innocence after his execution. In such circumstances, an innocent man’s right to life and other basic human rights have been violated. Quoting Benjamin Franklin, *“it is better that hundred guilty persons should escape than that one innocent person should suffer.”*

Death penalty as a form of punishment is known to bring relief to victims and their family, it is believed that justice has been served for all the pain gone through by the family. However, does it really serve that purpose? There is no possibility of healing the pain through revenge and retribution. Also, the question that pops up is whether we are seeking vengeance so as to calm our collective frustration and resentment, or whether we are looking for something that will actually help the person reform? A Supreme Court decision has pointed out that barbaric crime does not have to meet with barbaric penalty. A death penalty is not the only solution, such harsh and brutal penalties hardly ever corrects the individual but instead hardens his attitude towards the society.²⁷

²⁵ Ratanlal & Dhirajlal, “The Indian Penal Code”, 87 (34th ed, LexisNexis) (2014).

²⁶ Willingham vs State, 897 S.W.2d 351 (1995).

²⁷ Attorney General of India vs Lachma Devi, AIR 1986 SC 467.

Although data and statistics collected by different bodies and organizations are available regarding the number of executions in countries around the world, no such concrete conclusion can be made that capital punishment effectively deters crimes as countries imposing such penalties did not see any reduction in crimes as such.²⁸ It was also found that crime rates are much lower in countries without death penalty than those that retained it. Abolishing capital punishment does not mean the convict can get away without being punished or that there is no punishment at all. An alternative punishment, like life imprisonment without parole could provide an equal price for the crimes he has committed. There are equal possibilities of deterring crimes and eliminating the risk of executing an innocent person.

However, no two people think alike, there are also portions of the society who believe that some crimes are so grave and heinous that even death penalty feels like a lenient punishment to be given. Also, when there is public outcry demanding for justice, the courts cannot ignore it, as doing so will only make a mockery of the legal system, and shatter the common man's faith in the system and its efficacy in ensuring justice.²⁹ Also, a large segment of the society believe that capital punishment is in public interest and an alternative punishment as long as it is not inflicted arbitrarily and given for the most serious crimes in accordance with law.

Another issue of prime importance is the rights of the victims and aggrieved. The criminal, as a consequence for his act will most likely face conviction and punishment but we cannot deny the rights of the victim as well. The victim has to undergo immense mental torture and trauma due to such crimes. In most cases, the victims and their families demand death to be given as a punishment as the mere fact that the criminal is living makes them anxious and live in fear as it is not entirely impossible that sometimes he might be able to successfully escape and threaten the victim's safety and well being. However, *"Victims' family members often end up deeply frustrated. If they are against the death penalty and the death penalty is imposed on the perpetrator, the cycle of violence is continuing instead of being broken. If they want revenge, just a few can get it, and often only after many years of waiting. Meanwhile, the expectation of the execution prevents closure,"* Mr. Šimonovic explained.³⁰

²⁸ Amnesty International, "A Clear Scientific Consensus that the Death Penalty does Not Deter", (Jan. 20, 2020, 3.30 PM), <https://www.amnestyusa.org/a-clear-scientific-consensus-that-the-death-penalty-does-not-deter/>.

²⁹ Mahesh vs State of Madhya Pradesh, (1987) 3 SCC 80 (82).

³⁰ "UN human rights official underscores effects of death penalty on range of victims", UN News, (Sep. 21, 2016, 6.30 PM), <https://news.un.org/en/story/2016/09/540672-un-human-rights-official-underscores-effects-death-penalty-range-victims>.

V. CONCLUSION

By the end of 2017, majority of the countries have abolished death penalty for all crimes. Even though the number of execution is very minimal, there are certain countries where death penalty is still in practice and legal. Abolishing death penalty has been a controversial issue and people still debate over it. Diverse opinions have been given regarding it. People are in favour of death penalty and they believe that it is a deterrent to crimes of heinous nature. However, there were clear scientific consensus that it does not deter crimes. So, if it is proven that it is not deterrent to murder and other heinous crimes, is it really the right choice to retain it despite the drawbacks inherent to its practice? The abolishment of such penal measures in some countries are due to consideration of the criminal's rights and reformative measures that can be taken instead. However, when considering whether such punishments should be given, the victim's rights and society's perspective should be taken into account, so that the legal system fulfills the objectives for which it actually exists. Also, it has to be seen whether such punishments are in harmony with the constitutional provisions and principles.