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A Study of Capital Punishment in India and its Constitutional Validity

AKANSHA PANT¹

ABSTRACT

While capital punishment has existed since time immemorial, in recent times the mode of punishment and the ideology behind it has gathered massive backlash. The general consensus around the penalty seems to be mixed, with some countries completely doing away with the practice while others using it as a deterrent for petty crimes. When talking specifically about India, one would assume that the land famous for the preaching of 'ahimsa' would be one of the abolitionists of such a heinous punishment, but that is not the case; pre and post independence India has always been a practitioner of the death sentence, with both Indian Penal Code and Code of Criminal Procedure having provisions dealing with the punishment.

The purpose of this paper is to understand the past and present condition of capital punishment in India alongside studying its constitutional validity which has been questioned time and again. The paper explains the theories of punishment which the death penalty relies on and various past judgments in order to explain the position of the punishment in society. After in detail discussion of organizations aiming to abolish death penalty in India on humanitarian grounds, precedents were also used to justify the constitutional validity of the punishment alongside arguments for continuation of the penalty.

Keywords: Capital Punishment, Penalty, Constitutional, Abolish.

I. INTRODUCTION

In legal language, punishment refers to any kind of suffering (pain, fine, confinement, etc.) given to a person by authority of law for a crime/offense or omission of legal duty committed. In any society, punishment is deemed necessary as findings from perpetual studies of deterrence lead to the conclusion that perceived certainty of punishment is inversely related to involvement in illegal behavior². It is the state's responsibility to punish criminals to uphold social harmony. There are 5 kinds of punishments given in India- fine, imprisonment, imprisonment for life, forfeiture of property, and the rarest, death. The death sentence which is the most severe punishment available in today's day and age involving the execution of a convict is also known

¹ Author is a student at Kirit P. Mehta School of Law, NMIMS, Mumbai, India.

² Harold G. Grasmick, The Deterrent Effect of Perceived Severity of Punishment, 1st December, 1089, Oxford Academic, ISSN-0037-7732

as capital punishment. Validity of this sentence has always been a topic of wide controversy with many countries such as the United Kingdom abolishing it on the grounds of human rights; whereas others such as China routinely execute people, even for non-violent crimes such as drug offenses.

Death penalty is recognized by law in India. India as a country has always preached about 'Ahimsa' which makes many people wonder why it has not done away with the penalty like various countries worldwide that are abolitionists of the practice³. The reality is that while capital punishment is legal, it is only a possibility in special or rarest of the rare cases; what constitutes 'rare' had not been answered either by the legislative or supreme court for a long time until 1983 when the judiciary laid down 5 factors on which death penalty could be awarded⁴. Various attempts have been made to remove death penalty from India but none of them have succeeded. With the most recent execution being conducted in 2020, India continues to stand for death penalty to create a deterrent effect among people with hopes of such effect leading to a harmonious society. The provision in support of death penalty is considered to be article 21 of the constitution which states- "*No person shall be deprived of his life or personal liberty except according to procedure established by law*"

II. HISTORY

Ever since society existed there exists right and wrong and punishment for people who commit wrongs. Primitive societies practiced taking the lives of people to punish them for the crimes they have committed. As times progressed and humankind established systems, written rules were drafted to make people aware of the law. The first written document which supports the concept of the death penalty gets its origins from China in eighteenth-century BC when it was introduced by King Hammurabi of Babylon who codified it for 25 different crimes. Following the system of an eye for an eye, early forms of death penalty included methods such as stoning, being burned to death, boiling to death, etc. where the primary intention was that the perpetrator of these activities shall suffer. These were later found to be cruel and humane practices were sought out by society.

In India, the existence of capital punishment in earlier times is seen through the writings of famous writers like Kalidasa and Kautilya and religious texts of Hindu philosophy like the Mahabharata⁵. Even in provinces under Mughal and Buddhist rule death sentence was never

³ Tanya Kukade, Capital Punishment in India, July 2020, Lex Humanitariae: Journal for a change, ISSN: 2582-5216

⁴ Sukriti Singh, Constitutional Validity of Death Penalty in India, April 21, 2013. LAWLEX.org

⁵ Chaitanya Shah, Capital Punishment in Indian Legal History, The Law Brigade (Publishing) Group, ISSN- 2454-

abolished in India. British left India in 1947 but left behind its legislations. Two such legislations are the Indian Penal Code (IPC) and the Code of Criminal Procedure (CrPC) which have provisions for capital punishment under several cases. During the process of drafting the constitution between 1947 & 1949 by the constituent assembly, several members expressed the idea of abolishing death penalty, but it was not implemented. In early days CrPC provided for death as default punishment in cases of murder, it was amended in 1973 in such a way that now while giving death sentences judges were required to provide special reasons for doing so, drastically reducing the number of sentences passed.

The first death row convict execution in independent India happened on 9 September 1947 when Rasha alias Raghuraj Singh was hanged to death for murder. However, the infamous death sentence still remembered is that of Nathuram Godse who was executed on 15 November 1949 for assassination of Mahatma Gandhi. Repeatedly the validity of capital punishment has been challenged but India continues to practice it for specific crimes. The court specifies that when a person is sentenced to death the punishment will be carried out by hanging the guilty person from the neck until he is dead. While that is how the majority of executions in India take place the law also allows death by shooting in cases related to the armed forces if a military court finds it necessary⁶.

III. AIM OF CAPITAL PUNISHMENT

The aim of any punishment is to make an example of the guilty person to make other people realize the consequences of their actions and not commit crimes due to wanting to avoid a similar fate. Under criminal law there exist 5 major theories for punishment namely – Deterrent, Reformatory, Preventive, Retributive & Expiation theories which explain several reasons due to which punishments are awarded and the expected effect from it. Out of these, the two theories which work in the argument for the aim of capital punishment are Deterrent Theory and Retributive Theory.

(A) Capital Punishment as a Deterrent

One of the oldest law providers Manu was of the belief that capital punishment in a society is necessary to create dread or fear among individuals of consequences on committing wrongdoings and without its existence individuals with more power will torment those beneath them. He compared people to fishes in water to illustrate that how big fishes gobbling up the smaller ones is what society would be like without capital sentences.

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⁶ The Army Act, 1950, No. 46, Acts of Parliament, 1950 (India)

This principle is one of the most common arguments voiced in favor of death penalty and is called the theory of deterrence, also known as the Utilitarian theory. Deterrence believes that giving a severe punishment, such as capital punishment discourages others who might want to commit the same crime from doing it in fear of consequences. A man might think of committing murder under many circumstances but often what stops him from doing the deed is the fear that he might have to spend his entire life in jail or worse, be executed by the state. Most people do not commit crimes due to the fear that they will get caught, without stringent laws like those supporting capital punishment in place rates of heinous crimes will increase.

While this theory sounds very convincing there is no actual evidence or figures to support it. On the contrary, it has been observed that in some countries which have abolished the death penalty the rates of murder cases have gone down. As observed by Justice Bhagwati Singh in his dissenting argument made in the landmark case of *Bachan Singh v. State of Punjab*⁷- "*More than the severity of the sentence, it is the certainty of detection and punishment that acts as a deterrent*"⁸. It is evident that the argument for capital theory fails as a deterrence as increasing efficiency of the judicial system and other harsh punishments such as life imprisonment would have the same effect without the need for death penalty.

(B) Capital Punishment for Retribution:

Another argument for capital punishment is based on the idea of "an eye for an eye." It is believed that the punishment given to an offender must be equal or proportional to the crime he/she has committed. In a way, the retributive theory is the most moral because it ensures that death penalty would be given only to those who have committed the most heinous crimes. Many believe that even if punishing them would produce no other good, criminals who have committed serious crimes should be punished in accordance with their crimes⁹.

The argument against retributive theory lies in the belief that no one is inherently good or evil. It is statistically observed that many times perpetrators of crimes are themselves victims of child abuse or social deprivations such as poverty, racism, discrimination, etc., and applying retributive measures blindly would be incorrect as even though in a small measure, their families or society also shares responsibility¹⁰. It is also said the eye for an eye theory falls short as the judiciary retaliating by murder in the offense of murder does not make sense in the 21st century

⁷ *Bachan Singh vs State of Punjab*, (1982) 3 SCC 24

⁸ Deekcha Tewari, *Capital Punishment in India and it's Deterrent Effect or Not*, The Law Brigade(Publishing) Group

⁹ Alec Walen, *Retributive Justice*, July 31,2020, Stanford Encyclopedia of Philosophy

¹⁰ *Supra* no.2

where the standard is to be humane.

IV. CONSTITUTIONAL VALIDITY OF CAPITAL PUNISHMENT

According to statistics by National Law University, Delhi since 1947 at least 572 individuals have been executed in India. While death sentence has always been constitutional in India over the years there have been several cases and organizations questioning the constitutional validity of it and seeking its abolition. The main issue in all these cases has been to prove death penalty to be unconstitutional due to it violating article 21 which stands for the protection of life and personal liberty. However, Article 21 clearly states that the rights it promises can be taken away through the proper procedure of law.

The case of *Jagmohan Singh v. State of Uttar Pradesh*¹¹ in October 1972 argued that the death penalty goes against Article 14, Article 19, and Article 21 of the Indian constitution. However, the five-judge bench of the Supreme Court held that death sentence is given by the procedure of law and does not violate the constitution. The next year, CrPC was amended with the introduction of Code of Criminal Procedure Section 354(3)¹² which made it mandatory for judges to provide special reasons for granting death sentence to a convict.

In the case of *Rajendra Prasad v. State of Uttar Pradesh*¹³ in February 1979 deterrence was emphasized as being the social goal of death penalty and not retribution. It was held that *“If the murderous operation of a die-hard criminal jeopardizes social security in a persistent, planned and perilous fashion then his employment of fundamental rights may be rightly annihilated”*¹⁴. However, this statement expressed the views of Justice Iyer that death penalty violates the fundamental rights of the accused and thus is unconstitutional.

Considered to be the most landmark judgement due to the establishment of the “rarest of the rare” doctrine which says that death penalty can only be awarded in the most rare and exceptional circumstances, *Bachan Singh v. State of Punjab*¹⁵ of May 1980 by majority overruled the judgment in *Rajendra Prasad v. State of Uttar Pradesh*¹⁶ and upheld death penalty as being constitutional. Even though the principle of ‘rarest of the rare’ case was established there were no clear guidelines laid as to what crimes would fall under the aforementioned ‘rare’ or ‘special’ cases.

¹¹ *Jagmohan Singh v. State of Uttar Pradesh*, (1973) 1 SCC 20

¹² The Code of Criminal Procedure, 1973, Section 354 (3)

¹³ *Rajendra Prasad v. State of Uttar Pradesh*, (1979) 3 SCC 646

¹⁴ *Ibid*

¹⁵ *Supra* no.6

¹⁶ *Supra* no.13

Machi Singh v. State of Punjab¹⁷ of 20th July 1983 is believed to be the continuation of Bachan Singh v. State of Punjab. Here guidelines were given to explain what crimes lie under the rarest of the rare doctrine. The court specified 5 factors that would be considered before awarding the capital sentence- the manner of commission of crime, the motive for commission of crime, anti-social or socially abhorrent nature of the crime, the magnitude of the crime, and personality of the victim¹⁸

The case of Deena v. Union of India¹⁹ has established some requirements in order to make the punishment be carried out in a humane way, which are necessary to be followed.

V. OUTLOOK ON CAPITAL PUNISHMENT

Law Commission of India established by the Government of India works as an advisory body for the Ministry of Law and Justice. Its main task is to work for legal reforms. In the year 1967, the review conducted by the commission was of the conclusion that abolition of death penalty was not something that India could experiment with and favored the law to remain as it is.

The 262nd report which came out on 31st August 2015 however tells a different story. The panel asked for “abolition of death penalty in all aspects in the near future, soonest”²⁰ as they believed that as life imprisonment gives the same effect as death penalty which is why there is no need for such a harsh punishment. The commission came to this conclusion after extensive review. Their reasoning also included that since it is well known that justice system is flawed often people from marginalized sections or those not having resources become targets of such laws while people with capital conveniently escape them. Times have changed and there is an urgent need to abolish life sentence for all crimes except treason and waging war against the country.

After the convicts in Nirbhaya case were hanged in 2020 United Nations called for all nations to completely stop using capital punishment as a legal measure because it does not have a place in the 21st century. However, India opposed the UN’s resolution as it went against the right of each country to establish its sovereign legal system alongside going against Indian statutory legislation. There is no international law that prohibits capital sentences completely but there are strict restrictions on how the process should entail²¹. India is a member to the International Convent of Civil and Political Rights which states that no one can be denied their right to life

¹⁷Machi Singh v. State of Punjab, AIR (1983) SC 957

¹⁸Saptarshhee Misra, ‘Rarest of the Rare’ Doctrine In Awarding Death Penalty: A Critical Analysis, 4 October, 2020, Journal & Seminar Committee

¹⁹Deena v, Union of India, (1983) 4 SCC 645

²⁰Law Commission recommends abolition of death penalty, except in terror cases, 23 September,2017, The Hindu

²¹Sukriti Singh, Constitutional Validity of Death Penalty in India, April 21,2013, LAWLEX.org

without it being the most heinous crimes, which India follows. Despite what agencies such as the UN and Law Commission of India want, the abolition of death penalty in India does not seem to be happening anytime soon. The law commission argued that a reason for the ban would be the flawed justice system which might favor some over others, which can be dealt through granting everyone a right to fair trial.

Even as findings in this research have shown that death penalty often fails as a deterrent due to the existence of similarly harsh punishments like life imprisonment, it is not enough to abolish the law completely. In a country like India where it takes years to reach a sentence, ex. the perpetrators in the Nirbhaya case were hanged in 2020: 8 years after the horrifying incident took place, it is possible that if judgments in capital punishment cases are prioritized, reviewed, and reach a conclusion (often acceptance/rejection of mercy plea) say within 2 years with an efficient judiciary, seeing perpetrators punished while the case is still fresh might create a deterrent effect with the fear of punishment being served quickly. If a life sentence prevents even 1 heinous crime from happening, it is worth it.

‘Eye for an eye’ or retributive theory is the most supported argument which stands true as it punishes the criminal for the crime they have committed and provides the society with a sense of relief that justice has been served. Celebrations after the hanging of Kasab or the 4 perpetrators in the Nirbhaya case throughout India are enough to prove that even if the hangings had no effect on the crime statistics, a sense of justice being delivered was felt as the guilty were punished for what they had done, which is the whole premise that the theory rests on.

India maintains very humane methods of execution and it looks like would continue with the practice in coming years.

VI. CONCLUSION

“Capital Punishment depends entirely on the degree of culpability of the criminal act and the circumstances surrounding the individual offender”²²

In the history of India capital punishment has never been illegal. This research paper by examining judgements in various cases where validity of capital sentence was challenged has proven that capital punishment is constitutional. India is a rapidly growing country, which is directly proportional to the growing crimes. Legal systems require agents such as death penalty to keep a check on criminals.

The majority, if not all, death sentences carried out by the law involve execution through

²²Prof. N.V Paranjape, Criminology, Penology & Victimology, 2018, Central Law Publications

hanging which checks the list of requirements established in. India believes that the reasoning behind the death penalty, even though it has not been proven to work by countless studies, is to create fear in minds of the public and deter them from going down the same path. This research found that retributive theory is much more popular in terms of support and often is the reasoning behind death sentences in the minds of most people.

It was seen that HR is a vital component of Indian legislative system to help civilians and prevent superior authorities from misusing their powers. However, when crimes committed by an individual are beyond the realms of cruel and result in destruction, we should not look through the lens of moral dilemma. The criminal in this aspect is a threat to society and for society to live in peace the criminal should be appropriately punished, even if the punishment is death.

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