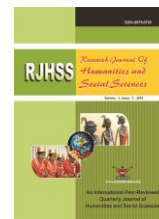


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REVIEW ARTICLE

Death Penalty: Relevancy and Necessity

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ABSTRACT:

The most debatable topic nowadays is capital punishment. Where most European countries are abolishing it to align with humanistic approach but some countries still retain this punishment. In our country although there is a shift from sentence of death to lesser sentence but there is also a clear intention of maintaining capital sentence to meet the ends of justice in appropriate cases.

KEYWORDS: Death Penalty, Relevancy, Necessity.

INTRODUCTION:

Since long time our society has been inflicting punishment upon wrongdoer, so that the society could be protected as well as other persons must be refrain from committing the same thing in the society.

The Death Penalty is a form of punishment whereby a state punishes a person who has been convicted of crime to death by execution. The Death Penalty has been widely abolished in most of the countries but also it has not been abolished or reinstated in some countries. In this article I want to discuss the necessity and relevancy of Death Penalty in India and whether or not it is still a relevant punishment in modern society.

Meaning of Capital Punishment:

The term 'Death Penalty' or 'Capital Punishment' stands for highest level of punishment, which is given in severe, grievous or heinous types of crime. May be the definition and extent varies from different scholars, countries, age group, but generally in jurisprudence, criminology, penology and common usage and sense capital punishment means sentence of death.

HISTORICAL BACKGROUND:

There is no country where Capital Punishment has never existed. It is an ancient form of sanction. The first glimpse of Capital Punishment we find in Hammurabi Code of Law 18th century BC in which there were 25 offences punishable with capital punishment. After that Hitti Penal Code (10th century BC) and Derconian Penal Code of Athens (7th century BC) in which all offences were punishable with death penalty. Capital punishment for murder, treason, arson and rape was widely employed in ancient Greece under the law of Draco (7th century BCE) though Plato agreed that it should be used only for the incorrigible.

The Roman also used it for a wide range of offence, though citizens were exempted for a short period of time during the republic.¹

Also it supported by Sir Henry Maine who stated that "Roman republic did not abolish death sentence though its non-use was primarily directed by punishment or exile and the procedure of questions."²

JURIST APPROACH AND THEORIS OF PUNISHMENT:

The Criminal Justice system is based on various theories of punishment. Sir Walter Moberly praises the definition given by Grotious that when a wrongdoer does a

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voluntary act, which is unpleasant, prohibited by authority for which the wrongdoer is answerable.³

- **Deterrent theory of punishment:**

Garfalo defined crime as an act which offends the sentiments of pity and probity possessed by an average person to the society. He recommended death, imprisonment for life or transportation as three modes of punishment for criminals.⁴

According to Salmond “The punishment is before all things deterrent and chief aim of law of crime is to make the evil doer an example and a warning to all that are like minded with him.”⁵

Thus deterrent theory of punishment serves more through fear of exertion or being deterrent.

- **Retributive theory of punishment:**

Prof. Hart has well explained this theory that the notion has two aspects, the positive aspect requires that the offender should receive a sentence which adequately reflects the gravity of his offence in the view of society as represented by the courts; in other words, this sentence must not be too short. The negative aspect requires that the offender should not receive a sentence which is heavier than that justified by his offences.⁶

This theory is primarily based on the maxim –“an eye for an eye and a tooth for a tooth”. The supporter of this theory mainly focus on retaliation against the wrongdoer and not for public welfare.

Sir Walter Moberly observed that “the theory of retribution is based on the view that punishment is a particular application of the general principle of justice that offender should be given their due.”⁷

- **Preventive theory of punishment:**

The essence of this theory of punishment is to prevent the wrongdoer from committing the same again, therefore the offender must be detained for long period of time.

According to Hobbes “there is no society where the rule does not exist that the punishment must be proportional to the offence.”⁸

Bentham view on punishment is very different perspective, that it is an empirical question of desire and of the infliction of sufficient pain to provide an effective deterrent. Bentham also held that there is no substantive difference between punishment and compensation. All injuries are offences, all sanctions are punitive, and they were treated in his penal code⁹ but also he said that ‘compensation’ must be distinguished from ‘punishment’.¹⁰

Preventive theory is supported by utilitarian principle reformers as it has humanising influences in penal law but it has been criticized by Kant who argues that there must be reformatory efforts for rehabilitation in the present society unless it does not serve any purpose.

- **Reformatory theory of punishment:**

Reformatory theory is mainly based upon that the

sanction of the criminal law should be used to effect a transformation in the offender and also with two fold aim of protecting the society and enhancing the well being as well as rehabilitating the offender in society.¹¹

CAPITAL PUNISHMENT IN INTERNATIONAL HUMAN RIGHTS TREATIES:

- The International Covenant on Civil and Political Rights (‘ICCPR’) is one of the key documents discussing the imposition of death penalty in international human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty.¹²
- The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death penalty, which is open to signatures from all countries in the world. It came into force in 1991, and has 81 states parties and 3 signatories.
- Similar to the ICCPR, Article 37(a) of the Convention on the Rights of the Child (‘CRC’) explicitly prohibits the use of the death penalty against persons under the age of 18. As of July 2015, 195 countries had ratified the CRC.¹³
- The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (‘the Torture Convention’) and the UN Committee against Torture have been sources of jurisprudence for limitations on the death penalty as well as necessary safeguards. The Torture Convention does not regard the imposition of death penalty per se as a form of torture or cruel, inhuman or degrading treatment or punishment (‘CIDT’). However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by UN bodies¹⁴.
- In the evolution of international criminal law, the death penalty was a permissible punishment in the Nuremberg and Tokyo tribunals, both of which were established following World War II. Since then, however, international criminal courts exclude the death penalty as a permissible punishment¹⁵.
- Of the treaties mentioned above, India has ratified the ICCPR and the CRC, and is signatory to the Torture Convention but has not ratified it. Under international law, treaty obligations are binding on states once they have ratified the treaty. Even where a treaty has been signed but not ratified, the state is bound to “refrain from acts which would defeat the object and purpose of a treaty”¹⁶.

POLITICAL COMMITMENTS REGARDING CAPITAL PUNISHMENT GLOBALLY:

- Several resolutions of the UN General Assembly (UNGA) have called for a moratorium on the use of

the death penalty. In 2007, the UNGA called on states to “progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed” and “establish a moratorium on executions with a view to abolishing the death penalty.” In 2008, the GA reaffirmed this resolution, which was reinforced in subsequent resolutions in 2010, 2012, and 2014. Many of these resolutions noted that, “a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights.” In 2014, 117 States had voted in favour of the most recent resolution. India has not voted in favour of these resolutions¹⁷.

- In a 2013 resolution, the UN Human Rights Council acknowledged “the negative impact of a parent’s death sentence and his or her execution on his or her children,” and urged “States to provide those children with the protection and assistance they may require,” Human Rights Council resolution, 2014 noted that “States with different legal systems, traditions, cultures and religious backgrounds have abolished the death penalty or are applying a moratorium on its use” and deplored the fact that “the use of the death penalty leads to violations of the human rights of those facing the death penalty and of other affected persons.”
- The Human Rights Council urged states to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.
- The law of extradition has been another tool for countries pushing for the abolition of the death penalty. Several abolitionist countries either require assurances that retentionist-extraditing countries not impose the death penalty, or have included such a clause in bilateral extradition treaties.¹⁸

SUPREME COURT ON VALIDITY OF CAPITAL PUNISHMENT IN INDIA:

In Indian Constitution of India article 21 incorporates the fundamental right of life and personal liberty which cannot be infringed in any situation and circumstances. And if the is to be taken there must a fair and valid procedure for that. The Supreme Court too has upheld the constitutional validity of capital punishment in ‘rarest of rare’ cases. In Jagmohan Singh v. State of U.P.¹⁹, then in Rajendra Prasad v. State of U.P.²⁰ and finally in Bachan Singh v. State of Punjab.²¹ The Supreme Court affirmed the constitutional validity of the death penalty. It said that if death penalty is awarded then the procedure must fair and reasonable, just and reason should be recorded in writing for infliction of punishment, however it must be in ‘rarest of rare cases’.²²

LAW COMMISSION OF INDIA’S REPORT ON DEATH PENALTY:

In its 262nd report law commission opined that death penalty should be abolished for all crimes except terrorism related offences and waging war. In 1955 removing the requirement of giving special reasons for imposing life imprisonment instead of death penalty, in 1973 special reasons are to be recorded for imposing death penalty, in 1980 narrowed the scope of death penalty to ‘rarest of rare cases’, it clearly implies the direction we are heading towards uplifting the right to life and also due process requirements by the imposing authority. The time has come to move towards abolition of death penalty.²³

ABOLITION VIZ-A-VIZ RETENTIONIST:

- **Deterrence:** Abolitionist argue that death penalty does not serve as deterrent. Its deterrent effect remains unproven. The major assumption is that a large number of crime are committed in a fit of rage or anger or when clinically depressed or out of strong emotions such as revenge.
- **Retribution:** this concept inclines that the offender should receive what he rightfully deserve. It is a sense of vengeance where reformation or any kind of rehabilitation is unthinkable.
- In *Shatrughan Chauhan v. Union of India*²⁴ Supreme Court ruled that “retribution has no constitutional value” in India. The Court has also reiterated that the retributive theory has had its day and is no longer valid.
- **Reformation:** this theory pertains towards transforming the offender into peaceful, productive and capable citizen in the society. Whenever a wrongdoer commits any offence generally he is in a situation where he could not control his emotions, therefore he must get a chance to correct himself and settle himself in the society rather than feel boycotted. Through death penalty the approach towards rehabilitation and restoration vanishes at all kind. Mahatma Gandhi, also said “hate the sin and not the sinner” in
- Other word destruction of individual can never be a virtuous act.

Justice Krishna Iyer said that “every saint has a past and every sinner has a future” therefore the life and liberty of the individual is to be respected and restored at any cost. On the basis of ongoing argument abolitionist argued that death penalty does not serve any legitimate end of punishment, since by killing the murderer it totally rejects the reformatory purpose and it has no additional deterrent effect which therefore, is not justified by deterrence theory of punishment. It cannot have any legitimate place in an enlightened philosophy of punishment.²⁵

Retentionist argument:

The punishment in criminal justice system must serve as an instrument for reducing the rate of crime in any society. By imposing punishment the state is deterring the offender from committing crime.

Now the question before us is whether it should be retained or not?

The law commission of India in 35th report opined that:

- Deterrence- generally the core purpose of punishment is deterrence itself. The deterrent value behind death penalty is that every human being fears death, and also death penalty differs from imprisonment in terms of quality rather than degree. Experts in legal field like judges, police officer, advocates, members of parliament also opined that capital punishment has achieved a deterrent effect in a fair measure in India.
- Retribution: in *Dhanonjoy Chatterjee v. State of West Bengal*²⁶ Supreme Court ruled that “imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the criminals.”
- Incapacitation: the law commission opined that the individuals who are ‘cruel and wicked’ are unable to reform. Also citing Sir James Fitzjames Stephen “to allow such person to live would be like leaving wolves alive in a civilized society.”²⁷
- Also Japanese argued that the capital punishment establishes the belief in the society that bad things happen to those who does it. The psychological behavior behind this belief is that there will be a reward of punishment in due time. Also it is more economical approach for a state rather than imprisonment where every cost of offender is born by state and in other way through public tax.

CONCLUSION:

WHY DEATH PENALTY SHOULD BE RETAINED:

As we have seen so many arguments so far, both the abolitionist as well as retentionist approach gives a wide range of insights. But I have come to conclusion that death penalty should be retained in India and not be abolished like many other countries. As we know that India is a multidiversity country where we could not imagine to structure it in one frame. Multi-regional, multi-lingual, multi-cultural etc. has many usage, customs at root level. At one point of time we even don’t have codified usage or custom law. Still the Indian society needs many decades to achieve the goal of a crime free civilized society. When any heinous or gruesome kind of crime occur in India like Nirbhaya case, the people wants the offenders at first sight to be hanged. The approach of Indian society is still that of retributive nature. And as a student of jurisprudence I have a approach of sociological school where society

makes the law and not vice-versa. Ultimately the ‘will of the people’ has to decide on issue of abolition.

Therefore, if death penalty is abolished then the court itself cannot go beyond its limit of life imprisonment when any heinous crime occurs which shakes the consciousness of society. As we have seen the apex court has given many verdicts where it narrowed the discretion of court to avoid arbitrariness, unfairness.

So as a conclusion there is no need to abolish death penalty in India. In order to have faith of people in Indian criminal justice system the death penalty should be retained in penal code.

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