
CAPITAL PUNISHMENT – SHOULD IT BE RETAINED OR ABSTAINED

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INTRODUCTION

“Power is of two kinds. One is obtained by the fear of punishment and the other by acts of love. Power based on love is a thousand times more effective and permanent than the one derived from fear of punishment.”

- **Mahatma Gandhi**

Punishment is the result of committing a crime.¹ Wrongdoers are punished with the goal of deterring them from repeating the same transgression and transforming them into law-abiding citizens. All penalties must be founded on the same principle: an improper action or discourse must result in a fine.. The type of punishment meted out to criminals is influenced or determined by the society in which they inhabit. The purpose of punishing wrongdoers is to make the wrongdoer realise the suffering he or she has caused others, or to establish a public example to serve as a deterrent to others in the future.

The death sentence, commonly known as capital punishment, is a form of punishment for wrongdoing. It needs to be differentiated from extrajudicial executions, which take place without adhering to the correct legal processes. It is the harshest type of punishment for the most egregious crime committed against humanity and hurting society as a whole. The severity of such criminality is determined by each country's established legal system.

Although many countries have outlawed the death penalty, there has been no international consensus regarding its legality. And countries such as India continue to retain and use capital punishment.

¹ Definition of Punishment by Webster Dictionary

The Indian legal system has time and time again faced repeated challenges to the constitutionality of capital punishment. Article 21 of the Constitution of India states that “no person shall be deprived of his life or personal liberty except according to a procedure established by law”. Article 14 of the Constitution “guarantees equality before the law and equal protection under the law” which means that no one shall be discriminated against or treated unfairly or arbitrarily. As a result, the equal protection requirement of Article 14 is bound to apply to the judicial procedure during sentence. The finding of arbitrariness in sentencing may be in violation of Article 14's equal protection clause, as well as Article 21's due process requirement.

THE DETERRENT THEORY OF PUNISHMENT

The death penalty has been termed as being barbaric, undemocratic, anti-life, and irresponsible but legal.² The topic of capital punishment has always been polarizing. On the one hand, it is irreversible, prone to error, and applied so inconsistently that it is hard to understand whether the death penalty exists to serve the ends of justice. But on the other hand, the penological purposes that it purportedly serves cannot be disproven Or proven.

If not for its penological function, why is the death penalty imposed? The primary criminological justification for this is deterrence. The death penalty's primary goal in modern society is deterrence. By deterring any potential perpetrators, The goal of punishment under the deterrent theory is to dissuade future criminal behaviour..and it is divided into two types: general and specialised deterrence.³ The former strives to deter possible future criminals by establishing a fear of punishment, whereas the latter aims to punish the specific offenders involved in order to deter them from committing crimes in the future. The death sentence is only considered in terms of general deterrence for obvious reasons. The deterrence theory states that in order for a penalty to be effective as a deterrent to crime, it must be harsh enough to offset any pleasure that the crime may offer, as well as be certain, swift, and publicly delivered.

Although there was no proof to show that the death penalty deters crime,, the Court in Bachan Singh decided that there was also no evidence to show that it has a deterrent effect.

² Justice A.K Ganguly , *Death Penalty is Barbaric* (Abolition of Death penalty)

³ Surendranath, A. ‘Penological Justifications as Sentencing Factors in Death Penalty Sentencing’, *Journal of National Law University, Delhi*

The Court went on to say that "a considerable segment of the community, including famous penologists, judges, jurists, and other enlightened individuals, believe that the death penalty serves as a greater deterrence than life imprisonment in most countries throughout the world, including India."⁴ This is the proper question to ask about the death penalty: not whether it is a deterrent, but if it is a bigger deterrent than life imprisonment. In *Bachan Singh*, the Court answered yes to this question, and so the death penalty's deterrent value served as one of the grounds for upholding the death penalty's constitutionality.

CAPITAL PUNISHMENT IN INDIA

"We are all the creation of God. I am not sure a human system created by a human being is competent to take away a life based on artificial and created evidence" -APJ Abdul Kalam ⁵

EVOLUTION: –

In India's imperial era, each state's king had supreme power and served as the arbiter of all disputes. As a result, the king might execute anyone at any time, no matter what their standing was.

Numerous instances of Indians being hanged after or even before the trial have occurred. However, the method of applying the death penalty has changed significantly since 1947, when India attained democracy. According to the Indian Constitution's provisions, only these precise offences were permitted to receive the death penalty under the Indian Penal Code.

Every citizen has a fundamental right to life, according to Article 21 of the Constitution, and neither their life nor their personal freedom can be taken away from them unless a legal procedure is followed.

"If the accused is connected to an offence punishable by death, and the court convicts him to any punishment other than death, the court shall declare the reason why sentence of death was not passed," according to Section 367(5) of the CRPC 1898.

Section 367(5) of the CRPC 1898, which specifies modifying the location of a death sentence, was repealed by Parliament in 1955. Because the death penalty is no longer the norm, the courts

⁴ "*Bachan Singh v. State of Punjab*", A.I.R. 1980, SC 898

⁵ 11th president of India from 2002 – 2007

did not require a special rationale for not enforcing it in circumstances where it was a mandated punishment.

In 1973, the Code of Criminal Procedure was re-enacted, with significant amendments, most notably in section 354 of the Code (3). "When the connection is for an offence punishable by death or, in the alternative, by life imprisonment or a year's imprisonment, the judgement shall indicate the rationale for the sentence awarded, and in the event of death, the special reasons for such punishments."

This was a substantial improvement over the circumstances that existed after the 1955 amendment, when the terms of imprisonment and the death penalty were probably equivalent in a capital case. Judges had to give specific justifications for applying the death penalty.

Under section 235(2), "If the accused is connected, the judge shall... hear the accused on the matter of sentence and thereafter pass sentence on him according to law," these modifications allowed for a post-connection judgement hearing on sentences, including life sentences.

DOCTRINE OF "RAREST OF RARE"

The notion of the "rarest of rare" test, which was established in *Bachan Singh v. State of Punjab*,⁶ decides the matter of the death penalty in India, which indicates that a life sentence will only be granted in the rarest of rare cases.

In the case of *Bachan Singh v. State of Punjab*,⁷ the Supreme Court ruled that only the rarest of the rare cases should be sentenced to life in prison. The court went on to say that capital punishment should only be used when life imprisonment is "unquestionably foreclosed."

The court expressed its opinion that if the court may use the alternative to life imprisonment, why should it use such an inhumane punishment as the death penalty ?

The supreme court further explained in "*Santosh Kumar Bariyar v. State of Maharashtra*"⁸ that the "Then rarest of rare" doctrine only serves as a guide in enforcing the provisions of section 354(3) of the CRPC and reinforces the idea that life in prison is the norm and death penalty is the exception.

⁶ AIR 1980 SC 898,1980

⁷ *Supra*

⁸ Criminal appeal no. 1478 of 2005

In the case of “Macchi Singh and others v. State of Punjab”⁹ to avoid a death penalty, the Indian judiciary established the following criteria.:

1. If the murder is particularly horrifying, ludicrous, evil, rebellious, or disgusting, it causes widespread indignation in the community. For example, setting fire to someone's home in order to kill them.
2. The crime was done on a massive scale, resulting in several deaths.
3. When the person's caste and avarice are important factors in the murder.
4. When the motive of the criminal was cruelty or complete depravity.
5. When the murder victim is an innocent child, a defenceless lady or person (owing to age or infirmity), a public figure, or someone else.

However, determining what constitutes the rarest of the rare crimes is challenging and subjective. Justice Radhakrishnan remarked in “Mukesh and Anr. v. State For NCT of Delhi”¹⁰ and Others “Nirbhaya case” that the "Rarest of Rare" case does not depend on the discretion of judges, but rather on society's abhorrence for specific crimes.

CONSTITUTIONALITY OF THE DEATH PENALTY

Article 21 of the Constitution states that everyone has a fundamental right to life and liberty. "No person should be deprived of his life or personal liberty except in accordance with the law," it states. This has been interpreted constitutionally to suggest that the state may deprive a person of his life by creating the law if there is a fair and lawful process.

The legality of the death sentence has been called into doubt on multiple occasions, but the result has always been the same: capital punishment will not be abolished.

“Jagmohan Singh v. State of Uttar Pradesh”¹¹ was the first case to challenge it. The Supreme Court's five-judge bench unanimously rejected the allegation that the death penalty is a violation of Articles 14, 19, and 21. When it comes to deciding whether a person should be put

⁹ 1983 AIR 957,1983 SCR(3)413

¹⁰ (2017)6 SCC 1

¹¹ 1973 AIR947,1973 SCR(2) 541

to death or sentenced to life in prison, the court says it must consider all of the relevant circumstances and evidence before making a judgement.

Justice Krishna Iyer stated in “Rajendra Prasad v. State of Uttar Pradesh”¹² that the death sentence violates Articles 14, 19, and 21. He cites two scenarios in which a life sentence might be imposed:

1. When a court sentences someone to death, special reasons must be noted.
2. Only in exceptional circumstances should a penalty be imposed.

However, in “Bachan Singh v. State of Punjab”, a five-judge bench (4:1 Bhagwati J.) overturned Rajendra Prasad's verdict within a year of its conclusion. The death penalty is not in violation of Articles 14, 19, and 21 of the Constitution, according to the ruling, and that the "Rarest of the Rare" cases, i.e. cases in which the community's collective mind is so shaken that it can be directed to expect the Judiciary to deliver the death penalty, are those in which the community's collective mind is so shaken that it can be directed to expect the Judiciary to deliver the death penalty.

The court of law in *Sher Singh v. State Of Punjab*¹³ ruled that the life sentence did not invalidate the rights guaranteed by the Indian constitution.

THE DETERRENT VALUE OF THE DEATH PENALTY

There is no definitive answer on the death penalty as a deterrent, but the fact that legal scholars and practitioners disagree suggests that it is not wholly without purpose.

Supreme Courts have cited the necessity of strict punishments to instill fear in the public as a reminder that leniency is counterproductive to the pursuit of justice and that insufficient sentences will not deter others, and constitutional courts have emphasised the importance of harsh punishments to instill fear as a reminder to the public.¹⁴

In several cases, the Supreme Court has ordered the death penalty, emphasising the need for harsh punishments so that people fear the law and do not commit crimes. As previously stated, this line of reasoning does not distinguish between deterrence as a consequence and a

¹² 1979 AIR916,1979SCR(3)78

¹³ 1983 AIR 465 ,1983 SCR(2)582

¹⁴ “Paniben v. State of Gujarat”, (1992) 2 SCC 474

penological goal, and while it is a factor in sentencing, it has little to do with individual guilt, rendering the purpose of customised sentencing worthless. Deterrence has been used by trial courts as a sentencing consideration, particularly in crimes with a large-scale impact on society, and it has frequently been the primary rationale for issuing a death sentence.

The death penalty's deterrent efficacy has been repeatedly affirmed, as it is objectively assessed to have a stronger deterrent effect than life imprisonment. However, no solid evidence of the deterrent effect of harsh criminal punishment in general, or the death penalty in particular, has been found in studies on deterrence.

The deterrent theory has been criticised for a number of reasons, including the impossibility to determine whether criminal law and punishment have any deterrent effect, and the debate over whether increasing the severity of punishment can result in a measurable reduction in that particular crime.

The rationality fallacy and the knowledge fallacy are two flaws in the deterrence hypothesis that criminologists have found. The former is based on the idea that criminals are not always rational decision-makers, as the deterrent theory suggests, and that committing a crime involves a wide range of emotions that influence their actions. The second flaw casts doubt on the assumption that offenders are aware of the severity of their punishment.

When examining the death penalty's deterrent effectiveness, one important question to address is if the same deterrent effect may be achieved with a lower punishment, such as not executing someone. If a lesser punishment could be shown to have the same advantages as the death penalty, this would be sufficient evidence to refute the claim that death is a more effective deterrent than life imprisonment.

To really comprehend the death penalty's deterrent effect, it is necessary to recognise that society is not homogeneous, and that there will always be a segment of society that will not be deterred by any punishment, regardless of severity. On the other hand, there may be a segment of society that is discouraged by any sentence, as well as a distinct group that is exclusively deterred by capital punishment.

The following considerations would be dependent on a number of elements, as well as a society's sensitivity to these factors. For example, by disseminating information about executions, capital trials, and other such events to the general public, mass media and public

communication could provide a more effective deterrent. However, if society is mostly made up of people who are not deterred by any form of punishment, this element will be ineffective in deterring future criminals.

However, if society is made up of people who are easily discouraged or who are deterred only by the threat of death, the deterrent impact of capital punishment would be sufficient. The effectiveness of a punishment is highly dependent on societal circumstances and is inextricably tied to human nature. As a result, it is subject to the whims of human nature. As a result, there is no definitive answer to the question of whether the death sentence deters more than a lesser penalty, such as life imprisonment.

DETERRENCE AND DEATH

Why should death be imposed if it does not serve a penological purpose? Death serves mostly as a deterrent to others. In today's culture, the major goal of death penalty imposition is deterrence. The real question is whether death is more deterrent than life imprisonment. However, the absence of data to support death as a deterrence has been a source of worry.

It is impossible to establish that death deterrence is effective based on actual facts. However, because the deterrent theory of punishment is predicated on the fear of punishment discouraging future crime, it must objectively deter, as the threat to life is the most serious of all threats. Because there is no association between the rate of crime and the death sentence, the only method to find out is to measure the crime that is not committed as a result of the death penalty, which is impossible to quantify.

Deterrence is based on the promptness and certainty of the punishment, which is death in an unknown future. A prompt penalty of any type deters more than death. Because results are determined by promptness rather than severity, improving the criminal justice system should be a major goal.¹⁵

LAW COMMISSION REPORT OF 2015¹⁶

The death sentence, according to the law commission's 262nd report, should be abolished for all offences except those that endanger national security or terrorism. The Law Commission

¹⁵ R. Basant, *An ideal death penalty law*, Youtube last visited 5th July 2022

¹⁶ Law commission of India, Report no.262 on Death Penalty, Aug.2015

ruled in 1967 that India could not risk a "experiment of capital punishment abolition." "The commission believes that the time has arrived for India to proceed toward abolition of the death sentence," the commission stated in 2015.

The group recommended that the death penalty be abolished, notwithstanding the fact that it is rarely carried out in India. The following are the reasons given by the commission:

1. The time has been shifted
2. It has no deterring effect.
3. There are flaws in the Indian legal system.

The death penalty must be abolished for all offences other than those that compromise national security or support terrorism, according to the law commission's 262nd report. The Law Commission came to the conclusion that India couldn't risk the "experiment of the abolition of the death penalty" in its previous year of 1967. The commission, however, declared in 2015 that "the commission considers that the time has come for India to move towards abolition of the death sentence." Although the death penalty is rarely carried out in India, the panel still advocated for its abolition. The following reasons were given by the commission:

1. The time has shifted
2. It does not work as a deterrence
3. The Indian justice system has problems

Death penalty – For

1. The severity of the punishment must match the seriousness of the crime.
2. Sentencing the murderer will instil fear in the minds of the public.
3. The benefits of discouraging further murders outweigh the small risk of murdering the incorrect individual.
4. Capital punishment is not an act of injustice, but rather an act of fairness.
5. The Japanese believe that those who execute people would suffer awful things whereas those

who are virtuous and engage in good deeds will experience lovely things..

Death penalty- Against

1. According to Article 21 of the Constitution, the death sentence is unconstitutional.
2. Justice system flaws can sometimes result in the death of an innocent person.
3. Emotional turmoil can also lead to the perpetrator committing actions that have unforeseeable effects.
4. A life sentence has no effect on preventing or controlling crime.
5. A life sentence is a violation of international human rights legislation.
6. Many executions are botched, resulting in unwarranted and severe suffering and torture.

CONCLUSION

According to Emile Durkheim, "It is not a crime because it harms public sentiment, but it is a crime because it hurts public sentiment" This is true because what is illegal in India might be legal in another country. As a result, the sentiment of that particular society must be taken into account. Punishment is administered not merely to provide justice to those who have been wronged, but also to satisfy societal attitudes.

The decision in Machhi Singh involved the element of "collective conscience" and has since resulted in the courts considering the outrage of the public as one of the factors which affect capital sentencing. This has significantly diluted what was set out in Bachan Singh's framework and made sentencing crime-centric. Bachan Singh called punishment based on proportionality to culpability. The punishment has to fit the guilt of the criminal. However, public opinion has resulted in the focus shifting from the guilt of the accused to the sentiments of the people.

In the "Nirbhaya case", Justice Radhakrishnan observed, "The Rarest of Rare case does not depend on the discretion of judges, but rather on society's abhorrence for particular acts." In some cases, a sentence of life imprisonment is insufficient punishment. It is society's demand and faith in the judiciary to impose the death penalty on those who have broken the law. Giving

those types of perpetrators the death penalty will also deter others from committing such terrible crimes.

If, for example, the perpetrator in the Nirbhaya case was merely sentenced to a year in prison, there was a risk that his family would seek vengeance. To combat the idea of vengeance and retaliation, proper punishment is required, and the criminal must be punished according to the law.

As a result, capital punishment should not be prohibited in India. Except for section 303 of the IPC, there is no mandatory death penalty in the IPC. Every crime that carries the death penalty has a life sentence option, and the death penalty is only applied in the rarest of circumstances.

As a result, capital punishment must be kept in our country, but only in the "rarest of rare circumstances."