



Death penalty in India: Retributive or reformative

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Abstract

The execution of a person is the most stringent measure to punish an offender by executing him after following the due process created by legislation. It is based on the retributive theory of jurisprudence and is in place since time immemorial. But modern times require a different approach and the best-suited one is the reformative theory which advocates for the eradication of causes that leads to offenses rather than deterring future offenders by scaring them. It has been the center of the global debate on whether the death penalty should be abolished or not. Around 108 countries are there which have abolished the practice whereas India still retains it. Many arguments support as well as reject this punishment. Even though Law Commission and the judiciary once in a while have suggested abolishing this punishment for serious offenses except waging war and terrorism but the Indian Legislature has shown no interest in reforming any laws for this change to happen. This article not only reflects all the legal and social frameworks which either support or oppose this punishment and also suggests what the way forward should be.

Keywords: retributive or reformative, stringent measure, legislation

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 The Sociological School of Law recommends that “with social evolution comes legal evolution and vice-versa” as both are interlinked with each other. And in the course of social evolution, many practices across the globe have been banned considering their nature for example slavery, human trafficking, physical torture, etc. A long-time debate is going on regarding the execution of murderers as a measure to punish offenders but the world has not formed a consensus against its use yet. If we see the data 55 nations still use the death penalty, whereas 108 nations have abolished it. In that order, China, Iran, Egypt, Saudi Arabia, and Syria were the countries with the most well-known executions. India is also among just a few nations that continue to use death punishment under various laws for serious offenses. There are many ideas of retribution applied in the Indian justice delivery system and thus different kinds of punishment based on their offenses. Capital Punishment plays an important part in the Indian criminal justice system based on the retributive theory of punishment which supports the principle of “an eye for an eye”. And here comes the debatable part of it, if it’s right to execute a person or not. In this article, we will be discussing both sides of the arguments related to capital punishment and trying to find a way forward to it.

Death Penalty and its framework

The death penalty, also known as capital punishment, is distinguished from extrajudicial execution carried out without due process of law. It can be defined as “a practice sanctioned by law whereby a person is put to death by the state as a penalty for a crime after a proper legal trial”. Although the imposition of the penalty (even when it is

sustained on appeal) is always followed by execution, the terms “death penalty” and “capital punishment” are occasionally used interchangeably. This is because there is a chance that the sentence could be commuted to life in prison. This punishment is awarded in the rarest of the rare cases vis-à-vis to the most heinous, grievous, and detestable crimes against humanity. The death penalty is being used as a mode of punishment since time immemorial all over the world and the moral acceptability that the Death Penalty i.e., the state’s power to execute people and its circumstances become a center of global debate. If we see the history of the Death Penalty in India, then it becomes evident that there was no debate against its awarding till 1931, when Shri Gaya Prasad sought to introduce a bill to abolish it for the offenses under IPC. Britishers didn’t think it wise to abolish it and thus after independence when India continued several laws like IPC, CrPC, etc., death punishment remained to be a factor. Our Indian Constitution borrows the concept of the need for life from the American and Japanese constitutions. It is provided under Article 21 and is one of such concepts which the constitution guarantees as well as confers. The broad scope of this Article depends on its interpretation and thus it includes several other rights. Article 21 provides “No person shall be deprived of his life or personal liberty except according to the procedure by law” and Article 14 provides “Within the boundaries of India, the State shall not deny anyone’s right to equal treatment under the law or equal protection of the laws. prohibition of discrimination based on a person’s birthplace, race, caste, religion, or sexual orientation”. One more aspect to take into account is that Criminal Law and Criminal Procedure are under a Concurrent List leading to various laws dealing with the Death penalty such as:

1. Indian Penal Code, 1860: Prescribes death for offenses such as:
 - Declaring war on the Indian government. (Sec. 121);
 - Committed mutiny facilitation (Sec. 132);

- Providing or creating false evidence that results in the death of an innocent person. (Sec. 194);
 - Murder (Sec. 302)
2. Narcotics Drugs and Psychotropic Substances (NDPS) Act, 1988 provides the death penalty for offenses of financing, producing, manufacturing as well as selling certain drugs.
 3. Army Act, 1950; Air Force Act, 1950 and Navy Act, 1956
 4. Commission of Sati (Prevention) Act, 1987 prescribes that the death penalty for direct or indirect abetment of sati SC/ST (Prevention of Atrocities) Act, 1989
 5. Prevention of Children from Sexual Offences (POSCO) Act, 2012

Our Criminal Legislation works basically on the principle of these two Articles. When deciding between life in prison and the death penalty, the discretion lies with the judge but that discretion gets qualified only when it passes all the aspects of these two articles. As per Section 354(3) of CrPC, 1973, the courts are required to give a reasoned statement or speaking order for awarding the death penalty. But even after that from time to time, this discretionary power has been challenged in different cases. The Supreme Court has maintained the legality of the death penalty under the “rarest of rare” case in Jagmohan Singh v. State of Uttar Pradesh and then in Rajendra Prasad v. State of Uttar Pradesh. Finally, in Bachan Singh v. the State of Punjab (1980) where the SC judges due to its built-in adequate procedural safeguards and its procedure, which is neither arbitrary nor provides judges excessive power, affirmed the death penalty's constitutional legitimacy. It was established by Justice Sarkaria in this case that “Along with the facts and circumstances of the offense, the circumstances of the offender must be taken into account. The court must scrutinize both the crime as well as the criminal, and then decide whether life imprisonment is to be awarded or the death penalty. Accordingly, the presence or the absence of ‘special reasons’ must be established. Emphasis is to be laid on the aggravated and mitigating circumstances which are dependent upon the facts and the case's specifics. “The principle as to what are the essentials of the “rarest of rare was laid down in the landmark judgment of the Machhi Singh Case The Apex Court held that two questions need to be asked and answered before giving the death penalty.

- First, is there something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for a death sentence?
- Second, Are the crime's specifics such that the death penalty must be imposed even after the mitigating factors that speak in the defendants' favor have received the most weight?

In *Mithu v. State of Punjab*, the Supreme Court finally struck down the provision of Of the Indian Penal Code, Section 303, which provided for a mandatory death sentence for offenders. Section 303 provided that “If a person serving a life sentence for murder, they would automatically receive a death sentence. The Supreme Court ruled that the clause arbitrarily distinguished between murderers and those already serving life sentences for murder.” which was determined to be against the Constitution's Articles 14 and Later in *Machhi Singh v. the State of Punjab*, the court stated some guidelines to be observed concerning executions. It was stated to first “identify how the crime was

committed, motive, the anti-social nature of the crime, the magnitude of the crime, and the personality of the victim.” But we observe then in recent years, the judiciary has changed its approach and has entrenched the punishment of “full life” or life sentences of a determinate number of years as a response to challenges proposed by death cases. The justice system is focusing on a reformatory approach and thus the situation has reversed i.e., now a life sentence is a rule whereas There is one exception the death penalty. the Supreme Court's three-judge panel's decision in *Swamy Sharad dhan and v. State of Karnataka* laid the foundation for this penal option instead of the death penalty.

Clemency Powers

For a person once convicted by the courts, a mercy plea is the last constitutional resort. This Mercy plea or clemency petition gives a sense of humanity to the judicial process as the punishment can be reviewed beyond the scope of legal angles. Sometimes, when there is a mistake in the administration of justice or when the conviction is doubtful due to issues like torture, fabrication of evidence, poor legal aid, etc., the mercy plea comes to the rescue. This plea can be submitted by the condemned prisoner from the Indian President and the Governor of the State under Article 72 and Article 161. These articles empower the President and Governor to not only grant pardons but also sentence suspension, reduction, or commutation in certain cases. Articles 74 and 163 respectively provide that neither of these powers is personal to the holders of the Office which means that they can be exercised only using the Council of Ministers' guidance and assistance. This casts a heavy responsibility on those wielding this power and necessitates a full application of mind, scrutiny of judicial records, and wide-ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution. In the case of *Swaran Singh v. the State of Uttar Pradesh*, the Supreme Court eloquently held that clemency powers are not out of the jurisdiction of the courts and shall be liable for judicial review. This means that the use of such authority by the president cannot be against the spirit of the constitution. Though there are benefits provided in Mercy Petition for the accused, there are some grave issues also involved in it.

1. The first big issue is that there is no provision for a fixed time frame to take the mercy plea which only leads to long delays. The Law Commission in its Report No.262 has highlighted this aspect and stated that certain Presidents put brakes on the disposal of the Mercy petition.
2. The second big issue with the mercy petition is that there is a lack of transparency. In *Epuru Sudhakar & Anr. v. Government of Andhra Pradesh*, it was stated that the mercy plea lacks transparency as there is no compulsion to share reasons for rejection or acceptance of the mercy plea, but it is subjected to Limited Judicial Review.

Capital Punishment in international human rights treaties

On the international platform, countries can be classified into 4 different categories based on their attitude toward the imposition of the death penalty. These categories are

- Abolitionists for all crimes which include countries such as Bhutan, Australia, Argentina, etc., whose laws do not prescribe the death penalty for any crimes.
- Abolitionists for ordinary crimes only which include countries such as Brazil, Israel, Peru, etc., Its laws only stipulate the death penalty for heinous and extraordinary crimes.
- Abolitionists include nations like Algeria, Brunei, Mali, and others who maintain the death penalty even for lesser offenses but have not carried out an execution in the past ten years.
- Retention includes countries like China, Bangladesh, India, etc., which still retain the death penalty for ordinary crimes and still execute the convicted ones.

Even though the United Nations has occasionally opposed it, India continues to use the death sentence as one of its punishment options. Many international conventions oppose the death penalty due to its irreversible nature, for example

- The ICCPR is the most major convention which though doesn't rule against the practice of capital punishment but provides vital protections for those nations that continue to use the death penalty following Article 6 as well as a protective zone for the right to life. Concerning explicitly abolishing the death penalty, the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) is concerned. As of March 2022, it has around 90 state parties and 3 signatories.
- The application of the death sentence for those under the age of 18 is expressly forbidden by Article 37(a) of the Convention on the Rights of the Child (CRC). At least 195 nations had ratified this by the year 2015.
- Since 2007, the UN General Assembly has passed four resolutions calling for an end to the death penalty, among other things.
- Additionally, safeguards to restrict the use of the death penalty are provided by the UN Committee against Torture and the Convention against Torture and Cruel, Inhuman, or Degrading Treatment or Punishment.

Arguments supporting Death Penalty Deterrence

1. **Deterrence:** It ranks among the greatest justifications for the death penalty. The reason is offered by the claim that putting convicted killers to death will dissuade would-be killers in the future from killing people. Given that it has a brutalizing effect, it is for the better good of society. If we might use Japan as an example, at least 3 inmates are put to death every year to perpetuate the notion that horrible things happen to people who do wrong. The death sentence is also said to give victims' relatives closure.
2. **Retributive Justice:** Retributive justice is based on the principle of "everyone should get what they deserve in proportion to the seriousness of their crime," or more simply, "eye for an eye." For the taking of life, the death sentence is necessary for a just society. When someone kills someone, justice is upset, and if it isn't corrected, society will give in to the scourge of violence. The value society placed on preserving lives would be weakened if the perpetrator received any lesser punishment. According to this theory, John Locke once said, "If one breaches another's right to life, they forfeit their right to life." The victims' families

experience a sense of psychological closure thanks to the death penalty.

3. **Will of the citizens:** In 2012, a survey was conducted to find out how much of the population agrees with the death penalty and it was found that nearly 70% of Indians favored capital punishment continuance. One of the crucial examples in recent times to show this is the Hyderabad police encounter in Disha's case. A large populace not only hailed this act of police but also asked for speedy judgment like that in the future.
4. **An incentive to help Police:** Plea bargaining under the Criminal Procedure Code (CrPC) allows the accused to negotiate a reduction in the sentence that will be imposed. Prisoners on death row are encouraged by the death penalty to assist the police in exchange for lighter sentences.
5. **Principle of Proportionality:** According to the proportionality principle, punishment must always be appropriate for the crime committed and in proportion to that offense. Justice dictates that the severity of the penalty be determined by the offense's gravity and its merits. And if the offense is too serious, then according to this principle there is no wrong with executing the offender.

Arguments against the death penalty

1. **No statistical data:** For many years, criminologists examined murder rates to determine if they varied with the likelihood that murderers would be executed, but the findings were contradictory. There is no statistical proof for the death penalty being the most effective deterrent to less severe punishment such as life imprisonment. Death has been prescribed as one of the punishments for Rape (S.376A IPC) but still the number of cases and its brutality has increased multifold.
2. **No constitutional value of retribution:** The constitution of India does not support vengeance and instead goes for rehabilitation and reformation. The judiciary has from time to time supported the death punishment as not against constitutional values and has reasoned that it helps the victims' families to deal with their situations. But there is no supporting evidence on psychological closure as families often react differently to such situations. The number of offenses can be decreased or reduced if the level of education and socioeconomic conditions of people will be increased. The Death Penalty India Report 2016 (DPIR) published by the National Law University Delhi, found that nearly 75% of all the prisoners sentenced to death in India belong to socio-economically marginalized communities, including Dalits, OBCs, and religious minorities. Moreover, the report also found that over 62% of the prisoners sentenced to death had not completed secondary school. Since 1992, India has witnessed a continuous decline in the murder rate from 4.6 per lakh of the population to 2.7 per lakh of the population in 2013. The argument to reform the offenders through the perspective of retributive and reformatory justice is a convincing one and thus needs to be taken into account.

3. **Immoral nature of the punishment:** The death sentence should not be given since it degrades the offender's position as a man and a citizen. Executing a person and depriving him of his unalienable right to life is against human dignity.
4. **Lack of objectivity:** Since there is no established framework for aggravating and mitigating circumstances, there is no consistent way to define the process of carrying out a person. Additionally, because there are various and arbitrary interpretations of the rarest of the rare cases, there is a lack of procedural fairness in this situation. Pressure from the media also provides room for dishonesty.
5. **Adverse Criminal Justice System:** Inequality can occur in the adversarial criminal justice system due to things like unfair representation of one's case, unequal access to resources, etc. Due to ineffective prosecution, innocent defendants from socially disadvantaged backgrounds frequently become the target of this system. Long delays are also caused in this type of criminal justice system which often leads to worrisome situations for the accused.

Way Forward

- The Law Commission of India recommended that the capital punishment or death penalty should only be kept as punishment for crimes related to terrorism and waging war and it should be abolished for all the present crimes. The Report recommended that the government should take some measures to reform the police, and witness protection schemes and restructure the victim compensation scheme.
- Death penalty being an extraordinary expression of state demands trust and transparency whenever it is being used. The Supreme Court's recent guidelines on proper consideration of the accused's mitigating circumstances who is facing the death penalty at the trial stage while applying the Bachan Singh Test is in itself a step to bring procedural fairness, uniformity, and objectivity.
- There needs to be a consistent judicial approach with more focus on the restorative and rehabilitative aspects of justice to avoid any grave costs of imposition of the death penalty. The court needs to provide a compelling justification rather than a mere justification as a formality to impose the death penalty and avoid excessive punishment and maintain the utmost respect for the inalienable right to life.
- Longer delays in mercy pleas should be shortened by concreting a time framework for it, if not a procedural framework. Mercy's plea should act as a final bulwark against the miscarriage of justice and not become another example of injustice itself by delaying the whole process.
- Recently, Supreme Court initiated a *Suo moto* case to examine and institutionalize the process involved in the collection of data and information to decide the award of the sentence in death penalty cases. Further, the apex court should issue a concrete guideline to lay down the options, other than the death penalty in serious cases which can be given.

Conclusion

With all the discussion and laws above, It is obvious that there is still a lack of consensus regarding the death penalty in our nation, which allows for both debate and consideration by the legislative. It is impossible to ignore the Law Commission Report's recommendation to abolish the death sentence. In a country like ours, where the population is both large and extremely diverse, The emphasis should be moved from crime prevention to population reform through the improvement of socioeconomic status and education. According to official statistics, 720 people have been put to death since independence, which hasn't produced a strong deterrent effect yet. The courts should now set a different course for the future. The state must protect life rather than end it since it is the protector of the populace. Why can't India do the same if 108 other nations have done so and have found other ways to punish criminals? It becomes difficult to ignore public sentiments on one side, but the other side opines that the justice delivery system should be unbiased, independent, and free from any such sentiments. We believe that the death penalty is one of the worst, unjust and unfair punishments as once life is taken away, can't be given back. Since The government and judiciary have enforced the death sentence as a means of crime prevention, so some changes should be made in their stance toward the death penalty. The principles and alternatives to life imprisonment as ordained in the *Swamy Sharaddhananda Case* needs to be followed in future cases by the judiciary and the legislature shall abolish the application of the death penalty to every one. The path of reformation is much better than the path of vengeance and no country other than India should establish that in the international sphere.

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