



THE DEATH PENALTY CONUNDRUM

Akash Deep Nagal¹ & Saumya Chopra²

¹ *Research Scholar, Department of Laws, Panjab University, Chandigarh*

² *LLB Student, Campus Law Centre, Faculty of Law, University of Delhi*

Paper Received On: 21 FEB 2022

Peer Reviewed On: 28 FEB 2022

Published On: 1 MAR 2022

Abstract

The death penalty is a concept that is ever evolving and transitioning with the advent of penal philosophies and the new world order. This form of punishment is the highest form of sentence to exist in any country. However, such form of punishment, that takes away the inviolable right to life must be applied in a restrictive and circumspect manner. Many countries have different perspectives as to the application of death penalty. There have been several attempts made in the recent times to abolish death penalty as a way of punishment as it is believed to be a violation of Human rights. Under such new developments, it is imperative to look at death penalty with a fresh outlook. The article aims to analyse Indian as well as global perspective on death penalty.



Scholarly Research Journal's is licensed Based on a work at www.srjis.com

Introduction

Article 21 of the Constitution of India provides for Right to life and personal liberty. Whether this right can be taken away by the state from an individual who is guilty of crime punishable with death penalty is a debatable issue not only in India but globally. The abolitionists argue that such

¹ Research Scholar, Department of Laws, Panjab University, Chandigarh

² LLB Student, Campus Law Centre, Faculty of Law, University of Delhi

kind of intentional conduct (taking away human life) by the state is not justified, whereas retentionists argue that death penalty creates a deterrent effect in the society setting an example of the proportionate punishment to the intended wrongdoer. It is undisputed that the punishment of a crime must be proportional to the act and a convict must not be punished in an unusual manner or retroactively.³ Death penalty as a form of punishment is not a recent occurrence and is based on utilitarian and retributive theories. It is suggested that any punishment can and should remain act-focused.⁴ Whether death penalty should be awarded for certain crimes still remains an arguable question. Thus, the status of death penalty varies around the world and a different approach is taken towards capital punishment.

Tracing Death Penalty in The Indian Context & Legal Developments

Capital punishment is applicable in India since the inception of the legal order. The constitutionality of death penalty has been held in several cases. In *Jagmohan v. State of Uttar Pradesh*⁵, the death penalty was declared to be not violative of Articles, 14, 19 and 21. The framers of the Constitution were aware of death penalty as a form of permissible punishment. The Hon'ble Supreme court of India has propounded the doctrine of 'Rarest of Rare' in the case of *Bachan Singh v. State of Punjab*⁶ The court with due consideration to the dignity of human life has carved an exception that death penalty shall not be the norm but will be applied only in rarest of rare cases. The court tried to lay down a framework to reduce arbitrary application of death sentence and guidelines in this regard. The rarest of rare doctrine is still not defined in any statute⁷ and it continues to be based on the circumstances and facts of a case. The punishment of awarding capital punishment is restricted to certain cases and has to be in accordance with the test laid down in the

³ Joshua Dressler, *Understanding Criminal Law*, 7th Edition.

⁴ Erin I. Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility*, Harvard University Press, 2018, ISBN 9780674980778.

⁵ (1973) AIR 947

⁶ AIR 1960 SC 898

⁷ Kiran Ranganath Kale, *Doctrine of 'Rarest of Rare' And the Indian Legal System*, South Asian Law Review Journal, Volume 3.1, June 2017

Bachhan Singh⁸ case. India has not done away with death penalty in totality but the doctrine of rarest of rare must be kept in mind while applying judicial mind and awarding the death sentence. Difficulties were realised by the court in applying the test of rarest of rare cases and guidelines of what will fall in rarest of rare cases was further clarified by the court in the *Macchi Singh case*⁹. In the Indian context death sentences may be imposed after it is seen whether an accused can be reformed or rehabilitated and only after ensuring that all the mitigating circumstances are duly considered. The court observed in the case of *Shabnam v. Union of India*¹⁰, that the state cannot act in haste in death penalty cases and has to wait for prisoners exercise their rights.

In the case of *Rajendra Prahladrao Wasnik vs The State of Maharashtra*¹¹, the Hon'ble Supreme court has cleared that several precedents mandate the probability that a convict can be rehabilitated and reformed in the society must be seriously and earnestly considered and the need for such consideration cannot be over emphasised. Social reintegration is not an easy process but any sentence without such consideration would not be in accordance with the rarest of rare doctrine which aims at avoiding and minimising the use of capital punishment.

It is absurd that despite such careful formulation of the doctrine, India remains to be one of the countries which awards the greatest number of death sentences.

On the global front India exists as a retentionist country. It is a signatory to the *International Covenant on Civil and political rights*¹² and in accordance with Article 6 of the multilateral treaty, the application of death penalty should only be thin on the ground and after the final pronouncement of judgement by a competent court.

⁸ *ibid*

⁹ *Macchi singh v. State of Punjab*, 1983 AIR 957

¹⁰ (2015) 6 SCC 702.

¹¹ (2018) SCC Online SC 2799

¹² <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

Global Outlook

There is an emerging trend and aggressive demand towards the abolition of death penalty worldwide. Over the years, the approach taken is to move further away from death penalty. Some countries have already moved away from capital punishment. Change from retribution to rehabilitation and reform is the need of the hour. Article 3 of the Universal Declaration of Human Rights recognises the right to life.¹³ Article 6 of Part III of the International Covenant on Civil and Political Rights¹⁴ provides for the universal right of life. Further, it elucidates that this right shall be protected by law and no one shall be arbitrarily deprived of right to life.

Despite capital punishment being awarded, the crimes committed remain at an all-time high, which contradicts the perception that death penalty will act as a deterrent to heinous crimes. It cannot be completely done away with, especially in developing countries. In the popular mind, a convict is an offender and a threat to the law and order as well as personal security.¹⁵

Comparative Analysis of Death Penalty in USA and India

There is popular support for capital punishment in the United States of America, however some states have abolished the use of death penalty. The states have the right under the U.S Constitution to formulate and apply their own criminal code including capital punishment. In the landmark case of *Furman v. Georgia*¹⁶, the U.S Supreme court held that death penalty is unconstitutional if it is applied in an arbitrary manner. Following the judgement, capital punishment was put on hold till the states could review the criminal justice system. Capital punishment was reinstated in the case of *Gregg v Georgia*¹⁷. While the death penalty was never abolished in India rather it was held to be constitutionally valid in certain cases, but in both the countries, it certainly must be based on constitutional standards and philosophies.

¹³ Universal Declaration of Human Rights, 1948

¹⁴ International Covenant on Civil and Political Rights, 1966, Article 6

¹⁵ Leila Seth, "Talking of Justice, Peoples' rights in Modern India" Alaph book company, 2014

¹⁶ *Furman v. Georgia*, 408 U.S. 238 (1972)

¹⁷ *Gregg v. Georgia* 428, U.S. 153(1976)

An expansive definition is given to Article 21¹⁸ of the Constitution of India as was given in the *Maneka Gandhi*¹⁹ case where the court held that “Procedure established by Law” as envisioned in the said article must be just, reasonable, and fair to pass the test of Constitutionality. Similarly, in Eighth Amendment to the U.S Constitution²⁰ forbids cruel and unconstitutional punishments and the due process of law shall be followed as envisaged in The Fifth and Fourteenth Amendments.

The Indian court observed in the case of *Jagmohan Singh supra* that the Indian Constitution does not have any provision like the Eighth amendment and the judges in India do not have the freedom like US courts to apply the test of reasonableness and the due process clause.

The Indian Supreme court in the case of *T.N Vatheeswaran v. State of Tamil Nadu*²¹, observed that in the United States of America, the denial of speedy trial has been held to entitle an accused person to vacation of the sentence²². This analogy of American Law was made not permissible, however the court clarified that the prolonged delay in execution of sentence has a dehumanising effect in depriving a person of his life in an unjust, unfair, and unreasonable way which further offends constitutional guarantees and no person shall be deprived of life except in accordance with procedure established by law. In the case of *Mohd. Arif v. Registrar*²³, the court held that if the death penalty is executed, then it becomes irreversible, therefore, every opportunity must be afforded to the condemned convict to establish that his life ought not to be extinguished. This obligation is a part of reasonable procedure to be followed which granting death sentence.

In *Gregg v. Georgia*²⁴ while upholding the constitutionality of death penalty, the American court held that mitigating factors and aggravating factors must be considered before imposing the death

¹⁸ Article 21, The Constitution of India

¹⁹ *Maneka Gandhi v. UOI*, (1978) 1 SCC 248; *National Legal Services Authority v. UOI*, (2014) 5 SCC 438.

²⁰ U.S. Constitution, 8th Amendment

²¹ (1983) 2 SCC 68

²² *Strunk v. United States* (1973) 37 L.Ed. 56

²³ (2014) 9 SCC 737

²⁴ *Ibid*

sentence. The aggravating factors must outweigh the mitigating factors. A similar view has been taken by the Indian Supreme court in the case of *Anguswamy v. State of Tamil Nadu*²⁵ wherein the court held that the hearing should be intended to afford an opportunity to show mitigating circumstances as well as aggravating facts. Accused must be given sufficient time on the question of sentence. These factors are considered to give and expand human rights jurisprudence which is fundamental. The court's intervention is necessary to avoid conviction in an arbitrary manner. Both countries have provisions for appeal of the death sentence and judicial review which may act as a sieve to prevent wrongful sentence.

Conclusion

Death penalty as observed in the retributive and utilitarian theories of criminology does serve and intrinsic purpose to act as a deterrent in criminal justice system of any country. It must be awarded only with utmost sensitivity with due regard to constitutional values. Meanwhile higher standards need to be set for the application of the highest form of punishment. Arbitrary sentences need to be prevented at all costs. Andrew Hamilton observed that power may be compared to a great river, which kept within in bounds, is both beautiful and useful but when it overflows its banks it is then too impetuous to be stemmed, it bears down all before it brings destruction and devastation wherever it comes.²⁶

²⁵ *Anguswamy v. State of Tamil Nadu*, (1989) 3 SCC 33.

²⁶ Andrew Hamilton, *The Cause of Liberty*, (August 4,1735) cited in “*The Penguin Book of Historic Speeches*”, edited by Brian MacArthur, Penguin, (2012), p.67.