

Death as a Penalty in World's Two Largest Democracies- India and America

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Abstract

The debate about the future of the death penalty often focuses on whether its supporters are animated by instrumental or expressive values and if the latter, what values the penalty does in fact express. Crime as well as the mode of punishment correlates to the culture and form of civilisation from which they emerge. With the march of civilization, the modes of penalty have witnessed significant humanised changes. The never ending debate- between the abolitionists and retentionists- on the efficacy of capital punishment as a deterrent has not been resolved. Many retentionist governments claim that the public supports the death penalty and that therefore it should be maintained. The modern trend tilts in favour of abolition, but at the same time there is another section of opinion that professes the retention of capital punishment. A majority of countries has now abandoned the use of death penalty. But the world has not yet formed a consensus against its use. The most populous country in the world China, executes thousands of people every year, the most powerful country, the United States uses it regularly, and the world's largest democracy India also resumed death penalty after gap of eight years of no execution.

Introduction

Our civilisation has evolved from the horrors of New gate, where people were strung up for even picking pockets. In 1949, the Federal Republic of Germany and Costa Rica became the first countries to ban the death penalty in their Constitution. Most democratic countries have done away with this punishment; others still have it existing in the law but do not entertain the option. In 1956, the Indian government sought the opinion of the States on the 'death penalty', and they voted in favour of retaining it. Later in 1967, the Law Commission also recommended its retention with a paramount view to maintain law and order.¹

Today's debate over capital punishment has its broad genesis in 1764 when the Italian jurist, Cesare Beccaria, published his treatise, "An essay on Crimes and Punishments". In it,

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¹ Jonathan Rodrigues, "Kasab washed his hands, we stained ours", *The Hindu*, Dec. 9, 2012.

Beccaria argued that abolishing the death penalty was crucial to a society's progress from barbarity to civilised refinement. "Is it not absurd", he asked, "that the laws, which detect and punish homicide, should in order to prevent murder, publicly commit murder themselves? Beccaria's thesis was founded on two central arguments. One, that the objectives of punishment were dual: to deter the future commission of crimes, which the death penalty decidedly did not achieve, and to reform the offenders, which the death penalty decidedly cannot achieve. And two, that the State's right to take the life of a citizen was illusory, and opposed to the social contract from which it derived its sovereignty.²

The increase in the number of countries that have abolished the death penalty since the Second World War shows a steady trend towards worldwide abolition of the death penalty. The abolitionist trend gained momentum in 1980s, during which 11 countries abolished the death penalty for all crimes. The trend reached a peak in the 1990s, during which 34 countries abolished the death penalty for all crimes, and five countries for ordinary crimes. The trend continued into the twenty-first century and during the first decade, 22 countries abolished the death penalty for all crimes, followed by two more countries during the period between 2010 and 2012. The total number of abolitionist states amounts to 97 as of January 2013.³

Capital Punishment- Meaning

Capital punishment or the death penalty is the killing of individual ordered by the government as punishment for certain serious crimes. Its practice, once almost universal has gradually dwindled during the last century. Today capital punishment has been abolished in all of Europe and most of Latin America, as well as Australia, New Zealand and Canada. The United States remains the only western nation in which capital is still practiced.⁴

Origins

Death penalty laws as far back as the Ancient laws of china. In the eighteenth century BC, The Code of King Hammurabi of Babylon codified the death penalty for twenty different crimes. Murder, however was one of them. The chief concerns of the code appears to be

² Suhrith Parthasarthy, "India's Muddled Thinking on Punishment", *The Hindu*, Sept. 16, 2013.

³ Amnesty International, Death Sentences and Executions 2011, *available at*: <http://www.amnesty.org/en/library/asst/ACT50/001/2012/en/241a8301-05b4-41c0-bfd9-2fe72899cda4/act-500012012en.pdf> (Last Visited January 11, 2014)

⁴ Ron Fridell, *Open for Debate Capital Punishment*, 1 (Benchmark Books, New York, 2004).

setting an appropriate measure of compensation for injuries to slaves, domestic animals and property with the death penalty serving as the back-up penalty for restitution and fines. Michael H. Reggio notes that the first historically recorded death sentence occurred in Egypt in the sixteenth century BC. The wrongdoers, a number of nobility, were accused of magic. He was ordered to take his own life. During this period, no nobles were usually killed with an axe. The death penalty was also included in the fourteenth century BC's Hittite Code.⁵ Some ancient societies applied it sparingly, and only for the most terrible of crimes other imposed it for minor offences. Under Rome's Law of the Twelve Tablets in the 5th century B.C., for example, death was the penalty for publishing: insulting songs and disturbing the peace of the city at night. Under Greece's Draconian legal code in the 7th century B.C., death was the punishment for every crime. The Draconian Code was an exception, however, in the ancient world. Death was rarely the only available punishment even then.⁶

Categories of Countries with respect to capital punishment

Countries fall into four categories with respect to capital punishment.

Retentionist countries not only retain the death penalty but use it (albeit in some cases, only rarely); *Abolitionist* countries have formally abolished the death penalty for all crimes, and in all circumstances. Countries that are *abolitionist for ordinary crimes* have abandoned capital punishment for common criminal offences, such as murder and rape, but retain it as an option for such crimes as treason and desertion from the armed forces in time of war. Countries that are *abolitionist de facto* retain the death penalty in theory but have not carried out an execution for so long that they are considered to have effectively abandoned it.⁷

Abolitionist Views on Death Penalty

Death penalty is viewed as a 'premeditated' form of killing which is carried out in the name of punishment.⁸ It is 'barbarous' in nature since all the methods of execution involve a great amount of pain to the person being executed; hence it is believed that till such advanced technology has not developed that the execution can be carried out in an 'immediate and

⁵ Joseph A. Melusky and Keith Alan Pesto, *Historical Guides to Controversial Issues in America Capital Punishment*, 8 (Greenwood Press, Connecticut, 2001).

⁶ Michael Kronenwetter, *Capital Punishment* 1 (ABC-CLIO, California, 2nd edn., 2001).

⁷ *Id* at p. 19.

⁸ *See Taylor v. Crawford*, 487 F.3d 1072, 1081 (8th Cir. 2007) ("The infliction of capital punishment is itself a deliberate act, deliberately administered for a penal purpose").

painless' manner, death penalty should not be administered. It is also believed that death penalty does not serve as an instrument of deterrence which is regarded as its main objective by the proponents of death penalty.⁹

Death penalty is therefore futile and this is evidenced by the fact that its abolition has had no such adverse impact on the crime rates of the countries which have abolished it. Further, it also denies the possibility of rehabilitation and reformation of the criminal. Death penalty 'runs the risk of irrevocable error' as many are denied the opportunity of a fair trial or they grapple with issues relating to inadequate legal representation. Hence, the international community condemns the use of death penalty on the ground of human rights violation.

In many countries that use the death penalty similar serious flaws in the administration of justice show, in and of themselves, that the death penalty cannot be defended. However, even if a justice system were infallible no person should be executed or have to live under sentence to death. The death penalty is the premeditated judicial sanctioned killing, by a State, of a human being. It is the ultimate denial of human rights. The use of such calculated violence in the name of justice stains justice system.¹⁰

Deterrence: What Supporters Say

There are strong arguments on both sides. However, supporters and opponents tend to agree on these basic points:-

- Punishments are necessary to deter crime and to encourage law abiding behaviour.
- Those punishments must be administered by the State through due process of law rather by individuals through vigilant action.
- The punishment must fit the crime with more serious crimes requiring most serious punishment.¹¹

Death sentence has been used as an effective weapon of retributive justice for centuries. The justification advanced is that it is lawful to forfeit the life of a person who takes away another's life. A person who kills another must be eliminated from the society and therefore, his execution is justified.¹²

⁹ Dawinder S. Sidhu, "On Appeal: Reviewing The Case Against The Death Penalty" 111 W. VA. L. REV. 453, (2009).

¹⁰ Amnesty International- Death Sentences and Executions 2012, *available at*, <https://www.amnesty.org/en/death-penalty> (Visited Jan. 14, 2014).

¹¹ *Supra* 4 at p. 61.

¹² David Dressler, *Reading in Criminology and Penology* 501 (Columbia University Press, New York, 2ND edn., 1991).

Supporters believe that capital punishment is both a necessary and a just punishment for the most heinous and violent crimes. Opponents believe that capital punishment is unnecessary and unjust and that the most violent criminals should be sentenced to life in prison instead of death. Supporters of the death penalty insist that it effectively deters violent crime by striking fear into the hearts and minds of potential murderers.¹³

Global Perspective regarding Death Penalty

There has been a growing realization among the international community regarding the abolition of death penalty. These sentiments were echoed by United Nations (*hereinafter* UN) Secretary-General Ban Ki-Moon in 2007 when he stated, “I recognize the growing trend in international law and in national practice towards a phasing out of the death penalty.” Governments of various countries have not merely limited themselves to rooting out capital punishment from their own judicial systems but have also contributed towards launching a global movement for the eradication of death penalty.¹⁴ This consensus was first acknowledged in the Universal Declaration of Human Rights¹⁵ adopted by the UN General Assembly in 1948. Article 3 of UDHR says that everyone shall have the right to life.¹⁶ It was further elaborated in Article 5 that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This was the beginning of international law on death penalty. Although abolition directly was not promulgated by the UDHR, the abolitionist outlook of the document was evident. Thus, the UDHR marked the first step in the international trend towards abolition of the death penalty. Since then countries have joined the abolitionist ranks in exceptional numbers, on the ground that it is a gross violation of human rights.¹⁷

At the UN, evidence of this international trend further manifested itself through the International Covenant on Civil and Political Rights (ICCPR).¹⁸ Paragraph 2 of Article 6 establishes the existence of abolitionist countries and invokes a relatively high standard for the imposition of the death penalty. The international trend disfavouring capital punishment

¹³ Ibid.

¹⁴ Autri Saha and Pritika Rai Advani, “The Death Penalty: A New perspective in light of Santosh Bariyar Case” 2 *NUJS L. REV* 671 (2009).

¹⁵ Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc. A/810 (December 12, 1948).

¹⁶ Article 3 states “Everyone has the right to life, liberty and security of person.”

¹⁷ *Supra* 10.

¹⁸ International Covenant on Civil and Political Rights, adopted Dec. 19, 1966.

is also evident in the Second Optional Protocol to the ICCPR,¹⁹ providing for total abolition of the death penalty which was adopted by the UN General Assembly in 1989. Protocol No.²⁰ In the wake of these intensifying international opinions against death penalty, the UN General Assembly in 2007 approved Resolution 62/149²¹ which called for all states to establish a moratorium on executions with a view to abolishing the death penalty. This further strengthened the movement against death penalty since 105 countries voted in favour of it while 48 countries, including India voted against, thereby demonstrating its resolve in retaining this practice. Thus, it is imperative for India to realize that it is becoming increasingly detached and solitary in the world scenario by supporting, if not advocating the use of death penalty. India has failed to embrace the aspirations embodied in Article 6 of the ICCPR and the UN Resolutions to abolish the death penalty in due course.²²

Despite some disappointing setbacks in 2012, the global trend towards ending the death penalty continued, Amnesty International²³ found in its annual review of death sentences and executions. 2012 saw the resumption of executions in several countries that had not used the death penalty in some time, notably India, Japan, Pakistan and Gambia, as well as an alarming escalation in executions in Iraq. But the use of the death penalty continues to be restricted to an isolated group of countries, and progress towards its abolition was seen in all regions of the world. Only 21 of the world's countries were recorded as having carried out executions in 2012 – the same number as in 2011, but down from 28 countries a decade earlier in 2003.²⁴

The Global Trends towards Abolition in 2012

- The USA is the only country to have carried out executions in the Americas.
- Belarus is the country to have executed in Europe and Central Asia.
- No executions were recorded in the 10 member states of the Association of Southeast Asian Nations.

¹⁹ (The Preambulatory clause states that abolition of the death penalty results in enhancing human dignity and progressive development of human rights and that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life).

²⁰ Supra 10.

²¹ *Moratorium on the Use of the Death Penalty*, UN General Assembly, 63rd Session, A/C.3/ 63/L.19/Rev.1.

²² Supra 10.

²³ Amnesty International is a Global Movement of more than 3 millions supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of Human Rights.

²⁴ Death penalty 2012: Despite setbacks, a death penalty-free world came closer, *available at*: <http://www.amnesty.org/> (Last Modified Dec. 28, 2013).

- Five of the 54 member states of Commonwealth were known to have carried out executions Bangladesh, Botswana, Gambia, India and Pakistan.
- Japan and USA were the only countries in the G8 to have carried out executions
- 174 of the 193 member states of the United Nations were execution free in 2012.²⁵

Death Penalty in United States of America

The United States of America remains the only Western democracy that continues to use capital punishment.²⁶ For hundreds of years prior to the formation of the United States, the death penalty existed in Britain.²⁷ When the British colonists arrived in America, they brought with them British forms of justice, including the death penalty.²⁸ Generally, the American colonies imposed the death sentence for the same offenses as the English. In Massachusetts Bay Colony during the seventeenth century, a person could be sentenced to death for pre-meditated murder, sodomy, witchcraft, adultery, idolatry, blasphemy, assault in anger, rape, statutory rape, poisoning, and bestiality. By the late eighteenth century, the number of capital crimes in Massachusetts had been whittled down to seven: murder, sodomy, burglary, arson, rape, and treason. By 1776, most of the colonies had nearly the same death statutes, which provided for the death penalty in instances of arson, piracy, treason, murder, sodomy, burglary, robbery, rape, horse-stealing, slave rebellion, and often counterfeiting.²⁹ The early United States- in the wake of the American Revolution³⁰, the U.S. Constitution gave both the States and the federal Government the right to set their own criminal penalties. The very first Congress of the United States passed federal laws making death the penalty for rape and murder. Although the death penalty was widely accepted in the early United States, its approval was not universal.³¹ There would be three great waves of anti death penalty sentiment in the first two centuries of the country's history. The first occurred in the mid-nineteenth century led to important restrictions on the use of the death penalty in several northern states; Michigan, Wisconsin, and Rhode Island abandoned the practice

²⁵ Amnesty International- Death Sentence and Executions 2012, *available at*: <https://www.amnesty.org/en/death-penalty> (Visited on Jan. 12, 2014)

²⁶ ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 23–27 (4th ed. 2008).

²⁷ Dawid S. Sidhu, “On Appeal Reviewing the Case against the Death Penalty” 111, *W. Va. L. Rev.* 453, 457 (2009).

²⁸ *Ibid* at 458-59.

²⁹ *Mental Retardation as a Bar to the Death Penalty*,

<http://law.missouri.edu/edu/lawreview/files/2012/11/efink.pdf> (Visited on Dec. 29, 2013)

³⁰ American Revolution was a political upheaval during the last half of the 18th Century in which 13 colonies in North America joined together to break from the British Empire combining to become the United States of America.

³¹ *Supra* 4 at p. 16.

altogether. The second wave of abolition also broke against the rocks of war. Thus one rose up toward the end of the 19th century and continued until the United States entered World War I. The state of Missouri and the territory of Puerto Rico both abolished the death penalty in 1971. Opposition to the death penalty gathered strength again in the mid-twentieth century.³²

Today in the United States, capital punishment is reserved for the most brutal crimes and criminals, the so called worst of the worst. The U.S. Constitution took the trend of narrowing the scope of capital punishment. The Eighth Amendment expressly forbids the inflicting of “cruel and unusual punishments.” The courts have interpreted this statement as a warning to use capital punishment cautiously and sparingly.³³ In 1977 the U.S. Supreme Court eliminated the death penalty for kidnapping or rape where death does not result, leaving murder, espionage and treason as the only remaining capital crimes. Though espionage or treason could bring death penalty, they rarely did. One of these rare occasions was the 1953 execution of a husband and wife, Julius and Ethel Rosenberg. They were put to death in the electric chair at Sing Sing Prison, New York, for supplying secrets about the atomic bomb to the Soviet Union. The Rosenberg’s execution brought forth protests from individuals and human rights groups objecting to all capital punishment not just for espionage but for any crime.³⁴

In recent years, some judges and governing officials have acknowledged problems with the capital punishment system in the United States.³⁵ While Europe abolished the death penalty in the 1970s and 1980s and the United States did not, the United States in the last ten years has moved significantly in the direction of de facto abolition, with a continuing decline in the use of the death penalty both in the number of executions and new death sentences.³⁶ And the United States Supreme Court has, in the last decade, categorically eliminated three classes of offenders from eligibility for the death penalty: mentally retarded individuals in 2002,³⁷ minors in 2005,³⁸ and offenders in non-homicide crimes in 2008.³⁹ The USA continued to be the only executing country in a region where recourse to the death penalty

³² Supra 4 at p. 17-19.

³³ FRIDELL, *supra* note 2 at 13.

³⁴ Ibid.

³⁵ Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 21-74 (2002).

³⁶ The European Prescription for ending the Death Penalty, *available at*: <http://ssrn.com> (Visited on Dec. 30, 2013)

³⁷ *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002)

³⁸ *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005)

³⁹ *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008)

has been in decline. Only four countries imposed death sentences in the Americas, and even within the USA support for capital punishment is waning. Although the number of executions in the USA remained the same as in 2011 (43), only nine states carried out executions in 2012- compared to 13 in 2011. The total number of new death sentence imposed (77) was the second lowest since the USA Supreme Court approved revised capital punishment laws in 1976; these sentences were imposed in 18 out of the 33 states retaining capital punishment.⁴⁰

Death Penalty in India

The ancient law of crimes in India provided death sentence for quite a good number of offences. The epics, viz., the *Mahabharata* and the *Ramayana* also contain references about the offender being punished with *vadhadand* which meant amputation by bits. Justifying the retention of death penalty, *king Dyumatsena* observed: “if the offenders were leniently let off, crimes were bound to multiply.” The great ancient law-giver *Manu* also placed the element of fear as an essential attribute of judicial phenomenon. During the medieval period of Mughals rule in India, the sentence of death revived in its crudest form. However, these crudest modes of putting an offender to death were abolished under British system of criminal justice administration during early decades of nineteenth century when death by hanging remained the only legalised mode of inflicting death sentence.⁴¹

Offences punishable with death sentence under IPC

It would be pertinent to refer to the relevant provisions of the Indian Penal Code which provide for death sentence for certain specified offences:

1. Waging war against the Government.⁴²
2. Abetment of mutiny.⁴³
3. Giving or fabricating false evidence leading to procure one’s conviction for capital offence.⁴⁴
4. Murder.⁴⁵

⁴⁰ Amnesty International- Death and Executions 2012, available at : <https://www.amnesty.org/en/death-penalty> (Visited Jan. 13, 2014)

⁴¹ Prof. N.V. Paranjape, *Criminology & Penology with Victimology*, 293 (Central Law Publications, Allahabad, 15th edn. 2011)

⁴² Section 121 of Indian Penal Code, 1860 (Act 45 of 1860)

⁴³ Section 132 of Indian Penal Code (Act 45 of 1860)

⁴⁴ Section 194 of Indian Penal Code, 1860 (Act 45 of 1860)

5. Abetment of suicide by child or insane person.⁴⁶
6. Attempt to murder by a life convict, if hurt is caused.⁴⁷
7. Dacoity with murder.⁴⁸
8. Kidnapping for ransom etc.⁴⁹
9. Punishment for repeat offenders under section 376 (Punishment for Rape) or section 376A (Punishment for causing death or resulting in persistent vegetative state of victim of rape) or section 376D (Gang Rape).⁵⁰

The Code of Criminal Procedure, 1973, also contains a provision regarding death sentence. Section 354 (3)⁵¹ of the Code provides that while awarding the sentence of death, the Court must record “special reasons” justifying the sentence and state as to why an alternative sentence of life imprisonment would not meet the ends of justice in that particular case. Commenting on this provision of the code Mr Justice Krishna Iyer of the Supreme Court (as he then was) observed that the special reasons which section 354 (3) speaks of provides reasonableness as envisaged in Article 19 as a relative connotation dependent on a variety of variables, cultural, social, economic and otherwise”.⁵² The rationale of the above procedural safeguards and the awful consequences of a death sentence on the convict, his family and society were considered by the Supreme Court once again in the case of *Allauddin Mian v. State of Bihar*⁵³ in this case the Apex Court held that when the court is called upon to choose between the convict cry ‘I, want to live’ and the prosecutor’s demands “he deserves to die “, it must show a high degree of concern and sensitiveness in the choice of sentence.

India was among three countries that resumed executions in 2012 after many years of having none, according to Amnesty International’s latest report “Death Sentences and Executions 2012.”⁵⁴ Parliament attack case convict Afzal Guru was hanged and the secrecy with which the execution was carried out in Delhi’s Tihar Jail without informing even his family about it triggered a controversy. The hanging came within the six months of execution

⁴⁵ Section 302 of Indian Penal Code, 1860 (Act 45 of 1860)

⁴⁶ Section 305 of Indian Penal Code, 1860 (Act 45 of 1860)

⁴⁷ Section 307, Indian Penal Code, 1860 (Act 45 of 1860)

⁴⁸ Section 396 of Indian Penal Code, 1860 (Act 45 of 1860)

⁴⁹ Section 364-A of Indian Penal Code, 1860 (Act 45 of 1860)

⁵⁰ Section 376E The Criminal Law Amendment Act, 2013 (Act 13 of 2013)

⁵¹ The Code of Criminal Procedure, 1973 (Act 2 of 1974)

⁵² *Rajendra Prasad v. State of U.P.*, AIR (1979) SC 916 (931).

⁵³ AIR (1989) SC 1456.

⁵⁴ Sandeep Joshi, “Civil Rights Group Worried over Executions in India” *The Hindu*, Apr. 15, 2013.

of Mumbai Attack case convict Ajmal Kasab. There has been a lull in executions in India as the last person to go to the gallows was Dhananjay Chatterjee in Kolkata 2004.⁵⁵

Judiciary on ‘Death Penalty’

The concerns regarding arbitrariness and the discrimination in the processes leading to a death sentence are indeed grave. Such factors would render India’s use of death penalty to be in violation of International law and standards. The judges in India have long been aware that India’s maintenance of the death penalty stands in stark contrast to international norms. The sentencing norm on the death penalty in India is that the death penalty is not a rule but an exception. But this was not so from the beginning.⁵⁶

The constitutionality of death penalty was challenged for the first time in 1973 in the case of *Jagmohan Singh v. State of UP*.⁵⁷ It was contended that death sentence infringes all freedoms guaranteed under Article 19(1) (a) to (g) and that the unguided discretion vested in the judges was in violation of Article 14 of the Constitution; also since no procedure was prescribed in the Code of Criminal Procedure for determining whether life imprisonment or the death penalty are to be awarded, it was in violation of Article 21. The Five Judge Bench did not accept any of the arguments and upheld the constitutional validity of death-sentence and held that deprivation of life is constitutionally permissible. In coming to their conclusion, they mainly relied on the 35th Law Commission Report, 1967,⁵⁸ and on the fact that on four occasions, bills or resolutions tabled in the Parliament for abolition of death penalty had been Also, the Constitution makers had recognized the death sentence as a permissible punishment and had made constitutional provisions for appeal, reprieve and the likes. Thus, though the Supreme Court settled this controversy long back in 1973, the constitutionality of the death penalty continued to be challenged in later cases.

*Ediga Anamma v. State of Andhra Pradesh*⁵⁹ is the next landmark judgment which dealt with death penalty relating to female criminals. Justice Krishna Iyer reversed the punishment from death sentence to life imprisonment on the basis of factors like gender, age,

⁵⁵ *Dhananjay Chatterjee v State of West Bengal*, (2004) 9 SCC 751.

⁵⁶ Mr. Justice S.B. Sinha, “To Kill or not to Kill: The Unending Conundrum”, 24(1) *NLSIR*, 10 (2012).

⁵⁷ *Jagmohan Singh v. State of Uttar Pradesh*, AIR 1973 SC 947 [Supreme Court of India].

⁵⁸ LAW COMMISSION OF INDIA, 35th Report, 1967, *Indian Penal Code*, 69 (“Having regard to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country, at the present juncture, India cannot risk the experiment of abolition of capital punishment”).

⁵⁹ *Ediga v Anamma*, AIR (1974) SC 799

socio-economic background and psychic compulsions. Here it was said that the crime committed is not the sole criterion of determining the punishment but various other factors should also be taken into account while evaluating death penalty. Justice Krishna Iyer while tracing the history of capital punishment also observed that its history “hopefully reflects the march of civilization from terrorism to humanism and the geography of death penalty depict the retreat from country after country.”

The origin of “Rarest of rare”

*Bachan Singh v State of Punjab*⁶⁰ was a landmark judgement, which despite affirming the constitutionality of death penalty, diluted the scope of its imposition substantially by introducing the test of ‘rarest of rare cases’. It held that:

.....for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when alternative option is unquestionably foreclosed.⁶¹ The Supreme Court’s five-judge Constitution Bench judgement in *Bachan Singh* (1980) is the source of contemporary death penalty jurisprudence in India. Its major contribution was to limit the imposition of death penalty to the rarest of rare crimes, and for laying down the principle that the courts must impose the death sentence on a convict only if the alternative sentence of life imprisonment is unquestionably foreclosed. For achieving these twin objectives, the court held that judges must consider the aggravating features of the crime, as well as the mitigating factors of the criminal.⁶²

Reasons behind the origin of “Rarest of rare”⁶³

Firstly The CrPC was re-enacted in 1973 and Section 354(3)⁶⁴ was added, thereby making the death sentence the exception and not the rule as far as punishment for murder is concerned.

Secondly, in the case of *Maneka Gandhi v. Union of India*⁶⁵, it was held that every law of punitive detention, both on substantive and procedural aspects must pass the test of

⁶⁰ *Bachan Singh v. State of Punjab*, AIR (1973) SC 947

⁶¹ *Bachan Singh*, Para 209

⁶² Editorial, “For a Moratorium on Death Sentence”, *The Hindu*, Dec. 10, 2012.

⁶³ Dr. S. Murlidhar, *Hang them now, Hang them not- India Travails with the Death Penalty*, 40 JILI, 147 (1998).

⁶⁴ The Code of Criminal Procedure, 1973 (Act 2 of 1973)

⁶⁵ *Maneka Gandhi v. Union of India*, AIR (1978) SCC 621

reasonableness on a collective reading of Articles 14, 19 and 21. Based on this decision, the Supreme Court in *Rajendra Prasad v. State of U.P.*⁶⁶, gave detailed parameters for awarding death penalty and held that special reasons for imposing death penalty must relate not to the crime but to the criminal and that it was to be awarded only when security of state, public order compelled the course⁶⁷. It was also held that life imprisonment would be a better alternative than death penalty since it has the potential to reform the criminal, thereby upholding the right to life and human dignity.

Thirdly, India ratified the ICCPR⁶⁸, thereby committing itself to progressive abolition of death penalty.

Different Interpretations of ‘rarest of rare’

The guidelines given by the Court in *Bachan Singh*⁶⁹ on sentencing approach has either been lost sight of or has been subject to conflicting interpretations. In *Bariyar*⁷⁰ the Supreme Court expressed in unequivocal terms the constitutional implications including concerns relating to arbitrariness involved in deciding the death penalty cases. The Apex Court observed: A survey of the application of rarest of rare doctrine in various courts will reveal that various courts have given their own meaning to the doctrine. This variation in the interpretation of Rarest of rare analysis may amount to be constitutionally infirm because of apparent arbitrariness on the count of the doctrine. Today, it could be safely said in the context of Indian experience on death penalty that no standards can be culled out from judge made law which governs the selection of penalty apart from broad overall guideline of rarest of rare under *Bachan Singh*. Frequent findings as to arbitrariness in sentencing under Section 302 of Indian Penal Code⁷¹ may violate the idea of equal protection clause implicit in Article 14 and may also fall foul of the due process requirement under Article 21. In the ultimate analysis, it serves as an alarm bell because if capital sentences cannot rationally distinguished from a significant number of cases where the result was a life sentence, it is more than an

⁶⁶ *Rajendra Prasad v. State of U.P.* (1979) 3 SCC 746

⁶⁷ *Id.*, ¶ 79, (“To my mind, it is ultimately a question of respect for life and human approach to those who commit grievous hurts to others. Death sentence is no remedy for such crimes. A more humane and constructive remedy is to remove the culprit concerned from the normal milieu and treat him as a mental case. I am sure a large proportion of the murderers could be weaned away from their path and their mental condition sufficiently improved to become useful citizens”) (*per* V.R. Krishna Iyer, J.).

⁶⁸ International Covenant on Civil and Political Rights, India acceded to the ICCR on 10 July 1979.

⁶⁹ *Bachan Singh v. State of Punjab*, AIR (1980) SC 898

⁷⁰ *Santosh Kumar Shantibhushan Bariyar v State of Maharashtra*, AIR 2009 6 SCC 498

⁷¹ Punishment of Murder.

acknowledgement of an imperfect sentencing system⁷²m. In a capital sentencing system if this happens with some frequency there is a lurking conclusion as regards the capital sentencing system becoming constitutionally arbitrary.

The immediate impact of *Bachan Singh* can be seen in *Earabhadrapa v State of Karnataka*,⁷³ in which Justice A.P. Sen, who was the chief dissenter in many of the abolitionist judgements of Justice Krishna Iyer, was, “constrained to commute the sentence of death passed on the appellant into one for imprisonment for life”⁷⁴ due to the test laid down in *Bachan Singh* being “unfortunately” not fulfilled in the said case. Shortage of reasoning and simple affirmation of death sentences with no reference to *Bachan Singh* were the hallmark of some of the decisions in the late 1980s.⁷⁵ In *Mahesh v. State of Madhya Pradesh*⁷⁶ the Supreme Court held: “To give the lesser punishment for the appellants would be to render the justice system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformatory jargon.”

Dhananjay Chatterjee alias Dhana v. State of West Bengal, In August 2004, Dhananjay Chatterjee was executed for the 1990 rape and murder of a girl in the apartment building where he worked as a guard. He was the first person to be hanged in India for over six years, ending a *de facto* moratorium on executions.⁷⁷

In 2011, the Apex Court in the case of *Ajitsingh Harnamsingh Gujral*⁷⁸ in which, focusing solely on the nature of the crime committed by the convict (which was in fact gruesome and heinous), the court gave a go by to the “State’s responsibility to prove impossibility of rehabilitation” guideline in *Bachan Singh* reiterated in *Bariyar*.⁷⁹ Critics clamored that it amounted to the replacement of need for evidence with the Judge’s personal opinion.⁸⁰

In a contrasting decision, the court however, rekindled the hopes of the abolitionists. In *Sham v. State of Maharashtra*⁸¹ the court set aside the death penalty imposed by the High Court on the accused nothing that he could be reformed or rehabilitated.

⁷² Supra 7 at p. 13-14.

⁷³ *Earabhadrapa v State of Karnataka*, (1983) 2 SCC 330

⁷⁴ Supra 11 at p. 341.

⁷⁵ Supra 7 at p. 16.

⁷⁶ *Mahesh v. State of Madhya Pradesh*, (1987) 4 SCC 381

⁷⁷ (1994) 2 SCC 220

⁷⁸ *Ajitsingh Harnamsingh Gujral v. State of Maharashtra*, (2011) 14 SCC 401

⁷⁹ *Santosh kumar Shantibhushan Bariyar v State of Maharashtra*, AIR (2009) 6 SCC 498

⁸⁰ V. Venkatesh, “Clear Confusion”, 28(23) *Frontline* (November 5-18, 2011).

⁸¹ *Sham v. State of Maharashtra*, (2011) 10 SCC 389

The application of its principles by the courts to various cases before them has been very uneven, and inconsistent. This has naturally led to the criticism that the jurisprudence suffers from a judge-centric approach, rather than a principle-centric approach.⁸²

According to former chief justice of India P. Gajendragadkar, “A judge is yet to be born who has not committed a mistake. Everybody has to discover, the ‘special reasons’ to bring a case in the category of ‘rarest of rare’ and there is every possibility of committing an error of judgment which may hurt (violates) the provisions of Article 14, 19 and 21.”⁸³

Public Opinion

There is such a thing as capital crime, there is such a thing as jurisprudential evolution. And there is of course such a thing as ‘public opinion’. There are those who would say and perhaps accurately, that if a referendum were to be held in India today, the hangman will not only stay but have to be paid “overtime”. Terror and crimes against women have given the noose just that dip in grease its immortality needs. But since when has the State become such a three-legged racer with ‘public opinion’? Would our progressive enactments on untouchability, dowry, domestic violence, have stood a chance against the orchestrations of opinion by khap panchayats and their kind? A democracy is about what a people want, but a Democratic Republic is also about what its enlightened New Agers fight to make it what it is meant to be. The death penalty may not be abolished in India “tomorrow” but that is where it has to go. With the “rarest of rare” principle, judges can no longer be “exonerating judges” and “hanging judges”.⁸⁴

Democracy and Death Penalty

One of the significant global trends of the last few decades has been the movements towards ending the death penalty. Describing this as the ‘age of abolition’, Garland observes that, ‘what was once an unproblematic institution, universally embraced, is fast becoming a

⁸² Editorial, “For a Moratorium on Death Sentence” *The Hindu*, Dec. 10, 2012.

⁸³ Dr. Janak Raj Jai, “Introduction”, in Dr. Janak Raj Jai, *Death Penalty*, 29 (Regency Publication, New Delhi 2005)

⁸⁴ Editorial, “The Power of Pardon” *The Hindu*, April 18, 2013.

violation of human rights, universally prohibited.’⁸⁵ “Capital punishment goes against the foundation of democracy. Democracy regards the life of human being as the most cherished thing in the world, and to end a person’s life even in the name of law clearly runs counter to the basic principle of human rights.” This statement by Kim Dae Jung, former President of South Korea and Nobel Prize recipient, is representative of the dominant account of the relationship between democracy and the death penalty.⁸⁶

Democracy and human rights are taken to be fundamentally linked, and insofar as the death penalty is a violation of human rights, it also violates core democratic principles. The United States is apparently left as the great exception: “alone among the Western democracies, state governments in United States authorize and conduct executions as criminal punishment and show no clear indication of a willingness to stop doing so.”⁸⁷ India is world largest democracy, and despite not executing since 2004, it considered that it has adopted *de facto* abolition of death penalty, has again retained in 2012 and continues to hand out death sentences.

Meanwhile, Indonesia is a notable example of where successful democratized has not lead to abolition. One also finds further examples with the Caribbean democracies. The United States might be the most prominent democracy to retain the death penalty, but it is certainly not alone. A majority of established democracies may not be using the death penalty but one must resist the common tendency to downplay the exceptions especially given that India, the United States, Indonesia and Japan respectively have the second, third, fourth and the tenth largest population in the world.⁸⁸

Abolition is generally pursued through political or juridical channels, both of which are insulated from the direct input of the wider public. Abolition does not create any great contradictions with the principles and institutions of democracy, if we recall that we are concerned with liberal democracy. In both theory and practice, elites be they politicians or judges making decisions that go against public opinion is not ipso facto a problem for liberal democracies. Modern democracy is based on a representative system in which politicians are delegated power and are not bound to follow the popular will. As such, elected politicians

⁸⁵ David Garland, Randall McGowen, *et.al.* (eds.), *Modes of Capital Punishment: The Death Penalty in Historical Perspective*, 61 (NY: NYU Press, 2011).

⁸⁶ David T. Johnson, Franklin E. Zimring, *et.al.* (eds.), *The Next Frontier* 147 (Oxford University Press, New York, 2009).

⁸⁷ Madoka Futamura and Nadia Bernaz (eds.), *The Politics of the Death Penalty in Countries in Transition*, 32 (Routledge, New York, 2014).

⁸⁸ *Ibid.*

determining to stop capital punishment potentially against the wishes of the majority are not the 'paradox' it is often presented to be. Likewise, the judicial route to abolition does not create a 'contradiction' for modern democracies. Constitutional rule and an independent judiciary are important components of contemporary democracy. They act as a balance, preventing democracy being the tyranny of the majority. Building on these clarifications, abolition being successfully pursued in transitional countries through either avenue may actually be taken as a sign that liberal democratic principles and institutions are being more deeply embedded. What some scholars identify as a 'paradox' or a 'contradiction' may instead be a positive sign. The problem, however, is that a majority of transitional states have struggled to establish these liberal democratic institutions.⁸⁹

Conclusion

Punishment is an imposition to make an individual a better person. Killing is not punishment, it is murder. Finally, 'legal murder' is a mockery of our Constitution, our humanity and our spirituality as Indians.⁹⁰ Abolition of death penalty is a global human rights question. International resistance to capital punishment as a deterrent is mounting. Killing by law is contrary to Buddha, Jesus, Gandhi, and yet there is no in-depth criminology investigation into this human rights question in the land of karuna.⁹¹ Americans consider their criminal justice system to be best in the world. Some conservatives may carp that it coddles criminals, and some may believe that there not enough protections for suspects, particularly indigent ones. By and large, however, the system yields justice.....the system is only good as the lawyers who administer it- prosecutors, defence counsel, judges. If prosecutors abuse their authority, if defence lawyers are lazy or incompetent, if judges are weak or biased, the result is injustice, and in capital cases that can spell death.⁹² The recent decision of the Supreme Court of India in *Shatrughan Chauhan v Union of India* is a remarkable example of how innovative judicial craftsmanship can lead to the upholding of constitutional values, while humanising capital punishment. It has reiterated the importance of human rights struggles and the need for pursuing them with determined effort. It also demonstrates the continuing ability of institutions to respond to Constitutional issues with a deeper recognition of human rights as the basis of protection of freedoms. Indian democracy needs to move

⁸⁹ Supra 83.

⁹⁰ Supra 1.

⁹¹ Supra 83 at p. 6.

⁹² Supra 7 at p. 1.

towards abolishing the death penalty as a form of punishment for all offences.⁹³ The values and principles of Constitutionalism as well as the values of human rights should not be shaped by the exigencies of current situations, political considerations or, for that matter public perception.

⁹³ Editorial, "Putting a Full Stop to Death Sentence", *The Hindu*, Feb., 6 2014.