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CAPITAL PUNISHMENT IN INDIA: PENAL THEORY, HISTORICAL EVOLUTION AND JUDICIAL DOCTRINE

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Abstract

Capital punishment remains one of the most contested instruments of the criminal law. This paper examines the death penalty in India by tracing its theoretical foundations, its historical development in England, America and India, the arguments advanced by retentionists and abolitionists, and the constitutional and judicial framework that governs it today. It argues that Indian law has moved from an unstructured, discretion-driven practice towards a regulated one, anchored in the “rarest of rare” doctrine, yet continues to suffer from arbitrariness, uncertain empirical justification and irreversible risk of error. The paper concludes that the death penalty should be treated as an exceptional measure, hedged by strict safeguards, with serious consideration given to life imprisonment as a more reformatory and less error-prone alternative.

Keywords: Capital punishment; theories of punishment; rarest of rare; Bachan Singh; mercy petition; Indian Penal Code; abolition

1. Introduction

Punishment is the most visible expression of the coercive power of the State. Austin regarded sanction as an essential ingredient of law, since it is only through the threat of pain or loss that obedience can be secured. Punishment may accordingly be understood as the pain, suffering, loss or confinement inflicted on a person for an offence by the authority to which the offender is subject. Of all the penalties known to the law, none is more severe or more controversial than the sentence of death. It extinguishes the offender, forecloses every possibility of reform and, because it cannot be undone, magnifies the consequences of any judicial error.

Capital punishment was once accepted as necessary and inevitable by rulers in almost every civilisation, and there is no country in which it has never existed. In India it has been applied since ancient times, although its methods, its grounds and its procedural safeguards have

changed considerably. The modern debate turns on a set of enduring questions. Is the State entitled to take life as retribution? Does the threat of execution deter serious crime better than long imprisonment? Can a fallible legal system be trusted with an irreversible penalty? And how should a constitution that guarantees the right to life reconcile itself with a sentence that ends it?

This paper approaches these questions in four stages. It first considers the theories of punishment and the manner in which each bears upon the death penalty. It then reviews the arguments for and against retention, followed by a historical survey of capital punishment in England, America and India. Finally, it analyses the legal framework and judicial doctrine of independent India, including the clemency power, the method of execution and the available statistics, before offering conclusions and suggestions.

2. Theories of Punishment and the Death Penalty

The nature of punishment is best understood as a method of social control. The law announces standards of behaviour, attaches penalties to deviation and leaves individuals to choose. The community, acting through the State, is bound to reassert the moral order that the offender has broken, and it does so by affirming his guilt and dealing with him accordingly. Threats that are never carried out become empty bluffs and lose their force, which is why every State punishes those it identifies as criminals. What remains disputed is how severe the punishment should be. Neo-Kantian thinkers insist on proportionality, so that punishment must fit the crime, while sociologists such as Gibbs, Chiricos and Waldo, and Tittle have argued that the severity and certainty of punishment operate as additive factors in preventing crime.

The retributive theory is the oldest of the accepted justifications. It treats punishment as an end in itself rather than as a means to some other good, and holds that evil should be returned for evil, so that the wrongdoer pays for the wrong he has done. State punishment is understood as a substitute for private vengeance, and Sir James Fitzjames Stephen went so far as to compare the relation between criminal law and the passion for revenge to that between marriage and sexual appetite. Retribution can also be read as expiation, in which the offender discharges a debt to the law and the legal bond created by the crime is dissolved. The weakness of the theory is that it ignores the causes of crime, treats moral indignation as though it could prevent offending, and overlooks the fact that two wrongs do not make a right. If vengeance is the spirit of punishment, violence becomes a way of prison life.

The deterrent theory looks forward rather than backward. Its object is to demonstrate the futility of crime and thereby to teach a lesson both to the individual offender and to the public at large. The preventive theory, by contrast, seeks to disable the offender physically, whether by imprisonment, by the suspension of a licence or, in its most extreme form, by execution. The distinction is significant: deterrence works upon the motives of potential offenders, while prevention works upon the offender's physical capacity to repeat the offence. Capital punishment is the ultimate preventive measure, since a person who has been executed can never offend again, and it is also the ultimate deterrent threat, since it appeals to the strongest human instinct, that of self-preservation.

The reformatory theory takes the opposite view. It regards crime as a disease and the offender as a patient, holding that punishment should be curative and that one cannot cure by killing. On this view a prison sentence should be used to re-educate the offender and to reshape his personality so that he becomes a useful member of society. Execution, solitary confinement and maiming are treated as relics of the past. Yet the reformatory theory has limits. Salmond pointed out that some offenders appear incurably bad, and that a criminal justice system built exclusively on reformation would be helpless against them and might even invite crime by treating every murderer with leniency.

The sound conclusion, and the one reached in the literature, is that no single theory is a complete answer. A defensible penal code must combine retribution, deterrence, prevention and reformation in judicious proportion, always subject to the principle that punishment must be just and directed to the good of society. Salmond suggested that the perfect system is a compromise in which the deterrent principle nevertheless exercises the predominant influence. For the death penalty this means that it can be justified, if at all, only by the retributive, deterrent and preventive theories, and that it stands in direct tension with the reformatory ideal.

3. The Case for Retention and the Case for Abolition

The controversy between retentionists and abolitionists is as old as the penalty itself. Retentionists are generally jurists with a traditional training, judges, law enforcement officers and many political figures, while abolitionists are drawn largely from sociologists, penologists, psychiatrists, doctors and writers on the social sciences. The question has moral-religious, popular and scientific dimensions, and each side draws support from all three.

Those who favour retention begin with the argument that a murderer forfeits his own life. Religious traditions are invoked in support, including passages of the Mahabharata and the Bhagavad Gita which justify the removal of the wicked so that virtue may flourish, and the State executing a murderer is compared to a surgeon removing a diseased organ. The death penalty is also said to mark society's reprobation of the gravest crimes and to keep the public from taking the law into its own hands. The most frequently repeated argument is deterrence. Lord Jowitt and Lord Simon, among others, acknowledged that the deterrent effect could not be proved statistically, but maintained that it was a matter of human nature and common experience that the fear of death restrains premeditated murder. Retentionists add that the studies of abolitionists are themselves biased or inconclusive, and that the failure to demonstrate deterrence is not the same as demonstrating its absence.

Further arguments in favour of retention are practical. Life imprisonment, it is said, is an inadequate alternative because prisoners may be released on parole, may commit fresh crimes inside prison against guards and fellow inmates, and may feel that they have nothing further to lose. It is argued that the modern trial system, with its appellate review and executive clemency, has become so reliable that the risk of hanging an innocent person is remote.

Abolitionists respond first on moral and religious grounds. They point to the commandment against killing, to the story of Cain who was marked rather than slain, and to the tradition within Indian thought that opposes the taking of life, as reflected in the position of Satyaketu in the Mahabharata and in the Vedic injunction against destroying life. They argue that the right to life is universal and inalienable, that the State confers no such right and therefore cannot take it back, and that execution brutalises everyone involved in it, from the executioner to the public.

In the words often quoted in this debate, a great reverence for human life is worth more than a thousand executions.

The abolitionist empirical case is at least as strong. Studies conducted by Sellin and others have failed to show that the death penalty exercises any greater deterrent influence than long imprisonment, and available data indicate that abolition has never been followed by a measurable rise in homicide. A criminal ordinarily does not expect to be caught, or convicted if caught, and offences committed in passion or under the influence of drink are not calculated against the penalty. Abolitionists also argue that the prospect of death makes juries reluctant to

convict, so that the certainty of punishment may actually be reduced, and that inmates on death row suffer a prolonged psychological ordeal which is itself cruel and degrading.

The most persuasive abolitionist argument is the risk of irreversible error. Human institutions err, witnesses make mistakes and courts exercise discretion unevenly. Historical examples of prisoners hanged shortly before reprieves or exonerating evidence arrived illustrate the point, and the concern is aggravated by evidence of bias, since for identical crimes some accused are sentenced to death while others escape it. The penalty also falls disproportionately on the poor, the uneducated and the underprivileged, who lack the resources to mount an effective defence. Finally, abolitionists contend that life imprisonment is a real and severe alternative, and that resources spent on gallows would be better used to train law enforcement and correct defects in the judicial system.

4. Historical Evolution of Capital Punishment

In England the death penalty can be traced back several centuries before the Christian era, but its use expanded dramatically under successive monarchs. Henry I and Henry II prescribed death for various offences, and later rulers extended capital liability to a wide range of acts including treason, heresy, witchcraft and offences against property. By the time of Queen Anne there were thirty-two capital offences, and by the early nineteenth century the number had grown to over two hundred, extending to petty thefts. This so-called Bloody Code attracted the criticism of reformers.

The intellectual challenge to this system began with Cesare Beccaria, whose work of 1764 argued that the State had no right to take a life which it had not given and that execution was not a necessary deterrent. Bentham, Romilly, Mackintosh, Peel, Ewart and Bright carried the argument into Parliament and progressively reduced the number of capital crimes. After a Royal Commission in 1949 examined the subject, the Homicide Act, 1957 restricted the death penalty to specified categories of murder, and the Murder (Abolition of Death Penalty) Act, 1965 suspended and then effectively ended it for murder in Great Britain, with the position confirmed by Parliament in 1969. The penalty was retained only for very limited offences such as treason, and subsequent attempts to restore it failed.

In America the colonists transplanted English law, and early colonial codes prescribed death for a large number of offences, including murder, rape, arson, burglary, sodomy, adultery and

even witchcraft, with harsher penalties for slaves. The abolition movement gained real momentum with Benjamin Rush of Pennsylvania, who wrote against capital punishment after the Revolution, and Pennsylvania restricted the penalty to murder in the first degree. The American experience is marked by cycles of abolition and revival, and by continuing debate over discretion, race and fairness in sentencing.

In India the origin of capital punishment lies in the ancient system of Dandaniti, whose fundamental basis was deterrence. Punishments were traced to the Vedas and elaborated in the Smritis, especially the Manusmriti, and in Kautilya's Arthashastra, which prescribed death for spying, sedition, conspiracy against the king, theft of the king's property and a range of other offences, often with methods that involved torture.

The Muslim period introduced a different body of criminal law, which classified offences into those against God, those against the individual and those left to discretion. Homicide attracted the principle of qisas, or retaliation, which was treated as a private right of the victim's heir who could accept diyat, or blood money, in its place. Hadd offences carried fixed penalties, while tazir crimes were punished at the discretion of the judge.

The British period gradually displaced the Mohammedan criminal law. Warren Hastings and his successors at first preserved the existing system, but a series of Regulations, culminating in Regulation VI of 1832, ended its operation as a general penal law. The process was completed by the Indian Penal Code of 1860, which prescribed death for a number of offences, including murder, waging war against the Government and abetment of mutiny. After the Code came into force, attempts were made in the Legislative Assembly to abolish the penalty, and the Government replied that in India, where crime was frequent and the population vast, the penalty could not be dispensed with. After independence, private members' Bills for abolition were moved in Parliament in 1952, 1956, 1958 and 1961, and were unsuccessful. The Law Commission was asked to examine the question in the course of its review of the Code of Criminal Procedure and reported in 1967, recommending retention.

5. The Legal Framework in Independent India

Capital punishment is a lawful penalty in India, and its constitutional basis is Article 21, which provides that no person shall be deprived of life or personal liberty except according to procedure established by law. The Indian Penal Code provides the death sentence for offences

such as murder, waging war against the Government of India, abetting a mutiny that is actually committed, giving false evidence leading to the conviction of an innocent person for a capital offence, kidnapping for ransom and dacoity accompanied by murder. Other statutes extend the penalty, including the Commission of Sati (Prevention) Act, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, the Narcotic Drugs and Psychotropic Substances Act, 1985 in the case of repeat offenders, and anti-terrorism legislation. Following the public outcry after the Delhi gang rape of 2012, the Criminal Law (Amendment) Act, 2013 extended the penalty to rape that results in death or a persistent vegetative state and to repeat offenders.

Procedurally, a death sentence passed by a Sessions Court cannot be executed until it is confirmed by the High Court. The convict has a right of appeal to the Supreme Court, may seek review of the judgment, and may finally invoke the curative petition, a remedy which the Supreme Court recognised in *Rupa Ashok Hurra v. Ashok Hurra* to prevent abuse of process and correct gross miscarriages of justice. When judicial remedies are exhausted, the convict may petition the President under Article 72, or the Governor under Article 161, for pardon, reprieve, respite, remission or commutation, and Article 72 expressly extends to all cases where the sentence is one of death.

The method of execution under the Code of Criminal Procedure, 1973 is hanging by the neck until the person is dead, a method that was carried over from the colonial procedural code. The method is widely regarded as the norm for civilian executions.

6. Judicial Doctrine: From Discretion to the Rarest of Rare

The constitutional validity of the death penalty was first tested in *Jagmohan Singh v. State of Uttar Pradesh*. The petitioner argued that capital punishment violated Articles 14, 19 and 21, because judges were given unguided discretion and sentences varied without any fixed standard. The Supreme Court rejected the challenge, holding that the penalty was reasonable, that the procedure of trial and appeal was fair, and that the choice between death and life imprisonment could be safely left to judicial discretion exercised on the facts of each case. The Court also observed that whether the penalty should be abolished or retained was a question for the Legislature and not for the courts.

A significant statutory change followed. Under the Code of Criminal Procedure, 1973, Section

354(3) required that, where a court imposes the death sentence, it must record special reasons, thereby making life imprisonment the rule and death the exception. This reversed the earlier position under which a court had to give reasons for awarding life imprisonment rather than death.

The definitive constitutional statement came in *Bachan Singh v. State of Punjab* (1980), in which a Constitution Bench, by majority, upheld the validity of capital punishment. The Court held that the framers of the Constitution were aware of the death penalty and contemplated it through provisions on appeal, pardon and the like, and that Article 21 itself permitted the deprivation of life according to procedure established by law. Crucially, the Court held that the penalty should be imposed only in the “rarest of rare” cases, where the alternative option of life imprisonment is unquestionably foreclosed. It insisted that aggravating and mitigating circumstances must both be weighed, and that the balance must be struck with regard to the character of the offender as much as the offence.

The doctrine was elaborated in *Machhi Singh v. State of Punjab*, which is best known for its five categories of relevant considerations. The first is the manner of commission of the crime, as where the murder is committed in an extremely brutal, grotesque or diabolical fashion so as to arouse intense and extreme indignation in the community. The second is the motive, as where the crime shows depravity and meanness, such as a murder for hire or one committed in cold blood for gain. The third is the anti-social or socially abhorrent nature of the crime, and the fourth is the magnitude of the crime, as where several members of a family or community are killed.

The fifth is the personality of the victim, particularly where the victim is an innocent child, a helpless woman, a person rendered vulnerable by age or infirmity, or a public figure whose murder is not committed for personal reasons. In the same period the Supreme Court in *Mithu v. State of Punjab* struck down Section 303 of the Indian Penal Code, which had prescribed a mandatory death sentence for a person committing murder while under a sentence of life imprisonment, holding that a mandatory sentence which leaves no room for consideration of circumstances is unconstitutional.

Despite these principles, the application of the doctrine has been inconsistent. Terms such as brutal, cold-blooded or shocking to the collective conscience are inherently subjective, and

different benches have reached different conclusions on comparable facts. In some cases the Court has awarded death for a crime against a child, while in others it has set aside the High Court's decision and imposed life imprisonment on the ground that the accused was a young person whose reformation could not be ruled out. This variability is the central criticism of the current regime. If sentencing depends on the composition of the bench, the principle of equality before the law is placed under serious strain, and the arguments once rejected in Jagmohan Singh acquire fresh force.

7. Mercy Petitions, Delay and Contemporary Practice

The power of the President and the Governor to commute a sentence of death is a constitutional power and not an act of grace. The Supreme Court has therefore subjected its exercise to judicial review, to the limited extent of ensuring that it is not exercised arbitrarily. The Court has held that the prisoner and his family members are entitled to be informed of the rejection of a mercy petition and to a reasonable period to prepare before execution. In *Shatrughan Chauhan v. Union of India* (2014), a three-judge Bench headed by the Chief Justice held that undue, unexplained and inordinate delay in the disposal of mercy petitions is a ground for commuting the sentence to life imprisonment, because prolonged waiting under the shadow of death is itself a violation of Article 21.

The statistics on capital punishment in India are contested. Official government figures claim that only fifty-two persons had been executed since independence, but research by civil liberties groups locates records of many more, and a study by the National Law University, Delhi, on the period since 2000 found that of 1,617 persons sentenced to death by trial courts, the sentence was confirmed in only seventy-one cases. The Law Commission reported in 1967 that 1,410 death sentences were passed between 1953 and 1963. Executions after 1991 have been few, but they have included the hanging of Dhananjay Chatterjee in 2004, Ajmal Kasab in 2012 for the Mumbai attacks, Afzal Guru for the attack on Parliament, Yakub Memon in 2015, and the four convicts in the 2012 Delhi gang rape case in March 2020. The gap between the number of sentences imposed and the number executed shows that the death penalty operates as a heavily filtered and unpredictable process.

At the international level, India has maintained a cautious position. It voted against the United Nations General Assembly resolutions calling for a moratorium on the death penalty in 2007 and again in 2012, although more than a hundred States have abolished it in law or in practice.

In August 2015 the Law Commission of India, in a report submitted to the government, recommended the abolition of capital punishment for all crimes other than terrorism-related offences and waging war against the nation. The Commission relied on the global trend toward abolition, on the arbitrary and flawed application of the penalty in India, and on the absence of any proven deterrent effect. The Commission's reasoning reflects a middle path, in which abolition for ordinary crime is accepted in principle while an exception is retained for offences affecting the security of state.

8. Conclusion and Suggestions

The study leads to several conclusions. First, capital punishment is not a recent invention in India but an ancient sanction that has been reshaped by successive legal systems, and it has never been declared illegal by the Indian judiciary. Second, no theory of punishment provides a complete justification. The retributive and preventive theories support the penalty for the gravest offences, but the deterrent claim has not been proved, and the reformatory theory, which is the most humane, is fundamentally opposed to it. Third, the doctrine of the rarest of rare, though a serious attempt to confine the penalty, has not eliminated arbitrariness in its application.

Those who defend retention argue that the death penalty is a requirement of justice for the most serious crimes, that it sends the strongest possible message that a legal system will not tolerate murder, and that without it the law would make no adequate response to the deliberate taking of life. However, the arguments of the abolitionists, especially those concerning irreversibility, unequal access to competent legal representation, and the lack of conclusive evidence of deterrence, are equally weighty in a country where the majority of those on death row are poor and unable to afford strong counsel.

In the light of this analysis, several suggestions may be offered. The State should ensure that every accused person facing a capital charge receives competent and adequately remunerated legal aid at every stage, for a system that imposes death on those who cannot defend themselves cannot claim to be just. Courts should adopt more consistent sentencing guidelines, so that the rarest of rare doctrine is applied on principle rather than impression, with the offender's background, capacity for reform and the possibility of life imprisonment considered in every case. Mercy petitions should be disposed of promptly, with reasons recorded, in line with the safeguards laid down in *Shatrughan Chauhan*. Public resources spent on gallows and execution

machinery might be better diverted to training police and prosecutors and to correcting defects in investigation, which are a major source of wrongful conviction.

Life imprisonment, which can be imposed for the whole of the offender's natural life in an appropriate case, offers a safer alternative that protects society without irreversibility. At the same time, the recommendation of the Law Commission suggests a reasonable staged approach.

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