



CAPITAL PUNISHMENT:- ABOLITION v. RETENTION

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INTRODUCTION

*"The least offences deserve death, and I can impose no worse for higher crimes"*¹. This quote explains the status of death as a punishment. It is regarded as the most barbarous and preposterous punishment which can be awarded to a criminal. 'Death penalty' is a process where a person is punished by State through death (following the due procedure of law).

While both the terms 'Death penalty' and 'Capital punishment' are used interchangeably as eventually the criminals die for the crime committed, there is a fine line of difference between these two. "Death penalty" applies to a prisoner who has been sentenced to die, but has not yet been executed; "capital punishment" refers to his actual execution.

Although the death penalty has existed from time immemorial, the need to abolish it has gained a lot of momentum in the recent times. Its movement can be traced back to the works of one of the great criminologist named Cessare Beccaria who convinced many people that death penalty should be abolished because it is inhuman, cruel and a public assassination. However, India has yet not abolished the capital punishment and is still trapped in this incessant debate.

The roots of capital punishment can be traced back to ancient India, where it was used for the most heinous, grievous and detestable crimes against humanity, following which it was stated that Death sentence should be avoided even for the greatest offences, unless the guilty was a traitor who had indulged in any activity dangerous to the security of state. Hence, only 4 successful executions have been carried out in India since 1995 which included a lot of parleys like, Whether Females should be given death penalty, Which one is better: Retributive or Reformative Constitutionality of capital punishment and what not.

Well, Death indeed is a severe and unique form of punishment mainly because of the permanent damage caused, they say dead is gone into another world making it an irreversible act which can't be undone, it is one of primary reasons why a good quantum of people wants to abolish it. The people defending it argues that it may be of an extreme nature but is something our country needs direly.

CONSTITUTIONALITY OF DEATH PENALTY

Sir James Stephen once remarked:

"No other punishment deters a man so effectually from committing a crime as punishment of death".

Thus, Death has been used as a form of punishment since time immemorial. It is the best player in the ground when it comes to a game of punishments seeking to lessen the crimes. After death there is no next level of

¹Draco, The first Compiler of Penal Code of Greece.



punishment, Death is Death, there is nothing more terrifying than death itself.

Every wrong must be punished and there are two main reasons for inflicting any punishment:

- (a) The belief that it would be fair, just and reasonable,
- (b) It discourages others from doing similar wrongs.

Abreast every punishment should be proportionate to the intensity of crime committed, so should capital punishment, but clearly it becomes a hot tiff that whether this punishment actually serves its purpose of fairness, appropriateness and effectiveness and discourages similar crimes, or not and if not then it becomes gross violation of our rights.

Is taking a criminal's life actually an effective way to daunt the crimes or is it just another abrogation of our human rights and constitution?

The constitutional validity of capital punishment is an issue which has troubled the constitutional courts of world as some jurist says it violates a person's right to life which is embraced in Article 21² of Constitution that gives us the right to life and personal liberty and Article 14³ of Constitution that gives the right to equality. The concept of equality incorporated in Art. 14 finds echo in the preamble to

²No person shall be deprived of his life or personal liberty except according to procedure established by law.

³Equality before law :The State shall not deny to any person equality before the law or equal protection of the laws within territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

constitution. Capital sentence, it seems, is therefore, an anti-thesis of one's right to life .While some other jurist defends it as being constitutional.

At the same time, it is an indisputable fact that there is nothing in the constitution which expressly holds capital punishment as unconstitutional, but the mere fact that it may lead to infringement of a person's fundamental rights is enough to create a doubt about the constitutional validity of capital punishment.

Thus, considerable question is whether death penalty is lawful or not, should it be retained or abolished?

The mass rebelling against this aberrant form of punishment argues that it debilitates our fundamental rights and is a just enough reason to do away with capital punishment, but knowing the criminals, their psychology, nature of plausible crimes and indubitably the effect on society we live in, is it what the society really needs?

No doubt, Capital punishment has always been a point of contention in our country, and because of some extreme violation of laws the judiciary has tried to save it as a punishment to be used only in rarest of rare cases which is why in the past 10 years the Indian Judiciary has sentenced 1,303 people to death but only four have been hung till death in this entire decade.⁴

⁴ INDIA'S HISTORY OF CAPITAL PUNISHMENT IN LAST DECADE, (June 22, 2018, 11.00 AM)<https://www.indiatoday.in/education-today/gk-current-affairs/story/indias-history-of-capital-punishment-in-the-last-decade>.



Law commission in its 35th report in 1967⁵ recommended to retain capital punishment having regard to conditions in India, social upbringing, disparity between morality and education vastness, diversity and said that it was not the appropriate time to risk with the abolition of capital punishment.

CATENA OF JUDGMENTS

The tussle over the constitution validity of capital punishment was carried on for years through numerous cases.

The first case where the courts had the opportunity of discussing this question was of

- *Jagmohan Singh v. State of U.P.*⁶- The case was presented on three main grounds, firstly that capital punishment violates rights guaranteed under Article 19, secondly there is no fixed standard to be followed while giving capital punishment and thirdly this unguided and unfettered discretion violated Article 14 of the constitution, which guarantees equality before the law. The five judge bench upheld its constitutionality stating that there is no infringement of fundamental rights.
- *Rajendra Prasad v. State of U.P.*⁷- Again the same contention was laid down. Justice Krishna Iyer empathetically stressed that death penalty is violative of articles 14, 19

and 21. He further said that to impose death penalty two things must be required:

- (a) The special reason should be recorded for imposing death penalty in a case,
- (b) The death penalty must be imposed only in extraordinary circumstances.

However, the court stated that the question whether capital punishment should be abolished or retained was a question for the Legislature and not for the Courts to decide.

- *Bachan Singh v. State of Punjab*⁸ - The question of the validity of capital punishment came again and *this time by a majority of 4:1 the five judge bench with dissenting opinion of Bhagwati J. held that capital punishment is not unreasonable and violative of Article 14, 19 and 21.* Bhagwati J. in his dissenting judgment observed that “Death penalty is not only unconstitutional being violative of Articles 14 and 21 but also undesirable from several points of view.” The five Judge Bench stated that the taking of human life shouldn’t be encouraged even in the form of punishment except in “rarest of the rare” cases, thus came the doctrine of “rarest of the rare”.
- *Machhi Singh v. State of Punjab*⁹ - The SC laid down the broad outlines elaborating the doctrine of ‘rarest of the rare’. Justice Thakkar speaking for the Court held that the stated five things may be regarded while deciding a case as rarest of rare cases:
 - (a) Manner of Commission of murder;
 - (b) Motive;

⁵LAW COMMISSION OF INDIA, 35TH REPORT, 1967, (June 18, 2018, 5.51 PM))<http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf> and <http://lawcommissionofindia.nic.in/1-50/Report35Vol2.pdf>.

⁶*Jagmohan Singh v. State of Uttar Pradesh*, A.I.R. 1973, S.C 947 (India).

⁷ *Rajendra Prasad v. State of Punjab*, A.I.R. 1979, S.C.916 (India).

⁸*Bachan Singh v. State of Punjab*, A.I.R. 1980, S.C 898 (India).

⁹*Machhi Singh v. State of Punjab*, A.I.R. 1983, S.C 957 (India).



- (c) Anti-social nature of the crime;
- (d) Magnitude of the Crime;
- (e) Personality of victim of murder.

- Sher Singh v. State of Punjab¹⁰ - J. Chandrachud expressing the view of the three judges of the Supreme Court held that death sentence is constitutionally valid and permissible within the constraints of the rule in Bachan Singh. This has to be accepted as the law of the land.
- Mithu v. State of Punjab¹¹ - § 303 Of IPC¹² is based on the logic that any criminal who has been convicted for life and has committed a murder while in custody is beyond reformation and do not deserve to live was declared unconstitutional and deleted from the IPC. It was struck down as violative of Article 21 and 14 of the Constitution of India as it takes away the power of judiciary to exercise its discretion and thus result in an unfair, unjust and unreasonable procedure depriving a person of his life.

In the laconic view, capital punishment is indeed regarded as constitutional in India, despite many legislative attempts to abolish it. We still stand with capital punishment to be used as a missile in our hand when it comes to some certain rare cases which is evident from the executions in India.

MODE OF EXECUTION

The execution of death sentence in India is carried out by two methods,

¹⁰Sher Singh v. State of Punjab, A.I.R. 1983 S.C 365 (India).

¹¹Mithu v. State of Punjab, (1983)2 SSC 277 (India).

¹²Punishment for murder by life-convict.—whoever, being under sentence of [imprisonment for life], commits murder, shall be punished with death.

- (A) Hanging by neck till death
- (B) Shot to death.

Once the death sentence is awarded and is confirmed, the execution is done following Code of Criminal Procedure.

§ 354(5) of Code of Criminal Procedure states:

“When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead”.

Hanging by death is the only method followed in India, while some argue that it is inhumane and painful, the defenders of this mode of execution says that it is the least painful method available.

Justice Bhagwati, in a judgment, provided a graphic description of the execution process: *“The day before an execution, the prisoner goes through the harrowing experience of being weighed, measured for the length of drop to assure breaking of the neck, the size of the neck, body measurements, etc. When the trap springs, he dangles at the end of the rope. There are times when the neck does not break, and the prisoner strangles to death. His eyes almost pop out of his head, his tongue swells and protrudes from his mouth, his neck may or may not break, and the rope claims large portions of skin and flesh from the side of the face. He urinates, he defecates, and droppings fall to the floor while witnesses look on. The prisoner remains dangling from the end of the rope for eight to 14 minutes before the doctor climbs up a small ladder and listens to his heartbeats and pronounces him dead.”*¹³

¹³ Swati Deshpande, HANGING IS THE LEAST INHUMAN FORM OF EXECUTION, (June 26, 2018, 7.19 PM)

<https://timesofindia.indiatimes.com/india/Hanging-is->



Hence, many judges are convinced that the mode of execution should be changed to lethal injections rather than hanging, but again the latter is an unreliable method which has not been ever tested, the least we can do is let that person die without experimenting the methods to kill him and give him a civilized way to end his life.

In 2014 a verdict was given by a bench headed by former CJI P. Sathasivam which made a declaration that hanging is the least painful way of ending life. A year before he had confirmed death sentence to Yakub Menon in 2007 trial. He laid down some guidelines requiring a post mortem to check if the hanging was done accurately or not, as if it inflicted pain due to suffocation it would be violative of the 'due procedure'.

Hanging is preferred due to the following reasons:

1. Hanging consists of a mechanism which is easy to assemble.
2. The preliminaries to the act of hanging are quick and simple and they are free from anything that would unnecessarily sharpen the poignancy of the prisoner's apprehension.
3. The chances of an accident during can safely be excluded.
4. The method is a quick and eliminates the possibility of a lingering death.¹⁴

In a nutshell, the mode of hanging is still relied upon as no other alternative method is available yet.

[the-least-inhuman-form-of-execution-Apex-court/articleshow/](#)

¹⁴Shatrughan Chauhan & Anr v. Union Of India & Ors (2014) (India).

THE EXECUTIONS MADE

➤ DHANANJOY CHATTERJEE

Date of execution: August 14, 2004 (Alipore Central Jail, Kolkata)

The convicted rapist, murderer of a fourteen year old school girl was hanged on August 14 which started a hot debate, was Dhananjoy guilty of rape and murder beyond doubt? As some people still believe that an innocent man was killed at the hand of the state. Before being hanged he himself said he was an innocent being punished just because he was poor. He was working as a security guard in the building where the victim resided with her mother. The judiciary declared the crime as "rarest of rare" because the guard was responsible for the protection of the society and the people living in it. The accused was scheduled to hang on June 25, 2004 but his family filed a mercy plea, which was rejected by the then President of India, A.P.J. Abdul Kalam. He was finally hanged on his 39th birthday in Alipore Central Jail in Kolkata. He was the only man hanged for a non-terrorist act.

➤ MOHAMMAD AJMAL AMIR KASAB

Date of execution: November 21, 2012 (Yerwada Jail, Pune)

The Pakistani terrorist and a member of Lakshar-e-Taiba Islamist group, through which he took part in the infamous 26/11 Mumbai terrorist attack was held guilty of 80 crimes including treason, waging war against India, murder and terrorist acts etc. and a 11,000 paged charge sheet was filed



against him, thus making a strong case against him. He was sentenced to death on 6 May, 2010, the sentence was upheld by Bombay High court and Supreme Court. He kept changing his statement from time to time and moved up to the Supreme Court pleading for mercy. President Pranab Mukherjee upheld the judgment of capital punishment on the November 5, 2012 and he was hanged to death on November 21, 2012.

➤ AFZAL GURU

Date of execution: February 9, 2013 (Tihar Jail, Delhi)

A Kashmiri separatist who was the master mind behind the 2001 Parliamentary attacks received a death sentence for his involvement, which was upheld by the Indian Supreme Court. Following the rejection of a mercy petition by the [President of India](#). Five armed terrorists attacked the Indian Parliament which led to the death of 8 security personnel and a garden. The case was handed to a special cell of Delhi Police, which was able to track and arrest Afzal by December 15, 2001. He pleaded guilty in front of the media but took back his statement later claiming that he did it due to the pressure induced by the police. A special court was formed under the Prevention of Terrorism Act which finally sentenced him to death on December 18, 2002. Due to various pleads and protests the case went on till February 6, 2013, when his plea was rejected by the President Pranab Mukherjee. His execution was carried out as a secret mission on February 9, 2013.

➤ YAKUB ABDUL RAZAK MENON

Date of execution: July 30, 2015 (Central Jail, Nagpur)

Due to the involvement in the 13 blasts that rocked Mumbai in 1993, A Chartered Accountant by profession was hanged. It is the most recent execution done by India. He is the brother of the prime suspects of the bombings, Tiger Menon and he assisted him and Dawood Ibrahim in planning and executing the bombings. He was arrested on August 5, 1994 and was found guilty of following offences: He was hanged by the same hangmen who executed Ajmal Kasab on his 53rd Birthday.

SUPREMO AMICUS
CONCLUSION OF THE VEXED DEBATE

On 30 July, 2015 after a three hour long mid night hearing by three Supreme court judges the recent execution of Yakub Menon had lost all its hope and after a few hours he was hanged, this execution worked out as oil in the burning debate of 'Abolition' v. 'Retention'. The sentence for death again became a hot cake for intense discussion in view of the fact that it has been banned in at least 140 countries because it's inhuman and archaic but not yet in India.

One view is that capital punishment punishes a wrong doer following the principle of 'eye for an eye' and gains satisfaction and justice for the victim, nevertheless, Mahatma Gandhi said, 'eye for an eye makes the whole world blind' thus the other view is that rather than being reformatory and setting an example capital punishment is actually infringing human rights by being inhumane and torturous. Its continued use is a stain on a society built on humanitarian values.



By retaining death sentence, we may condemn someone to death, who may be able to expiate but, by giving a second chance to someone, we might be giving them a bullet to shoot us, just because they missed the first time.

Hence in simple words capital punishment should be retained only to an extent.

"Each extreme is a vice; virtue lies in the middle" – Aristotle

