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# The Philosophy of Death Penalty

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## Abstract

*The death penalty debate is the most generally relevant debate, keeping in mind the situation that has been brought about by today. Death penalty is an integral part of the Indian Criminal Justice System and of many other retentionist countries. This article argues that death penalty is a philosophical issue no doubt, but it also draws inspiration from Durkheim's discussion to the impact of political organization on penal evolution. It suggests that the most serious punishment i.e., death penalty is the first to grow milder, then to disappear with the progressive weakening of punishment. The author has drawn the conclusion with few suggestions at the end of this article.*

Keywords: Death penalty, Punishment, Philosophy, Deterrence, Debate.

## Introduction

The impulse of vengeance is recognized as the major doctrine for historical development of punishment (Faqr, 2015). It is a punishment or retribution that reflects both the instincts and positive self-feelings inflicted for an injury or wrong. However, still there is difference between vengeance and anger, as the first occurs deliberately and remains for long time, while the second happens suddenly and for short time. The essential elements of human psychology behind vengeance are both the positive self-feeling and pugnacity or a natural disposition to be aggressive by which the actual action of revenge is reproduced. Retaliation is also considered as other impulse supplying the lust of vengeance for human and animal (Fitzjames, 1883).

In primitive society, the criminal justice management was absent on the light of brutal and retributive system of savage or fierce justice by displaying an intense aggressiveness, as justice used to be achieved by the various means of instinct of savage of self-redress and cruelties merely by retaliating to any sort of threat to life or property (Hoebel, 1967). The primordial mankind which existed from the beginning lived with perpetual vendettas, as the revenge itself reproduces a counter revenge again, which provides 'no satisfactory method of bringing a quarrel to an end' (Harry, 1972).

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## 1. Ancient Philosophical Trends of Punishment

Penal sanctions were characterized with severity and harshness in different legal systems (Faqir, 2015). The corporal punishment of death was established in the Code of Hammurabi about 18th century B.C. for more than 25 different offences, and it was part of Hittite Code 14th century B.C., Draconian Code 7th century B.C., and Twelve Tables in 5th century B.C. (Michigan State University and Death Penalty Information Center, 2006). The death system was terrifying during Roman Empire, as it was executed by barbaric means of scourging or beating to death, torture, exposure, deception, crucifixion, exposing to wild animals, vivi-combustion or burnt alive and penalty of the sack (a type of death penalty) was imposed on a subject who has been found guilty of parricide (killing of parent or near relative). However, decapitation or cutting of the head of a person was a common method of execution and standard for all members of lower classes of the society, while sack penalty was imposed on persons found guilty of ‘parricidium’, vivi-combustion was applied in arson, state-enemy and slave related cases, and later the rule of free decision of death was applied only for offenders from upper classes during the regime of ‘Claudius’ emperor, such sentence was considered as ordering someone to commit suicide (Richard, 1996). At one time the death penalty was common form of punishment in England and there were about three hundred capital crimes (Neumayer, 2008). The extensive application of death penalty has been introduced with the spread of the Empire to other countries that adopted common law as basic source of its legal systems. At present, there are some countries in Middle East which use decapitation as the major method of execution for specific crimes, and other common forms of death punishment adopted by many legal systems include hanging, gas, lethal injection, electrocution and firing squad (Potas & Walker, 1987).

### 1.1. *Punishment in Ancient India*

In ancient India, the criminal punishments ‘Danda’ under ancient Hindu penal law were based on the principle of retaliation, the capital punishment was imposed on poor offenders of lower classes, while wealthy defendants of Brahmin caste were immune from execution of death penalty (Scott, 2009). On this context it has been rightly stated by Prejean that, ‘rich people never go to death row’ (Prejean, 2005). Vardhamana, a great Hindu penologist classified penalties under Hindu penal law into three categories viz., pain, mutilation of limbs and capital punishment (Donald, 1970). The punishments imposed were of severe nature, such as mutilation of limbs ‘Angaccheda’ (e.g., cutting off fingers or hand of a thief, a tongue of a defamer), the punishment of inflicting pain or afflicting ‘pidana’ was executed by whipping, flogging, imprisonment, chaining or fetters, and the same punishment was inflicted through exposing to humiliation by shaving the offender’s head, and by giving a ride on an ass or making him patrol in front of public in villages and cities (Sen, 1943).

Death penalty ‘Pramapana’ was a traditional practice in ancient India, and its execution during the regimes of Maurya’s dynasty 4th century B.C. and after drawing Dharmasastra Code by Manu 2nd and 3rd century A.D. was more heinous even for trivial offences or sins ‘pataka’ than in other nations through trampling under the foot of elephants, keeping the offender alive under the wheel, or burning him alive ... etc (Bikram, 2008).

## 2. Philosophy of Punishment

The concept of punishment—its definition—and its practical application and justification during the past half-century have shown a marked drift away from efforts to reform and rehabilitate offenders in favour of retribution and incarceration. Punishment in its very conception is now acknowledged to be an inherently retributive practice, whatever may be the further role of retribution as a (or the) justification or goal of punishment. A liberal justification of punishment would proceed by showing that society needs the threat and the practice of punishment, because the goal of social order cannot be achieved otherwise and because it is unfair to expect victims of criminal aggression to bear the cost of their victimization. Constraints on the use of threatened punishments (such as due process of law) are of course necessary, given the ways in which authority and power can be abused. Such a justification involves both deontological (the study of the nature of duty and obligation) as well as consequentialist (the right and wrong depends on the consequences of an act) considerations (Bedau, Hugo, & Kelly, 2015).

The question of whether, and how, legal punishment can be justified has long been a central concern of legal, moral, and political philosophy: what could justify a state in using the apparatus of the law to inflict intentionally burdensome treatment on its citizens? Radically different answers to this question are offered by consequentialist and by retributivist's theorists—and by those who seek to incorporate consequentialist and retributivist considerations in 'mixed' theories of punishment. Meanwhile, abolitionist theorists argue that we should aim to replace legal punishment rather than to justify it. Among the significant developments in recent work on punishment theory are the characterization of punishment as a communicative enterprise, greater recognition that punishment's justification depends on the justification of the criminal law more generally, and growing interest in the normative challenges (relating to rules especially of behavior) raised by punishment in the international context (Duff & Hoskins, 2017). The traditional debate among philosophers over the justification of legal punishment has been between partisans of the 'retributive' and 'utilitarian' theories. Neither the term 'retributive' nor the term 'utilitarian' has been used with perfect uniformity and precision but, by and large, those who have been called utilitarian have insisted that punishment of the guilty is at best a necessary evil justified only as a means to the prevention of evils even greater than itself. 'Retributivism', on the other hand, has labeled a large miscellany of theories united only in their opposition to the utilitarian theory. It may best serve clarity, therefore, to define the utilitarian theory with relative precision and thus define retributivism as its logical contradictory, so that the two theories are not mutually exclusive but also jointly exhaustive (Feinberg, 1995). That is why the discussion on utilitarian theory precedes to retributive theory and leaves no doubt for any ambiguity and as such also backed by Feinberg.

### 2.1. Utilitarian Theory

Therefore, as suggested by Feinberg, we first define the utilitarian theory and then define retribution. Utilitarian theories of punishment have dominated American jurisprudence during most of the twentieth century. According to Jeremy Bentham's classical utilitarianism, whether an act or social practice is morally desirable depends upon whether it promotes human happiness better than possible alternatives. Since punishment

involves pain, it can be justified only if it accomplishes enough good consequences to outweigh this harm. A theory of punishment may make the balance of likely consequences central to justification without asserting, as Bentham did, that all relevant consequences are reducible to happiness and unhappiness. It may even claim that reducing future instances of immoral violations of right is itself an appropriate goal independent of the effect of those violations on the people involved (Greenawalt, 1983). Utilitarian believes that the punishment is means to an end and seeks to punish the offenders to discourage or deter future wrongdoing. Great jurist Jeremy Bentham who was instrumental behind the utility theory said,

The principal end of punishment is to prevent like offences. What is past is but one act: the future is infinite. The offence already committed concerns only a single individual; similar offences may affect all. In many cases it is impossible to redress the evil that is done; but it is always possible to take away the will to repeat it; for however great may be the advantage of the offence, the evil of the punishment may be always made to out-weight it (Bentham, 1995).

Reduction or prevention of crime has to be ultimate object of punishment that has to look forward not backward as presented by retributist. These theories can be categorized as Expiation, Retribution, Reformative (corrective or therapy), Deterrent, Preventive and Compensatory (Goudappanavar, 2001).

## ***2.2. Retributive Theory***

Why should wrongdoers be punished? Most people might respond simply that they deserve it or that, they should suffer in return for the harm they have done. Such feelings are deeply ingrained, at least in many cultures, and are often supported by notions of divine punishment for those who disobey God's laws. A simple retributivist justification provides a philosophical account corresponding to these feelings: someone who has violated the rights of others should be penalized, and punishment restores the moral order that has been breached by the original wrongful act. The idea is strikingly captured by Immanuel Kant's claim that an island society about to disband should still execute its last murderer. Society not only has a right to punish a person who deserves punishment, but it has a duty to do so. In Kant's view, a failure to punish those who deserve it leaves guilt upon the society; according to Hegel, punishment honors the criminal as a rational being and gives him what it is his right to have. In simple retributivist theory, practices of punishment are justified because society should render harm to wrongdoers; only those who are guilty of wrongdoing should be punished; and the severity of punishment should be proportional to the degree of wrongdoing, an approach which is crudely reflected in the idea of 'an eye for an eye, a tooth for a tooth (Chabra, 2002). Kant has emphasized on the state's obligation to punish the person for violating the rights of others and Hegel thinks it is an honor of the criminal to receive what he deserves in terms of punishment and ought to have it as his right.

Close examination of this theory dispels or remove the fears, doubts, and false ideas much of its apparent simplicity, reveals some of the tensions between its implications and the practices of actual societies, and exposes its vulnerability to powerful objections. Taken as claiming an intimate connection between moral guilt and justified legal punishment, the



retributive theory raises troubling questions about the proper purposes of a state and about any human attempts to equate reward and punishment to moral deserts i.e., what a person deserves more usually with regard to punishment (Chabra, 2002).

### *2.3. Deterrent Theory*

Taking up the deterrence as the justification of punishment, here we are concerned with something that is aimed at the protection of the society. By making certain action a punishable offence, we expect that people will refrain from committing the offence through fear of punishment. However, the fact that people nevertheless continue to commit the offence is itself a proof that deterrence does not act universally and with everyone alike.

In the matter of infliction, the punishment as a deterrent is expected to serve two-fold purpose: individual and general. The object is to teach the offender a lesson so that he will be deterred from repeating his offence; but it is also to demonstrate to the potential offender the consequences if he violates the law. Logically, it ought to follow that, the more severe the punishment, the more certain the deterrent effect. Yet the whole history of penal law shows that, the severity of punishment did not curtail the volume of crime. In the time of Queen Elizabeth I, for instance, it was a capital offence to pick pocket. Yet the preamble of an Act of her reign sets out that pick pockets were to be seen busily plying their trade amongst the crowds which gathered to watch the executions of other pick pockets who had been caught and condemned to die for pick pocketing.

### *2.4. Reformative Theory*

Taking up next theory of punishment, namely, reformative, one finds that movement in that direction began originally as a protest. It was a protest both against the physical conditions in prison and against the moral spiritual degeneration or deterioration which took place in those conditions. And for a long time, the twin object of the reformers remained the erection of clean prisons, decently and fairly administered together with efforts directed at the prisoner to get him abandon his evil ways with the aid of religious and moral exhortation or persuasion. At the bottom the offender was regarded as a free agent able to control his conduct by making a straight-forward moral choice between good and evil. Provided he was decently treated, and shown the errors of his way, it was expected that he would reform. Unfortunately, the results proved disappointing.

Today, it is a fact that modern penal reformers are concerned with the prisoner's social and psychological readjustment as Grunhut says,

This conception of readjustment makes no presumptuous claims to produce a religious conversion or moral rebirth nor does it pretend to make a man a law abiding citizen by a wise handling of his economic and social problems alone. The efforts are to be focused on the man himself ... penal reformative treatment has taken over this outlook from social work. Constructive methods owe much to the experience of social case work and to psychological insight into man's personal conflicts (Grunhut).

The reformative theory aims at doing this by stressing that the offender should, while punished by detection, be put to educative and healthy or ameliorating (but never

degrading) influences. He should be re-educated and his character traits be reshaped and put once again in the furnace for being moulded.

The Supreme Court of India has taken the following view in (*Narotam Singh v. State of Punjab*, AIR 1978), 'Reformative approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice' (Tanu, 2014).

### 3. Punishment and Social Organization

#### 3.1. *Impact of Political Organization on Penal Evolution*

Although Durkheim devotes considerable discussion to the impact of political organization on penal evolution, it should be emphasized that he presented this variable as a secondary factor, useful in explaining exceptions to the general pattern of social change. Rather than exploring the relationship between social evolution and political development, Durkheim asserts that 'political organisation is not ... a consequence of the fundamental nature of society, but rather depends on unique, transitory and contingent factors' (Spitzer & Steven, 1975). Political systems, therefore, create more or less random disturbances in the unfolding of punishment. It happens that when 'in passing from a primitive type of society to other more advanced types, we do not see punishment decreasing as we might have expected' it is 'because the organisation of government acts at the same time to neutralise the effects of social organisation' (Spitzer & Steven, 1975).

To complete the argument, the emergence of incarceration, as a more lenient punitive response, is consistent with the progressive weakening of punishment that Durkheim has described. This attenuation or effect is assumed to take a specific developmental form, whereby the most serious punishments (i.e., aggravated capital punishment) 'are the first to be affected by this regression, that is to say, which are the first to grow milder, then to disappear' and 'lesser punishments must be developed to fill the gaps which this regression produces.' In general, therefore, 'new forms of punishment invade the free spaces which they then find before them' and 'various modes of imprisonment are the last punishments to develop' (Spitzer & Steven, 1975).

### 4. Moral Principles for Imposition of Punishment

Although punishment has been a crucial feature of every legal system, a widespread disagreement exists over the moral principles that can justify its imposition. One fundamental question is why and whether the social institution of punishment is warranted. The second question concerns the necessary conditions for punishment in particular cases. The third relates to the degree of severity that is appropriate for particular offences and offenders.

Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification. The difficulties of justification cannot be avoided by the view that punishment is an inevitable adjunct or supplementary of a system of criminal law.

However, the question: 'What are the rationales behind punishment?' remains unanswered. This question relates to the theories of punishment. Generally, punishment contributes to the preservation of public order through inflicting the wrong doer who is

expected to behave in the future to become a good citizen and to inspire fear in any one 'who witness the punishment to wrong doer, and to make them prudent.' This is the primary rationale of punishment. There are theories of punishment of which the following are generally been regarded as the most important.

#### ***4.1. Retribution***

Retribution is the oldest of the rationales for punishment tracing its root to the Bible. For instance Leviticus (the third book of the Pentateuch in the Bible) reads, 'When one man strikes another and kills him, he shall be put to death ... when one injures and disfigures his fellow country man, it shall be done to him as he has done; fracture for fracture, eye for eye, tooth for tooth.'

Retribution is often assimilated to revenge, but a public rather than a private one. Retribution is based on the principle that people who commit crimes deserve punishment. In that sense, the theory is backward looking: the justification for punishment is found in the prior wrong doing.

Retribution theory punishes the offenders because they deserve the punishment. It says to the offenders, 'You have caused harm to society; now you must pay back to the society for that harm. You must atone i.e. make amends or reparation for your misdeeds'.

Implicit in retribution is the condemnation or denunciation of both the offender and the offending behaviour.

Retribution, however, is not in a kind. Society cannot rape rapist or steal from thief, although in some countries death penalty is exacted or inflicted for murder. Instead, the law tries to convert the offence into a common currency to impose a sentence which is proportional to the harm caused. In this regard, it might be observed that retribution, with its emphasis on proportional punishment, provides a basis for the grading of offences.

#### ***4.2. Deterrence***

Deterrence is one of the several rationales of sentence. It is described as 'consequentialist' in the sense that it looks into the preventive consequence of sentence. It relies on the threats and fear through sentencing. Deterrence is based on the belief that crime is rational and can be prevented if people are afraid of penalties. There are two types of deterrence; viz., *General deterrence* and *Specific deterrence*.

##### ***4.2.1. General Deterrence***

Knowledge that punishment will follow crime deters people from committing crime, thus reducing future violations of right and the unhappiness and insecurity they would cause. It aims at deterring other people who witness punishment and like-minded with the offender, from committing this kind of offence. It makes other people prudent by inducing the public to refrain from criminal conduct by using the defendant as an example of what will befall a person who violated the law.

Jeremy Bentham, the main proponent of this theory argues that all punishment is pain, and should therefore be avoided, however, it might be justified if the benefit in terms of general deterrence would outweigh the pain inflicted on the offender punished and if the same benefits could not be achieved by non-punitive methods.

Sentence should therefore be calculated to be sufficient to deter others from committing this kind of offence, no more no less.

#### *4.2.2. Specific Deterrence*

A goal of criminal sentencing that seeks to prevent a particular offender from engaging in repeated criminality. The actual imposition of punishment creates fear in the offender that if he repeats his act, he will be punished again.

Adults are more able than small children to draw conclusions from the punishment of others, but having a harm befall on oneself is almost always a sharper lesson than seeing the harm occur to others. To deter an offender from repeating his actions, a penalty should be severe enough to outweigh in his mind the benefits of the crime.

For the utilitarian, more severe punishment to repeat offenders is warranted partly because the first penalty has shown itself ineffective from the stand point of individual deterrence.

#### *4.3. Incapacitation*

Incapacitation is the use of imprisonment or other means to reduce the likelihood that an offender will be capable of committing future offences.

It makes the offender incapable of offending for substantial period of time. It is popular form of ‘public protection’ and sometimes advanced as general aim. This pragmatic theory argues that offenders need to be separated from the rest of the society in order to protect ordinary citizens from their committing other offences. The implicit premise is that, if not incarcerated, the offender will continue in their criminal way.

In ancient times, mutilation and amputation of the extremities were sometimes used to prevent offenders from repeating their crimes. Modern incapacitation strategies separate offenders from the community to reduce opportunities for further criminality. Incapacitation is sometimes called the ‘lock them up approach’ and forms the basis for the movement of forward prison ‘warehousing.’ It is confined to particular group, such as ‘dangerous’ offenders, career criminals or other persistent offenders.

Capital punishments and severing of limbs could be included as incapacitation punishment. But there are formidable humanitarian arguments against such irreversible measures.

What has been claimed for incapacitating sentencing is the imposition of long, incapacitating custodial sentence on the offender which is deemed to be dangerous. The proponents of this theory argue that one can identify certain offenders as dangerous who are likely to commit serious offences if released into community in the near future and the risk of victims are so great that it is justifiable to detain such offenders for long period.

Opponents of this theory have chief objection: ‘over prediction’. They say that incapacitating sentencing draws into its net more non-dangerous than dangerous offenders. For instance, in the UK, study indicates that only 9 out of 48 offenders predicted as dangerous, committed dangerous offences, within five years of release from prison. An equal number of dangerous offences were committed by offenders not classified as dangerous.

This indicates that there are hundreds of offenders serving discretionary sentence of life imprisonment in UK and Wales, imposed on the ground of predicted dangerousness, and

there is no way of telling, whether the predictions on which these sentences rest are not over caution in ratio of two-to-one.

#### ***4.4. Rehabilitation***

Rehabilitation seeks to bring about fundamental changes in offenders and their behaviour. As in the case of deterrence, the ultimate goal of rehabilitation is a reduction in the number of criminal offences. Whereas deterrence depends upon a fear of the law and the consequences of violating it, rehabilitation generally works through education and psychological treatment to reduce the likelihood of future criminality. This theory argues that too much alternation was given for crime, and little was given to the criminals.

This theory rests upon the belief that human behaviour is the product of antecedent causes and that these causes can be identified, and that on these basis therapeutic measures can be employed to effect changes in the behaviour of the person treated. This requires modification of attitudes and behavioral problem through education and other skill training. The belief is that these might enable offenders to find occupation other than crime.

If a dangerous offender needs to be located until he/she is no longer dangerous, it is the duty of the state to rehabilitate the offenders so that they can be released. That is why rehabilitation is termed as the other side of restrain coin.

This theory is closely related with forms of positivist criminology which locates the causes of criminality in individual pathology or individual maladjustment whether psychiatric, psychological or social.

This theory tends to regard the offender as a person in need of help and support. It says that criminals are socially sick people who need some kinds of treatment.

### **5. Death Penalty Debate**

The death penalty debate is the most generally relevant debate, keeping in mind the situation that has been brought about by today. Death penalty is an integral part of the Indian Criminal Justice System.

A careful scrutiny of the debates in British India's Legislative Assembly reveals that no issue was raised about death penalty in the Assembly until 1931, when one of the members from Bihar, Shri Gaya Prasad Singh sought to introduce a Bill to abolish the punishment of death for the offences under the Indian Penal Code. However, the motion was negated after the then Home Minister replied to the motion.

The Government's policy on death penalty in British India prior to Independence was clearly stated twice in 1946 by the then Home Minister, Sir John Thorne in the debates of the Legislative Assembly. 'The Government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided' (Gupta, 2000).

#### ***5.1. International Scenario***

The International landscape regarding the death penalty – both in terms of international law and state practice – has evolved in the past decades. Internationally, countries are classified on their death penalty status, based on the following categories,

- Abolitionist for all crimes

- Abolitionist for ordinary crimes
- Abolitionist *de facto*
- Retentionist

At the end of 31 December 2017, 106 countries were abolitionist for all crimes, 7 countries were abolitionist for ordinary crimes only, and 29 were abolitionist in practice, making 142 countries in the world abolitionist in law or practice. 56 countries are regarded as retentionist, who still have the death penalty on their statute book, and have used it in the recent past (Amnesty, 2018). While only a minority of countries retain and use death penalty, this list includes some of the most populous nations in the world, including India, China, Indonesia and the United States, making a majority of population in the world potentially subject to this punishment.

### ***5.2. Death Penalty and International Human Right Treaties***

The International Covenant on Civil and Political Rights (ICCPR) is one of the key documents discussing the imposition of death penalty in International Human Rights Law. The ICCPR does not abolish the use of death penalty, but Article 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty (LCI Report, 2015).

The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death penalty, which is open to signatures from all countries in the world. It came into force in 1991, and has 81 states parties and 3 signatories (LCI Report, 2015).

Similar to the ICCPR, Article 37 (a) of the Convention on the Rights of the Child (CRC) explicitly prohibits the use of death penalty against persons under the age of 18. As of July 2015, 195 countries had ratified the CRC (LCI Report, 2015).

The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention) and the UN Committee against Torture have been sources of jurisprudence for limitations on death penalty as well as necessary safeguards. The Torture Convention does not regard the imposition of death penalty *per se* as a form of torture or cruel, inhuman or degrading treatment or punishment (CIDT). However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by UN bodies (LCI Report, 2015).

In the evolution of international criminal law, death penalty was a permissible punishment in the Nuremberg and Tokyo tribunals, both of which were established following World War II. Since then, however, International Criminal Courts exclude death penalty as a permissible punishment (LCI Report, 2015).

Of the treaties mentioned above, India has ratified the ICCPR and the CRC, and is signatory to the Torture Convention but has not ratified it. Under international law, treaty obligations are binding on states once they have ratified the treaty. Even where a treaty has been signed but not ratified, the state is bound to ‘refrain from acts which would defeat the object and purpose of a treaty’ (LCI Report, 2015).

### ***5.3. Political Commitments Regarding Death Penalty Globally***

Several resolutions of the UN General Assembly (UNGA) have called for a moratorium (a temporary prohibition) on the use of the death penalty. In 2007, the

UNGA called on states to ‘progressively restrict the use of death penalty, reduce the number of offences for which it may be imposed’ and ‘establish a moratorium on executions with a view to abolishing the death penalty.’ In 2008, the GA reaffirmed this resolution, which was reinforced in subsequent resolutions in 2010, 2012, and 2014. Many of these resolutions noted that, ‘a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights.’ In 2014, 117 states had voted in favour of the most recent resolution. India has not voted in favour of these resolutions (LCI Report, 2015).

In a 2013 resolution, the UN Human Rights Council acknowledged ‘the negative impact of a parent’s death sentence and his or her execution on his or her children,’ and urged the ‘States to provide those children with the protection and assistance they may require,’ Human Rights Council resolution, 2014 noted that ‘States with different legal systems, traditions, cultures and religious backgrounds have abolished death penalty or are applying a moratorium on its use’ and deplored the fact that ‘the use of death penalty leads to violations of the human rights of those facing death penalty and of other affected persons.’ The Human Rights Council urged states to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.

The law of extradition has been another tool for countries pushing for the abolition of death penalty. Several abolitionist countries either require assurances that retentionist-extraditing countries not impose death penalty, or have included such a clause in bilateral extradition treaties (LCI Report, 2015).

#### ***5.4. Current Status of Death Penalty***

Article 21 of the Indian Constitution ensures the Fundamental Right to life and liberty for all persons. It adds no person shall be deprived of his life or personal liberty except according to procedure established by law. This has been legally construed to mean if there is a procedure, which is fair and valid, then the state by framing a law can deprive a person of his life. While the central government has consistently maintained it would keep the death penalty in the statute books to act as a deterrent, and for those who are a threat to society, the Supreme Court of India too has upheld the constitutional validity of capital punishment in ‘rarest of rare’ cases. In (*Jagmohan Singh v. State of Uttar Pradesh*, 1973), then in (*Rajendra Prasad v. State of Uttar Pradesh*, 1979), and finally in (*Bachan Singh v. State of Punjab*, 1980), the Supreme Court of India has affirmed the constitutional validity of death penalty. It said, if capital punishment is provided in the law and the procedure is fair, just and reasonable one, then death sentence can be awarded to a convict. This will, however, only be in the ‘rarest of rare’ cases, and the courts should render ‘special reasons’ while sending a person to the gallows (Ambasta, 2015).

The principles as to what would constitute the ‘rarest of rare’ case have been laid down by the top Court in the landmark judgment in (*Bachan Singh v. State of Punjab*, 1980). Supreme Court of India formulated certain broad illustrative guidelines and said, it should be given only when the option of awarding the sentence of life imprisonment is ‘unquestionably foreclosed’. It was left completely upon the court’s discretion to reach this conclusion. However, the apex court also laid down the principle of weighing, aggravating and mitigating circumstances. A balance-sheet of aggravating and mitigating circumstances in a particular case has to be drawn, to ascertain whether justice will not be

done if any punishment less than the death sentence is awarded. Two prime questions, the top court held, may be asked and answered. First, is there something uncommon about the crime, which renders the sentence of imprisonment for life inadequate and calls for a death sentence? Second, are there circumstances of the crime such that there is no alternative, but to impose the death sentence even after according maximum weightage to the mitigating circumstances, which speak in favour of the offenders (*Bachan Singh v. State of Punjab*, 1980)?

#### ***5.4. Alternative to Death Penalty***

In the last few years, Supreme Court of India has entrenched the punishment of 'full life' or life sentence of determinate number of years as a response to challenges presented in death cases. The Supreme Court of India speaking through a three-judge bench decision in (*Swamy Shraddhanand [2] v. State of Karnataka*, 2008), case laid the foundation of this emerging penal option in following terms,

The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged (gently encouraged) into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus or gap between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

Further, the formalization of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases.

The observations in (*Swamy Shraddhanand [2] v. State of Karnataka*, 2008), case have been followed by the Court in a multitude of cases such as *Haru Ghosh v. State of West Bengal*, 2009), (*State of Uttar Pradesh v. Sanjay Kumar*, 2012), (*Sebastian v. State of Kerala*, 2004), and (*Gurvail Singh v. State of Punjab*, 2013), where full life or sentence of determinate number of years has been awarded as opposed to death penalty (LCI Report, 2014).



### **5.5. Clemency Powers**

If the Supreme Court of India turns down the appeal against capital punishment, a condemned prisoner can submit a mercy petition to the President of India and the Governor of the State. Under Articles 72 and 161 of the Constitution, the President and Governors, respectively have the power ‘to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence’ (LCI Report, 2014).

Neither of these powers are personal to the holders of the office, but are to be exercised (under Articles 74 and 163, respectively) on the aid and advice of the Council of Ministers.

Clemency powers, while exercisable for a wide range of considerations and on protean or fluctuating occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a heavy responsibility on those wielding (holding and using) this power and necessitates a full application of mind, scrutiny of judicial records, and wide-ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence and who is on the very verge of execution.

The Ministry of Home Affairs, Government of India, has drafted the ‘Procedure Regarding Petitions for Mercy in Death Sentence Cases’ to guide State Governments and the prison authorities in dealing with mercy petitions submitted by death sentence prisoners (LCI Report, 2015).

### **5.6. Judicial Review of the Exercise of Mercy Powers**

The Supreme Court of India in (*Shatrughan Chauhan and another v. Union of India*, 2014), has recorded that the Home Ministry considers the following factors while deciding mercy petitions,

- Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);
- Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;
- Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;
- Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;
- Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench?
- Consideration of evidence in fixation of responsibility in gang murder case;
- Long delays in investigation and trial etc.

However, when the actual exercise of the Ministry of Home Affairs (on whose recommendations mercy petitions are decided) is analyzed, it is seen that many times these guidelines have not been adhered to. Writ Courts in numerous cases have examined the manner in which the Executive has considered mercy petitions. In fact, the Supreme

Court of India as part of the batch matter (*Shatrughan Chauhan and another v. Union of India*, 2014), case heard 11 writ petitions challenging the rejection of the mercy petition by the Executive (LCI Report, 2015). Supreme Court of India, last year held that judicial clemency could be granted on the ground of inordinate delay even after a mercy petition is rejected (Anand, 2015).

### **5.7. Law Commission of India's Report on Death Penalty**

The Law Commission of India in its 262nd Report (LCI Report, 2015), recommended that death penalty be abolished for all crimes other than terrorism related offences and waging war. Complete recommendations of the Report are as follows,

- The Commission recommended, measures suggested that police reforms, witness protection scheme, and victim compensation scheme should be taken up expeditiously by the government.
- The march of our own jurisprudence - from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court of India to the rarest of rare cases - shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the Right to life and strengthened due process requirements in the interactions between the state and the individual, prevailing standards of constitutional morality and human dignity, the Commission felt that time has come for India to move towards abolition of the death penalty.
- Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism-related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the Commission did not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.
- The Commission accordingly recommended that the death penalty be abolished for all crimes other than terrorism related offences and waging war.
- Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible (LCI Report, 2015).

## **6. Two Main Dilemmas**

It is pertinent for further discussion on this thorny topic, to add two main dilemmas: firstly, the religious basis of death penalty as in Islamic law and secondly, death penalty as a basis for social control in some tribal societies such as many Arab societies.

### **6.1. The Religious basis of Death Penalty as in Islamic Law**

The question of whether to apply death penalty for unusually severe or heinous crimes is a moral dilemma for civilized societies across the world. For Muslims, Islamic law guides their views on this, clearly establishing the sanctity of human life and the prohibition

against taking human life but making an explicit exception for punishment enacted under legal justice (Huda, 2019).

The Quran establishes that killing is forbidden, but as clearly establishes conditions under which death penalty may be enacted:

... If anyone kills a person—unless it is for murder or for spreading mischief in the land—it would be as if he killed all people. And if anyone saves a life, it would be as if he saved the life of all people (Quran 5:32)

According to Islamic law, the following two crimes can be punished with death penalty: Intentional murder and Fasad fil-ardh (spreading mischief in the land).

The Quran legislates that the death penalty for murder is available, although forgiveness and compassion are strongly encouraged. In Islamic law, the murder victim's family is given a choice to either insist on the death penalty or to pardon the perpetrator and accept monetary compensation for their loss (Quran 2: 178)

Islamic penal law consists of four systems or categories. In the first, that of Haad or Hudud, important crimes deemed to threaten the very existence of Islam are punishable pursuant to penalties set by the Quran itself, or by the Sunna or Sunnah. Islamic jurists consider that these sanctions are set and immutable, and conclude that the judge is left with no discretion. Hudud crimes consist of adultery, defamation, theft, robbery, rebellion, drunkenness, and apostasy. Several Hudud crimes are punishable by death penalty, specifically robbery, adultery, and apostasy.

The second system, *Qisas*, concerns intentional crimes against the person. Its fundamental premise is the *lex talionis*, that is, “eye for eye, tooth for tooth,” and is set out in the Quran, in verse 5.32 (further developed by verse 17.33). Actually, the *lex talionis* appears as early as the Code of Hammurabi (Savey-Casard, 1968). Even then, it was a progressive penal reform aimed at enhancing the principle of proportionality, although it is now seen as a basis for retribution. According to the Quran, it is the victim or his or her heirs who are to inflict the punishment, although they do this under the supervision of public authorities. The victims of such crimes may pardon the offender, in which case the penalty set by *Qisas* will not be imposed.

In such cases, two other systems of crime and punishment become relevant. These are *Deah*, which prescribes restitution or compensation for the victim, and *Tazir*, by which public authorities set their own punishment and in which the judge has wide discretion. Under *Tazir*, public authorities may provide for death penalty, but no religious text requires them to do so (Schabas, 2000).

## ***6.2. Death Penalty as a basis for Social Control in some Tribal Societies such as many Arab Societies***

The death penalty for a murderer would help prevent chaos, sedition and revenge from the perpetrator's family. Customary tribal law in some of these communities, such as Jordan, still helps the executive and judicial authorities to reach an alternative and peaceful solution to the conflict by accepting blood money. However, the state's general right to

inflict punishment on the perpetrator, which is often the penalty of imprisonment remains.

### 6.2.1. Customary Tribal Law and Homicide in Jordan

When a murder takes place in a village, the male members of the victim's family have the right under Bedouin law to murder a male member of the perpetrator's family. The victim's family need not choose to kill the perpetrator. In fact, the victim's family will often choose the most respected member of the perpetrator's family so as to bring shame on the perpetrator within his own family.

As soon as the police in a village know that a killing has taken place, they will go to the victim's family and the perpetrator's family to secure a truce (*atwa*) for three and one-third days. The perpetrator's family must flee to a sanctuary as soon as possible after the incident to avoid immediate retribution, which is legitimized under traditional customs, from the injured party. This evacuation process (*J'wa*) is carried out by and under the supervision of the policemen in the village to ensure the safety of evacuees.

The logic of *atwa* is to have a cease-fire and cooling-off period until the parties can pursue peace negotiations. During the cease-fire, the sheikh will negotiate the return of the women, children, and elderly to the village.

The next step in the resolution process is to assemble a *Ja'ha*. This group is analogous to a mediation team. Often weeks or months pass before this step is taken. An effort is made in a series of meetings with the litigants, respected male tribal leaders selected by the perpetrator's party, and the tribal leader who provides protection to resolve the matter by consensus. The people who compose the *Ja'ha* are expected to be neutral, prestigious, knowledgeable of the tribal values and customs, and personally experienced in dealing with tribal conflicts.

The goal of *Ja'ha* is to achieve a *sulh* (peace agreement) between the involved parties. The injured party must already know the *Ja'ha* leader. Some Bedouin require a specific tribe's leader to be head of the *Ja'ha*. Members of the injured party discuss with each other the demands that they are going to put on the table in the *Ja'ha*. They also assign a specific person to be their speaker, or they might choose another tribe's figure to do this on their behalf. The latter must be committed to the demands that the injured party requests. The main demand is *Me'da* or blood money (Furr & Al-Serhan, 2008).

## Conclusion

Life imprisonment is the rule and death penalty is an exception in an offence of murder. The crux of the matter is that death penalty is not so much a legal or constitutional issue as a sociological one, requiring a totally humane and rational approach to this entire problem. Because of this, abolitionists have developed a strong lobby – with the consequent result that various countries have moved over to the gradual abolition of death penalty. Their main plank of argument is that as the hangman's noose ends the search of truth – what if the judge is wrong? As against which the retentionists maintain that the death sentence has a deterrent effect – not because of the fear of death but the dread (great fear) and abhorrence (a feeling of revulsion) for the crime of murder (Kelawala, 1992).

However, a discussion on the death penalty cannot be carried out by ignoring systemic realities. Irrespective of the sides we may take on the death penalty as a philosophical issue, we need to acknowledge that the nature of the crime cannot be the only relevant consideration. The harshest punishment in our legal system is administered using a criminal justice system that is in a deep crisis at multiple points. To rely on such a system not only raises concerns of the rule of law but also asks questions of our own humanity (Death Penalty India Report Summary, 2016).

The nature of the crime cannot be the only relevant consideration to retain death penalty. The dilemma faced by many prisoners about the uncertainty over their lives, not knowing whether they would live or die is considered to be the worst part of the punishment. Therefore, it would always be better to go for lesser punishments, to prescribe new forms of punishment, and to develop various modes of imprisonment as an alternate to death penalty.

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