

“Marking a Line on the Practice of Capital Punishment”

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Abstract:

Capital Punishment is a debate in the global community. The arguments have been stated for both the aspects of abolishing or retaining capital punishment. The paper neutrally provides an insight of the arguments from both sides paper. The paper tries to draw a line on the requirement of capital punishment under what circumstances with the help of a Mid-Way Approach as a solution to the problem. The paper tries to justify a reasonable understanding on the assertions with the help of two scenarios to safely assert the outcome which can be a conclusive solution.

Keywords:

Capital Punishment, Crime, Terrorism, Life imprisonment

An Introduction to Capital Punishment:

Capital punishment or the death penalty is a legal process whereby a person is put to death by the state as a punishment for a crime committed by him. Death penalty is currently practised in 58 nations, and 97 countries have abolished it (the remainder have not used it for 10 years or allow it only in exceptional circumstances such as wartime).¹ Death penalty is retained on the ground that it will be awarded only in 'the rarest of the rare cases' and for 'special reasons'.² The decision in *Bachan Singh*³, observed that the rarest of rare cases is when the murder is committed in an extremely brutaldiabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community or when the murder is committed for a motive which evinces total depravity and mean-ness.

Abolishing Capital Punishment:

In U.S. from 1936 to 1966 the Gallup Poll found backing for capital punishment declined 20 percentage points, from 62 to 42 per cent. Then, early in 1969, the same source reported approval of the death penalty up to 51 per cent again. This upturn seems to be a correlate of the rising cry for law, order, and more severity in the judicial and penal system.⁴ Ammnety international is an active international body which opposes capital punishment.⁵

The critics of capital punishment argue that a man has no right to take life another man. They believe in the idea of natural birth of an individual can only be curtailed by nature and no human agency can wilfully take a life of an individual. In a book *Reflections on the Guillotine, Resistance, Rebellion & Death*, the human right supporters are of strong opinion that it is in violation of right to life of an individual. International human rights conventions mandate that criminal sanctions can be imposed only against an individual who has been subject to due process of law that guarantees a presumption of innocence, a fair opportunity to answer the

¹Amnesty International. <http://www.amnesty.org/>. Retrieved 2013-08-15

² CODE CRIM. PROC. Section 354(3).

³Bachhan Singh vs State of Punjab, AIR 1980 SC 898.

⁴Hazel Erskine, *The Polls: Capital Punishment*, 34 The Public Opinion Quarterly 290, 290-307 (1970).

⁵Michel Guesdon, *On Death Penalty*, 32 Economic and Political Weekly 2430, 2430 (1997).

charges brought against him or her before a duly constituted court, and the assistance of a well-qualified defence counsel.⁶

Morality⁷ is based on the universal law of cause and effect (Kamma), which distinguishes between a "good" or "bad" action according to intent, and the way by which the action may affect others. "Good" behavior results from love, charity, and wisdom, while "bad" behavior results from greed, hatred, and vengeance. "An action, even if it brings benefit to oneself, cannot be considered a good action if it causes physical and mental pain to another being" (Dhammananda, 1987: 161). In this context, capital murder, the offense most often committed by death row inmates, is absolutely unacceptable. Similarly, the death penalty as a punishment is a "bad" action of psychological, emotional, and physical trauma that convicted individuals face during the time spent on death row.

Retaining Capital Punishment:

Capital punishment is an ethical way to curb an act which kills humanity. The argument is a practical approach in the society where state is responsible to protect its citizens. In order to that they have to take away the life of such individuals who don't know what humanity is. A much larger matter, however, often raised, especially by supporters of the capital punishment experiment, was that if government found it essential to follow the views of the majority on an issue of this sort, then no progress could ever be made.⁸ The idea of state paternalism stands to be the one which is often ignored. This is often formulated on the Social Contract Theory which gives the state, the power to take away liberty and life in certain circumstances in order to maintain law and order.

The Clash of the Two Believers:

Herein lays the problem. Both sides must recognize the integrity of responsible proponents of anti-death penalty and pro-death penalty stands, but there is no process in place, other than an adversarial one, in which exchange of information and ideas can occur.⁹

Understanding the need of Capital Punishment: The judicial view

The court lay down the following propositions:

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme Culpability
- (ii) The circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'
- (iii) Life imprisonment is the rule and death sentence is an exception;

⁶, Roger Hood and Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"*, 38 Crime and Justice 38, 1-63 (2009).

⁷Leanne Fital Alarid and Hsiao-Ming Wang, *Mercy and Punishment: Buddhism and the Death Penalty*, 28

⁸L. R. England, *Capital Punishment and Open-End Questions*, 12, The Public Opinion Quarterly 416, 412-416 (1948).

⁹Thomas F. Geraghty, *Trying to Understand America's Death Penalty System and Why We Still Have It* *The Contradictions of American Capital Punishment* by Franklin E. Zimring; *Beyond Repair America's Death Penalty* by Stephen P. Garvey; *Kansas Charley: The Story of a 19th Century Boy Murderer* by Joan Jacobs Brumberg; *III. Governor's Comm'n on Capital Punishment* by Governor's Commission on Capital Punishment, 94 The Journal of Criminal Law and Criminology 237, 209-238 (1973).

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised

The court thereafter observed that in order to apply these guidelines the following questions may be answered

- (a) Is there something uncommon about the crime, which renders sentence of imprisonment for life inadequate and calls for a death sentence?
- (b) Are the circumstances of the crimes such that there is no alternative but to impose the death sentence even after according maximum weightage to them litigating circumstances which speak in favour of the offender.¹⁰

An analysis of the observation of Supreme Court can be clearly inferred that the circumstances can only be well accorded from facts of a situation which will lead to death penalty. Every observation shows a remark that even judges are not of the liberal approach to pronounce death punishment and the due process ought to be followed.

Mid way approach:

The mid way approach is the solution paper pronounces that:

“The person committing the act should be differentiated in order to reach out to a conclusion of pronouncing capital punishment”.

The above observation of judiciary is used as the basis to come to a conclusion that any crime which passes the test of the above observation should be given life imprisonment. By the term life imprisonment, it has to be understood as an imprisonment for life time till he naturally dies. Now if the same act is committed by a terrorist such that he passes the test of the above observation he must be given death sentence. Thus a clear distinction on the use of capital punishment should be made on a criminal and a terrorist.

To understand and resolve the conflict there are two examples that needs to be considered:

- A. An innocent young defenceless girl being raped by a security guard who commits a crime for his lust deserves a capital punishment?
- B. A terrorist who bombs a hotel killing 28 people deserves a capital punishment?

To understand the condition (A) the person who has the responsibility to guards a society commits an act out of his lust on a young girl. Clearly he will be charged under the various provisions of Criminal Acts which are applicable in different parts of the world. But does his act deserve death sentences is a matter of debate. The author is of the opinion that he has committed a Crime. A criminal creates a law and order problem only for which he can be corrected. But in the degree of the offence is grave as it amounts to the qualification of the above observation than he must be given life imprisonment till he/she achieves his/her natural death.

Whereby in condition (B) the person is a terrorist and has killed 28 people.

The only similarity that can be observed from the two examples is that a death of an individual is taking place. But the persons committing the offence are different. In the case A. it's a criminal whereby in case B. it's a terrorist. Terrorism means the act of terrorising,

¹⁰Machhi Singh v. State of Punjab, 1983(3) SCC 470.

unlawful acts of violence committed in an organised attempt to ‘overthrow a government’¹¹ or to bring a ‘political change’¹² or like purposes.¹³ Terrorism can’t be equated with a usual law and order problem within a state.¹⁴ It tends to attack the sovereignty of a nation. It is not an act which is done out of selfish motives but it carries an altruist behaviour. What distinguishes terrorism from other forms of violence therefore appears to be the deliberate and systematic use of coercive intimidation¹⁵ A terrorist deserves to be given a death sentence because they try to overthrow the existing political setup. The state has to take harsh and hard measures against such elements to defend the national security which is the prime concern.

Conclusion:

The controversy on death penalty will be a never ending debate because it will rest on the government approach of what suits them best in order to maintain their administration. However the liberal approach towards a death penalty can be looked into and can be made applicable to a limited number of circumstances. Capital Punishment is a weapon and a shield at the same time. An army cannot win a war with weapons only. A shield is also required at the same time to take cover and defend the army. So is the state cannot completely give away the idea of capital punishment and abolish it. It can be used sparingly in the circumstances to fight against the perpetrators who are trying to affect the sovereignty of a nation. The Indian judiciary has often failed to differentiate between a criminal and a terrorist which has resulted in a lot of pendency in reaching justice for the loss of the souls of the motherland. On the same hand a criminal can be suppressed and reformed for which an active I.P.C is in place. Therefore the paper attempts to draw a line on the use of capital punishment by differentiating between a criminal and a terrorist since it is a shield for the security of a nation and a weapon to spread clear message in the terrorist community.

Bibliography

Cases

- Bachhan Singh vs State of Punjab, AIR 1980 SC 898
- Machhi Singh v. State of Punjab, 1983(3) SCC 470.
- Muralidhar Sarangiv. New Delhi Assurance Co. Ltd. (2000) 3 SCC 466
- Devendra Pal Singh v. State of NCT of Delhi, (2002) 5 SCC 234
- Nazir Khan v. State of Delhi (2003) 8 SCC 461.
- State of Punjab v. Sukhpal Singh AIR 1990 SC 231
- P.U.C.L v. Union of India, AIR 2004 SC 456

¹¹Muralidhar Sarangiv. New Delhi Assurance Co. Ltd. (2000) 3 SCC 466. *See also*, P RAM NAINA AIYER, THE MAJOR LAW LEXICON 1256 (Lexis Nexis Butterworth Wadhwa Nagpur 4th ed. 2010).

¹²Devendra Pal Singh v. State of NCT of Delhi, (2002) 5 SCC 234. *See also*, Nazir Khan v. State of Delhi (2003) 8 SCC 461.

¹³State of Punjab v. Sukhpal Singh AIR 1990 SC 231. *See also*, Caesar Roy, *The Unlawful Activities (Prevention) Amendment Act, 2008 And Its Loopholes*, 2 CONTEMPORARY RESEARCH IN INDIA 41, 39-44 (2012).

¹⁴P.U.C.L v. Union of India, AIR 2004 SC 456.

¹⁵Hitendra Vishnu Thakur v State of Maharashtra, AIR 1994 SC 2623. *See also*, Ujjwal Kumar Singh, *POTA and Federalism*, 39 EPW 1794, 1793-1797 (2004); South Asia Human Rights Documentation Centre and Ravi Nair, *The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes*, 44 EPW 12, 10-14 (2009).

- Hitendra Vishnu Thakur v State of Maharashtra, AIR 1994 SC 2623

Sites

- <http://www.amnesty.org/>.
- [http:// www.jstor.org/](http://www.jstor.org/).
- <http://manupatra.org>
- <http://indiankanoon.org>
- <http://legalserviceofindia.com>

Articles

- Hazel Erskine, *The Polls: Capital Punishment*, 34 *The Public Opinion Quarterly* 290, 290-307 (1970).
- Michel Guesdon, *On Death Penalty*, 32 *Economic and Political Weekly* 2430, 2430 (1997).
- Roger Hood and Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"*, 38 *Crime and Justice* 38, 1-63 (2009).
- Leanne Fiftal Alarid and Hsiao-Ming Wang, *Mercy and Punishment: Buddhism and the Death Penalty*, 28
- L. R. England, *Capital Punishment and Open-End Questions*, 12, *The Public Opinion Quarterly* 416, 412-416 (1948).
- Thomas F. Geraghty, *Trying to Understand America's Death Penalty System and Why We Still Have It*
The Contradictions of American Capital Punishment by Franklin E. Zimring; *Beyond Repair America's Death Penalty* by Stephen P. Garvey; *Kansas Charley: The Story of a 19th Century Boy Murderer* by Joan Jacobs Brumberg; *III. Governor's Comm'n on Capital Punishment* by Governor's Commission on Capital Punishment
- South Asia Human Rights Documentation Centre and Ravi Nair, *The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes*, 44 *EPW* 12, 10-14 (2009).
- Caesar Roy, *The Unlawful Activities(Prevention) Amendment Act, 2008 And Its Loopholes*