

THE SIGNIFICANCE OF DEATH PENALTY TODAY: A CRITICAL ASSESSMENT OF THE LAW AND HUMAN RIGHTS ABUSES

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ABSTRACT

This paper focuses on how the relevance of death sentence has changed since the ancient ages of the code of Hammurabi to modern day Constitutional Regimes. It is important to realise how death penalty has multiple social implications, which favour and disfavour the society on numerous counts. An analysis of the various international charters and agreements which discuss imposition of moratoriums on death sentence use is also made, these primarily include the Universal Declaration on Human Rights (UDHR), 1948, the International Covenant on Civil and Political Rights (ICCPR), 1969 and the Optional Protocol, 1989 and the United Nations General Assembly Resolutions (UNGA).

Also, an analysis of the various legal provisions providing for death sentence in the Indian Legal Regime has been made. It is noteworthy as our penal law is archaic since its enactment in 1860. The right of clemency petition under Article 72 and 161 is also not fool-proof as it has suffered from over pendency. The paper also attempts to evaluate how in some landmark cases, including the Afzal Guru case or the Nuremburg trials, where human rights and legal rights were violated in the manner of imposition and execution of death sentence. It is also important to identify the arguments against death penalty, as various nations have imposed moratoriums on its use.

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INTRODUCTION

1.6 million Pilgrims gathered on Mina valley in Saudi Arabia on 4th October 2014 to join the symbolic stoning of the devil, the final stage of the annual haj pilgrimage¹. A practice which celebrates death given by the society to an offender, the question is, whether death penalty is relevant in the present day democracies or is it a violation of human rights?

Death Penalty is defined as, “*punishment by being put to death*”.² At present, 100 countries i.e. 51% countries have abolished death penalty, 95 countries have provisions for death sentence based upon various crimes or offences. Developed countries like United States and China have provisions for death sentences, various Islamic countries carry out executions for certain crimes. There are 48 countries which have not abolished death penalty but have not carries out any executions in the past 10 years. Amongst absolute abolition of death penalty, Caribbean countries have had the most disappointing statistics, although the last execution by any Caribbean nation took place in 2008, 13 of the 25 Caribbean nations still have provisions in law for capital punishment, Latin America and the Caribbean account for 8.5 per cent of the world’s population, yet 27 per cent of all global homicides took place in this region according to a 2012 report by the UN Development Programme.

The vicious circle in this regard is created when emphasis is laid on the crime levels, death penalty has created deterrence amongst various offenders and some even regard death penalty as the reason why crime can be reduced. However, this theory does not seem to be fool-proof as habitual offenders and professional criminals do not fear the law and its sword.³

In India, the law provides capital punishment for 10 offences however the death sentence is only given in ‘*rarest of rare*’ cases. 1 execution was carried out in 2012 in the country and the method used is hanging by the neck. The United States carried out 43 executions in 2012 and methods used vary by state and include injections or electrocution.

¹Lynne Al-Nahas, *Haj culminates with stoning the devil ritual*, The Hindu, October 5, 2014

²*Oxford Dictionary* 211 (Dorling Kindersley Limited edn. 2006)

³Shahid M. Shahidullah, *Comparative Criminal Justice Systems: Global and Local Perspectives*, 978-144-960-4257

INTERNATIONAL COVENANTS AGAINST DEATH PENALTY

According to the UN Universal Declaration of Human Rights everyone has the right to life, liberty and security of person. As yet, there is no general prohibition against the death penalty in international law.

October 10 is now commemorated as the *World Day against the Death Penalty* by the World Coalition challenging the use of capital punishment.⁴

Although the global trend towards abolition remained strong, 2014 saw a disappointing resumption of executions in some countries. The total number of confirmed executions was 778, which rose from 682 in 2012, these numbers are expected to increase when the 2014 statistics are computed. Executions were recorded in 21 countries, the same number as 2012. However, the number of countries where death sentenced was 22.⁵

The following are some of the International Covenants against death penalty:

- **Article 3 of the United Nations Universal Declaration of Human Rights (UDHR), 1948**

The provision states that “Everyone has the right to life, liberty and security of person”. The prime cause of adding Article 3 to UDHR was the aftereffect of the bloodiest war ever fought in the history of mankind. However, in modern times, the provision can be interpreted to mean as against capital punishment as the right to life extends to ‘every person’ which can also include offenders of any sort. As far as UDHR is concerned, **Article 5** provides, ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Thus the sole purpose of the provision is to prevent execution of degrading punishment against any convicted person, and capital punishment is definitely one of them. Thus the UDHR through indirect means has aimed to abolish death penalty.

- **Article 6 of the International Covenant on Civil and Political Rights (ICCPR), 1966**

The right to life is to be protected by law. The same Article prohibits states from arbitrarily depriving persons of their lives. Article 6(2) provides that death sentence

⁴World Coalition against death penalty, October 10, 2003

⁵Amnesty International, Death Penalty and Human Rights Standards, March 27, 2014

can only be issued by countries which have not expressly prohibited it, and such sentence shall only be issued only in the most serious crimes which are provided in the laws of a country, such laws shall also be not contrary to the covenant.

Article 6(4) provides that every person punished with death sentence shall have the right to seek pardon of the sentence, and that such pardon can be granted in all cases. This however is not a step forward in abolishing death penalty, pardon is only a reduction of sentence granted in certain cases and on the contrary, absolute abolition would serve as a more concrete step to curb the violation of human rights by capital punishment.

This is visible from Article 6(5) where a complete abolition of death sentence is provided for offenders who are below 18 years or pregnant women. This is in tune with the spirit of the society as juveniles are not considered criminals; also women bearing a child should be subject to special provisions and not treated as a hardened criminal.

- **United Nations General Assembly Resolutions (2007 and 2008)**

In 2007 and 2008 the United Nations General Assembly adopted resolutions 62/149 and 63/168, calling for a suspension on the use of the death penalty. Where in resolution 62/149, it is expressly stated that the use of death penalty undermines human dignity and progression of human life. It is also stated that there has not been any conclusive evidence of the use of death penalty acting as a deterrent. Since then, other regional bodies or civil society coalitions adopted resolutions and declarations advocating for a moratorium on executions as a step towards world-wide abolition of the death penalty.

- **2nd Optional Protocol to ICCPR, 1989**

On the 15 December 1989 the Second Optional Protocol was adopted by the General Assembly with 59 votes in favour, 26 votes against and 48 abstentions. Voting against the resolution were the US, China, Japan and a block of Islamic states.

The protocol expressly deals with abolition of death punishment in all states bound by its jurisdiction. State parties to the covenant are thus not allowed to carry out any more executions. The protocol also provides that the State Party shall include in its report sent to the Human Rights Committee (HRC) all the information on the measures adopted to give effect to the optional protocol for abolition of death penalty.

Two important implications arise from abolishing the death penalty and ratifying the 2nd Optional Protocol. The first implication is that a country ratifying the protocol is duty bound to ensure that it exposes no offender to the real risk of execution. The second implication is that the death penalty can never be reintroduced without violating international law and the covenant.

In the ARJ's case ⁶the Committee concluded that the Protocol carries with it an implication that no state party should not expose anyone to a real risk of capital punishment. ARJ, an Iranian national, was convicted of drug supply in Australia. After he had served his sentence, Australia wanted to deport him to Iran. It was argued in the Australian courts that he could face the death penalty if he was returned to Iran. Complaint was sent to the UN Human Rights Committee, arguing that if Australia deported him to Iran then it would violate his right to life (ICCPR Article 6) and expose him to capital punishment. However, no evidence could be brought on record that deportation of ARJ could lead to his execution in Iran. Thus it was held that Australia was not acting in violation of ICCPR.

In another case of *Judge v. Canada*⁷ involved a US citizen, Mr Judge, was sentenced to death in the US for committing murder. Mr Judge escaped his US prison and fled to Canada, where he committed two robberies and was sentenced to 10 years prison. When Canada tried to deport Mr Judge back to the United States, he sent a complaint to the UN Human Rights Committee alleging a violation by Canada of his right to life. The Committee went on to conclude that Canada (an abolitionist country) would violate Mr Judge's right to life by deporting him to the United States without first obtaining a guarantee that Mr Judge would not be executed thus reversing its decision in ARJ's case. The UN Human Rights Committee states that abolitionist nations are obliged to protect life in all circumstances

⁶ARJ v. Australia, CCPR/C/60/D/692/1996

⁷Roger Judge v. Canada , CCPR/C/78/D/829/1998 (2003)

India is a non-member to the second optional protocol thus executions are still carried on in the country.

DEATH PENALTY IN INDIA

India's stand on abolition of death penalty is clear from its vote against a UN General Assembly Resolution regarding a ban of death penalty in 2012. According to government statistics, executions since 1947 have counted up to 53, however popular NGO People's Union for Civil Liberties has claimed that executions since 1953, about 1422 executions have taken place in India.

Indian Penal Code, 1860 provides death sentence as one of the punishments⁸ in criminal cases. However, the sentence is passed only in exceptional situations which are referred to as 'rarest of rare cases'. The doctrine was established from the landmark Supreme Court decisions in *Bachan Singh v. State of Punjab*⁹ and *Machi Singh v. State of Punjab*¹⁰, where in the former Bachan Singh was sentenced for the murder of 3 and in the latter, Machi Singh and his 2 other companions were sentenced to death and the other were imprisoned for committing the murder of 17 people in a feud in Punjab. The settled rule now is that sentence of death shall be imposed only in rare cases depending upon the brutality of the crime, the doctrine only applies to offences under IPC which have a provision for death sentence. The most recent instance imposition of death sentence was by the Distt. And Sessions Court Saket, New Delhi (Fast track court) against the accused persons in the 16th December 2012 gang rape case, the reason cited for death sentence was the brutality of the crime and that leaving the victim in a vegetative state amounted to murder as per the Ordinance, 2013 by the President.

Criticism against Death sentences in India

An interesting point rose against imposition of death sentences in India are that, there is a class bias in awarding the death penalty. It is not a coincidence that the majority of those who

⁸Section 53, Indian Penal Code, Act 45 of 1860, 1860

⁹*Bachan Singh v. State of Punjab*, AIR 1980 SC 898

¹⁰*Machi Singh v. State of Punjab*, AIR 1983 SC 957

faced the gallows in 2012 belong to the economically or socially backward. In 2012, two men were hanged to death in Indian jails, sentenced for crimes of terror.¹¹

On August 8, Maganlal Barela a tribal cultivator, charged with killing and beheading his five minor daughters was scheduled to be hanged in the Jabalpur Central Jail. Human rights lawyers chanced to read of his hanging in an online news item the evening before his execution was fixed, and met Supreme Court Chief Justice P Sathasivam. The execution was then stayed by the apex court. The stay was granted on Barela's execution after members of the People's Union for Democratic Rights (PUDR) approached the apex court. It is also worth noting that all remedies were exhausted previously and even the President's approval was taken for his execution.

On February 9th 2013, Mohammed Afzhal Guru was hanged and buried inside the Tihar Jail for his active involvement in the 2001 Parliament House attacks. President rejected his mercy petitions on 3rd February and Home Minister's consent was taken on the following day. The execution comes out as one of the most brutal violations of human rights, even his family was not informed. A letter through speed post was sent to his family in Sopora which never reached them and thus none of his family members received information of his imminent execution. Also, none of his family members thus were not able to attend the funeral and neither was his body handed over to his family.

The most regularly advanced criticism of death penalty in India is regarding the dilatory procedure from date of institution of the case till the date of decision. This in turn proves to be further harassment of the convicted already suffering the gravest and the most radical punishments available. This is a violation of human rights itself thus arguments go against death sentences.

ARGUMENTS AGAINST DEATH PENALTY

The global stand adopted by all international organisations is against the use of capital punishment. On 19th November 2012, the United Nations General Assembly by a draft resolution by the Third Committee, approved by a recorded vote of 110 in favour to 39

¹¹Harsh Mander, '*Retribution, not justice*', The Hindu, February 23, 2013

against, with 36 abstaining expressed its deep concern over the continued use of death penalty by certain nations across the world¹². India has voted against the resolution.

Death penalty on a whole is also criticised as it does not teach the convicted any lesson. Prisons across various countries are regarded as ‘hell on earth’, criminals who are executed never experience this which in the opinion of many human rights activists, is the only solution to the wide spread dispute regarding death penalty.

Another argument advanced against death penalty is that execution is carried on in the most gruesome and barbaric manners. Execution by electrocuting, stoning or injecting is still practiced in various countries specially the Islamic countries. The method adopted in India is by hanging which was held to be the most scientific way of execution and does not violate of Article 21, in the apex court’s decision in *Deena v. Union of India*¹³.

Capital punishment is also scarred by the presence of retribution within it. It gives the effect of state killing a criminal out of vengeance. The spirit of retribution which aims to re-establish justice does resemble lack of authority with the state itself. It also is based on the retributive theory of punishment which has been vehemently criticised on grounds of being harsh and violating the right to life. Similarly Kant’s views have also been criticised as he states that one who commits murder, has to die and that the state has right to take his life.¹⁴

INSTANCES OF HUMAN RIGHTS VIOLATION BY CAPITAL PUNISHMENT

The argument against death sentence makes it amply clear that the stand of the remaining nations needs to be changed. Executions have at times been barbaric and as expressed above from the Afzhal Guru execution and the ManganlalBarelal episode, it is clear that capital punishment can extend to violating human rights. Following are some other instances of such violations:

¹²Third Committee Resolution on Moratorium on the use of the death penalty, November 19, 2012, A/C.3/67/L.44/Rev. 1

¹³*Deena v. Union of India*, AIR 1983 SC 1155

¹⁴Immanuel Kant, *The Metaphysics of Morals*, July 6th, 1797

- **NUREMBERG TRIALS**

The Nuremberg trials were a series of military tribunals held between 1945 and 1946 prominently for passing sentences against the political, military and economic class of Nazi Germany. Executions were conducted on 16th October 1946, it is claimed that the method adopted which is the Short Drop Method was used, as a result of which the condemned died because of strangulation. This indicates the malice intended towards the already convicted and such actions were definitely uncalled for.

It is also argued that during the trial, the principles adopted for issuing death sentence at times of war were first established which stated that death sentence shall only be given for crimes against peace, crimes against humanity and crimes against transnational obligations. These principles were used against the offenders, thus it acted as *ex-post facto law* and executions were conducted based on such law.

- **AJMAL KASAB'S EXECUTION**

The execution of convicted terrorist Ajmal Kasab for crimes against the state and genocide during the 26/11 attacks in Mumbai was also considered violative. The execution is considered bad in law because of the manner adopted by prison authorities.

The lawyers and family members of the condemned were not informed of the execution which is in violation of international standards on the use of death penalty. Also, his funeral was conducted within the prison and was buried there itself. The execution also makes India answerable on the international front and ends the countries' brief moratorium on the use of capital punishment. The execution also clears the countries' stand on capital punishment and establishes the fact that executions are still prevalent in the country.

- **FRANK COPPOLA'S EXECUTION**

On 10th August 1982, the execution was conducted in Virginia, U.S. The method adopted was Electrocution. Official data released from the Virginia Department of Corrections has stated that during the execution, the condemned was subject to 2

electric shocks of 55 seconds each. The second shock produced the smoke and fire effect which caused burning of half of Coppola's body and the entire chamber was filled with smoke. The act itself proves the barbaric nature of it and establishes how Rights against Torture were violated. This acts in furtherance of the harassment already meted out to the convicted. Electrocutation definitely is not the most scientific methods and official data proves that it is still used in the U.S, one of the most developed countries in the global village.¹⁵

PENDENCY OF CLEMENCY PETITIONS AND VIOLATION OF ARTICLE 21

The Constitution of India is widely regarded as one of most eloquent documents in modern day jurisprudence. The most evident illustrations of this are the six fundamental rights embodied under Part III. In this regard, the most widely invoked provision is Article 21, *Right to Life*, the expansive interpretation meted out to this fundamental right since the 1950's has delivered noteworthy judicial decisions and laws to Indian Jurisprudence.

The power to pardon, condone, remit or suspend a death sentence has been conferred on the President or the Governor of States. Such power is to be exercised with utmost care and caution in order to render the sufficient discharge of a constitutional obligation. However, an abuse of such an authority has been evident by the requisite offices in keeping clemency petitions pending for over 10 years or more and effectively tumbling the efficacy of such a remedy. Such an issue has been addressed by the apex court where it has aimed to achieve judicial review on the decision or indecision of the President or Governor.

In *ShatrughanChahuan v. Union of India*¹⁶, the issue of failure by executive to discharge the requisite obligations under Article 72 and Article 161 as being in violation of Article 21 was initiated. P.Sathasivam CJI was quoted:

“This case provides yet another momentous occasion, where this Court is called upon to decide whether it will be in violation of Article 21, amongst other provisions, to execute the

¹⁵ Deborah Denno, 'Is Electrocutation an Unconstitutional Method of Execution? The Engineering of Death over the Century', 551, 664-665 (1994)

¹⁶January 21, 2014 (Writ Petition (Cr. NO. 55 OF 2013))

levied death sentence on the accused notwithstanding the existence of supervening circumstances.”

The apex court previously in *Triveniben v. State of Gujarat*¹⁷ has observed that such failure by the executive authorities could amount to violation of right to life and personal liberty under Article 21. It is now visible that prolonged delay in execution forcing the convicted to wait in the gallows for countless years is an outright violation of Article 21. In *T.V.Vatheeswaran v. State of Tamil Nadu*¹⁸, the court observed:

“Delay in execution of a sentence of death had a dehumanizing effect and this had the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way so as to offend the fundamental right under Article 21 of the Constitution.”

It is a settled principle that the jurisdiction of the apex court provided under Article 32 can be invoked in circumstances mentioned above. Undue delay by the executive is purely a violation of Article 21, a violation grave enough to commute sentence of the convict from capital punishment to life imprisonment also. It is correct in stating that a fixed outer limit cannot be prescribed as a binding time frame on the executive. However, the statistics testify that since the 1980's, the time used has been increasing gradually, the time taken during that decade for disposing mercy petitions rose upto 4 years. During the last decade, the time taken for disposal even reached 12 years. Thus, the timely intervention of the Judiciary was necessary as such encroachments into the fundamental rights need to be curbed.

These case studies reveal that execution has also caused certain fundamental right violations; it is quintessential for the democratic governments to oversee that no such rights are violated of the already incarcerated convicts.

The decision in the case of *Shatrughan Chauhan* is a welcome decision as the executive is now expected to act expeditiously and refrain from politicising such a sensitive issue. The judiciary will have the ability to decide in such matters and thus it reimburses the efficacy of the remedy enlisted under Article 72 and Article 161.

¹⁷(1988) 4 SCC 574

¹⁸(1983) 2 SCC 68

CAPITAL PUNISHMENT TIMELINE

1787 - Death penalty abolished in Austria

1847 - The state of Michigan (USA) first English-speaking territory in the world to abolish capital punishment

1948 - Universal Declaration of Human Rights includes the right to life

1982 - Special Rapporteur on Extrajudicial, summary or arbitrary executions by the U.N

1985 - Council of Europe adopts Protocol to the European Convention on Human Rights on the abolition of the death penalty

1989 - Second Optional Protocol to ICCPR on the abolition of the death penalty adopted by the UN General Assembly

2000 - Protocol to the American Convention on Human Rights on the abolition of the death penalty

2007-08 – UN resolutions 62/149 and 63/168

2012 – UN draft resolution on moratorium of the use of death penalty

CONCLUSION

As already expressed above, capital punishment is a violation of Human Rights, the point of dispute is how it is dealt with at the international stage. Sweden has understood that death penalty is an inhuman, cruel and irreversible punishment that has no place in a modern legal system, and its abolition is a prioritised task for the Government in efforts to promote and increase respect for human rights. In this regard, Sweden has also made efforts to convince other countries to curb the use of capital punishment by raising concerns in the UN and the OSCE (Organisation for Security and Cooperation in Europe).

During the first world congress, the participants adopted the Strasbourg Declaration on 22 June 2001, and the signatories pledged to create a ‘World Coalition against Death Penalty’

who hold world days against death penalty with the objective of removing capital punishment from all legal systems in the world. The most recent congress was held in Geneva, 2010.

Apart from building international cohesiveness among nations it is also important to mobilise the media in campaigning against death penalty. The retentionist nations have to be made answerable for not supporting the International means adopted to restrict the use of death penalty.

Right to life is the root of human existence, acting in continuous violation of it is not the best way forward in creating a harmonious environment for sustainable development, fighting crime is important, but this shall never be interpreted to mean that the state becomes the executor and imposes the law of the sword.