

The edifice of capital punishment

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Abstract

The question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. It is not necessary to express any categorical opinion, one way or the other, as to which of the two antithetical views, held by the abolitionists and retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the argument that retention of death penalty, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, to abolish or specifically restrict the area of death penalty.

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Introduction

Retribution and deterrence are not two divergent ends of capital punishment. They are convergent goals which ultimately merge into one. Ours is a civilised society - tooth for a tooth and eye for an eye ought not to be the criteria; the civilisation and the due process of law coupled with social order ought not to permit us to be hasty in regard to the award of capital punishment and as a matter of fact the Courts ought to be rather slow in that direction. Justice is supreme and justice ought to be beneficial for the society so that the society is placed in a better off situation. Law courts exist for the society and ought to rise up to the occasion to do the needful in the matter, and as such ought to act in a manner so as to sub-serve the basic requirement of the society. It is a requirement of the society and the law must respond to its need. The greatest virtue of law is its flexibility and its adaptability, it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day. In the present day society, crime is now considered a social problem and by reason therefore a tremendous change even conceptually is being seen in the legal horizon so far as the punishment is concerned. One school of thought on this score propagates the function of the law court is that of a social reformer and as such in its endeavour to act as such, question of deterring punishment would not arise since the society would otherwise be further prone to such violent acts or activities by reason of the fact that with the advancement of the age the mental frame of boys of tender age also go on changing and in the event of any arrogance being developed or a sense of revenge creeps the society, the society would perish to the detriment of its people.

The other school, however, expressly recorded and rather emphatically that unless severest of the severe punishments are inflicted on an offender (obviously depending upon the nature of the crime) the society would perish. The other school professes that since one has taken the life of another

that does not mean that his life shall have to be taken but during the trial if it transpires the method and manner or the nature of the activities which has resulted in the elimination of a human being from this world, there should not be any laxity on the part of the law courts, otherwise people will and in turn the society will be engulfed in false sense of security of life in the event of there being most heinous crime of the earth. The law courts as a matter of fact have been rather consistent in the approach that a reasonable proportion has to be maintained between the seriousness of the crime and the punishment. While it is true that a sentence disproportionately severe, ought not to be passed but that does not even clothe the law courts with an option to award the sentence which would be manifestly inadequate having due regard to the nature of the offence since an inadequate sentence would fail to produce a deterrent effect on the society at large. Punishments are awarded not because of the fact that it has to be an eye for an eye or a tooth for tooth, rather having its due impact on the society: while undue harshness is not required but inadequate punishment may lead to sufferance of the community at large.

The Law Commission of India published its Thirty-Fifth Report in 1967. After collecting as much available material as possible and assessing the views expressed in the west both by abolitionists and the retentionists the Law Commission has come to its conclusion at paras 262 to 264. These paragraphs are summarized by the Commission as follows at page 354 of the Report: The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind. It is difficult to rule out the validity, of, or the strength behind many of the arguments for abolition nor does, the Commission treat lightly the argument based on the

irrevocability of the sentence of death the need for a modern approach, the severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values. Having regard, however, to the conditions in India to the variety of the social upbringing of its inhabitants to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area, in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts. On a consideration of all the issues involved, the Commission is of the opinion, that capital punishment should be retained in the present state of the country.

Case Laws at a Length

The question of abolition of capital punishment is a difficult and controversial subject, long and hotly debated and it has evoked, during the past two centuries strong conflicting views. Supporters of capital punishment commonly maintain that it has a uniquely deterrent force which no other form of punishment has or could have. The arguments adduced both in support of this proposition and against it fall into two categories. The first consists of what we may call the 'common sense argument' from human nature applicable particularly to certain kinds of murders and certain kinds of murderers. This, a priori argument proceeds on the view that by doing so, the law helps to foster in the community a special abhorrence of murder as "a crime of crimes". By reserving the death penalty for murder the criminal law stigmatises the gravest crime by the gravest punishment, so that the element of retribution merges into that of deterrence. The second justifies the ethics of capital punishment. Whatever be the ultimate justification for the punishment, the law cannot ignore the public demand for retribution which heinous crimes undoubtedly provoke; it would be generally agreed that, though reform of the criminal law ought sometimes to give a lead to public opinion, it is dangerous to move too far in advance of it. All punishment properly implies moral accountability. It is related to injury and not only to damage or danger, however great. Capital punishment does so in an eminent degree. It is directed against one who is ex-hypothesi an inhuman brute, i.e. it is imposed simply to eliminate one who is held to have become, irretrievably, a liability or a menace to society. The use of capital punishment has declined in recent times, although it is still permitted by law, as in this country, for various kinds of offences like treason, murder etc. The issue of abolishing it has aroused much controversy. The advocates of capital punishment claim it as a necessary deterrent to crime and relatively painless if done properly. Even where it has been legally retained, as here, capital punishment is now seldom employed except in very grave cases where it is a crime against the society and the brutality of the crime shocks the judicial conscience. Indeed, the death penalty satisfies the society's retributive goals and is still presumed to be a deterrent to potential offenders.

Of the three purposes commonly assigned to punishment-retribution, deterrence and reformation-deterrence is

generally held to be the most important, although the continuing public demand for retribution cannot be ignored. Prima facie, the death sentence is likely to have a stronger effect as a deterrent upon normal human beings than any other form of punishment. There is some evidence that this is, in fact, so and also that abolition may be followed by an increase in homicides and crimes of violence. I feel that it is futile for us to attempt to project our personal views in a matter which lies in the realm of political decision-making, by focusing on a single controversy, the question of the proper penalty for the crime of murder. The capital punishment controversy falls within the strict limits of 'independent' parliamentary law-making, and is a typical or representative of the kind of problems that leaders of Parliament face every day. In short, the case for abolition of the death sentence is political, not constitutional. The Government carries the responsibility of law and order. That is the first and fundamental duty of any Government. The Executive has the duty of advising the Government of the laws it believes necessary for the national well-being. It is the duty of the courts, to administer the laws as they are^[1].

In *Jagmohan Singh v. The State of U.P.*^[2], it was ruled by a constitution bench that it will be difficult to hold that capital punishment as such is unreasonable or not required in the public interest. Judges should never be blood-thirsty. It is, therefore, imperative to voice the concern life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. The following factors must be borne in mind.

One of the reasons given by the courts in a number of cases for imposing death penalty is that the murder is "brutal", "cold blooded", "deliberate", "unprovoked", "fatal", "gruesome", "wicked", "callous", "heinous" or "violent". But the use of these labels for describing the nature of the murder is indicative only of the degree of the court's aversion for the nature or the manner of commission of the crime and it is possible that different judges may react differently to these situations and moreover, some judges may not regard this factor as having any relevance to the imposition of death penalty and may therefore decline to accord to it the status of "special reasons". In fact, there are numerous cases, where despite the murder being one falling within these categories, the court has refused to award death sentence

1. There have been cases where death sentence has been awarded on the basis of constructive or joint liability arising under Sections 34 and 149.
2. One mitigating factor which has often been relied upon for the purpose of commuting the death sentence to life imprisonment is the youth of the offender.
3. One other mitigating factor which is often taken into account is delay in final sentencing. There is thus no uniformity of approach even so far as this factor is concerned.

The following propositions emerge from *Bachan Singh v. State of Punjab*^[3],

1. the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
2. Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration

- alongwith the circumstances of the 'crime'.
3. Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
 4. A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In order to apply these guidelines inter-alia the following questions may be asked and answered:

1. Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
2. Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

The law is well settled as to the circumstances in which capital punishment can be imposed. Capital punishment can be imposed in the rarest of the rare cases and if there are any aggravating circumstances such as the accused having any criminal record in the past; the manner of committing the crime; delay in imposing the sentence and so on ^[4]. In *Nachhittar Singh v. State of Punjab* ^[5], the Apex Court refused to consider the question of delay as a mitigating circumstance. In *Maghar Singh v. State of Punjab* ^[6], it was ruled that that delay does not appear to be good ground to commute to life imprisonment in view of the pre-planned, cold-blooded and dastardly murder committed by the accused. In *Ramnaresh v. State of Chhattisgarh* ^[7], the Hon'ble Supreme Court has stated various legal principles which would be precepts on exercise of judicial discretion in cases where the issue is whether the capital punishment should or should not be awarded.

Aggravating Circumstances would include the following:

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
2. The offence was committed while the offender was engaged in the commission of another serious offence.
3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
5. Hired killings.
6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

7. The offence was committed by a person while in lawful custody.
8. The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Code of Criminal Procedure.
9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.
11. When murder is committed for a motive which evidences total depravity and meanness.
12. When there is a cold blooded murder without provocation.
13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society ^[8].

Mitigating Circumstances would include

- a. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.
- b. The age of the accused is a relevant consideration but not a determinative factor by itself.
- c. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.
- d. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.
- e. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.
- f. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.
- g. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused ^[9].

While determining the questions relateable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence:-

1. The Court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.
2. In the opinion of the Court, imposition of any other

- punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.
3. Life imprisonment is the rule and death sentence is an exception.
 4. The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.
 5. The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime ^[10].

In *Shankar Kisanrao Khade v. State of Maharashtra* ^[11], a new test was laid down. It was opined that the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the R-R Test and not "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R test). R-R Test depends upon the perception of the society that is "society centric" and not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges.

Conclusion

To sum up capital punishment does act as a deterrent. The main points that have weighed with in arriving at this conclusion

- a. Basically, every human being dreads death.
- b. Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.
- c. Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers-are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.
- d. As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.

- e. Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.
- f. Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect; neither can they be regarded as conclusively disproving it.

It has been a fundamental point in numerous studies in the field of Death Penalty jurisprudence that cases where the sole basis of conviction is circumstantial evidence, have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter sources of proof. Convictions based on seemingly conclusive circumstantial evidence should not be presumed as full proof incidences and the fact that the same are circumstantial evidence based must be a definite factor at the sentencing stage deliberations, considering that capital punishment is unique in its total irrevocability. Any characteristic of trial, such as conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the culpability calculus, must attract negative attention while deciding maximum penalty for murder. Despite the transformation of approach and radical changes in principles of sentencing across the world, it has not been possible to put to rest the conflicting views on sentencing policy. The sentencing policy being a significant and inseparable facet of criminal jurisprudence, has been inviting the attention of the Courts for providing certainty and greater clarity to it. Capital punishment has been a subject matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one undisputable statement of law follows that it is neither possible nor prudent to state any universal formula which would be applicable to all the cases of criminology where capital punishment has been prescribed. It shall always depend upon the facts and circumstances of a given case

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