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CAPITAL PUNISHMENT - A NEVER-ENDING CONTROVERSY OF LIFE VERSUS DEATH

ABSTRACT

Capital punishment is the highest level of punishment awarded in a society. Despite being the highest form of punishment, there are several deliberations as to whether it should be legally valid.

According to Black's Law Dictionary, "Capital punishment is the sentence of death for a serious crime and is often called the death penalty." It where a government sanctions an order whereby the state kills a person as a punishment for a crime. The sentence condemning a convicted defendant to death is known as 'Death Sentence' and the act of carrying out the death sentence is known as 'execution'.

The judicial scrutiny of Capital Punishment is never ending. While some of us are in favor of it, the others are giving multiple reasons as to why it has to be abolished. Every country has varying views when it comes to death penalty as a form of punishment. The debate over death penalty has been complicated in the recent years by such concerns as the fairness of the judicial system.

In India, section 368 of the Criminal Procedure Code gives the power of confirmation of death sentence to high courts. It is normally given as a punishment in cases of murder, for waging war against the state and also in cases cited as rarest of rare cases.

In this article we shall discuss the theories of punishment, different countries view on death penalty and the arguments for and against capital punishment. Further, there shall be an elaborate discussion on capital punishment in India and various judicial pronouncements regarding the same. This article will critically analyze the legal validity of capital punishment in India and enumerate the provisions under which death penalty is awarded.

INTRODUCTION

Capital punishment is the highest level of punishment awarded in a society. Despite being the highest form of punishment, there are several deliberations as to whether it should be legally valid.

Capital Punishment which is also known as death penalty is referred to the execution of an offender sentenced to death after conviction by a court of law. It where a government sanctions an order whereby the state kills a person as a punishment for a crime. The sentence censuring a convicted defendant to death is known as 'Death Sentence' and the act of carrying out the death sentence is known as 'execution'.

The judicial scrutiny of Capital Punishment is never ending. While some of us are in favor of it, the others are giving multiple reasons as to why it has to be abolished. Every country has varying views when it comes to death penalty as a form of punishment. The debate over death penalty has been complex and complicated in the recent years by such concerns as the fairness of the judicial system.

In this context, there shall be a discussion about the arguments for and against capital punishments. There shall also be a discussion about how certain other countries treat death penalty. This paper shall also elucidate about Capital punishment in India and the landmark judgements relating to capital punishment.

The various punishments that are given are based on the four theories of punishment. Each of these theories approach the punishment in a different way. Some treat punishments as a mode to deter while another treats it as a form of rehabilitation.

METHODS OF EXECUTION

The various ways/ methods of execution are as follows:

1. Death by burning: This is a method by which people are set on fire once they are sentenced to execution. This type of execution was seen in the past where Joan of Arc who was sentenced to death by burning on the ground since she was known to be a witch.
2. Wheel: The process can include rolling a wheel full of spikes on top of a person or attaching a person to a wheel and roll him down a hill.
3. Execution by firing: The most common form of execution during World War II whereby a firing squad is called and then the accused person is tied to a pole and then fired upon.
4. Headman's Axe: This is the method by which the head is placed on a wooden platform and the executioner chops off the head of the convict by the use of an axe.
5. Guillotining: It is a form of execution. The origin of this method traces back to the French Revolution. A person named Dr. Joseph Guillotine invented this method of execution. In this method, the accused person's head is to be placed in a round hole on a wooden block and a blade is dropped to sever the accused's head.
6. Gas chambers: The most common form of execution seen in Nazi Germany whereby the enemies of Adolf Hitler were sent to concentration camps. They were sent to chambers where toxic gas was released in order to kill the people.



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THEORIES OF PUNISHMENTS

There are four main theories of punishment. Each of these theories treat the crimes in a different way. They address the crimes committed according to the principles laid out in each of these theories. Punishment is the infliction of pain or loss of life, freedom, rights or property, deliberately imposed on an individual without his consent and against his will. The primary objective of punishment is to protect the society by reducing the criminal behavior.

There are four main theories of punishment:

- Deterrent
- Preventive
- Retributive
- Restorative

Deterrent theory aims at making the wrongdoer an example and a warning to all who are like minded with him. According to this theory, offences are a result of a conflict between the

interests of the wrongdoer and those of the society. The aim of this punishment is to dissolve the conflict of interests by making it an offence.

Preventive theory is when the punishment is preventive or disabling. The purpose of punishment is to deter by fear and to prevent a repetition by the wrongdoer by the disablement of the offender. This theory aims at ensuring that the crime is not repeated but it make no note of the criminal.

Reformative theory states that a crime is committed due to a conflict between the character and motive of the criminal. This theory considers punishment to be curative or to perform the function of medicine.

Retributive theory relies on the saying - "eye for an eye" or "revenge for revenge". The thought is that of the restoration of the moral character, the appraisalment of the disturbed conscience of the society itself and the maintenance of the sovereign power of the state which becomes aggrieved when a criminal offence is committed and inflicts punishments to set matters right.

OTHER COUNTRIES ON DEATH PENALTY

According to Amnesty International in 2017, death penalty in law or practice was abolished in around 142 countries and the human rights organization recorded at least 2591 death sentences in 53 different countries in the year 2017. Four countries were responsible for 84% of executions in 2017:

- Saudi Arabia
- Iraq
- Pakistan
- Iran

China is not included in these findings as the statistics regarding capital punishment in that country is a state secret. However, Amnesty believes that china carries thousands of executions in a year.

Japan uses the death penalty in a restricted or unfrequented manner, executing approximately 3 prisoners per year.

A very distinctive justification is given for keeping capital punishment. This explanation has been laid out by a few Japanese psychologists who suggest that Capital punishment plays an important psychological part in the life of the Japanese who live under severe stress and pressure in the workplace.

They contend that death penalty reinforces the belief that bad things happen to those who deserve it due to their bad acts. This in turn reinforces the contrary belief; that good things will happen to those who are 'good'.

In this way, the presence of capital punishment provides a psychological release from conformity and overwork by reinforcing the very fact and hope that there will be a reward in due time.

The Japanese public opinion concurs with this argument. The official statistic confirms that around 81% of the Japanese population express their support for the above mentioned argument. Nonetheless there's also a minimal but an increasingly vehement abolitionist movement in Japan. From an ethical and moral standpoint, this contention is consequentialist in nature when it asserts the very fact that executing a few people will lead to an aggregate increase in happiness then that is a good thing. The contention is justified and backed on the premise that the implications of one's conduct are the ultimate basis for any judgement about the rightness or wrongness of their action.

COUNTRIES THAT CARRIED OUT EXECUTIONS BETWEEN 2013 AND 2017 ARE:¹

Yemen, Vietnam, USA, Afghanistan, Bahrain, Bangladesh, Belarus, Botswana, Chad, China, Egypt, Equatorial Guinea, India, Indonesia, Iran, Iraq, Japan, Jordan, Kuwait, Malaysia, Nigeria, North Korea, Oman, Pakistan, Palestinian Territories, Saudi Arabia, Singapore, Somalia, South Sudan, Sudan, Taiwan, Thailand (2018), United Arab Emirates (UAE).²

The Chinese government operates in an alternate manner when compared to the rest of the other countries. Unlike the United states of America where such cases are made public and the execution dates are announced, China intends to keep all death penalty executions private and secretive.

Japan carries out its executions in a similar manner to that of China. Japanese officials do not inform anyone about the executions. However, what differentiates Japan and China is that in Japan even the inmates are not informed about the execution. The officials notify them one hour before their execution takes place.

¹ Reality check team by BBC news, Death Penalty: How many countries have it?(14 October 2018), <https://www.bbc.com/news/world-45835584>

² Reality check team by BBC news, Death Penalty: How many countries have it?(14 October 2018), <https://www.bbc.com/news/world-45835584>

In the United States 30 out of the 50 states have legalized the death penalty and the government carries out the executions in the state level.³

ARGUMENTS IN SUPPORT OF DEATH PENALTY AS A FORM OF PUNISHMENT

➤ RETRIBUTION

The first argument is that under the retributive theory of punishment it states that the real justice is acquired when people suffer for their wrongdoing and suffer in a way appropriate to the crime that they committed. Each criminal shall be punished in accordance to the crime he committed and should suffer according to the crime. In the case of murder what the crime deserves is death. This argument supports the saying “An eye for an eye”/ “a tooth for a tooth”. Even if retribution is considered as vengeance, it is still argued that taking vengeance for crimes is not bad. The Victorian legal philosopher Sir James Fitzjames Stephens pointed out that punishment should be inflicted, “For the sake of ratifying the feeling of hatred- call it revenge, resentment, or what you will- which the contemplation of such offensive conduct excites n healthily constituted minds.”

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➤ DETERRANCE

Capital punishment is commonly justified with the argument that by executing the wrongdoers we will deter those who have the same or similar ideas. By punishing wrongdoers for the crime they committed the officials attempt to discourage like-minded people from committing crimes by instilling fear of the consequences that may arise.

Deterrence is most efficacious when the penalizing happens soon after the crime. The more the legal process distances the punishment from the crime - either in time, or certainty - the less effective a deterrent the penalizing will probably be.

One should also consider how it's impossible to test the deterrent effect of a punishment in a rigorous way since this will require knowing how many murders would have been carried out in a certain state if the law had been different during the same time period.

³ Countries with Death Penalty 2019 (27 August 2019),
<http://worldpopulationreview.com/countries/countries-with-death-penalty/>

Some people argue that punishing an innocent person will also have the same effect. However, this is untrue as people can't be randomly punished. They have to go through a legal process in which it has to be proved through facts, circumstances and evidences that they have done wrong after which they should be penalized according to the crime that they have carried out.

➤ REHABILITATION

It is believed that capital punishment doesn't rehabilitate the prisoner. However, there are a number of instances where persons condemned to death take the opportunity of the time before execution to repent, express remorse, and very often experience profound spiritual rehabilitation.

Thomas Aquinas observed that by agreeing to receive the punishment of death, the offender was able to atone for his evil deeds and so escape punishment in the next life.

➤ PREVENTION OF RE-OFFENDING

It is undeniable that those who are executed will not and cannot further commit crimes. This ensures no re-offence on the part of the offender. It is necessary to prevent and control heinous crimes and execution helps in ensuring the same.

Few people don't believe that imprisonment for life without parole protects society sufficiently. The offender may no longer be a threat to the public, but he remains a menace to prison staff and other inmates. Execution would remove that peril.

➤ CLOSURE OF VICTIMS FAMILY AND VINDICATION

When the offender is executed it serves as a closure to the victim's family and dear ones. The family feels justice has been served when the offender has been punished.

➤ VALUE OF HUMAN LIFE

Those who are in favor of capital punishment believe that human life is valuable and should be preserved unless there is a good reason not to. According to these people, if one commits an offence that is punishable by capital punishment then the crime that was committed serves as

a good reason to not preserve the human life in order to protect the others. The value of human life of the general public has to be protected.

➤ RIGHT TO LIVE

This is very similar to the 'value of human life' argument. However, it is approached from a different perspective. It is argued that by awarding death penalty to a person the offenders right to live is violated. The opposition to this view is that a person can, by their actions, relinquish human rights, and that criminals forfeit their right to life.

➤ EXECUTION OF THE INNOCENT

Executing an innocent is a very popular argument made by those who are against the idea of death penalty. However, there is huge legal process that takes place before executing a person. Hence, it is not possible to make a mistake of executing an innocent person.

➤ EXPENSIVE

It is a misconception that capital punishment costs more than imprisonment for life. It should be kept in mind that when a person is imprisoned for life, the basic and fundamental needs and facilities should be provided for his/her whole life. However, for a person who is going to be executed costs have to be covered only till the date of his execution.

In countries with a less expensive and lengthy appeals procedure, capital punishment seems like a much cheaper alternative than long-term imprisonment.

ARGUMENTS AGAINST DEATH PENALTY AS A FORM OF PUNISHMENT

➤ RETRIBUTION

To take a life when a life has not been lost is revenge, it's not justice. A number of them believe that death penalty is vengeance and not retributive.

The suffering of the accused who is kept on death row for many years, makes this punishment far more rigorous than simply taking away of his/her life.

Camus and Dostoevsky argued that retribution with respect to the case of death penalty is unfair as the suffering of the criminal who is kept on death row would exceed the victim's anticipatory suffering. Another argument is that the retribution theory is flawed since it punishes the criminal twice- the primary being, the suffering of the criminal before execution and therefore the second being the execution in itself.

The Old Testament meaning of "An eye for an eye" is that the guilty should be punished and that they should be punished neither too leniently nor too severely. Hence, the retributive theory doesn't suggest that one must take vengeance rather it states that one should be punished keeping in mind the type of punishment that one has committed. Whether or not one feels that corporal punishment could be a retributive form of punishment there's another argument that rises at this time which claims that retribution as an idea in itself is flawed. We cannot educate the wrongdoers by killing because you can't teach by killing that murdering is wrong.

Even if the retributive argument is accepted the problem of executing innocent persons becomes a difficulty. Also the Death Penalty Information center states that a lot of offenders are kept 'waiting' on death row for a really long time; in the USA the average wait is 10 years. Some lawyers believe that death penalty isn't retributive enough. They believe that suffering within the prison for life without possibility of parole causes way more pain than the act of taking life which can happen in a very short span and can hence be painless.



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➤ REHABILITATION

Capital punishment doesn't rehabilitate a person. The main purpose of rehabilitation is to help the wrongdoer in realizing his mistakes and to correct him in order to enable him to reenter the society. However, this doesn't happen when a person is given capital punishment. The offender doesn't correct himself and even if he does, he is not given a chance to go back and live in the society.

➤ PREVENTION OF RE-OFFENDING

Many people don't think that prevention of re-offending maybe a sufficient justification for taking human life, and argue that there are several other ways to ensure the offenders don't re-offend, such as life imprisonment without parole.

They further assert that although there are cases where people are caught escaping from prison and committing a crime again, these cases are extremely rare.

➤ CLOSURE OF VICTIMS FAMILY AND VINDICATION

This is often known to be an unsubstantial and flimsy argument since every family has a different conception of how justice should be served. The idea of justice becomes subjective according to the family's principle. There are a few people who believe that by giving a punishment such as death penalty will still not provide closure, the argument doesn't provide a justification for capital punishment as a whole.

➤ VALUE OF HUMAN LIFE

Human life is the most valuable. Those who are against the idea of death penalty assert that even under the worst circumstance human life should not be taken away since it is so valuable and no one should be deprived of the value of their lives. A few philosophers believe that the offender's life should not be taken away because of the conduct of the offender.

➤ EXECUTION OF THE INNOCENT

A very common argument that is made against death penalty is the fact that innocent people will eventually get killed because of the flaws present in the justice system. Capital punishment is irreversible; one cannot bring back a person from death after finding out that they were punished wrongly. This will indeed, inevitably claim innocent victims.

There is ample evidence that these mistakes may happen. In the USA, 130 people sentenced to death have been found innocent since 1973 and released from death row.⁴

➤ BRUTALISING SOCIETY

⁴ Death penalty facts (May 2012)

<https://www.amnestyusa.org/pdfs/DeathPenaltyFactsMay2012.pdf>

Brutalizing individuals: Statistics show that death penalty leads to brutalization of society. This eventually leads to an increase in murder rate. The individuals who are disturbed individuals may be angered and hence, may more likely to commit murder. It is also said that this is linked to increase the number of police officers murdered.

Brutalizing the state: Capital punishment brutalizes the society/state in a different way. It is a fundamental process which has implications for the state's relationship with all citizens. The citizens will start to fear and may develop hatred as time passes by.

Brutalizing the law: Capital punishment is said to produce an unacceptable link between the law and violence. However, it is noted that in many ways the law is inevitably linked with violence - it punishes violent crimes, and it uses punishments that 'violently' restrict human freedoms. Philosophically the law is always involved with violence. It is observed that this function includes preserving an ordered society from violent events. Nonetheless, a strong case can be made where one can claim that legal violence is clearly different from criminal violence, and that when it is used, it is used in a fair and justifiable manner.

➤ CAPITAL PUNISHMENT 'LOWERS THE TONE' OF SOCIETY

Civilized societies do not and cannot tolerate torture even if torture helps in deterring or producing other effects through which people are prevented from committing crimes.

Majority of the population are of the view that capital punishment is inappropriate and hence, not the right way in which a modern civilized society chooses to respond to even the most dreadful crimes.

➤ PEOPLE NOT RESPONSIBLE FOR THEIR ACTS

This argument is set against the execution of capital punishment and is not made against capital punishment in itself. Some countries have executed people proven to be insane. It is generally accepted that people should not be punished for their actions unless they have a guilty mind (mens rea and actus reus) which requires them to know what they are doing and that the doing of such act is wrong. People who are insane should not be executed.

➤ APPLIED UNFAIRLY

There has been much concern that flaws in the judicial system make capital punishment unfair or the flaws are the reason why there are times when the system applies capital punishment unfairly.

➤ **CRUEL, INHUMANE AND DEGRADING**

Carrying out death penalty is a form of torture and some philosophers argue that it is both morally and ethically wrong to make the accused suffer from such a rigorous and unscrupulous punishment. Over the years, a number of execution methods have been banned, the reason being, they were thought to be barbaric. Some examples are firing squads and beheading. These methods are brutal and hence are inhumane and degrade the value of human life.

CAPITAL PUNISHMENT IN INDIA

Capital punishment in India has not taken place on a very frequent basis though there are many who are sentenced to death. At the end of 2018, 371 people were known to be under death sentence. However, the last execution that took place was in 2015. The last execution took place in July 2015. Yakub Memon who was convicted of financing the Mumbai bombings. Muhammad Afzal , Mohammed Ajmal Amir Qasab, Dhananjoy Chatterjee were a few among others who were executed. The first execution was that of Dhananjoy Chatterjee in 2004 for the murder and rape of a 14-year old girl.

LEGAL VALIDITY OF CAPITAL PUNISHMENT

In *Jagmohan singh v State of Uttar Pradesh*⁵ the question arose with respect to the constitutional validity of capital punishment in India. The main argument that was made with respect to holding capital punishment unconstitutional was that it violates right to life under Article 21. However, the five judge bench upheld the constitutional validity of capital punishment by stating that deprivation of life is constitutionally permissible for being recognized as a permissible punishment by the drafters of our Constitution.

⁵ *Jagmohan singh v State of Uttar Pradesh*, 1973 AIR. S.C 947

The 36th Law Commission Report in 1967 examined various arguments for and against capital punishment and concluded stating that the conditions in India owing to the variety of social upbringing of its inhabitants, to the disparity and to the vastness of its area, to the diversity of the 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.⁶

Justice Krishna Iyer in *Ediga Anamma v State of Andhra Pradesh*⁷ in support of Life Imprisonment over Capital Punishment said :

“A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life.”

Justice Krishna Iyer reiterated a similar opinion in *Rajendra Prasad v State of Uttar Pradesh*⁸. *Bachan singh v State of Punjab*⁹ gave birth to the doctrine of rarest of rare cases. The 5 judge bench said :



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“A real and abiding concern for the dignity of human life postulates resistance to taking a life through law instrumentality. That ought not to be done except in rarest of rare cases where the alternative opinion is unquestionably foreclosed.”

In *Mithu v State of Punjab*¹⁰ mandatory death sentence under section 303 of the Indian Penal Code was declared unconstitutional as a result of which it stands invalid.

In *T.V Vatheeswaram v State of Tamil Nadu*¹¹ and *Sher Singh v State of Punjab*¹² the Supreme Court was faced with the question of delay in execution of death sentence and whether a protracted delay was reason enough to commute the death sentence to incarceration. While the primary case laid down that such a situation gave reason enough

⁶ 36th Law Commission Report (1967)

<https://indiankanoon.org/doc/35654105/>

⁷ *Ediga Anamma v State of Andhra Pradesh*, 1974 AIR 799

⁸ *Rajendra Prasad v State of Uttar Pradesh*, 1979 AIR 916

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

¹⁰ *Mithu v State of Punjab*, 1983 AIR 473

¹¹ *T.V Vatheeswaram v State of Tamil Nadu*, 1983 AIR 361

¹² *Sher Singh v State of Punjab*, 1983 AIR 465

for the convict to invoke section 21 and acquire lesser punishment, the majority in the latter case differed on now.

The United States of America suspended Capital punishment from 1972 through 1976. This was due to the decision on the Supreme Court's judgement in the case of *Furman v Georgia*.¹³ In this case it was held that the death sentence were given in an unconstitutional manner on the grounds that the punishment was carried out in a cruel and unusual manner and hence was found to be in violation of the Eighth Amendment to the United States Constitution.

CONCLUSION

In view of the above punishments it can be observed that there are varying arguments relating to death penalty which is put forward by the abolitionists and retentionists. The importance has been given to Indian context as well. What causes confusion when it comes to this topic is the fact that not only legal arguments come to light but also social and moral which makes it even harder to arrive at a conclusion.

The answer to whether Capital punishment is right or wrong is not something that can be found probably because of the fact that there is no answer. There are reasons to justify why capital punishment should exist and there are reasons why they should not. It is really difficult to experiment when it comes to this topic since it involves human life. All we need to focus on as a country is to examine the facts and circumstances properly and legally and award punishments accordingly.



¹³ *Furman v Georgia*, 408 U.S.238 (1972)