



CAPITAL PUNISHMENT: WHAT TO CHOOSE BETWEEN DETERRENT AND REFORMATIVE THEORY

AUTHOR – ANIRUDH ALEX VICTOR, STUDENT AT AMITY LAW SCHOOL, NOIDA

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Abstract

Capital Punishment in criminal law means taking a defendant's life in return for the defendant's crime. In simple words, it is also called the Death sentence. It is one of the most heated topics in the entire world, and India is no exception to it. The act of carrying out the sentence of ordering capital punishment is called "Execution." Capital Punishment is a highly polarising and heated practice that includes the deliberate execution of individuals who are convicted for their crimes as a form of brutal punishment.²⁹ There is always a controversy that surrounds the practice of capital punishment. The major issue that the scholars put against the practice of capital punishment is its effectiveness as a deterrent to crime. Critics of capital punishment also question its efficacy, pointing towards its ineffectiveness. This paper aims to provide an overview discussing the issues surrounding Capital Punishment and its current status globally.

Keywords– Capital Punishment, Execution, Judiciary, Justice, Death Penalty, Crime, Legal System, Criminal Justice System

GRASP - EDUCATE - EVOLVE

¹ <https://www.amnesty.org/en/what-we-do/death-penalty/>

Introduction

Capital Punishment, formerly called Judicial Homicide, is a state-sanctioned practice in which a person is executed by following a proper process. Capital Punishment has a long history. The practice of executing criminals and dissidents has been used by mostly all societies in this world.³⁰ The topic of capital punishment has been highlighted in the last few centuries, with the emergence of new nation-states where justice has been associated with an individual's legal and natural rights. In 1764, "On Crimes and Punishments" was the first detailed analysis of Capital punishment. It opposed the practice of the death penalty and demanded the abolition of capital punishment. In the 20th century, under the Nazis in Germany, there were a total of 3 types of capital punishment-

- Hanging
- Decapitation
- Death by shooting

This was also the time when capital punishment was used in excess, and as a response to this, many civil rights organizations started emphasizing the concept of human rights and demanded the abolition of capital punishment.

One thing which we can easily conclude about capital punishment is that it has a rich historical background that emphasizes the moral values of various people, their different perspectives, and finally, it also takes into consideration the legal system of various civilizations. The practice of capital punishment has evolved and has attracted many critics who have challenged its legitimacy at various times. The heated debate which surrounds this topic is shaped by many factors which continuously shape its role in the modern criminal justice systems of many countries.

Research Methodology

This research paper on capital punishment is descriptive. The main focus of this paper is on

the multifaceted issues which surround the topic of capital punishment. The research tries to examine the various aspects related to capital punishment, which majorly include-

- Assessing the efficacy of capital punishment
- Understanding its perspectives globally
- Examining the legal frameworks of capital punishment
- Looking for alternatives

The secondary sources of this research paper are- newspapers, journals, websites, and books.

Review of Literature

When the court awards a punishment, there is a theory or, we can say, a proposition on whose basis the court passes a judgment.³¹

These theories or propositions which the court passes are known as 'Theories of Punishment.'

They are usually five types of Theories of Punishment:

1. Deterrent Theory
2. Reformatory Theory
3. Preventive Theory
4. Retributive Theory
5. Expiation Theory

Method

The method of research is descriptive and analytical. The research paper is based on the Doctrinal Research method.

Death Penalty

"We are all the creation of God. I am not sure if a human system created by a human being is competent to take away a life based on artificial and created evidence".

- A.P.J. Abdul³²

These are the views of Dr. Abdul Kalam, the President of India from 2002 to 2007, on the practice of capital punishment.

³⁰ https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/CAPITAL_PUNISHMENT_IN_INDIA.pdf

³¹ [https://amity.edu/UserFiles/aibs/3fc0Article-XII%20\(Page%2088-92\).pdf](https://amity.edu/UserFiles/aibs/3fc0Article-XII%20(Page%2088-92).pdf)
³² <https://factly.in/what-were-dr-abdul-kalam-views-on-death-penalty/>

Every day people are executed for their crimes in different countries. Some countries have a judicial system where the death penalty is given to criminals for a variety of crimes. In others, capital punishment is just reserved for high-class crimes like terrorism, rape, etc. Some countries even execute criminals who were convicted of the offense when they were under the age of 18. On the other hand, some countries do not execute juveniles for harsh punishments like the death penalty.

Whenever capital punishment is awarded to someone, there are majorly two reasons to award such a harsh punishment:

1. The major reason why states allow the practice of capital punishment in their states is that it acts as a lesson to others that if such a wrong/offence happens again, the criminal would not be left free.
2. The other reason is that capital punishment allows the person who has committed the wrong to suffer for the same.

Crimes whose punishment is death are called capital offences/ capital crimes or capital felonies. Capital offences majorly include all the major crimes against a person, such as-

- Murder
- Rape cases
- Terrorism
- Child sexual abuse
- War crimes
- Crimes against humanity
- Aircraft Hijacking
- Genocide/ Mass Murders

It also includes treason, sedition, and other crimes against the state. Not only this, but some states also impose punitive executions for an expansive range of conduct.

Criminological Approach to Capital Punishment

“The eye for an eye will turn the whole world blind.”

- Mahatma Gandhi

These are the words of none other than the father of India- Mahatma Gandhi. These words of Mahatma Gandhi are the thrust for the reformatory theory of punishment. Whenever we talk about capital punishment, we need to look at two theories of punishment-

1. Preventive theory
2. Reformatory theory

The preventive theory of punishment seeks to prevent further crimes by disabling criminals. The main idea behind the preventive theory is to transform the criminal either permanently or temporarily. According to Justice Holmes, in the Preventive Theory of Punishment, crime is prevented by disabling the offender, which is an idea also reflected in the Deterrent Theory of Punishment. Many Utilitarians like Bentham, Austin, and Mill gave their support to preventive theory because of its humanizing ability.

We all have heard of one famous line that “Prevention is better than cure.” The major idea in the preventive theory of punishment is to keep the criminal away from society and to prevent further offences. It is the preventive theory of punishment that led to the development of the institution of prison.

Case laws related to the Preventive Theory of Punishment

1. Dr. Jacob George v State of Kerala³³

In this case, the honorable Supreme Court of India stated that “every saint has a past & every sinner has a fortune.” The Supreme Court said that criminals are part of society, so the state must reform and correct them and make them sober citizens of the country. The Supreme Court held that the aim of punishment should be deterrent, reformatory, preventive, retributive & compensatory. One theory preferred over the other is not a sound policy of punishment. Each theory of punishment should be used independently or incorporated based on the merit of the case.

³³ <https://www.legalserviceindia.com/legal/article-4323-safeguards-for-victim-compensation-scheme-an-analysis.html>

Reformative Theory of Punishment

According to the reformative theory of punishment, the object of punishment should be the reform of the criminal. Now this can be done by the method of Individualization. This method is based on the humanistic principle that even if an offender commits a crime, he does not cease to be a human being. This theory of punishment puts forward that we may not understand the circumstances under which the criminal has committed the crime. It emphasizes the idea that a judge should try to understand the intentions and mindset of the criminal at the time when he/she committed that crime. He might have committed a crime in a situation that might never occur again. The main idea is that everyone should at least get a chance to reform himself/herself. The object of the punishment is to bring moral reform.

The advocates of the reformative theory of punishment put forward that by a sympathetic, tactful, and loving treatment of the offenders, a revolutionary change may be brought about in their characters. They believe that even cruel, hardened prisoners can be reformed and converted into helpful friends with good words and mild suggestions. They emphasize that severe punishment is merely going to debase them. Men always kick against pricks. Whipping will make them balk. The threat will result in resistance. Prison hell may create the spirit of defiance of God and man.

If we take a look at the theories of punishment, we can say that the reformative theory has its fair share of advantages over the deterrent theory as in the reformative theory of punishment, there is a 'Scope of Improvement' present, whereas, in the deterrent theory of punishment, this scope is completely absent. In India, the prisoners of Tihar Jail make 'Essence Sticks' and 'DhoopBatti', which is a good way to make them adjust or be flexible with society. Whereas on the other hand, in the deterrent theory of punishment, there is no essence of humanity neither it provides the scope for improvement

The Doctrine of the 'Rarest of Rare'

Capital punishment in India is based on the doctrine of 'the rarest of rare' cases. When we talk about the death penalty, we need to remember that it is one of the harshest punishments that are provided under the Indian Penal Code. It includes capital punishment for the accused for his wrongdoing. One question that arises here is whether a state has the right to take a life of a person if he/she crosses any limit of bareness. Here the people were divided into two groups about this question.

First is the 'Moralists' who feel that this penalty is necessary to deter other like-minded persons from committing such crimes in the future. Second is 'Progressive', who argue that it is only a judicial taking of a life that the court mandated.

An analysis of criminal jurisprudence will find that the death penalty is only given in the extreme or "rarest of rare cases" that involve a high level of crime, which poses a great danger to society. So, according to this doctrine, the punishment should depend on the seriousness of the offender's act and the social response to the crime he/she committed.³⁴

In the case of Bachan Singh v. State of Punjab³⁵, the Supreme Court put its view regarding capital punishment and said that the death penalty should be awarded only in 'the rarest of rare cases'. This view of the Supreme Court of India was highly supported as it aimed to reduce the use of Capital Punishment.

The 'Ratio Decidenti' or the 'Rule of Law' applied by the Supreme Court in the case of Bachan Singh is that- capital punishment is constitutional only if it acts as an alternative to life imprisonment and also put forward that the same shall be applied in rarest of the rare case when the alternative option is unquestionably foreclosed.

³⁴ <https://ijirl.com/wp-content/uploads/2022/08/THE-DOCTRINE-OF-RAREST-OF-RARE-A-CRITICAL-ANALYSIS.pdf>

³⁵ <https://main.sci.gov.in/jonew/judis/9886.pdf>

Further, in the case of 'Santosh Kumar Bariyar v. State of Maharashtra'³⁶, the Supreme Court put forward that "The rarest of rare dictum only serves as a guideline in enforcing the provisions mentioned in Section 354(3) of CrPC and entrenches the policy that life imprisonment is the rule and death punishment is an exception.

The Constitution of India under Article 21 states that no person shall be deprived of his 'Right to Life' unless done with due process of law.³⁷ In the case of the death penalty, when the punishment of death is awarded then, it also limits the scope of introduction of new facts or law in the case. If the punishment has been executed, it is irrevocable.

Juvenile Executions

Juvenile Executions are one of the most controversial topics when we talk about capital punishment. Not all countries in this world allow executing the juveniles (people who are below 18 years of age) but still, some countries in this world allow the practice of giving the death penalty as a punishment to people who are below 18 years of age for the wrongs which they have done.

Under International Human Rights Law, the use of the death penalty for crimes committed by people who are under the age of 18 years is prohibited, yet some countries still resort to the death penalty when a juvenile has committed a capital offence.

Such executions are few compared to the total number of executions recorded by Amnesty International each year. However, their significance goes beyond their number and calls into question the commitment of the executing states to respect international law.

Since 1990 Amnesty International has documented at least 163 executions of people who were below the age of 18, in 10 countries: China, the Democratic Republic of Congo, Iran,

Nigeria, Pakistan, Saudi Arabia, South Sudan, Sudan, the USA and Yemen.

Several of these countries have changed their laws to exclude the practice. Iran has executed more than twice as many people who were below the age of 18 at the time of the crime as the other nine countries combined. At the time of writing Iran has executed at least 113 of them since 1990.³⁸

Execution Procedures Used for Capital Punishment

1. Shooting

Shooting is considered the official method of execution under the Army Act of 1950. It is used majorly in the case of the Military Court Martial System.

There is no fixed procedure when it comes to execution by firing squad. The convict usually is tied to the pole, with hands and is blindfolded and a cloth patch is put on his heart. In some cases, the convict is tied to a chair. In most cases, a team of five executioners is used to aim at the convict's heart.

2. Hanging

Hanging is one of the traditional methods of execution and usually involve suspending the convict from a gallows or crossbeam until death occurs. In some cases, the convict may be made to stand on a trapdoor and when the trap is released, he falls a couple of meters until stopped by the rope tied around his neck.

It is the method of execution in the civilian court system, according to the Indian Criminal Procedure Code.

3. Beheading

Beheading is a mode of executing capital punishment by which the head is severed from the body. The ancient Greeks and Romans regarded it as a most honourable form of death. In this method of execution, the criminal is tied to a stake and whipped with rods.

4. Lethal Injection

³⁶ <https://www.scobserver.in/journal/court-in-review-the-death-penalty/>
³⁷ <https://www.legalserviceindia.com/articles/art222.htm>

³⁸ <https://www.amnesty.org/en/what-we-do/death-penalty/>



Lethal injection as a method of execution, avoids many of the unpleasant effects of other forms of execution. It is considered one of the most humane methods of execution.

India's Supreme Court ruled out shooting by firing squad, death by electric chair or lethal injection as alternatives to the existing 'hanged till death' method of capital punishment.³⁹

The Global View: Death Sentences and Executions

China's data is classified as 'state secret', and it remained the world's leading executioner in 2022, followed by Iran, Saudi Arabia and Egypt, according to the report released by the Amnesty International in the year 2022.

According to the report of Amnesty International, every year, approximately 2016 people were given death sentences in various countries in the world and 28,882 people were under sentence of death globally at the end of 2022. It also recorded 883 executions in 2022 in 20 countries which showed a growth of 53% from 2021, when the number stood at 539.⁴⁰

Why is there a need to abolish the Death Penalty?

1. Doesn't Deter Crime

The countries that frequently use the death penalty as a punishment for crimes give a reason that the death penalty is a way to deter people from committing crimes. But this claim doesn't stand true as there are unable to provide any concrete pieces of evidence that the death penalty is more effective in reducing crime in comparison to other types of punishments.

2. Discriminatory Use

People belonging to less advantaged social backgrounds are the real victims of capital punishment. They don't have enough resources

to avail the judicial system and are also unaware of the legal aid available to them. They have limited access to legal representation and are at a great disadvantage in their experience of the criminal justice system.

3. It is incompatible with human rights and dignity

The death penalty violates the Right to life, which is the most fundamental human right. Not only this, but the death penalty also undermines the human dignity which is inherent to every human being.

4. The death penalty does not improve public safety

By no means does the death penalty guarantees public safety. We need to take a closer look at what works and use a common-sense approach to improve public safety. By abolishing the death penalty, we could focus our time, energy and resources on supporting victims and families harmed by violence and can also help them to come out of their trouble. We must ensure that all victims are treated fairly and with respect. If you listen to victims speak about their experience with the death penalty, you find that virtually all are frustrated with the current system. There's no such thing as quick and easy in a system that's supposed to be deliberative to ensure that the innocent should stop getting punished along with the guilty.⁴¹

Suggestions and Conclusion

Till now, we can all agree on one thing that our focus needs to be on preventing crime and violence. We know that to reduce crime and violence, we must focus on the root causes of crime. Crime happens when other issues are neglected, such as mental health, housing, access to education and sustainable employment options. When these issues are addressed, communities become safe and vibrant.

³⁹ <https://www.wionews.com/india-news/indias-top-court-rules-out-lethal-injection-as-alternative-to-hanging-method-of-capital-punishment-574724#:~:text=Story%20highlights,death%20method%20of%20capital%20punishment.>

⁴⁰ <https://www.amnesty.org/en/what-we-do/death-penalty/>

⁴¹ <https://icomdp.org/why-the-death-penalty-should-be-abolished/>



Capital punishment is a concept that is ancient and barbaric and should be abolished as soon as possible as it involves the killing of a human being which is immoral. Democracies should thrive more on reformative theory rather than deterrent theory. The reformative theory provides a chance for improvement which can change the life of an individual and can offer him a chance to get back into his/her normal life and hence reformative theory has its advantage over deterrent theory.

We can help move our communities and nation forward by addressing the root causes of crime to create strong, healthy families and our communities. We must remember these lines-

“Life is precious and death is irrevocable”.

