

Review Article

Death Penalty: A Legal Murder

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Abstract

Death Penalty is a type of punishment where the convict is sentenced to death. It prima facie seems to be very harsh. It is given in the rarest of rare cases. There is huge uproar among the public whether to abolish death penalty or not. Death penalty takes away the Right to Life of the convicts.

It is given in very serious cases like waging war against the state. In the article the author has analyzed the hanging of Yakub Memon who was involved in 1993 Mumbai Serial Blasts. There are many philosophers who have stated the importance of death sentence in the society. The justification of the criminalization process of death penalty has been taken into consideration in the article.

There were Law Commissions set up for the analysis of death penalty in India. There is a drastic change in the view of the courts regarding capital punishment. Time and again the courts went through the societal conditions before giving the judgment in the death penalty cases. The author has described the inadequacies in the administrative set up. The author has taken the views both for and against capital punishment in order to come to a conclusion. The author will employ doctrinal method of research.

Keywords: Death Penalty; Yakub Memon; Rarest of Rare; Capital Punishment; Retributive; Paternalism; Mercy Petition; Deterrent.

Introduction

Yakub Memon was hanged recently. He was involved in 1993 Mumbai serial blasts. His curative petition was dismissed on 28th July 2015. He was convicted by the Terrorists Activities and Disruptive Activities (Prevention) Act, 1987 court for his role in the Mumbai blasts. His hanging was the third in the row after Ajmal Kasab in 2012 and Afzal Guru in 2013. There were the first hangings since that of Dhanajay Chatterjee. According to the Centre on the Death Penalty at the

National Law University, Delhi, out of 1800 people who are sentenced to death by the trial courts, only 5% has been confirmed by the Supreme Court of India. Now around 385 people are on the death row [1]. There are many cases where the death penalty was awarded on wrong grounds. Many judges have written letters regarding this to the President of India. Here the reason behind the protest against the hanging of Yakub is very difficult to understand. Two years earlier, when the Delhi gang rape happened, everyone was asking for death penalty for the culprits. So now Yakub was involved in the blasts which took the life of thousands of people. Why should he be not given death penalty?

When a mercy petition is rejected, there has to be a minimum period of 14 days between its rejection being communicated to the petitioner and his family and the scheduled date of execution. That apart, minimum period of 14 days is stipulated between the communication of the death warrant to the petitioner and the scheduled date of execution[2]. After the rejection of the first mercy petition, despite sufficient time, the petitioner chose not to challenge the same. We do not think that it is a case of such nature where it can be said that legal remedy was denied to the petitioner.

Death penalty is regarded as state sanctioned executions. There were huge debates on the same in the social media and among the human activists groups. People are questioning the judicial process of the country and also the law enforcement procedures of the country. In India death penalty is awarded on the 'rarest of rare cases'. This means there has to be very high standard proof in order to award death sentence. This includes excessive brutality, incessant killing of people etc.

The limited grounds that are given for the death penalty makes the people think that there still remains one or the other doubt while awarding the death sentence. Some people think the death penalty is a kind of reprieve to the culprits. The onus also comes on to the judges that they have to be unbiased towards all the citizens. But all the cases, where death penalty was given to the culprits, are of serious nature where a lot of social commotion is involved. It is very difficult to expect a judge to always decide cases objectively. There is already existed the procedure of appealing in the higher courts and also the judges are appointed in the transparent way. But above all that, a judge is a human being and is also a part of the society. He cannot remain uninfluenced by the socio-economic situation of the surroundings.

Cesarae Beccaria, one of the greatest philosophers, stated that capital punishment is both inhuman and ineffective and is having less deterrent effect than imprisonment. The state has the responsibility of giving expressions to public will and hate murders, crimes but by exercising death penalties the state is committing public murders by its own[3]. The great philosopher Bentham has stated about the utilitarianism principle. This principle upholds 'greatest good of greatest number.' The convicts are being given death penalty as they are not regarded as the part of the society. It is for the welfare of the society because if they remain alive, people will imitate them and commit heinous crimes. It is better to eliminate them from society as they are not only doing harm to themselves but also to the society. It is

on the basis of pleasure and pain relationship as the violation of laws by the convicts has caused a greater harm. This harm is needed to be removed. Immanuel Kant supported death penalty on different lines. He stated that death penalty has to be there for murderers. If anyone kills other in the rage of revenge or any other reason, the action of killing becomes immoral. But when the state imposes death penalty the person, who has killed the other, is a moral act as the state is not acting in personal interests. The death penalty is for the protection of citizens.

Retributive punishment always does not seem to give us the same result as it is thought of. The emotions of the society are also attached to the culprit. Though the culprit has done the most heinous which has been proven, but the state should not take the responsibility of killing of those people. But there is also no alternative existing in the current scenario to have the same effect as the punishment of death penalty. The people should not be allowed to take the laws in their hands in any regard. The reformatory form of punishment will not work in all circumstances. We can take the alternative of life sentence but whether the right to life would be protected in the four walls of prison is really a doubtful one. The abolition of the death penalty is only a suggestive one but the criminals have to be given some punishment which can have a deterrent effect. Sometimes the greater good principle has to be kept in mind and the death penalty should not be abolished absolutely by the society. The main motive behind awarding any punishment is to educate the people about what are the things that are considered apt by the society. With this, the punishment can have the deterrent effect. Deterrent effect is a very subjective one. Prima Facie death penalty may seem brutal but the main motive of the legislators behind incorporating this provision also has to be considered. There has to be some alternative tool to address the emotions of the culprit. Death penalty should not be given only on the basis of popular opinion.

The death penalty is barbaric and primitive one. If we are awarding death sentence to the criminals, there may be a chance of his or her to be proved innocent. Moreover we cannot be the party to take life of other person.

The differentiation between harm and the offence given by the great philosopher J.S. Mill can also be taken into consideration. According to Mill, harm occurs whenever there is physical or mental injury and that is a crime. But in offence, there is no such injury. The killings that were done by Yakub Memon was a harm to the society. There was no chance of

negotiation between both the criminal and the victims. It disturbed the harmonious social constitution. There is direct connection between the crime and the victim. The crime was against the whole society. There was no such of avoiding the crime.

In the Hart-Devlin the concept of individual v. the community interests was evolved. We have given our rights to the state to protect in all circumstances. The state is giving those people death penalties who are committing serious crimes. Here though the process of punishment may be against the morals of the society but the interests of the citizens have to be protected at any cost. The legislators have made the law keeping in mind the morality of the society. This is called legal moralism. The society is a dynamic society. There are many factors that will keep on changing the faces of the society like legal norms etc. The building blocks of the society will remain the same i.e. good faith but to cope up with all the circumstances society will imbibe new values. The concept of legal paternalism was brought into picture by the philosopher Hart. It signifies that the state would give the instructions as to how to lead life. Everyone has the obligation to follow it. The terrorists are those persons who willingly did not follow the rules. So they are liable to be given punishment. But this principle is against the principle of individual autonomy. Individual autonomy is the basis of most of the laws? Then why the terrorists are given so harsh punishments? Terrorism cannot be seen as a general offence in which the person can escape any punishment. The liability and the sentencing part of the crime vary from circumstances to circumstances. The seriousness of the crime is the determinant of the punishment. The court, while rejecting the mercy petition of Yakub Memon, has taken all the factors into consideration. Though he had committed such a grave crime, but all the procedure was still followed by the Indian courts. This displays the moral obligations in the judges that is still existing in them.

The welfare principle can be considered when Yakub was sentenced to death. Section 121 of the Indian Penal Code, 1860 states that

“Whoever, wages war against the [Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or [imprisonment for life] [and shall also be liable to fine]. Yakub Memon committed crime against the whole nation. Even though he can claim defense that he was not involved in any of the crime, but in a crime against the nation he will be presumed to be involved in that crime. The welfare of all the public will be having an upper hand in comparison to the right of the terrorist.”

But according to the principle of individual autonomy, the rights of the culprits have to be protected also. There has to be consideration of human rights of the culprit while convicting him. The criminal is already convicted but he still has rights inside the prison also. None can be arbitrarily subjected to the death penalty. According to some reports, the culprits, who planted bombs in the respective areas, were awarded death penalty by the respective trial courts. But later on their punishment was commuted to imprisonment. Now Yakub was “commanding position”, as he made financial and travel arrangements for the other accused who later planted the explosives. He cannot escape the consequences but whether commutation of all other criminals would lead to a discriminatory approach by the state towards Yakub. Now his case was already going on for 22 years then why his second mercy petition was not taken into consideration by the Supreme Court. The mere procedural aspects of the law cannot be abridged away.

Right to life is the right from which all other Fundamental emanates. All the remaining rights have restrictions embedded in it. So there has to be stronger, foolproof procedure for taking away the Right to Life.

Our nation, India, is not always harsh in the sense that it has many times commuted the death penalty to imprisonment. But if the state is making ‘terrorism’ as one of the grounds for death penalty, then how many criminals get lesser sentences. It seems to everybody that there is some political interest involved in it.

In order to make the acts as crimes the criminalization procedure has to be followed. Indian Penal Code gives death penalty in the rarest of rare cases. It is an open bracket in which the court includes acts from time to time. Every crime that has been included in that bracket has its own moral justification. The death penalty is awarded to protect the interests of greater number of people. The validity of any such law can be challenged on the grounds of violation of fundamental rights. In death penalty we are having the fundamental right of one person against the rights of whole nation. In what situation can the right be taken away? In this way we can take the example of Maneka Gandhi v. Union of India^[4] case where Justice Bhagwati has stated that the procedure established by law has to be just, fair and reasonable. Yakub Memon or Ajmal Amir Kasab, both of them was given enough number of chances to represent their case. Their crimes were heinous in the sense that in both the situations hundreds of innocent people were killed. The provision of the

Constitution of giving right to the citizens to be heard was never denied to those terrorists.

Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal[5]. In the 35th law commission report, 1967, it was stated that arguments for the death penalty which are valid in one area can be invalid in another area. Drawing the same analogy, the reasons behind abolition of death penalty would be accepted by one part of India and might be rejected by the other part. So the Law Commission recommended for the retention of the capital punishment.

But since 1967, a lot of developments have taken place in India. The retention of the death penalty was recommended keeping in view the then circumstances.

The concept of 'rarest of rare' "alternative option is unquestionably foreclosed" was very much there from the beginning of the regulation of death penalty in India [6]. The court has shown its concern over the arbitrary issuance of death penalty by giving guidelines in the Bachan Singh's case. But the Supreme Court only has been time and again stating that there is no such precedents which have to be considered while ordering death penalty. The court has affirmed the capital punishment without specifying any legal principle [7]. The dictum of 'rarest of rare' has been inconsistently applied in a number of cases.

In the month of May 2014, the 20th Law Commission rolled out consultation paper on death penalty to take their views into consideration. At last on 11th July, 2015 the Law Commission invited eminent lawyers, distinguished judges, political leaders, academics, police officers, and representatives of civil society to discuss on the issue of death penalty.

In the Constituent Assembly, Prof. Shibban Lal Saksena analyzed the right to appeal against the order of death penalty. He stated that every person who has been given death penalty has the inherent right to approach the Supreme Court so that he has the satisfaction that his case has been heard by the highest court of the country. But the poor section of the society is unable to approach the highest forum because of lack of resources. Though in our Constitution, the Supreme Court can grant special leave to appeal from any judgment, but only the rich and wealthy section can go ahead with the same[8].

Dr. B.R. Ambedkar, in the Constituent Assembly, stated for the abolition of death penalty from the

statutes. He argued that Indians have always followed the principle of non-violence. Though they do not follow those principles in their actual life but they consider non-violence as one their moral mandate which they will try to follow as far as possible[9]. He also suggested that it should be left to the discretion of the legislature whether to include death penalty in the statutes or not.

Jagmohan Singh v. State of U. P[10], the petitioners argued that the death penalty is in violation of article 14, 19 and 21 of the Constitution of India. It gives the judge a high degree of discretion to decide the death penalty cases. There is no procedure established to determine as to whether the accused should be given capital punishment or death penalty. But the court held that the discretion invested in the judges is liable to be corrected by the superior courts. It will be the safest safeguard for the accused.

Deterrence and reformation are the primary social goals that are sought to be achieved. Rehabilitation is also one of the important purposes of punishment. In Bachan Singh case, the court stated that the circumstances of crime and criminal have to be taken into consideration while giving the death penalty.

Shatrughan Chauhan v. UOI,[11] the court held that the inordinate delay in the execution of death sentence would entitle the condemned person to approach the court under Art. 32 of the Constitution of India but the court will only examine the nature of delay caused and it has no jurisdiction to reopen the conclusions that are reached by the courts while convicting the accused. There is no such fixed period of delay that would make the death sentence inexecutable.

The Criminal Law (Amendment) Act, 2013 expanded the ambit of death penalty in India. This act imposed death penalty on the accused who has committed rape and it has led to death of the victim or left her in permanent vegetative state (Section 376A). This amendment also imposed death penalty for certain repeat offenders.

Concentration on the death penalty diverts our attention from other factors like poor system of investigation, rights of the victims. In India, there are many instances where the voices of the witnesses and victims are silenced by threats. There is no such comprehensive system for the protection of them. We have two opposing views. There are many cases where the discretion of giving death penalty has been used arbitrarily by the courts. But there is another side also. Our society is dynamic. Even if some standards are set for the application of death penalty, in the next moment a new circumstance will grow in where

it might seem that capital punishment has to be there. So the judiciary is finding it difficult to define the standards. Over that, the clemency power, which have been given by the Constitution of India to the President and the governor under Art. 72 and 161, are proving as some kind of impediment in deciding the death penalty cases. These powers have been given to the executive as a royal right but the time taken by them in deciding the clemency applications is making the victim suffer all the more.

The mistakes that are made by the trial courts, while awarding death sentences to the criminals, will not make the system of death penalty as an arbitrary one. There are grounds being included in the "rarest of rare" cases to make the basis of conviction more stringent. That will not make the courts rely on the weak evidences brought by the parties. India is a developing country whose society is also evolving. The need of death penalty is the need of the state. We do not have enough resources take care of all the criminals who are being sentenced to death. The process of including crimes in the rarest of rare bracket is a very slow process because nothing can be done suddenly in a democratic country like India where Public opinion matters a lot. Once the scope is made clear, then the death penalties will not be subjective to the judges of the courts.

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