

Life Beneath The Rope: Alternative To Capital Punishment

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INTRODUCTION

Capital Punishment or death penalty is putting the offender to death because the court of law finds him as the perpetrator of some criminal offence.² Since this involves death to the offender many consider it as violation of his human rights. It is described by the former Secretary General of United Nation, Mr. Ban Ki Moon as a “cruel and inhuman practices.”³ On the other side, the supporters of Capital Punishment claim the execution of the offenders prevent others from committing the same crime and also it is the punishment for the wrong conducted by the person. Hence, the abolition of Capital Punishment is one of the most controversial issues in the world. The modern trend among different nations is towards abolition of death penalty. At present, 140 countries have eliminated the use of Capital Punishment for administration of Criminal Justice.⁴ This is done either by completely removing Capital Punishment from law, i.e. abolition in policy or by continuously avoiding its usage (not removing it from law), i.e. abolition in practice.⁵

Death sentence is hugely condemned around the globe because of various reasons. This includes violation of human rights, the penalty being too severe, etc. Another important reason to be emphasised is the irreversible character. The Capital Punishment is awarded by the Judges or other authorities, however if the Jury gets erroneous and orders death penalty to an innocent, then it is the life of the person

²Roger Hood, *Capital Punishment*, ENCYCLOPEDIA BRITANNICA, (Oct. 12, 2017, 1:30 PM), <https://www.britannica.com/topic/capital-punishment>.

³UN News Correspondent, *Death penalty has no place in 21st century, declares UN Chief*, UN NEWS CENTRE, (Oct. 29, 2017, 12:30 PM), <http://www.un.org/apps/news/story.asp?NewsID=48192#.WfdLjNOCzIU> .

⁴Law Commission Official, *Law Commission of India Report 262*,LAW COMMISSION OF INDIA, (Oct. 17, 2017, 4:15 PM), <http://lawcommissionofindia.nic.in/reports/report262.pdf>; *see also*, Amnesty International Reporter, *Death Penalty and Executions 2014*, AMNESTY INTERNATIONAL, (Oct. 17 2017, 4:30 PM), <https://www.amnesty.org.in/images/uploads/articles/DP.pdf>

⁵Ibid

taken away. It is an infringement of his Right to Life.⁶ The life once taken cannot bring the innocent back to this world. Chris Patten, the European Commission on Capital Punishment, said “*the inhumane, unnecessary and irreversible character of capital punishment, no matter how cruel the crime committed by the offender....It is impossible to reduce the risk to zero of applying the penalty in error.*”⁷

Another reason is the condition of the death row convict. Death Row is “the area of a prison where those who have been sentenced to death are confined.”⁸ The Death Row convict wait for the execution be either completed or some mercy be granted. In the battle of this, the Death Row convicts are in big uncertainty of life and death.⁹ It is a despicable situation, when a person wakes up in the morning and does not know whether he will live for that day or how long he will live. These are gross violation of his human rights.¹⁰ Moreover, according to the Death Penalty India Report, “most in death row are backward, uneducated and first time offenders with no previous crime history.”¹¹ All this leads the legislature, executive and the judiciary, to ponder over the abolition of Death Penalty in India.

⁶Amnesty International Reporter, *Death Penalty and Executions 2014*, AMNESTY INTERNATIONAL, (Oct. 17 2017, 4:30 PM), <https://www.amnesty.org.in/images/uploads/articles/DP.pdf>

⁷Roger Hood & Carolyn Hoyle, *Abolishing Death Penalty Worldwide: The Impact of a “New Dynamic,”* THE UNIVERSITY OF CHICAGO PRESS, 20, 32, (2009)

⁸P Ramanatha Aiyar, *The Major Law Lexicon*, LEXIS NEXIS INDIA, (Nov. 2, 2017, 3:56 PM) http://www.lexisnexis.com/in/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T26744598488&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T26744598490&backKey=20_T26744598491&csi=352304&docNo=1&scrollToPosition=0&scrollToPosition=0

⁹*Report of the Committee against Torture*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, (Oct. 20, 2017, 4:20 PM), <http://www2.ohchr.org/english/bodies/cat/docs/A-65-44.pdf> “*in para 29, UN Committee Against Torture, Concluding observations of the Committee against Torture: Kenya, 19 January 2009, CAT/C/KEN/CO/1*”

¹⁰ *Infra note 9*, at 65

¹¹Contributors Death Penalty Research Project, *Death Penalty of India Report*, DEATH PENALTY INDIA REPORT, (Oct. 16, 2017, 4:50 PM), http://www.deathpenaltyindia.com/img/pages/resources/Vol.I_Death%20Penalty%20Report.pdf

India faces an augmented demand for abolishing death penalty. The Law Commission in the 268th Report suggested removing death penalty. However, this paper does not focus on the support or disfavor of abolition of Death Penalty. This Paper is an attempt towards the Solution Oriented Approach towards the issue. The objective of the paper is not to find whether India should adopt Death Penalty or not. The main aim is to find out the solution. "Punishment must serve as an instrument for reducing crime."¹² Therefore, if India takes the step which many countries have taken and removes Capital Punishment, then which other methods the country should adopt so that it is successful in ensuring reduction in crime and hence Criminal Justice.

Keeping the aim in mind, the paper first tries to understand the background of death penalty. This background is elucidated in the international and the national perspective. The former analyses the steps taken by different nations individually and through convention. The national perspective provides information about the development of Capital Punishment in India.

In order to find the alternatives it is also important to find the advantages in the previous system. Thus, this paper deciphers the main arguments in favour of Capital Punishment and tries to find out its effectiveness in the real life. There is no point in taking away an offender's life if in practicality it fulfils no big purpose. Thus the paper discusses the main arguments for retaining Death Penalty and analyses the effectiveness of those arguments. This analysis is done by using scientific method and takes into account the statistical data of the effectiveness. This helps to find which alternatives can help to fulfil the main advantages of death penalty.

It is often said that "Hate the Sin and not the Sinner." The study of Criminology involves questions related to causation of crime, its effect in society, etc.¹³ Thus in the

¹²DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW*, 17, (New York Univeristy Press, 2005).

¹³AHMAD SIDDIQUE, *CRIMINOLOGY PENOLOGY AND VICTIMOLOGY*, 18-30, (7th ed. Eastern Book Company 2016).

research of Alternatives of Capital Punishment, it is also important to analyse the causes of crime, the behavior of criminal, etc. A conclusion of the deep study on this expounds which substitute is viable according to the type of criminal behavior in India. Such option reduces the negatives of capital punishment and takes the positives of it, and hence finds a common path in between. Thus, “the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided.”¹⁴ The paper is an effort to find a practical answer if there is total commutation of all death penalty in the future, though unlike legal commutation this commutation is granted before the award of the penalty.

DEVELOPMENT OF THE CAPITAL PUNISHMENT

International

Since middle ages, the Capital Punishment was frequently given to the offenders.¹⁵ With spurt in the conscience and awareness of Human Rights, Fair procedure, etc. the lineation towards abolition of such punishment was seen.¹⁶ The genesis of abolition movement in England can be traced back in 18th century.¹⁷ In this time, Beccaria wrote an essay on Crime and Punishment¹⁸ and contended that the human has no right to take away man’s life since he has not created the person.

The nations in the international sphere have shifted their viewpoints from retaining capital punishment to removing it. This was done by passing various treaty and resolutions. The major sparkle in the trend was shown when the United Nations passed International Covenant on Civil and Political Rights (ICCPR) in 1966

¹⁴Shankar Kisanrao Khade v. State of Maharashtra (‘Khade’) 2013(5) S.C.C. 546 (India).

¹⁵Law Commission of India, *Consultation Paper on Mode of Death Sentence and Incidental Matters*, LAW COMMISSION OF INDIA, (Oct. 25, 2017, 8:50 PM) <http://lawcommissionofindia.nic.in/cpds1.pdf>

¹⁶*Ibid*

¹⁷JANAK RAJ RAI, *DEATH PENALTY*, 15, (Regency Publication 2005)

¹⁸Cesare Bonesana Di Beccaria, *An Essay on Crime and Punishment*, ALBANY: W.C. LITTLE & CO., (Voltaire trans. 1972)

(which came into force in 1976).¹⁹ The ICCPR is one of the key documents; it is the Magna Carta for assessing death penalty in the International Human Rights Law. When ICCPR was passed, there were only 26 countries which favoured abolition of death penalty; this changed and today 168 states, including India, are parties to the ICCPR.²⁰ ICCPR aimed at flourishing the principles of the UN Charter by recognizing and ensuring respect to human rights. In relation to Death Penalty, the covenant is against the arbitral Death Penalty.²¹ Some of the provisions states that the Death Penalty could be awarded by “final judgement rendered by competent court,” Right of Commutation be available to every person, Death Penalty should not be imposed on Person below 18 years.²²

Later on, in 1996, The Second Optional Protocol to the ICCPR came into effect. The Protocol aimed at the abolition of the death penalty.²³ “The protocol is the only treaty directly concerned with abolishing the death penalty....open to signatories all

¹⁹UNHRC Officials, *International Covenant on Civil and Political Rights*, OFFICE OF UNITED NATIONS HUMAN RIGHTS, (Oct. 29, 2017 4: 00 PM), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

²⁰*Ibid.*

²¹*Ibid.*

²²UNHRC Officials, *International Covenant on Civil and Political Rights*, OFFICE OF UNITED NATIONS HUMAN RIGHTS, (Oct. 29, 2017 4: 00 PM), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law inthis penalty can only be carried out pursuant to a final judgement rendered by a competent court” “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”

²³UNHRC Officials, *International Covenant on Civil and Political Rights*, OFFICE OF UNITED NATIONS HUMAN RIGHTS, (Oct. 29, 2017 4: 00 PM), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> “Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.”

over the world.”²⁴ Today there are 81 state parties and 3 signatories of the protocol.

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Apart from these, the United Nation General Assembly (UNGA) has invited various moratoriums dealing with the execution of death penalty as a form of punishment.²⁶ A moratorium is an intermediate path between Yes or No questions of International issues, it involves compromise.²⁷ In 2007, the UNGA asked states to keep in mind an ultimate view of abolishing death penalty and limiting the usage of capital punishment. In this, 104 states supported the moratorium.²⁸ The advancement in the support towards abolition is seen from the trends in favour of moratorium by different nations. The most recent resolution on abolition was published in December 2016; it was favoured by 117 states and denounced by 40 states.²⁹ The passing of this resolution is a step forward towards the abolition.³⁰

The adopted system by United Nation, categorised the countries on the basis of their status in Capital Punishment, these were countries which have:³¹

²⁴*Infra Note 30*, at 43

²⁵*Ibid*

²⁶Elise Guillot Placais, *The UN General Assembly voted overwhelmingly for a 6th resolution calling for a universal moratorium on executions*, WORLD COALITION AGAINST THE DEATH PENALTY, (Oct 29, 2017, 6:30 PM), <http://www.worldcoalition.org/The-UN-General-Assembly-voted-overwhelmingly-for-a-6th-resolution-calling-for-a-universal-moratorium-on-executions.html>

²⁷ Yin, Wenqiang, *Moratorium in International Law*, CHINESE JOURNAL OF INTERNATIONAL LAW, (Oct. 31, 2017, 8:30 PM), https://www.researchgate.net/publication/275126468_Moratorium_in_International_Law

²⁸Law Commission Officials, *262nd Report Death Penalty*, LAW COMMISSION OF INDIA (Oct. 31, 2017, 7:50 PM) <http://lawcommissionofindia.nic.in/reports/report262.pdf>

²⁹*Ibid*

³⁰*Supra Note 25*

³¹Law Commission Officials, *262nd Report Death Penalty*, LAW COMMISSION OF INDIA (Oct. 31, 2017, 7:50 PM) <http://lawcommissionofindia.nic.in/reports/report262.pdf>, “See for example, “Capital punishment

- Removed it from all crime and no death penalty can be awarded.³²
- Removed it from all “ordinary offences” in Criminal Code and Common Law and retained only in exceptions such as military offences, terrorism, etc.³³
- The countries which have not removed the punishment but did not use it for 10 years.³⁴ According to Amnesty International,³⁵ this includes the countries which have retained Capital Punishment for all crimes but have not practiced it or executed anyone for last 10 years.³⁶
- The retentionist or the one which still follow capital punishment for all crimes.³⁷

The Amnesty International report titled “Death Sentence and Execution,”³⁸ identifies that in 2014, 140 countries have eliminated Capital Punishment in all crimes or in all ordinary crimes or in actual execution (or practice).³⁹ However, 58 countries have retained capital punishment as a form of punishment. These include India, China, United States, etc.; this made a “majority of people in the world potentially subject to this punishment.”⁴⁰

*and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty”
Report of the Secretary-General, E/2015/49 [advance, unedited version] at page 4”*

³²*Ibid*

³³*Ibid*

³⁴*Ibid*

³⁵Amnesty International Reporter, *Death Penalty and Executions 2014*, AMNESTY INTERNATIONAL, (Oct. 17 2017, 4:30 PM), <https://www.amnesty.org.in/images/uploads/articles/DP.pdf>

³⁶*Ibid*

³⁷*Ibid*

³⁸*Ibid*

³⁹*Ibid*

⁴⁰*Supra note 30*, at 39

Apart from the direct treaties, agreements, studies or reports dealing with death penalty in the World, there were also other agreement which covered other aspects and abolition of death penalty was implied to such aspects. For example, the United Nation Human Rights Committee, interpreted the ICCPR and related death penalty with their right to life.⁴¹ It concluded, a step towards eliminating Capital Punishment is a “progress in the enjoyment of the right to life.”⁴²

A similar inference was made by the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, these have related death penalty with acts which infringe the rules against torture and cruelty.⁴³ The Preamble of the Convention seeks “desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”⁴⁴ Thus it helps to decipher the philosophy behind the arguments against death penalty. Likewise, the ICCPR’s Convention on Rights of the Child prohibits death penalty to person below 18 years.⁴⁵

⁴¹*Supra note 30*, at 40

⁴²*Ibid*

⁴³Law Commission Officials, *262nd Report Death Penalty*, LAW COMMISSION OF INDIA(Oct. 31, 2017, 7:50 PM) <http://lawcommissionofindia.nic.in/reports/report262.pdf>; *See also*, UN Special Rapporteur, *Death penalty increasingly viewed as torture*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS(Oct. 12, 2017 7:00 PM), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LangID=E#sthash.Gu6NTA2d.dpuf> (last viewed on 25.08.2015).

⁴⁴UN Special Rapporteur, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, UNITED NATION HUMAN RIGHTS, (Oct 25, 2017, 6:00 PM)<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

⁴⁵Committee on the Rights of the Child, *Convention on the Rights of the Child*, UNITED NATIONS, (Nov. 3, 2017, 3:50 PM), <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

Indian

In India, the aspect of Death Penalty was expounded by different legislations like the code for punishment (Indian Penal Code, 1860), penal provision of national security, and anti narcotic legislations. The members of the armed forces (the Army Act, 1950, the Air Force Act, 1950, the Naval Act, 1956) can also be penalized with capital punishment for some offences. For the offences under IPC, the Supreme Court reiterated the seven offences mentioned in the code, for which death penalty is a form of punishment,⁴⁶ These were (1) Attempt to/abetment for/actually wage war against the Government of India (Section 121), (2) Abetment in a mutiny (committed) (Section 132), (3) Giving or making false evidence which results in conviction or execution of an innocent (Section 194), (4) committing murder in such a way that it falls under “rarest of the rare category, (5) Abetment to suicide of a Person below 18 or insane or idiot or intoxicated (Section 305), (6) Murder while committing Dacoity (Section 396).⁴⁷ Earlier, it was also awarded for the murder committed by the person serving life imprisonment (Section 307).

⁴⁶Mithu Singh v. Union of India, (1983)2 SCC 277 “Accordingly, under the Code, death is the punishment that must be awarded for murder by a person under sentence of imprisonment for life (Section 303). This apart, the Penal Code prescribes “death” as an alternative punishment to which the offenders may be sentenced, for the following seven offences:

- “(1) Waging war against the Government of India. (Section 121)
- (2) Abetting mutiny actually committed. (Section 132)
- (3) Giving or fabricating false evidence upon which an innocent person suffers death. (Section 194)
- (4) Murder which may be punished with death or life imprisonment (Section 302)
- (5) Abetment of suicide of a minor or insane, or intoxicated person. (Section 305)
- (6) Dacoity accompanied with murder. (Section 396)
- (7) Attempt to murder by a person under sentence of imprisonment for life if hurt is caused. (Section 307)”

⁴⁷VIJAY S.T. SHANKARDAAS, ABOLITION OF DEATH PENALTY, *Indian Position Death Sentence A Struggle for Abolition*(1998)

Initially, India was an ardent supporter of Capital Punishment, and it did not notice the Human Right outlook and Criminal Justice. The country followed the same approach towards Capital Punishment for 100 years of its existence.⁴⁸ The present topic is about the change in India's trends which ultimately lead towards the country reducing trend in executions.

For instance, in two decades after its Independence, the Law Commission was considering the issue of abolition of death penalty. It submitted the 35th Report in 1967; the Report came to the conclusion that since the Indian society was not prepared to eliminate death penalty, hence the punishment should be retained.⁴⁹ The Commission was reluctant to suggest the nation to "experiment with abolition."⁵⁰ Hence, earlier the courts did not regarded death penalty as unreasonable. In *Bachan Singh v. State of Punjab*,⁵¹ the constitution validity of capital punishment was challenged. The Supreme Court, with majority of 4 Judges rejected this and went with the Commission's Report.⁵² Though the court did not declare Capital Punishment unconstitutional but they provided the future Criminal Jurisprudence with "rarest of the rare principle."⁵³ Death Penalty was announced only in the rarest

⁴⁸AHMAD SIDDIQUE, *CRIMINOLOGY, PENOLOGY & VICTIMOLOGY*, 35, (7th ed. Eastern Book Company 2016)

⁴⁹Contributors Death Penalty Research Project, *Death Penalty of India Report*, DEATH PENALTY INDIA REPORT, (Oct. 16, 2017, 4:50 PM), http://www.deathpenaltyindia.com/img/pages/resources/Vol.I_Death%20Penalty%20Report.pdf

⁵⁰Officials Law Commission of India, *35th Report on 'Capital Punishment 1967*, LAW COMMISSION OF INDIA, (Oct. 27, 2017, 4:34 PM), [http://](http://lawcommissionofindia.nic.in/1-50/Report35Voll1and3.pdf)

lawcommissionofindia.nic.in/1-50/Report35Voll1and3.pdf. "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....India cannot risk the abolition of capital punishment."

⁵¹*Ibid*

⁵²1980 2 SCC 484

⁵³*Ibid*

of the rare case. In assassination of Indira Gandhi, “the murder of the Prime Minister of the country by her own security guards was covered by the “rarest of the rare” principle”⁵⁴ The court interpreted and devised various principles of deciding the exception to murder. These were: brutality in murder, provocation and instigation, premeditation and planning, mental balance and other aggravating and mitigating factors.⁵⁵ Hence, another test can be the degree of threat it imposes to the order in society and the shock it gives.⁵⁶

Now there was reduction in the number of offences punished with death penalty. Thus, the inclination of many nations towards the abolition helped to alter judicial thinking. This is concluded through the analysis of other cases, statutes, reports, and examples. For instance, when the Code of Criminal Procedure, 1898 came to existence, the court had to compulsorily give reasons for not awarding Capital Punishment. This changed with the amendment of 1955 which stated that the mandatory reasoning was not necessary. Now, the latest CRPC code asks the court to give reasons if it awards the punishment.⁵⁷

In the 35th Report, the Law Commission also recommended avoiding amendment of Section 303.⁵⁸ Section 303 of IPC, talks about mandatory sentence, it states that a person who murders someone while serving life imprisonment, should

⁵⁴Kehar Singh v. State (Delhi Admn.) (1988) 3 SCC 609 (India).

⁵⁵Rajendra Prasad v State of UP 1979 AIR 916 (India).

⁵⁶AHMAD SIDDIQUE, CRIMINOLOGY, PENOLOGY & VICTIMOLOGY, 56, (7th ed. Eastern Book Company 2016) “So, one of test for imposition of death sentence is to find out whether the murderer offers such traumatic threat to the survival social order.” *Collective conscience of the community is so shocked that it will expect the judicial power centre to inflict death penalty.*”

⁵⁷*Ibid*

⁵⁸S. Moharana, *A Critical Study on Abolition of Capital Punishment*, 2, IJAR, March 2015, 3,

be sentenced to death.⁵⁹ Later on in *Mithu Singh v State of Punjab*,⁶⁰ Section 303 was declared unconstitutional as being violative of right to life. A point of peculiarity still remains in the IPC, which is that like Section 303, Section 307 should also be unreasonable, but today it is not unconstitutional. For instance, if one commits murder he would not be served death sentence (unconstitutional by *Mithu Singh's* case), but if attempts to commit murder and it hurts the victim (but the victim is not dead, just hurt) the death sentence may be awarded. This appears biased. But no order or instruction of legislative or judiciary has been made so far.

Later on the Law Commission of India, in its 262nd Report stated that a lot has changed in the present socio-economic conditions of the country.⁶¹ It recommended abolition of death penalty.⁶² After Independence there were various Bills introduced in order to abolish Capital Punishment. For instance in 1956 a Bill was introduced in Lok Sabha to abolish capital punishment but revoked by the upper house.⁶³ In 2008,

⁵⁹S. 303, Indian Penal Code, 1860, ACT OF LEGISLATIVE COUNCIL, 1860 *"Whoever, being under sentence of 1[imprisonment for life], commits murder, shall be punished with death."*

⁶⁰1983(3) SCC 277 *"A savage sentence is anathema to the civilized jurisprudence of Art 21...Accordingly Section 303 is unconstitutional....All cases of murder will fall under Section 303 and there shall be no mandatory sentence" "There is no rational basis for classifying persons who commit murders whilst they are under the sentence of life imprisonment as distinguished from those who commit murders whilst they are not under the sentence of life imprisonment"*

⁶¹Law Commission Officials, *262nd Report Death Penalty*, LAW COMMISSION OF INDIA (Oct. 31, 2017, 7:50 PM) <http://lawcommissionofindia.nic.in/reports/report262.pdf>; *See also*, UN Special Rapporteur, *Death penalty increasingly viewed as torture*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Oct. 12, 2017 7:00 PM), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LanguageID=E#sthash.Gu6NTA2d.dpuf> (last viewed on 25.08.2015).

⁶²*Ibid*

⁶³*Supra note 55*, at 269

a similar Bill to abolish death penalty for women, children, and indigent persons was issued in Lok Sabha, though it was not passed.⁶⁴

THE BASIC ARGUMENTS OF SUPPORT

Death Penalty is supported mainly because of two main arguments, Deterrence and Retribution.⁶⁵ The Deterrent and Retribution Arguments are mentioned under the theories of punishment.⁶⁶ In relation to Capital Punishment, the Deterrent Theory says that death sentence helps to prevent crimes further.⁶⁷ According to Deterrent Theory, the offender must be given severe punishment, so that the fear to face the result keeps the criminal away from crimes and hence reduce crimes.⁶⁸ It was described as terror to evil doers and an awful warning to all others.⁶⁹

On the other side, the Retribution Theory depicts that punishment is because the criminal deserves it.⁷⁰ It regards Punishment as an expression of disapproval by the society.⁷¹ It is regarded as the reaction due to vengeance of the crime. ⁷²These

⁶⁴Adhir Ranjan Chowdhury, *The Abolition of Death Penalty to Women, Children and Indigent Persons Bill, 2009*, LOK SABHA BILL TEXTS, (Oct. 29, 2017, 8: 20 PM), <http://164.100.47.4/billtexts/lbilltexts/AsIntroduced/4403LS.pdf>

⁶⁵AHMAD SIDDIQUE, *CRIMINOLOGY, PENOLOGY & VICTIMOLOGY*, 35, (7th ed. Eastern Book Company 2016)

⁶⁶*Ibid*

⁶⁷*Ibid*

⁶⁸N.V.PARANJAPE, *CRIMINOLOGY AND PENOLOGY* 204 (12th ed. Central Law Publication 2006)

⁶⁹*Ibid*

⁷⁰MIKE MAGUIRE & ROD MORGAN eds. et al., *THE OXFORD HANDBOOK OF CRIMINOLOGY* 992(4 ed. OXFORD Univ. Press 2007)

⁷¹Law Commission Officials, *262nd Report Death Penalty*, LAW COMMISSION OF INDIA (Oct. 31, 2017, 7:50 PM) <http://lawcommissionofindia.nic.in/reports/report262.pdf>; *See also*, UN Special Rapporteur, *Death penalty increasingly viewed as torture*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Oct. 12, 2017 7:00 PM), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&La>

theories existed from very long, and broached in the writings of Kant and Hegel. Thus since the criminal had done wrong to the victim, then as a just and fair response he should be punished for his acts.

This paper briefly discusses the reality of deterrent and Retributive explanation of death penalty. The notion to abolish Capital Punishment faces lack of empirical studies and analysis.⁷³ Thus, the paper takes the help of scientific data to understand the real effect of the Deterrent and Retributive Argument.

Deterrent Effect

According to argument of deterrent theory, Death Penalty is used to frighten the evil doer.⁷⁴ This notion initially appealed the people but later, it was an inexorable manipulation of social policy.⁷⁵ It was reprimanded due to absence of moral constraints.⁷⁶ In India, the validity of deterrence theory was challenged by the cases in Supreme Court, reports, studies, etc.

In the Supreme Court, the notion of deterrence effect of capital punishment had been a major point of concern among the judges.⁷⁷ Though, the judiciary tried to incline towards the Bacchan Singh doctrine⁷⁸ (death penalty had some deterrent effect), but sometimes the cases challenged this due to absence of a valid proof or

ngID=E#sthash.Gu6NTA2d.dpuf (last viewed on 25.08.2015).

⁷²*Supra note 64*, at 60

⁷³Santosh Kumar Satishbhusan Bariyar v. State of Maharashtra, (2009) 6 SCC 498

⁷⁴Nester Corrales, *Duterte : Death penalty is for retribution*, LEXIS NEXIS ACADEMIC, (Oct. 29, 2017, 10:55 AM), <http://www.lexisnexis.com/hottopics/lnacademic/>

⁷⁵Raymond Plant, *Don't write off retribution*, The Times(London), LEXIS NEXIS ACADEMIC, (Oct. 31, 2017, 8:45 P.M.), <http://www.lexisnexis.com/hottopics/lnacademic/>

⁷⁶*Ibid*

⁷⁷*Supra Note 64*

⁷⁸(1980) 2SCC 684

scientific data. For example, in *Shashi Nayar v. Union of India*⁷⁹, the court went with the 32nd report of Law Commission and *Bacchan Singh* case. However, the case also illuminated the absence of empirical data which proves that there is no deterrence effect on capital punishment.

The lack of empirical studies of deterrence in death penalty is a major challenge towards finding the other alternatives. However, there are some analyses which are formed after concerning the murder rate and reducing number of death penalties. The *Bachan Singh Case*⁸⁰ emphasized the absence of statistical studies in India, but with availability of some statistics of states, Justice P.N. Bhagwati's dissenting opinion referred to Mohan Kumaramangalam's study.⁸¹ In this study the data was taken in the former state of Travancore and Cochin in a period which experienced alteration in award of capital punishment (from retention to abolition).⁸² His study of deterrent theory and crime is based upon two assertions:

- The Positive Assertion: Serious and appalling punishment deters crime more. Thus Death Penalty results in more deterrence and less murder
- The Negative Assertion: No serious/ lenient Punishment means more number of crime. Thus, non usage of Death Penalty results in less deterrence and more murder.

The data was taken in two periods, in 1945-1950, when death penalty was "*in abeyance*"; and in 1951-1956, when death penalty was "*in vogue*".⁸³ Thus, when death penalty was established as punishment, the number of murders changed from 962 to 967.⁸⁴ Hence, the introduction of death penalty did not reduce the number of

⁷⁹(1992) 1 SCC 96 "*capital punishment does not serve any social purpose, and in the absence of any study, the barbaric penalty of death should not be awarded to any person as it has no deterrent effect*"

⁸⁰(1980) 2SCC 684 (India).

⁸¹*Ibid*

⁸²*Ibid*

⁸³ *Ibid*

⁸⁴ *Ibid*

murder, infact it increased them. This shows that execution by death penalty did not deter murder.⁸⁵ As far as the Negative Assertion is concerned the study emphasized the non availability of data.

Similar trend in the rates of murder was given by the Ministry of Home Affairs through the annual survey.⁸⁶ The analysis of this shows that, in 1952, murder rate was 2.81, which oscillated between 2.5 to 3 in the period between 1958 and 1978, and increased tremendously till 1992(when it was 4.6). Then it continued to decline.⁸⁷ The conclusion drawn from the development of Death Penalty in India highlighted that the usage of capital Punishment has continuously lessened. However, the statistics reveals increasing rate of murders in India. This proves a total peculiarity of Deterrence theory because the use of capital punishment has increased rate of murders instead of reducing it.

Similarly the National Crimes Record Bureau data reveals the erroneous reality in Deterrence Theory. According to the data, the rate of murder was 4.6 per lakh population in 1992.⁸⁸ This was 2.7 in 2013. After 2013 no figures could be found as the report depicted the number of murders committed, rather than the rate. Thus, according to the given data the rate of murder has reduced, even though the number

⁸⁵ (1980) 2SCC 684 *"It can, therefore, be inferred that if the heavy use of the death sentence in the pre- Bachan Singh era did not deter murder, the use of the death penalty at a fraction of its former frequency today cannot have any deterrent effect."*

⁸⁶Yug Mohit Chaudhry, *Hanging on Theories*, FRONTLINE, (Nov. 6, 2017 8:30 AM), <http://www.frontline.in/static/html/fl2917/stories/20120907291702900.htm>

⁸⁷Yug Mohit Chaudhry, *Hanging on Theories*, FRONTLINE, (Nov. 6, 2017 8:30 AM), <http://www.frontline.in/static/html/fl2917/stories/20120907291702900.htm>

Clearly, the decline in the murder rate in India has been neither sudden nor short-lived. On the contrary, it has been continuous and steady over a period of 20 years – hardly a flash in the pan

⁸⁸*Ibid*

of capital punishment was decreasing.⁸⁹ For, example, no person was executed for almost eight years, till in 2012 when Ajmal Kasab was hanged. This again shows the lack of deterrence in capital punishment.⁹⁰

In the survey conducted by Radelet & Lacoock in 2009, the former and present Presidents of America's top academic Criminology Societies were asked about their opinion on deterrence of death penalty. The response was, 88% of the presidents believed that death penalty does not cause any deterrence of murder.⁹¹

Thus, even though there are no numerical data available to prove the deterrence of capital punishment, but a comparison in murder rate can be used to study its deterrence. This analysis taken from different reports, judicial decisions, etc. can ascertain that death penalty does not have much deterrent value on murder. The main idea behind criminology is that the criminal should not reap the benefits (materially or psychologically) from their criminality and should not be punished disproportionately.⁹² Taking away the life of a person through death penalty seems inhuman, immoral and disproportionate. Thus, some other method of punishment should be taken which includes the pros of capital punishment and eliminate its cons.

Therefore, on the point of Deterrent perspective, even if contemplations are made that Capital Punishment has Deterrent Effect in the Society, that the statistics and data presented above are incorrect, that the people fear death and hence the number

⁸⁹NCRB Rapporteur, *Crime in India, 2013*, NATIONAL CRIME RECORDS BUREAU, (Nov. 5, 2017 6:00 PM), <http://ncrb.gov.in/CD-CII2013/figure%20at%20a%20glance.pdf> (last viewed on 8.08.2015). *This decline in the murder rate has coincided with a corresponding decline in the rate of executions, thus raising questions about whether the death penalty has any greater deterrent effect"*

⁹⁰Ananth Guruswamy, Indian rape debate: Why death penalty is no solution, CNN, (Oct. 28, 2017 3:50 PM), <http://edition.cnn.com/2013/01/03/opinion/india-rape-amnesty/index.html>

⁹¹*Study: 88% of criminologists do not believe the death penalty is an effective deterrent*, DEATH PENALTY INFORMATION CENTER, (Nov. 3, 2017 4:20 PM), <https://deathpenaltyinfo.org/study-88-criminologists-do-not-believe-death-penalty-effective-deterrent>

⁹²KATHERINE S. WILLIAMS, *TEXTBOOK ON CRIMINOLOGY*, 78, (Oxford University Press 2012)

of “rarest of the rare” crimes is less; then too there should be use of less severe alternative which have similar deterrence to death penalty. The substitute should be daunting enough to prevent the people from committing it.

Retribution

The Retributivist Argument states that death penalty is justified because one should pay for his crime.⁹³ It is stated that the theory had its origin in the natural instinct of humans. When an individual is hurt it instinctly retaliates.⁹⁴ For instance if A slaps B, then B automatically slaps A back. This is because, the animals have an inherent psyche of making things fair, and as a result they prefer to make the party suffer for his acts. In England, the origin of this theory was given by Rechtslehre, it states, punishment is not given to ensure good but it is given because the person punished has committed a crime. The theory assumes that it is the person who chooses to take a criminal path and thus he should suffer.

Though the theory is supported by Kant, it is criticized because of many grounds. One of them is that it tries to emulate punishment and crime. The retributivist’s centre point is the morality of punishment which is justified because the offender has also committed moral wrong. However, this is extraneous in the modern world. In Modern Criminology Punishment is given to rehabilitate the victim and that cannot be given by awarding same punishment.⁹⁵ Moreover, if same and proportionate punishment is to be provided then death penalty should be a penance for all cases of murder(a murder should be punished by lawful murder). However, due to lack of

⁹³Nester Corrales, *Duterte : Death penalty is for Retribution*, LEXIS NEXIS ACADEMIC, (Oct. 29, 2017, 10:55 AM), <http://www.lexisnexis.com/hottopics/lnacademic/>

⁹⁴Supra Note 42 at 205

⁹⁵Monica Sakhrani and Mahrukh Adenwalla, *Death Penalty: Case for its Abolition*, EPW 1023, 1027, (2005)

“The punishment should not only be such as to negate the benefit of the crime, but also proportionate to the offence”

evidence, procedural irregularities, etc. the judgement can be flawed and an innocent might be sentenced to death.⁹⁶ The person's family would suffer; the power of Human Resource would suffer, and so on. However, once a person is executed, the process cannot be reversed due to his innocence, for he has died and cannot come back.

Another argument of the retributivist is that the punishment is given because then public wants the offender to suffer. However, when CNN-IBN took the survey in 2013 in India, it was disclosed that 40% of the people supported abolition, 30% disagreed, and 30 % were neutral.⁹⁷ It also noted that these opinions were taken when the public was not totally familiar with Capital Punishment, its disproportionate character, its consequences towards the poor defendants. The knowledge could further affect their views.

In the words of Marie Deans, the founder of Murder Victims' Families for Reconciliation, a community that aims to eradicate death penalty. *"From experience, we know that revenge is not the answer. The answer lies in reducing violence, not causing more death. The answer lies in supporting those who grieve for their lost beloved ones, not creating more grieving families. It is time we break the cycle of violence"*.⁹⁸

⁹⁶ Official United Nations, *Moving Away From The Death Penalty, Arguments, Trends and Perspective*, Office of UNITED NATION COMMISSION OF HUMAN RIGHTS(Oct. 19, 2017 7:30 PM), <http://www.ohchr.org/EN/newyork/Documents/Moving-Away-from-the-Death-Penalty-2015-web.pdf> *"it would have to be enforced mandatorily, or at least with a high degree of probability, on a substantial scale across most categories of homicide, and swiftly. This would increase the probability of innocent or wrongfully convicted people, and people whose crimes had sufficient mitigating circumstances, being executed.*

⁹⁷ Livelaw Research Team, *Public Opinion Towards Death Penalty*, LIVE LAW, (Nov. 6, 2017, 3:45 PM), <http://www.livelaw.in/public-opinion-towards-death-penalty/>

⁹⁸ Law Commission Officials, *262nd Report Death Penalty*, LAW COMMISSION OF INDIA(Oct. 31, 2017, 7:50 PM) <http://lawcommissionofindia.nic.in/reports/report262.pdf>

SUGGESTIONS

Alternative to Capital Punishment

The developing world shows more clinging towards abolition of death penalty. India, which still vacillates in the issue of the end of executions, receives suggestions not only from its Law Commission, Supreme Court, etc. but also from International Organisations, other countries and experts. The main question is, if the country decides to eliminate Death sentence then which other method it should follow. The analysis of the arguments of death penalty shows that whichever alternative the nation decides, it should fulfill the following things:

- Less Cruel and Severe than Death Penalty,
- Has same Deterrence to Death Penalty (if the deterrence of death penalty is presumed)
- Ensures Rehabilitation if possible
- Avoid Irreversibility (like capital punishment), and most important,
- Ensures that the society is not harmed

These characteristics can be imbibed from the another form of severe punishment, life sentence without parole.” The United States based Non Profit Organisation formed by President Abraham Lincoln, the National Academy of Science, remarked life sentence without parole as the “second most severe punishment”.⁹⁹ The newer punishment is considered to have more decipherable accountability.¹⁰⁰ This is because, the punishment is reversible, hence even if an innocent is convicted, he can be set free by the court if found non-guilty. Moreover, the punishment is better as without possibility of parole, the person cannot make contact with the outside world, and hence he is less likely to plan something dangerous to society. Furthermore, Man is known to be a social animal. One of the

⁹⁹ 1DANIEL S. NAGIN & JOHN V. PEPPER, eds., DETERRENCE AND THE DEATH PENALTY (Washington, DC, National Academy of Sciences, 2012)

¹⁰⁰*Supra* Note 97

basic requirement is to have connection with the other world. However, this is denied in the sentence, the man's psyche would deter to commit crime, as he does not want to live in solitude.

Another important point is about the length for which absence of parole be permitted. For example, according to majority people in different states of United States, 45 States do not permit parole in any case for 25 years, other 33 states do not permit parole for the rest of the life.¹⁰¹ Thus majority opines to grant parole for a particular time period only.

On the other hand many countries follow Life imprisonment as one of the alternative. Other countries, like Togo, Ghana, and Mangolia which have/ will abolished/ abolish death penalty, have chosen to take life imprisonment as alternative. Likewise, in India, when capital punishment is commuted, it mostly gets converted to life imprisonment or imprisonment for a term.¹⁰² This was a challenge to the cases referred for capital punishment, because the court has two options only, one of death and other of 14 years imprisonment or life imprisonment.¹⁰³ However, according to the country's need to build a society of less crime, it is suggested that if the country eliminates the Death Penalty, it should take life sentence without parole for whole life. Further the following should be kept in mind:

- The person should not be permitted to meet with other inmates, if it is found through psychological examination of experts that he cannot be rehabilitated.

¹⁰¹ Rapporteur Death Penalty Information Center, *Sentencing for Life, Americans Embrace Alternative to Death Penalty*, NATIONAL CRIME JUSTICE REFERENCE SYSTEM, (OCT 28, 2017 7 PM), <https://www.ncjrs.gov/pdffiles1/Photocopy/142881NCJRS.pdf>, "One of society's best kept secrets is that the length of sentences which people would support over the death penalty are already in place and functioning in most of the United States."

¹⁰²Lok Sabha Secretariat, *Capital Punishment in India*, PARLIAMENT LIBRARY, (Oct. 28, 2017 5:37 PM), http://164.100.47.193/intranet/CAPITAL_PUNISHMENT_IN_INDIA.pdf

¹⁰³Swamy Shraddananda (2) v. State of Karnataka 2008(13) SCC 767

- If he is serious offender, the person should not be allowed to meet any family members, friends, or other near relative.
- The jails should adopt to conduct Yoga and Meditation sessions daily, which can make their mind positive.
- Avoid to grant parole for any circumstance, i.e. even if it is emergency, the parole should not be grant

Other Suggestions

Apart from the punishment, there are other suggestions which need to be improved in India. Firstly, the country needs to improve in the reformatory system of criminals. The offenders, if not given proper reformation can turn to be the worst criminal. No strict punishment can deter them from committing the crime. India lacks a lot in terms of the reformatory system. Therefore, the authorities responsible for the prison system should try to adopt better research which can lead to more reformation and rehabilitation. This was emphasized by Article 10 of ICCPR,¹⁰⁴ that the basic motive of the penitentiary system is to bring “reformation and social rehabilitation” of the offender punished for serious crimes. Hence, the country should undertake further research to improve the prison conditions, bring effective guidelines, and check its effective implementation in all big and small prisons across the country.

Apart from this, various studies have shown that murders are more prevalent in countries with low Human Development Index and big income inequality.¹⁰⁵ Hence, the government should try to undertake various programs in order to reduce the inequality and bring the more development. Thus the factors responsible for crime,

¹⁰⁴UNHRC Officials, *International Covenant on Civil and Political Rights*, OFFICE OF UNITED NATIONS HUMAN RIGHTS, (Oct. 29, 2017 4: 00 PM), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

¹⁰⁵ECOSOC Commission on Crime Prevention and Criminal Justice, “World crime trends and emerging issues and responses in the field of crime prevention and criminal justice”,

like socio-economic such as poverty, inequality, separation, etc. should be given consideration, and attempt should be made towards reducing the crime.

CONCLUSION

In 2013, the Trial Court acquitted 'Mohammad Hussain', a Pakistan National and announced his capital punishment. Mohammed Hussain was involved in the Delhi Bus Blast Case¹⁰⁶ and was charged with criminal conspiracy, murder, and under Explosive Act. In this legal battle he was sentenced to death, and waiting in the death row for eight years. This case depicts the truth of the criminal justice system in India.¹⁰⁷ The death row convict suffer the mental torture of not knowing how much they have to live. Moreover, even if the courts commutes them, then too the amount of mental pressure suffered cannot be emulated. The most reproachable point about capital punishment is its irreversibility and uncertainty. The person once executed cannot be brought back. If there is some discrepancy in the judicial decision, then it is the life of the person taken away.

Capital Punishment is a draconian and inhuman concept. The taking away of person's life cannot be justified for any reason. As the world grew towards human rights and encouraged respect to all humans, the Capital Punishment was highly despised. The punishment was highly applauded in the beginning, but later the exceptions to the rule were created and later crusades related to its abolition have begun. The international organizations and institutions have reformed the world towards eliminating the use of capital punishment. This was done through direct reference towards abolition like 2nd Optimum Protocol on Death Penalty, the International Convention on Civil and Political. It was also done impliedly through other agreements or traties such as Convention against Torture and Cruel, Inhuman

¹⁰⁶News Correspondent, *2005 Delhi Blasts- College to Jail: How cops stole 12 Years of his Youth*, TIMES OF INDIA, (Nov. 10, 2017 4:20 PM), <https://timesofindia.indiatimes.com/city/delhi/college-to-jail-how-cops-stole-12-years-of-his-youth/articleshow/57215328.cms>

¹⁰⁷ PARAMJIT S. JASWAL & G.I.S. SANDHU ED. ET AL. SELECTED ESSAYS ON DEATH PENALTY, CONTEMPORARY ISSUE, 1 (Twentyfirst Century Printing Press 2013)

or Degrading Treatment or Punishment,¹⁰⁸ ICCPR's Convention on Rights of the Child.¹⁰⁹

India also found the unreasonability of capital punishment in subsequent years. Earlier, the award was frequently given, it was even necessary for the court to give reasons if it did not order capital punishment. Later, the principle of rarest of the rare doctrine evolved,¹¹⁰ mandatory death sentence of an offender who commits murder while serving his life sentence, was declared unconstitutional. Apart from this, the Law Commission changed its viewpoint and recommended to abolish death penalty.

The deterrence and retributive arguments supporting death penalty are flawed. Deterrence is suitable in punitive argument, but from the capital punishment perspective either there is absence of empirical data directly dealing with death penalty or the data implied from rates of murder shows independence of deterrence and death penalty.

This brings to the conclusion that, while determining alternative of capital punishment, the problems associated with it should be kept in mind. Succinctly writing, the problems which the other method must inculcate are

- Reduction in crimes of serious offender, which needs to be done by inculcating a deterrent punishment, prevention of communication of the violent offenders with other groups (as he might seek their help and plan something bigger).
- Check on possibility of rehabilitation.
- Avoid the mental trauma similar to that of death row convict.

¹⁰⁸UN Special Rapporteur, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, UNITED NATION HUMAN RIGHTS, (Oct 25, 2017, 6:00 PM)<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

¹⁰⁹Committee on the Rights of the Child, *Convention on the Rights of the Child*, UNITED NATIONS, (Nov. 3, 2017, 3:50 PM), <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

¹¹⁰ 1980(3) SCC 684

- Avoid irreversibility of punishment, thus a flawed decision cannot put the innocent in a position he cannot return.

The scope of criminal justice is not only concerned with penology, but also to the criminal. This deals with the psychological and environmental factors responsible for crime. This aspect can be improved by proper education, living standard, human development, income equality, etc. Though no society can be totally crime free, but the idea is the assurance of maximum prevention of crimes, alongwith the respect for the human dignity and life of criminal. Thus, the method life sentence without parole endeavours to create the society, however the present offender to whom death penalty is given are accused of serious and brutal murder, thus no chance of parole is a reasonable restriction on their life.