CAPITAL PUNISHMENT: A SHIFT TOWARDS AN ABOLITIONISTIC REGIME?

*Justin Jos

The term "capital punishment" depicts the severest and most stringent form of punishment imposed by the legal machinery of any State upon its subjects. By common usage in jurisprudence, criminology and penology capital sentence means a sentence of death.[1] Ancient Hindu civilizations also agreed on the death sentence as an acceptable form of punishment. The moot question is why death penalty was never debated on grounds of legitimacy as a punishment for over all these years? To answer the question we have to understand that from time immemorial death of a criminal was considered just, fair, reasonable and beneficial towards the progress of the society. The value of a criminals' life was insignificant in a society where the State being the all-powerful possessed an apparent divine right to execute a criminal.

Howsoever, in the post-independent India, the 35th Report of the Law Commission of India favored a cautious approach and pleaded its retention as an exceptional penalty.[2] Various eminent jurists have been of the view that capital punishment is justified. Some jurists like Garofalo even went to the extent of saying that capital punishment is similar to a moral war for the good of the society.[3] George Ives was of the opinion that the incorrigible or hopeless criminal should be painlessly removed rather than that the State should have to maintain him unnecessarily.[4] Nevertheless, the abolitionists have also provided the legal community with very convincing arguments. The primordial deterrence justification has now be put to the side because it usually generates more heat than light, and it is essentially a politically motivated distraction deployed to reassure an electorate fearful of crime who are receptive to any purported solution to any offer.[5] Beccaria stated that the State cannot take the life of any individual because under the social contract theory no individual has surrendered his right to life to the State. It was also

[1] Raina, A. K., Notes on Stockholm Declaration for Abolition of the Death Penalty quoted in (Gupta, Subhash) p.17.
[2] Law Commission of India (1967), Thirty fifth Report on Capital Punishment, Vol. I & II. available at lawcommissionofindia.nic.in/cpds1.pdf
[3] Prof. (Dr.) Mustafa, Faizan & Singh, Yogesh Pratap, Abolition Of Death Penalty& Failure Of Rarest of Rare Doctrine in India, Paper presented at International Seminar on Relevance of Indian Penal Code in Controlling and Combating Crime In Modern Age, Dr. RML National Law University, Lucknow & Centre For Criminal Justice Administration on December 14-15, 2010 available at www.rmlnlu.ac.in/news_events_pdf/report_international_seminar.pdf.
[4] Sethna, J.M.J., Society and the Criminal, fifth ed. (1989) Tripathi, Bombay, p. 231.
[5] Yorke, Jon, Against the Death Penalty: International Initiatives and Implications, 2008, Ashgate Publication, p. 249.

argued by Hentig that judicial error[6] might invade and result in execution of the innocent. Death penalty in reality promotes sympathy for the criminal and hardly leads to any form of deterrence within the general public regarding the crime committed by the criminal. To argue on a philosophical premise we have to understand that death punishment cannot qualify as a punishment per se because the death relieves a person of the woes and wretchedness of the world. If by death we cut off his joys and happiness in the same measure we cut off his sorrows and humiliation.[7] There is inherent discrimination on grounds of sex when we question awarding of death sentences to criminals. Two per cent of men but only one tenth of one per cent of women convicted of murder are condemned to die.[8] This discrimination has also pervaded the racial grounds and it is evident that black males are more prone to be condemned to death sentence than white males.[9]

The justification on behalf of the State is that the rising rate of terrorism, radicalism and extremism compels the State to execute hardened criminals. Four international instruments which are currently in force in order to abolish death penalty are The Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty, Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, ETS no. 114, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, CETS No. 187 and The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organization of American States in 1990, OASTS 73.

Despite of the above protocols Articles 6(1) and (2) of the International Covenant on Civil and Political Rights do not abolish death penalty *in toto*. The only qualifications under the said provisions are that it should not be arbitrarily inflicted and shall be imposed only for punishing the gravest of the grave crimes. However, Articles 6(3) States that amnesty, pardon or

[6] Henting, H.: Punishment – Its Origin, Purpose and Psychology, London Press (1937), pp.169-170.
[7] Green, W.A., An ancient Debate on Capital Punishment, at p. 51.
[8] U.S. Bureau of Justice Statistics (1990:9), findings of a survey of state prison inmates in 1986 available at http://www.bjs.gov/content/pub/ascii/Pjimy96.txt.
[9] Brewer, Thomas W., Race and Juror's Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination, Vol. 28, No. 5 (Oct., 2004), pp. 529-545 available at URL: http://www.jstor.org/stable/4141718

commutation of the sentence of death may be granted in all cases. In addition, the United Nations Declaration of Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on December 9, 1975 and United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on December 10, 1986 also indicate the disapproval of death penalty.

A focus of abolitionist activity in recent years has been the push for the moratorium on executions.[10] The idea of a moratorium as a campaign dates to the initial activity in the United Nations in the late 1960s and the same revived in the December 2007 resolution calling for a global moratorium on executions with a view to total abolition was passed by the UN General Assembly.[11] The resolution which asks the member States to progressively restrict the use of death penalty and ensure that international standards are met was adopted with 104 votes in favor, 54 against and 29 abstentions.[12] The general assembly can only make non-binding legal recommendations so, although adoption of moratorium resolution conveys a strong political message to retentionists, there is no legal obligation stopping States from handing down execution sentences.[13]

The demand to abolish the death penalty is well founded provided there is an intellectual debate regarding alternatives to death penalty. It has been observed that in countries which have abolished death penalty life imprisonment without parole is the closest punishment which can be pronounced. Such a punishment is supposed to achieve the same "benefits" as the death penalty but it is awarded to protect the ulterior interests of the State. A sentence of life imprisonment without parole is harsher than that of death penalty and it also incapacitates the offender for the rest of his life without executing him. The possibility of executing an innocent is also washed away through this modality of punishment and along with it satisfies the retributive element to a great extent.

[10] Peter Hodgkinson, Lina Gyllensten and Diana Peel, Capital Punishment Briefing Paper, Chapter 11: Capital Punishment: A review and Critique of Abolition Strategies, University of Westminster available at http://www.westminster.ac.uk/research/a-z/centre-for-capital-punishment-studies
[11] United Nations General Assembly Resolution 62/149.
[12] *Supra* Note 10.
[13] *Id.*

Amidst, this discourse on the contemporary issues regarding death penalty we are obliged to delve into the impact on the victim and on their kin. Even though there is no need for a separate victim service as State is discharging the obligation to prosecute the criminal on behalf of the society as a whole and the loss which is suffered by the victim is already compensated for or equaled by the retributive act of State. Whilst this is a good argument for not including the victim's perspective in the trial process, it should not replace the development of services to meet the material and psychological needs of the individuals who are primary or secondary victims of crime.[14] The focus on secondary victims along with the victim reflects establishment of restorative justice in the modern context of criminology.

The Indian scenario with respect to death penalty has shifted its focus from a Retentionistic to an Abolitionistic regime. Erstwhile, the Court under the Code of Criminal Procedure (Cr.P.C) 1898 was not obligated to cite reasons for conferring death sentence but under the new Cr.P.C of 1973 the court is mandated to record reasons for awarding death sentence. It is evident that the revision regarding death sentence has gradually been liberalized in favour of the condemned person.[15]

In *Jagmohan Singh*[16] case, the court held that held that deprivation of life is constitutionally permissible provided it is done according to procedure established by law. However, the court tried to eliminate capital punishment in several cases[17] in an indirect manner through arguing in favor of upholding Article 14, 19 and 21. However, the court in *Bachan Singh*[18] upheld the constitutionality of death sentence but also laid down the doctrine of "rarest of the rare case". Court summarizing the doctrine added that "a real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare case when the alternative option is unquestionably foreclosed."[19] Under Section 303 of IPC, mandatory death sentence was awarded in case of a life convict committing murder. This section was held *ultra vires* by the court in the case of *Mithu*

[14] *Id.*
[15] Siddique, Ahmad, Criminology – Problems & Perspective, Second ed. (1983), p. 297.
[16] AIR 1973 SC 947.
[17] Mustafa, Faizan , Commutation of Death Sentence – Inconsistent Response of the Supreme Court, Civil & Military Law Journal Vol. 28, No.1, pp. 23-31.
[18] 1982 AIR 1325.
[19] AIR 1983 SC 473.

Singh v. State of Punjab[20] citing that no rational distinction is discerned between a person who commits a murder after serving out the sentence of life-imprisonment and a person who commits a murder while he is still under that sentence. Such an arbitrary classification is violative of Article 14 and any such imposition of death penalty is out of tune with the philosophy of an enlightened constitution like ours.[21] It is clear from the above discussion that mandatory death sentence is held as the negation of civil liberty jurisprudence and a relic of out-dated era. The foundation of a modern constitutional democracy rests on the shoulders of individual liberalism. The accused has a fundamental right to life and liberty but the idea of imposition of death penalty resulting in deprivation of life is not tenable in the land which upholds fundamental rights as sacrosanct.[22] Sec. 2(1) of the Scheduled Caste and Scheduled Tribe Prevention of Atrocities Act, 1989, Section 31A of The Narcotic and Psychotropic Substances (Amendment) Act 1988, The Arms (Amendment) Ordinance (No.5) of 1988 are some of the examples which provide for capital punishments. It is however surprising to note that as many as 52 sections of the Indian Penal Code (I.P.C) provide for life imprisonment.[23]

Therefore, we can understand that the criminal jurisprudence in our country is in dichotomy to the application of death penalty in the concrete sense. The vital element of "accused presumed innocent until proven guilty" is in practicality reversed to "accused if guilty then to be hanged" on account of authorization death sentences. The impression of inclusion of death penalty in our jurisprudence was with the aim of creating deterrence among the society towards crimes of grievous nature but howsoever the outcome is totally contradictory to it. The shift in the criminal jurisprudence towards the Abolitionistic regime is palpable. This ultimately leads us to the question "How far is death penalty legitimate?"

[20] 1983 AIR 473.
[21] *Id*. Concurring opinion of C.J. Chandrachud J. Chinnappa Reddy stated at para. 712.
[22] Selvi & Ors. v. State of Karnataka & Anr., Criminal Appeal No. 1267 of 2004.
[23] *Supra* Note 3.

BIBLIOGRAPHY

Books & Articles

- Raina, A. K., Notes on Stockholm Declaration for Abolition of the Death Penalty quoted in (Gupta, Subhash) p.17.
- Prof. (Dr.) Mustafa, Faizan & Singh, Yogesh Pratap, Abolition Of Death Penalty& Failure Of Rarest of Rare Doctrine in India
- Henting, H.: Punishment – Its Origin, Purpose and Psychology London (1937), pp.169-170.
- Yorke, Jon, Against the Death Penalty: International Initiatives and Implications, 2008, Ashgate Publication, p. 249.
- Sethna, J.M.J., Society and the Criminal, fifth ed. (1989) Tripathi, Bombay, p. 231.
- Green, W.A., An ancient Debate on Capital Punishment at p. 51.
- Brewer, Thomas W., Race and Juror's Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination, Vol. 28, No. 5 (Oct., 2004), pp. 529-545
- Peter Hodgkinson, Lina Gyllensten and Diana Peel, Capital Punishment Briefing Paper, Chapter 11: Capital Punishment: A review and Critique of Abolition Strategies, University of Westminster.
- Siddique, Ahmad, Criminology – Problems & Perspective, Second ed. (1983), p. 297.
- Mustafa, Faizan , Commutation of Death Sentence – Inconsistent Response of the Supreme Court, Civil & Military Law Journal Vol. 28, No.1, pp. 23-31.

Reports

- Law Commission of India (1967), Thirty fifth Report on Capital Punishment, Vol. I & II.
- U.S. Bureau of Justice Statistics (1990:9), reporting findings of a survey of state prison inmates in 1986

UN Resolutions

- United Nations General Assembly Resolution 62/149.
- United Nations Declaration of Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
- United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.