

# INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

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Volume 3 | Issue 2

2020

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# Judicial Killing: Justice or Judicial Murder

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DR. ASHU DHIMAN<sup>1</sup> AND MR. PARAM BHAMRA<sup>2</sup>

## ABSTRACT

*Capital Punishment is the most extreme penalty imposed on any offender for committing any heinous crime such as murder or waging war against India etc., India currently follows reformatory theory of punishment where judiciary aims to do welfare of the accused and try to reform them into responsible members of the society, once they are out of prison. But, Death penalty links to the concept of deterrent and retributive theory, as it provides strictest punishment following the principle of “an eye for an eye”.*

*In this paper, authors focus and analyze the various reasons on whether the death penalty presents justice to the society or forces complete injustice to the accused. There are many arguments in favor and against providing death penalties; this paper concludes on whether there are enough “in favor” arguments which provide another person the authority to decide the fate of the accused.*

**Keywords:** Human Rights, Violation, Convention, Rare, Justified

## I. INTRODUCTION

*“The death penalty is not about whether people deserve to die for the crime they commit. The real question of capital punishment in this country is Do we deserve to kill?”*

— *Bryan Stevenson, Just Mercy: A Story of Justice and Redemption*

In general sense, death penalty does not make quite sense as if we take example of a commission of a murder by a perpetrator and him getting a death sentence for the crime committed, how does killing a person is punishment given to convict for killing a person? It is mere useful to provide or fulfil revengeful sentiments of the person who lost their loved or dear ones in the crime committed by perpetrator but death penalty is not exactly the first choice of judiciary in India.

Death penalty is the punishment where the state orders the killing of its own citizen (in most cases) when the said person or citizen commits a crime which is heinous in nature and thus deserves to die by the due process of law. The question which comes out as stated by *Bryan*

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*Stevenson* in his book that, as humans, do we deserve to kill another human? Just because, he had not abided by our laws and rules? Though *ignorantia juris non excusat* states that ignorance of law is no excuse, but if a member of society is unaware of such rules or laws which might led him to execution. Does he really deserve to die? Is death penalty helpful or beneficial to anyone except providing vengeance or revenge?

Death penalty is considered as a possible deterrent for those crimes which are too heinous in nature which leaves a scar on the face of society as whole, giving death penalty is considered to stop others from doing the same act and saving the society from facing the horror again, but this is not specially proven fact that death penalties refrain others from doing the same act.

A Famous American author and a retired naval officer *Robert A Heinein* asked the question that, “*Under what circumstances is it moral for a group to do that which is not moral for a member of that group to do alone?*” “It states the example of a death punishment in case of murder. The author argued that, if a person kills the other, what gives the majority of the people to kill the accused, as both parties are indulged in killing, the only difference is support of public.

In India, a person can expect Death penalty is cases such as;

- 1) When a person is engaged in or a party to a criminal conspiracy<sup>3</sup>.
- 2) When a person wages war against India<sup>4</sup>.
- 3) When a person abets mutiny in armed forces of India<sup>5</sup>.
- 4) When a person gives or fabricates evidence which is false to procure a conviction on any of the grounds of death punishment<sup>6</sup>.
- 5) When a person kills someone<sup>7</sup>.
- 6) When a person abets the suicide of a minor<sup>8</sup>.
- 7) When a person kidnaps someone for ransom<sup>9</sup>.
- 8) When a person or group of person rapes a girl below twelve years of age<sup>10</sup>.
- 9) When a group of person committing dacoity and in the course of such dacoity, any

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<sup>3</sup> Indian Penal Code, 1860 (Act 45 of 1860) s. 120

<sup>4</sup> Indian Penal Code, 1860 (Act 45 of 1860) s. 121

<sup>5</sup> Indian Penal Code, 1860 (Act 45 of 1860) s. 131

<sup>6</sup> Indian Penal Code, 1860 (Act 45 of 1860) s. 194

<sup>7</sup> Indian Penal Code, 1860 (Act 45 of 1860) s. 302 and s. 303

<sup>8</sup> Indian Penal Code, 1860 (Act 45 of 1860) s. 305

<sup>9</sup> Indian Penal Code, 1860 (Act 45 of 1860) s. 364A

<sup>10</sup> Indian Penal Code, 1860 (Act 45 of 1860) s. 376AB, Protection of Children from Sexual Offences Act, 2012 (Act 32 Of 2012) s. 42 and The Criminal Law (Amendment) Act 2018 (Act 22 Of 2018).

member of such group murders someone, all members of the group will be liable for death penalty<sup>11</sup>.

- 10) When a person inflicts such an injury on his rape victim which leaves her in *vegetative state* or *death* or if he is a repeat offender<sup>12</sup>.
- 11) When a person aids or abets the offence of *Sati*<sup>13</sup>.
- 12) When a person is repeat offender in trafficking drugs<sup>14</sup>.
- 13) When a person manufactures or sale poisonous alcohol which leads to death of the drinker<sup>15</sup> (applicable only in Gujarat).

All of the crimes stated above are inhumane and heinous in nature and when committed leaves a scar on the society or the person who suffered the offence along with their families. The question that comes up is, does death penalty really deters commission of such crimes?

## II. REASONS AGAINST DEATH PENALTY

Death penalty is the end, end of suffering on the part of accused, but can death penalty provide salvation to the victim or victim's family? Surely, death penalty provides closure but is such closure worth the life of other human being?

There are further many reasons to get the death penalty law abolished as once the penalty is executed, it is impossible to take it back on appearance of new evidences. The spiritual view, that "*only God has the authority to give and take life*", also supports the abolition of death penalty.

If a person is burning up in the vengeance or in anger and plans to commit such crime against him or her, which consequence will provide him death penalty, or in simple words, simple and swift death; which might do a little to deter him against commission of such crime. But imprisonment for life deters the person to be bound by it for entire remaining time of his life and he will be made to live for whole life as punishment of the crime committed by him; this scenario might provide him better deterrence as compared to that of death penalty.

If a person dies by the act of other and that other person is on trial and possibly facing death sentence, the family or friends of accused might do anything to stop that from happening and may commit some illegal act themselves against the family of the victim or witnesses. Author

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<sup>11</sup> Indian Penal Code, 1860 (Act 45 of 1860) s. 396

<sup>12</sup> Indian Penal Code, 1860 (Act 45 of 1860) s. 376A and The Criminal Law (Amendment) Act, 2013 (Act 13 of 2013).

<sup>13</sup> The commission of Sati (Prevention) Act 1987 (Act 3 of 1988) s. 4.

<sup>14</sup> Narcotic Drugs and Psychotropic Substances Act 1985 (Act 61 of 1985) s. 31A.

<sup>15</sup> Bombay Prohibition (Gujarat Amendment) Bill, 2009

here doesn't mean that the justice should not be delivered due to fear but because the intensity and the grave nature of the punishment might push someone innocent (family or friends) over the edge into doing something which is not according to the law.

Author believes there are five such reasons on which bases, the death penalty should be abolished, and such reasons are;

- 1) Permanency of Nature
- 2) Ineffective deterrence
- 3) Lack of Humane way to kill
- 4) Violation of Right to life
- 5) Rapid Disappearance of death penalty in International community

**(A) Permanency Of Nature**

Let's say a person is held liable for theft or arson or any other crime which provides no scope of death penalty. Judge finds the person guilty and give him imprisonment, years later with inventions or innovations in technology new evidences arises that the accused in actuality is innocent and he did not commit such crime. In such a case, a review petition can be filed in the court and if the judge is satisfied on the new evidence, the accused can be released and set free only because he was alive.

Let's consider the cases where death penalties have been granted and years later, the court comes to the knowledge that the accused who has been hanged was actually innocent, in such cases, the court can reverse its judgement but it won't bring back the deceased.

Although in the case of *Bachan Singh v. State of Punjab*<sup>16</sup>, the Supreme Court of India held that the death penalty can only be granted in "rarest of rare cases". Then in further cases such as, *Jagmohan Singh v. State of Uttar Pradesh*<sup>17</sup> and *Rajendra Prasad vs State of Uttar Pradesh*<sup>18</sup>, Supreme Court clearly and expressly established the doctrine of rarest of rare case in the Indian judiciary making the scope of death sentence to be used only in rare cases and contradicting the intent of legislation to provide death sentences on thirteen grounds mentioned above.

As seen from the above, Judiciary in India has adopted the view of avoiding Death penalties

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<sup>16</sup> *Bachan Singh vs State of Punjab* (1980) (2 SCC 684)

<sup>17</sup> *Jagmohan Singh vs State of Uttar Pradesh* 1973 AIR 947, 1973 SCR (2) 541

<sup>18</sup> *Rajendra Prasad vs State of Uttar Pradesh* 1979 AIR 916, 1979 SCR (3) 78

as much as possible, as in the case of *Mithu v. State of Punjab*<sup>19</sup>, the court declared *Section 303 of Indian Penal Code* who provided only punishment of death as unconstitutional and held it to be violative of *Article 14* and *Article 21*.

The permanency of such death sentences can be observed by following the case of *Cameron Todd Willingham*<sup>20</sup>, he was alleged to start a fire in which his three daughters got killed, the accused used to claim his innocence but no good came out of it and the man was awarded with death sentence which got executed in Texas, 2004. After his execution, further evidence surfaced which clearly stated his undoubtable innocence but nothing can be done as the man was already dead and no act of state can bring him back.

### **(B) Ineffective deterrence**

There's no scientific or genuine proof that the death penalty deters and stop the perpetrators from committing crimes which are inhumane and serious in nature. If that were the case, there should be no more rape cases after *Nirbhaya* rapists got Death sentence but it didn't deter the perpetrators of *Priyanka Reddy* or *Unnao* rape case. If death sentences deter the perpetrators, then why are there still the cases of murders or kidnapping for ransom or drug trafficking etc.

Canada took a huge initiative in securing human rights and abolished death sentences in the country from their criminal code in 2014. After the abolition in 2016, the rate of homicides in the country hit rock bottom and become lowest since 1966<sup>21</sup>. This study reveals the finding which directly contradicts the theory of using death penalty as deterrent theory in India.

An expert, *Jeffrey Fagan*, a Law professor teaching at Columbia University, US states that there is no scientific or credible evidence that proves that death penalty in actuality deters criminals from committing crimes<sup>22</sup>. It has been stated by a study<sup>23</sup> that majority of criminologists, seem to believe that death punishment does not deter the crimes as more than that of long term of imprisonment.

### **(C) Lack of humane ways to kill**

There is no universally accepted humane way to carry out the death sentence, it doesn't matter what the offender had done to get that sentence, what matters is conscience of the executor of

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<sup>19</sup> *Mithu Singh vs State of Punjab*, 1983 AIR 473, 1983 SCR (2) 690

<sup>20</sup> *Innocent Project*, Retrieved from <https://www.innocenceproject.org/cameron-todd-willingham-wrongfully-convicted-and-executed-in-texas/> on 25/12/2019

<sup>21</sup> *Amnesty International*, Retrieved from <https://www.amnesty.ca/news/canada-marks-forty-years-without-death-penalty> visited on 25/12/2019

<sup>22</sup> ABC News, *Fact check: No Proof the death penalty prevents crime*, 2015, available at <https://www.abc.net.au/news/2015-02-26/fact-check3a-does-the-death-penalty-deter3f/6116030>

<sup>23</sup> Michael L. Radelet & Traci L. Lacock, "Do executions lower homicides rates?: The views of Leading Criminologists" *The Journal of Criminal Law and Criminology* Vol. 99, No. 2, p. 504

that execution. There are many ways such as hanging, lethal injections, electrocution, shooting, beheading etc.

In hanging the rope is tied around the neck and ground beneath the feet is displaced, it is believed that body weight of the person should snap the neck and it would be a quick and painless death but it isn't always the case and there are some cases in which the wait was up to thirty minutes before the death. In electrocution, the process is to run electricity through the body of the person to kill him but in many cases, smoke and flames were coming out of the body of the person condemned to die<sup>24</sup>.

Beheading and shooting might be less painful and quick in nature, but it depicts a level of violence which is unhealthy for the persons indulged in carrying out such execution.

Lethal injection, which was considered as a most humane way to kill a person by administering him sedatives and drugs which can cause paralysis and stop the heart. As the person will be on sedatives, he can't feel the pain and the dosage of paralysis inducing drug will refrain him moving and the drug can finally stop the heart and it'll all be over without any cruelty. It has been stated that the sedatives can wear out and the condemned may feel the pain being caused, but they cannot do anything due to dosage of paralysis, it has been reported that the receiver of such injection might be subject to tortured death as they are amounted to an extreme pain<sup>25</sup>.

#### ***(D) Violation of right to life***

*Tim Kaine*<sup>26</sup>, stated that, "Life is sacred whether it is abortion or death penalty".

Supreme Court in *Bachan Singh v. State Of Punjab*<sup>27</sup>, stated that death punishment will be given only in rarest of rare cases, but didn't define those rare cases, which left it open for wide interpretations and loopholes. *Constitution of India*<sup>28</sup>, provides for the *Right to life and personal liberty* where the state is directed to protect the right of life and personal liberty except according to the process which has been established by Law. This clause "except according to the procedure established by Law" provides the state with authority to carry out judicial killing. Killing of a person violates his fundamental right to life given to him whether

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<sup>24</sup> Stephanie Pappas, Execution Science: What's the Best way to Kill a person", *LIVE SCIENCE*, Oct 01. 2010, available at <https://www.livescience.com/10767-execution-science-kill-person.html> last visited on March 24, 2020.

<sup>25</sup> Associated Press, *Botched execution likely painful, doctors say*, 2006, available at [http://www.nbcnews.com/i/d/16241245/ns/us\\_news-%20crime\\_and\\_courts/t/botched-execution-likely-painful-doctors-say/#.XnnA4i0Q2L-](http://www.nbcnews.com/i/d/16241245/ns/us_news-%20crime_and_courts/t/botched-execution-likely-painful-doctors-say/#.XnnA4i0Q2L-)

<sup>26</sup> Timothy Michael Kaine is an American lawyer and politician serving as the junior United States Senator from Virginia since 2013. A member of the Democratic Party, he previously served as the 38th Lieutenant Governor of Virginia from 2002 to 2006 and 70th Governor of Virginia from 2006 to 2010

<sup>27</sup> Supra note 14

<sup>28</sup> The Constitution of India, art 21.

by domestic law<sup>29</sup> or international law<sup>30</sup>, whichever he is subjected to.

### ***(E) Rapid disappearance of death penalty in international community***

There's rapid trend of abolishing the death penalty among International community as according to *Amnesty International*, 101 states have abolished the punishment of death in their countries irrespective of the offence committed, whereas 140 countries have abolished the practice or law of death sentence<sup>31</sup>.

The trend in abolishing the death penalty can be observed due to raising awareness of citizens of their fundamental rights and misuse of the death penalty by the government for persecuting and executing political prisoners. It is believed that if people raise their voice against the government, exercising their fundamental right to speech and expression, the government can show the protests as armed insurrection and execute the protestors. This situation contains a lots of if's and but's but there is still a possibility of it. That is the reason that most of the countries of the world are abolishing the provision of death sentence or introduced a moratorium, an agreement to suspend the said policies<sup>32</sup>.

## **III. DEATH PENALTY FOR RAPE IN FOREIGN COUNTRIES AND WHETHER IT IS DETERRENT OR NOT?**

It has been noticed globally that most of the states have abolished the practice of awarding capital punishment as in Democracies people have fundamental rights and countries with the scope of death penalties, can execute political prisoners on false cases or can try civilians exercising their rights.

If we take the example of foreign countries in the context of offence of rape, who are considered as, "*Pro-capital punishment Countries*" such as UAE, Egypt or Afghanistan. We can analyze their statutory punishment and how much deterrence they might cause

a. *Egypt* - Criminal Code<sup>33</sup> used to grant any perpetrator who committed the offense of rape on the victim, an option to marry the victim if he want to avoid the penalty incurred upon him. But Presidential Decree<sup>34</sup> of 2011, enhanced the punishments and provided death penalty

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<sup>29</sup> Supra Note 26.

<sup>30</sup> United Nations, General Assembly resolution 217A, U.N. Doc A/810 at 71, adopted on 10 December 1948 and came into force the same day, art. 3.

<sup>31</sup> Infoplease, *The Death Penalty Worldwide*, 2017, available at <https://www.infoplease.com/world/political-statistics/death-penalty-worldwide>

<sup>32</sup> Reality Check Team, "Death Penalty: How many countries still have it?", BBC News, 14 October 2018, available at <https://www.bbc.com/news/world-45835584> last visited on 24 March 2020.

<sup>33</sup> Criminal Code of Egypt, 1992, art. 291

<sup>34</sup> Presidential Decree Promulgating Law No. 11 of 2011



for offences of rape. According to a poll conducted after amendments and strictening in laws<sup>35</sup>, *Cairo* which is the Capital of Egypt is considered as one of the most dangerous city for women.

b. *United Arab Emirates* - Article 354 to Article 357<sup>36</sup> talks about the cases of Rape in United Arab Emirates. The Penal Code of UAE gives death penalty to the offender if he is found guilty of using coercion to have sexual intercourse with the female<sup>37</sup>. But according to statistics provided, rape rate in United Arab Emirates has increased from 1.3% to 1.5%<sup>38</sup>.

c. *Afghanistan* -Rape is a crime in Afghanistan and rapist can be prosecuted legally for committing the crime, but reality is very much horrifying as the cases of the rape is not commonly and very rarely reported to the authorities because of the threats or risks that a female has to incur if they file complaint against her rapist. Victims of the rape, firstly suffers from the horror of getting raped then she face fear of being subjected to violence as she become subjected to victim of honor killings by her family along with fear of being getting attacked by the proper judicial authorities of the country as they might get charged with the crime of adultery, a crime which is punishable by death sentence in the country. As reported by Afghanistan Independent Human Rights Commission (AIHRC) the statistics of the rape are shocking and it is to believe that majority of the crime are not been reported due to various reasons<sup>39</sup>.

As we can see from the analysis of the death penalty in the following countries, there is no genuine evidence which states that providing death penalty in actuality deters the perpetrators from committing such crimes.

#### IV. REASONS IN FAVOUR OF DEATH SENTENCES

*Bill Mayer*, a comedian states that, “*Every Killer you kill, never kills again*”. It is obvious that awarding life imprisonment to the convict rather than death sentences, incurs the cost of the living of the inmate up on the state for the rest of life and state need to maintain the wrong doers of the society on the cost of tax payer’s money.

Executing a murder convict would not bring back the victim, but it could bring the sense of

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<sup>35</sup>Belinda Goldsmith, “EXCLUSIVE –Cairo named most dangerous megacity for women”, *Thomson Reuters Foundation News*, 16/10/2017, available at <https://af.reuters.com/article/africaTech/idAFL8N1L74J3> (last visited on 17/01/2020)

<sup>36</sup>Federal Law No. 3 / 1987 THE PENAL CODE

<sup>37</sup>Federal Law No. 3 / 1987 THE PENAL CODE, art. 354.

<sup>38</sup>Nation Master, *United Arab Emirates Crime Stats*, 2020, available at <https://www.nationmaster.com/country-info/profiles/United-Arab-Emirates/Crime>

<sup>39</sup>Ahmad Shah Ghani Zada, “240 Cases of honor killing recorded in Afghanistan, AIHRC”, *The Khaana Press News Agency*, 09/01/2013, available at <https://www.khaama.com/240-cases-of-honor-killing-recorded-in-afghanistan-aihrc-2177/> (last visited on 25/03/2020)

justice to the victim's family. Despite being no scientific certainty that death punishment can deter commission of such but even if one life gets saved from murder or rape, perpetrator having death sentence in mind. This would be worth it as death sentence cannot only be seen as deterrent theory but also as Preventive measure.

The main and massive concern is that in India, if the death penalty is abolished, it might lead to the rapid increase in the crime rates which are already at higher rates and numerous laws will be broken and heinous and inhumane acts will be committed.

Provision of death penalty under a statute, doesn't necessarily mean that a judge has to give him the said punishment, the provision has the scope to be used by police officers in negotiating the co-operation of the accused and influence him to help the authorities, which might help the greater good in catching the bigger fish in an ongoing investigation.

Death penalty further stops the accused to commit the crime again, as the accused may have feelings of hatred towards the witnesses who witnessed against himself or the family or friends who victim who lodged the complaint against him, this provision helps them in living their life peacefully.

Death penalty is not arbitrary in nature as judges give death penalty in rarest of rare cases. We need to have faith in our judicial system that it won't give such extreme punishment to an innocent. Even if a judge has a slight benefit of doubt, he'll refrain himself from giving out death penalty.

## V. CONCLUSION

There can be no possible end to this debate as death punishments has both its benefits and cons. On the one hand it can ensure justice to the victim, on the other hand it is violative of human rights of accused. On the one hand, it deters the perpetrators and can possibly save lives but on the other hand, it has no conclusive proof of such deterrence. On the one hand, it control's or limit the crime rates in the country to minimal whereas on the other hand, if wrongfully decided, can lead to loss of life of an innocent person.

As stated above, there are various factors to be considered and every situation is wholly different from the previous one. There can be no certainty that what happened in *Canada* after abolishing the death penalty, same will happen in *India* too.

At the end, the author would like to conclude with saying that death penalty should be abolished in India considering the reasons stated above, as the wrongful judgement given against one innocent can cause insufferable harm to the image and public's trust on judiciary

and can lead to massive protests all over India.

## **VI. SUGGESTIONS**

Death penalty is not as deterrent as is needed for people to refrain from committing such atrocities on the society, but other types of punishments can be followed in spite of death penalty such as;

1. Life Imprisonment without parole
2. Rigorous imprisonment
3. Solitary Confinement
4. Providing reformatory therapy

Giving these type of harsh punishment might actually deter the perpetrator from committing future crime as rather than just dying and be done with it, they have to live their whole life with the burden of the crime and face harsh and strict type of punishment, which can lead to their reformation and one day if they had good behavior, they have the scope to come back to the society and become a contributing member of the society.

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