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# DISCUSSING DETERRENT THEORY OF PUNISHMENT IN CRIMINOLOGY WITH SPECIAL REFERENCE TO AWARD OF DEATH PENALTY IN INDIAN CRIMINAL JUSTICE AND ROLE OF JUDICIARY

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## INTRODUCTION TO THE TOPIC

Deterrent theory is based on the Overarching principle that by instilling fear of punishment can prevent individuals from committing crimes. This aims to discourage the individual offender from committing further crimes by instilling fear of punishment<sup>1</sup>. This principle was established in the landmark case of **Bachan Singh v. State of Punjab (1980)**<sup>2</sup>, which is only in the case of exceptionally heinous and warrants such a punishment. As per the **National Crime Records Bureau (NCRB)**, there were 144 death sentences awarded in 2021. In 2022, India saw the highest number of death sentences which is 165 the highest in over two decades. By the end of 2023, there were 561 prisoners in death Row.

Other examples may include **Yakub Memon** convicted terrorist in the 1993 Mumbai bombings. The Supreme Court highlighted the deterrent effect of the death penalty in cases involving acts of terrorism that threaten national security. While it aims to prevent heinous crimes by instilling fear, the effectiveness and ethical implications of capital punishment continue to be subjects of intense debate. Balancing the need for justice and the protection of human rights remains a critical challenge for policymakers and the judiciary in India.

### Principles of Deterrent Theory:

To 'deter' is to Abstain from doing any wrongful act. The deterrent theory is closely associated with the utilitarian philosophy, which emphasizes the greatest good for the greatest number. Philosophers like Jeremy Bentham and Cesare Beccaria were strong proponents of this theory.

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<sup>1</sup> Deterrent Theory of Punishment, *IPleaders blog* <https://blog.ipleaders.in/deterrent-theory-of-punishment/> (last visited Nov. 18, 2024).

<sup>2</sup> (1982) 3 SCC 24

This theory advocates that punishment should be severe which outweighs the benefit derived from such crime. Critics argue that this does not hold importance in the cases where the cause is more individualistic.

Major Exponents Thomas Hobbes, Cesare Beccaria, and Jeremy Bentham. **Hobbes** in his work 'Leviathan' propounded There exists a social contract between the state and individual, which arises due to selfish nature of human, this results in competitiveness. With the help of social contract state grants protection when individual surrender some of their right in order to gain security.

*"It is better to prevent crimes than to punish them<sup>3</sup>."*

- 1. Utilitarian Approach:** Bentham argued that prevention of future crime is the main aim of punishment which unlike revenge or vengeance. He argued that punishment should serve a utilitarian purpose, benefiting society by deterring criminal behavior.
- 2. Certainty and Swiftness:** Crime should be certain; that means once crime is committed punishment should be given without any exception. Swiftness of punishment ensures the connection between crime and its consequence.
- 3. Publicity:** Publicity of punishment serves as a visual representation of the consequences of crime. This helps in curbing future crimes and discouraging potential offenders.
- 4. Severity:** The Punishment should be proportionate to the crime committed, which can deter crime effectively. Balanced approach should be taken in this regard while awarding punishment.

The emphasis on proportionate, certain, and swift given by Cesare Beccaria on punishment, has highly influenced criminal policy in the present scenario. Beccaria's Work has guided many parts of the world to abolish death penalty and remove solitary confinement and other forms of torture.

*"The greatest happiness of the greatest number is the foundation of morals and*

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<sup>3</sup> Cesare Beccaria "on Crimes and Punishments"

*legislation<sup>4</sup>.* "(Jeremy Bentham, 1776)

Beccaria philosophy in regards to the purpose of punishment, which is to prevent future crime, heavily influenced Bentham. "Bentham's theories integrate sociological and hedonistic perspectives by emphasizing the role of pleasure and pain in social control and individual behavior. The Panopticon, for example, uses the fear of punishment (pain) to regulate behavior, while his utilitarianism seeks to maximize overall happiness (pleasure) in society. This integration highlights the interplay between individual motivations and societal structures in shaping human behavior.

critics argues that though deterrent theory infliction of fear sometimes may act as deterrent for future crimes, but there are instances where death penalty is given and in that crowd pick-Pocketing takes place. Also, there are crime which is committed by individual in the heat of the moment without any prejudice which this theory fails to explain.

### **Deterrent Theory and Capital punishment:**

Capital punishment is the ultimate form of punishment backed by Deterrent theory. As per the severity of the crime Death penalty is given. As in the case of **Machhi Singh v. State of Punjab (1983)<sup>5</sup>**, principle of rarest of rare was supported by the judges which further resulted in expansion of this concept. Death penalty is given in the case of murder, rape, terrorism or in any other heinous crimes which varies from case to case basis. Leading examples are; **Nirbhaya case** where death sentence was imposed and **Yakub Menon** case of terrorism et cetera.

Unlike the Retributive Theory, which only believes that Punishment is "an end in itself," the Deterrent theory advocates for the prevention of future crime by instilling fear of the consequences.

Hence, a proper balance is required between goal of punishment and human rights. Awarding of Capital Punishment is a debated issue on certain 'moral' and 'religious basis'.

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<sup>4</sup> Jeremy Bentham: A Fragment on Government(1776)

<sup>5</sup> 1983 AIR 957

## Death Penalty and Criminal justice System in India:

As discussed, the principle of “ Rares of rare” case, forms the basis of Capital punishment in India. Through Various landmark judgments, a balance approach towards Balancing the ultimate goal of the deterrent theory and human rights has been the governing principle of Criminal justice system in India. The death penalty still remains a controversial topic in India because of its ‘effectiveness’ and also on ‘ethical’ and moral implications. In **Macchi Singh v, State of Punjab**<sup>6</sup> case, some guidelines were given while determining death sentence. A middle ground is taken in India, which also quite evident from the fact that appeal and review lies in the case of death sentence to the High court and Supreme court in India. Some argue that it's **immoral** to keep one person alive at the cost of the lives of others. Others argue that a lesser penalty, like life imprisonment, would be just as effective a deterrent. The Supreme Court has upheld through cases such as **Jagmohan Singh V. State of UP**<sup>7</sup>, The court rejected the argument that it violates article 21. The opinion of court is not quite consistent in this regard. In **Rajendra Prasad V State of U.P**<sup>8</sup>, Justice Iyer delivered the judgment by saying, “that death penalty was violative of articles 14, 19 and 21 and must be awarded in extraordinary circumstances.”

However, as per article 3 of the **Universal declaration of Human Rights, adopted in 1948** everyone has right to life death penalty remain legal in many countries. Efforts have been made through The International Covenant on Civil and Political **Rights (ICCPR)**, it advocates for the protection of human rights at an international level. The Rarest of the rare case doctrine is still inconsistent with the article 3 of the UDHR. In fact, second optional protocol (ICCPROP2) was introduced, which aims at abolishing death penalty, but India has not signed it. Due to national security and public opinion, India has maintained its stance.

The International Commission Against Death Penalty (ICADP) is against the death penalty, as per which death the following contentions are given:

1. Death penalty doesn't necessarily reduce crime and there are other ways to reduce the same.

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<sup>6</sup> 1983 AIR 957

<sup>7</sup> 1973 AIR 947

<sup>8</sup> 1979 AIR 916

2. The opinion of the public is not rational because in heinous crimes it comes out of anger.
3. Contrary to the principle of morality and there is a possibility that an innocent may fall prey to such evil.

According to recent reports, in 2022, 165 death sentences were awarded by the Trial court, which is highest in two decades. By the end of 2023, there were 564 prisoners in row, out of which 120 got death sentences by Trial court and only one has been awarded by High court. A recent case **Manoj Pratap Singh v. State of Rajasthan**<sup>910</sup> has resulted in capital punishment, wherein the man was convicted of killing and rape of minor girl. Hence, India supports humanitarian approach by advocating the doctrine of rarest of rare.

*“Since every saint has a past and every sinner a future, never write off a man wearing veneer attire but remove the dangerous degeneracy in him,”* (V.R. Krishna Iyer, j.)

### **Role of Indian judiciary**

The Indian judiciary plays a pivotal role in ensuring a balance between the demands of justice and right to life and dignity. The Supreme Court has been actively involved in clarifying the jurisprudence backing the death penalty. In recent years, the Court has put emphasis on reducing the death sentences by focusing on the factors which encourage the accused to commit such crimes. In **Shashi Nayar v. Union of India**<sup>10</sup>, the Court highlighted the extremely important purpose of Capital punishment for social good. Similarly, in **Ravji v. State of Rajasthan**<sup>11</sup>, the Court said that punishment should be severe enough which demands strict penalties reflecting the gravity of such an offence. Particular focus has been given to crimes which cause social harms as in **Kailash Kaur v. State of Punjab**<sup>1213</sup>, in which death penalty was awarded for offence related to dowry. Justice A.M. Ahmadi in **Allauddin Mian v. State of Bihar**<sup>13</sup> also supported exemplary punishments for crimes like bride-burning, which are increasingly prevalent.

**Justice P.N. Bhagwati**, who opposed the death penalty, argued that there is always a risk

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<sup>9</sup> (2023:rj-jd:303)

<sup>10</sup> AIR 395

<sup>11</sup> (1996)2 SCC 175

<sup>12</sup> (1987) 2 SCC 631

<sup>13</sup> AIR 1456

of mistakes in the justice system. For example, Rajiv Rao was hanged in 1996 for killing his pregnant wife. However, 13 years later, it was decided by the court that it was made carelessly<sup>14</sup>.” The judiciary should strive to Minimize it error as given in the previous cases.. Its responsibilities include ensuring justice, protecting the rights of the accused, and minimizing the possibility of wrongful convictions. The judiciary’s role is to ensure justice, fairness, and accountability, particularly in death penalty cases.

President who is the executive part of the government has been granted pardoning power **U/A 72**, which can help in correcting ‘judicial error’. Similarly, **U/A 161** Governors can grant pardons or commute sentences. However, courts can intervene if such powers are exercised arbitrarily or without proper reasoning.

### **Changes Brought by Bharatiya Nyaya Sanhinta, 2023**

The Bharatiya Nyaya Sanhinta 2023 is the new criminal code of India, and which will replace the Indian Penal Code (IPC) 1860. The BNS covers all aspect of Criminal Law, including Offences, punishment, defences, and procedures. The important changes introduced by this act are mainly:

1. Increase in number of Offences punishable by death sentence from 12 to 18 under the new act.
2. Section 103 of the BNS 2023: murder committed by a group of five or more people, specially based on conditions like religion, caste or community, place of birth, personal belief etc., is now distinctly punishable with death or life imprisonment.<sup>15</sup>
3. Section 106(1) deals with more harsher punishment in the case ‘death by negligence’ now carrying imprisonment of upto five years along with a fine, compared to the previous two year maximum punishment under IPC.
4. Section 4(f) of the BNS 2023: community service has been introduced as a form of Punishment.

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<sup>14</sup> Santhosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 2 SCC (Cri) 1150.

<sup>15</sup> [www.lexology.com](http://www.lexology.com)

Unlike the traditional form of punishment it is progressive in nature.

## Conclusion

In concluding remark, law should protect the innocent the one who is innocent, but as decided in the *Mukesh & Anr v. State for Nct of Delhi & Ors*<sup>16</sup> that when there is not even a hint of hesitation with respect to aggravating circumstances outweighing the mitigating factors death sentence may be granted.<sup>17</sup> India's move to expand capital punishment may draw criticism from Human rights organizations and international forums but the burden is now on the judiciary to navigate carefully to prevent excessive or arbitrary use of death penalty. The

Bharatiya Nyaya Sanhita (BNS) 2023 welcomes a progressive view towards punishment in Criminal Justice system in India. While the expansion of death penalty offences reflects a firm stance against heinous crimes like hate-based group violence, it also raises ethical concerns about the risk of judicial error and the global trend toward abolishing capital punishment. The impact of these changes will depend on their implementation by the judiciary, which must exercise caution and fairness to uphold justice. Issue of Overcrowding in Indian prison should not be ignored and should be tackled carefully.

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<sup>16</sup> AIR 2017 SUPREME COURT 2161

<sup>17</sup> [www.legalauthority.in](http://www.legalauthority.in)

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