
DEATH PENALTY: IS IT EFFECTIVE IN CRIME DETERRENCE

Ayushi, LLM, Amity Law School, Amity University, Lucknow, Uttar Pradesh.

Mudra Singh, Assistant Professor (Grade III), Amity Law School, Amity University,
Lucknow, Uttar Pradesh.

ABSTRACT

This article talks about the effectiveness of the death penalty in crime deterrence. Purpose of the death penalty and the aim behind eliminating the criminals through the death penalty has been analysed. The constitutional validity of the death penalty in India and the laws regulating death penalty have been examined. Data related to the death penalty has been analysed to understand the effectiveness of the death penalty in eliminating the criminals from society. Data suggesting the effectiveness of the death penalty in crime deterrence has also been analysed. The loopholes and shortcomings in the system of death penalty in India have been examined. There has been a discussion on the illegal ways adopted in the past and recent times to punish or eliminate the criminals because the current legal system is not able to provide quick justice. In this way, inefficiencies in the system of death penalty have been criticised due to its inability in providing quick justice and in creating a fear among people. The provisions for capital offences in the BNS Bill, 2023 have also been examined. In the end, it is found that the death penalty is not effective in deterring crimes and various helpful suggestions have been given to improve the existing system.

Keywords: Death penalty, capital offence, capital offences, capital punishment, hanging of prisoners, convict with death penalty, death row convicts, human rights of the prisoners, death penalty in IPC, Capital offences in BNS Bill 2023, Death penalty in The BNS Bill 2023, Article 21, right to life, reformation & rehabilitation of prisoners, mercy petition, presidential pardon, clemency, loopholes in the system of death penalty

1. INTRODUCTION

In modern times, protection of the prisoners rights have become quite important and many initiatives have been taken in this regard. Death penalty is also an issue which has been declared by many experts and scholars as an inhuman act which must be stopped. The supporters of human rights have been raising their voices against the death penalty for many decades. They want countries to perform the reformation of the prisoners and to rehabilitate them. In this way, they want countries to stop taking revenge for the crime, for which they want countries to not follow the retributive system of punishment. Death penalty is the most extreme form of punishment in the retributive system of punishment. These days many countries are shifting their punishment system from the retributive system to the reformative system. The main reason behind this shift is that the death penalty can only eliminate the criminal, not the crime. If a person has committed a crime then he has to be reformed because a reformed person may be prevented from committing any crime again while a harsh kind of punishment will make a criminal more gruesome and he may commit more dangerous crimes in future. In this way the harsh kind of punishment is not effective in deterring the crime. The IPC and many other criminal laws in India provide for the death penalty for various kinds of crimes but still the cases of such crimes are not stopping and courts are filled with such criminal cases. A better law and order system to prevent the commission of crimes and the reformative system of punishment is the best solution to prevent the happening of gruesome kinds of crimes in the society. Death penalty is not a solution for crime deterrence and various initiatives are required in India to discontinue the punishment of death penalty.¹

2. MEANING OF DEATH PENALTY

There are many capital offences for which the death penalty is imposed on the criminal. Death penalty is a form of punishment recognised in the IPC² & other criminal laws in India. Death penalty is given to kill a criminal and this form of death is legally recognised in India. In India, the death penalty is executed by hanging the criminal to death. According to the CrPC:

"When any person is sentenced to death, the sentence shall direct that he be hanged by

¹ Colin G. Smith, "The Death Penalty in India: A Flawed System" Vol. 42, No. 1 *EPW* 22-27 (2008).

² The Indian Penal Code, 1860 (Act No. 45 of 1860), s.53

the neck till he is dead."³

In this way, a death penalty is a lawful procedure to sentence a criminal by causing his death. The courts grant the death sentence after following all the legal procedures. Court of session, some special courts, military courts, High Courts and Supreme Court are the courts in India which are having jurisdiction to punish a criminal with the death penalty.

3. APPROACH OF INDIA TOWARDS DEATH PENALTY

Article 21 of the Constitution sanctions the death penalty in India if it is imposed on the accused after following all the procedures laid down by the law.⁴ The Apex Court has also upheld the constitutional validity of the death penalty but it must be imposed only in the rarest of rare cases.⁵ The death penalty has been granted many times in India and in future as well this practice is going to be continued. The BNS Bill, 2023 which is going to replace the IPC, 1860 in the coming years is also having various offences for which the maximum punishment is death penalty. In this way, the Indian Government has no immediate plans to discontinue the punishment of death penalty. India in 2021 had not supported a draft resolution in the UNHRC which was brought to prohibit the death penalty. Though, India has still maintained a firm approach on the continuance of the death penalty but in reality very rarely any criminal is executed these days. Only 8 people have been executed till today since the year 2000. It reflects that many criminals are convicted for the death penalty every year in India but they are not executed immediately. A chance of appeal is given to them, if they get no relief in appeals then they file mercy petitions to the Governor of a state or to the President of India. After various long procedures many death penalties are commuted to life imprisonment. There have been many cases where a person was convicted to the death penalty but later in appeal he was released and declared innocent in that case.

4. THE ISSUE OF LIMITED APPLICATION: RAREST OF RARE DOCTRINE

Except in rarest of rare cases, not in all criminal cases the death penalty is imposed in India. Even if a law talks about death penalty for a specific crime still death penalty is not imposed

³ The Code of Criminal Procedure, 1973 (Act No. 2 of 1974), s.354(5).

⁴ The Constitution of India, 1950, Art.21.

⁵ Kaustubh Khera, "The capital offences under the BNS Bill 2023" *The KKs Place*, November 15, 2023, available at <<https://kherakaustubh.wordpress.com/2023/11/15/the-capital-offences-under-the-bns-bill-2023/>> (last visited on March 15, 2024)

very oftenly if the conviction is proved. Only in the "rarest of rare" cases death penalty is imposed in India. In the Bachan Singh⁶ case, guidelines for imposing death penalty were provided by the Hon'ble SC of India. The court said that the death penalty as a punishment can only be imposed in the rarest of rare cases. If a death penalty is imposed by the session court then the HC can annul the conviction or confirm the sentence.⁷

It shows that imposing the death penalty requires proper following of procedures and if there is any essential shortcoming then the death penalty can be annulled. It is a good practice that the law provides every opportunity to the convicted person to protect himself from the death penalty but there are many loopholes in the law which are used for benefitting the accused. The biggest problem with the doctrine of "rarest of rare" is that it has no clear definition and at the end judges use their understanding to apply the "rarest of rare" doctrine to impose the death penalty. At the end, it is based on the subjective explanation of the judges to consider a case as a rarest of rare case and impose the death penalty in that case. There requires objectivity with a clear definition of "rarest of rare" doctrine to exist but currently there is no objectivity in applying the "rarest of rare" doctrine. Due to the subjective explanation of the "rarest of rare" doctrine the death penalties are not imposed in a uniform manner. The Government must consider this issue very seriously and define the meaning of "rarest of rare" doctrine and must explain the specific cases in which it must be applied. In this way, the chances of injustice done to the accused person may be prevented by protecting them from wrong convictions and only those people should be punished with the death penalty who really are very dangerous for the society.

5. MERCY PETITION AND PRESIDENTIAL PARDON

The President of India has power to pardon, reprieve, grant respite or grant remission of punishment or the President can suspend, remit or commute a sentence.⁸ This power is exercised by the President in cases of death sentences as well.⁹ It suggests that a convicted person can approach the President of India to seek mercy from being executed to death. The President of India in the past has granted mercy to many people from the death penalty. For the offence committed by violating a law in cases where a state has jurisdiction to exercise

⁶ Bachan Singh v. State of Punjab (1980)

⁷ The Code of Criminal Procedure, 1973 (Act No. 2 of 1974), s.368

⁸ The Constitution of India, 1950, Art.72(1).

⁹ The Constitution of India, 1950, Art. 72(1)(c).

executive powers, the Governor of that state also has power to pardon, reprieve, grant respite or grant remission of punishment or the Governor can suspend, remit or commute that sentence.¹⁰

6. PUBLIC DEBATE REGARDING THE EFFICIENCY OF THE DEATH PENALTY

Death penalty has not been effective in prevention of crimes and daily various heinous crimes happen and many of those offences are committed by the repeated offenders. The threat of the death penalty has not been effective in deterrence of crimes. If a convicted person is reformed then he can be prevented from becoming a criminal again when he is released from his sentence. This reformatory and rehabilitative system can be very useful in preventing the crimes committed by the repeat offenders.

Various scholars, experts and many intellectual people from society have started raising the questions over the efficacy of the death penalty in crime deterrence. Various politicians, social & human rights activists and legal experts have demanded for total abolition of the death penalty because according to them it is an inhuman act which must not be carried on in the modern times. According to them, if abolition of the death penalty is not possible then there must be a temporary prohibition on sentencing convicted people with the death penalty till the time a clear understanding about the status of the death penalty is achieved.

Execution of death penalty is a legal act of killing a criminal but there may be a possibility that a criminal can be reformed hence a chance for reformation must be given to the convicted people. In this way, the death penalty has been criticised by the human rights experts and they have said that death penalty violates the right to life provided in the Article 21 of the Indian Constitution.¹¹ If there is a chance for improvement in a convicted person then giving him death penalty is totally illogical and this penalty is totally an inhuman act. In the case of *Rajendra Prasad vs. State of U.P.* capital punishment was declared only to be justified in the cases where the criminal can pose danger to the society. It is true that there can be various notorious criminals who can be too dangerous for society and their existence in society can raise fear among the members of the society. But, the government must take initiatives to reform such

¹⁰ The Constitution of India, 1950, Art.161.

¹¹ The Constitution of India, 1950, Art.21.

criminals and make the society safe for living for other people.¹²

There are many sections in the IPC and in the other criminal laws in which maximum punishment for crimes is death penalty. The intention of having provisions for death penalty for capital offences is to create fear among the people to not commit such offences but in reality the commission of offences are not stopping and every year thousands of cases of capital punishment happen in India. It shows that the fear of the death penalty is not quite successful in deterring crimes. The Government instead of imposing fear through the death penalty must explore various other options. A good law and order system, proper implementation of the laws, good education, good rate of employment, good income, disciplined society, law abiding citizens, proper surveillance, good connection between society members and government and police, quick trial, quick justice to the victims, reformation and rehabilitation of the prisoners, etc. are some ways through which commission of crimes in the society can be decreased. Only fearing people through the death penalty is not an efficient way to decrease the crime rate.¹³

7. LOW NUMBER OF EXECUTIONS

As said above only 8 convicted people have been executed since the year 2000 which shows that the execution of death penalty is very low in India and now the correct approach of the Government should be to abolish the punishment of death penalty. The government is wasting its resources by continuing the punishment of the death penalty. The accused people generally never accept the death penalty imposed on them, they go for various appeals and at the end seek mercy/pardon through mercy petitions which takes a lot of time in finally deciding whether the death penalty should be upheld or not. This lengthy time should be used for reforming the convicted people but in reality many years are spent just to decide whether the death penalty imposed on a convicted person should be upheld or not and that convicted person remains imprisoned in the jail without getting reformed.

8. INTERNATIONAL PRESSURE & RIGID APPROACH OF THE INDIAN GOVERNMENT

As said above many steps have been taken at international platforms to abolish the punishment

¹² M.P Jain, *Indian Constitutional Law* (Lexis Nexis Butterworth Wadhwa Nagpur, 16th edn. 2011)

¹³ Madhulika S., "Capital Punishment in India: Does Deterrence Really Work?" Vol. 79 No. 4 *IJSW* 1123-1138 (2018).

of death penalty or to impose a moratorium on the death penalty but the stand of India has been quite rigid. The Indian Government still wants to continue the punishment of death penalty. International human rights organisations have asked the countries to not carry on the system of death penalty in modern times but India has not changed its stand.

9. REFORMING A CONVICTED PERSON IS BETTER THAN INDULGING HIM IN INORDINATE DELAYS IN APPEALS & MERCY PETITIONS

Delays in the execution of the death penalty is one of the strong reasons to abolish the system of death penalty. The fear of death penalty requires execution of the convicts to death but the rate of execution is very low in India which at the end creates no fear of death penalty in society. Courts are filled with many cases and a lot of time is taken in completing a trial. Even if a criminal is punished with the death penalty then still a lot of time is taken in the execution of the death penalty because the convicted person applies for appeals to challenge the conviction. Even in appeals also if the sentence is upheld then the convicted person applies for mercy petitions before the Governor of a State or the President of India. In these all processes a lot of time is taken which makes a convicted person to remain busy in protecting himself from death penalty instead of indulging himself in his reformation. In 2015, the report of Law Commission of India had also criticised the long time taken in trials, in appeals and had criticised the inordinate delays in executive clemency.¹⁴

The delays not only make the execution uncertain but it prevents the opportunity of the reformation of the convicted person. The convicted person after getting the death penalty gets involved in filing appeals and mercy petitions to get relaxation from the death penalty. If the death penalty was not imposed and if he had got the punishment of imprisonment and if there was a strong system to reform the convicted person then he could have indulged in the reformation but in the current system this is not happening.

Delays in trial and appeals make the system of death penalty too ineffective. The delays make the convicted person to mentally suffer a lot and he loses hopes to return back to society as a reformed person. It makes the convicted person go through various dehumanising experiences when he is not sure about his future. It shows that imposition of the death penalty on an accused is a cruel and inhuman practice. Even if he gets relaxation from the death penalty he has to face

¹⁴ Vivek Kumar & Pooja Sharma, "The Death Penalty Debate in India: A Critical Appraisal" Vol. 7, No. 1 *JANLS&R* 1-17 (2020).

the penalty of life imprisonment. Not only the convicted person suffers in all these processes but his family members also have to go through various ordeals.

10. DATA RELATED TO DEATH PENALTY, EXECUTION OF THE DEATH PENALTY & DELAYS IN THE EXECUTION

There were 371 convicts in India till December 2017 who were sentenced to death but still not executed. There was one case in which a person was convicted in 1991 but still not executed even after 27 long years.¹⁵ If we look in past 13 years before the year 2020 then it is found that only 4 convicts were executed through death penalty in which three convicts were executed in terrorism related cases while one convict was found guilty for child rape.

The Center on Death Penalty has found in its study on 373 death row convicts that the average duration in the trial was five years. 127 death row convicts faced a trial of more than 5 years and a delay of more than 10 years were faced by 54 death row convicts. There was a convict found in this study who was waiting for 21 years after being punished with the death penalty but still his final execution was not done. 20th March, 2020 was the last date when anyone was executed through the death penalty in India. This execution of death penalty was done on four persons Akshay Thakur, Mukesh Singh, Pawan Gupta and Vinay Sharma who were found guilty in the 2012 Nirbhaya Rape incident.

11. DELAYS AND LOOPHOLES IN THE SYSTEM OF DEATH PENALTY FORCING THE ADOPTION OF ILLEGAL WAYS TO ELIMINATE CRIMINALS

Quick delivery of justice can compensate the victim and his family members for the ordeal faced by them. But, delays in trial and various loopholes in the justice system are making quick delivery of justice impossible which is forcing the adoption of various illegal ways to punish the criminals. Fake encounters are one of the prime examples of such illegal ways and other more ways are the custodial deaths, gang wars, etc.

Deterring the crimes requires quick trial and quick punishment to the criminals. But due to various loopholes, it has become impossible in India to deliver quick justice. Low number of cases of execution of the death penalty and delays in execution is also forcing the adoption of illegal ways to eliminate the criminals. In this way, these delays and loopholes have made the

¹⁵ Death Penalty Report 2018.

death penalty a bad tool to deliver justice and neither this system is able to control the commission of crimes.

12. CAPITAL OFFENCES AND DEATH PENALTY IN THE BNS, 2023

Recently the Government of India brought the Bhartiya Nyaya Sanhita (BNS) Bill, 2023, to replace the IPC, 1860. IPC is a colonial era law which is planned to be replaced by a new and modern law but still the government has included death penalty in the BNS Bill for punishing various capital offences. Not only death penalty has been continued but various new crimes have been defined as capital offences like mob lynching. BNS has defined the organised crime, crime of terrorism, rape of minor as a capital offence. In these capital offences the maximum penalty is the death penalty.

The BNS Bill has again suggested that the government is no longer in the mood of discontinuing the system of death penalty. The system of death penalty is always criticised by the human rights activists, many politicians and by many legal experts. When the BNS Bill was brought for deliberations before a Parliamentary Panel consisting of members from the government, members from the opposition and some domain experts, the opposition members criticised the bill for still carrying various colonial era systems. They raised the issue that death penalty and delays in the execution of death penalty brings a lot of disadvantages to the convicts, their family members, society and government. According to them, continuing the colonial era systems, existence of long trials, delays in disposal of appeals and mercy petitions, are biggest hurdles and the BNS Bill will not bring any changes compared to the existing system and death penalty will again remain unsuccessful in crime deterrence. The convicts from poor social backgrounds are suffering most and they will keep on suffering more if colonial era systems are continued even in modern times.¹⁶

Domain experts in the parliamentary panel supported the death penalty only after the doctrine of "rarest of rare" is explained more clearly to impose death penalty on the accused people. They supported that objectivity must be there in applying the "rarest of rare" doctrine and asked for discontinuation of dependence upon the subjective explanation of the doctrine of the "rarest of rare" doctrine. At the end the report said that retention of the death penalty can be dangerous due to the existing problems like fallibility of the judiciary, wrong sentences imposed on an

¹⁶ *Supra* Note 7.

accused, and irreversibility of death penalty. If the Government seriously considers this report then various improvements can be made and there can be the possibilities that the Government may discontinue the sentence of death penalty.¹⁷

13. CONCLUSION AND SUGGESTIONS

A lot of anomalies have been found in the system of death penalty in India and the existing system of death penalty is not ineffective in deterring crimes. For various capital offences life imprisonment is awarded and death penalty is imposed in very few cases by applying the "rarest of rare" doctrine. There is no crime in India which only imposes the death penalty because in capital offences there is option for either to impose life imprisonment or death penalty. In this way, a direct fear of being hanged to death has not not been made which is the biggest hurdle in deterring criminals to commit heinous crimes. The Smaller number of executions is also decreasing the fear of being hanged to death for committing heinous offences. Not only is the death penalty ineffective in deterrence of crime but the accused people who have been granted death penalty remain imprisoned until the process of appeal and mercy petitions are over which takes a lot of time. It makes a death row convict to wait for a long time to face the execution which makes the purpose of the death penalty totally ineffective which at the end, is not able to create a fear in the mind of people to abstain from committing capital offences.

A lot of time is wasted in appeal processes and in deciding the mercy petitions. This time should be used for reformation of the convicted people but the problem is that the convicted person remains busy in the disposal of his appeals and mercy petitions and during this time period he remains imprisoned. It has been seen that many death row convicts are waiting from long years for the final decision on the certainty of the death penalty granted to them. Due to which neither he gets clarification whether he will be executed nor he gets a chance for reformation in this duration. The time wasted in delays makes the death row convict lose all the hopes of life and only wait for his death. It is a very cruel treatment. It makes the death penalty totally ineffective because neither the person is executed nor he is reformed to go back to the society and at the end no fear of death penalty is made in the society.

¹⁷ Kaustubh Khara, "The capital offences under the BNS Bill 2023" *The KKs Place*, November 15, 2023, available at <<https://kherakaustubh.wordpress.com/2023/11/15/the-capital-offences-under-the-bns-bill-2023/>> (last visited on March 15, 2024)

Death penalty is also against human rights because nobody is allowed to take the life of anyone and at the same time the delays and uncertainty causes a lot of mental and physical torture to the death row convict. In India death penalty is imposed on the subjective understanding judges through the "rarest of rare" doctrine which has no uniformity in its application, in this way this penalty must be declared unconstitutional which violates human rights. The Government has to abolish the system of death penalty or if it is not possible the government must clearly define the "rarest of rare" doctrine to bring objectivity and uniformity in the imposition of the death penalty to prevent the selective imposition of the death penalty.

International standards and commitment if followed by the Indian government then a moratorium on the death penalty can be imposed or the system of death penalty can be abolished completely in India. India should follow a proper mechanism of reformation and rehabilitation of the prisoners which will give a hope to the prisoners to return back to the society as a reformed person. This measure will decrease the cases of offences committed by the repeated offenders. Decrease in crimes committed by the repeated offenders will also decrease the cases of capital offences because the repeated offenders are largely involved in the heinous offences. A combination of proper L&O system, quick trial, quick disposal of appeals & mercy petitions, immediate opportunity for reformation after conviction and rehabilitation of prisoners can decrease the crime rate in India. Opportunity for reformation of an accused during trial or from the day of his arrest also has a lot of potential because it can provide the chance of reformation without wasting any time. It will provide extra time to a convicted person to get reformed and during the delays of appeals and petitions the precious time of the convicted person will not get wasted and he can be saved from various mental and physical tortures.

Even after inefficiency of the death penalty in deterring the crimes, the government has planned to continue the system of death penalty in the BNS Bill, 2023. The BNS will replace the IPC but the system of death penalty will still be continued (if no changes are done in the Bill regarding the death penalty). In the current system, the fear of the death penalty is not able to prevent the happening of heinous crimes. The process of imposing the death penalty is also very confusing and a lot of time is taken in the final execution of the death penalty. Hence, in modern times the punishment of death penalty must be discontinued.