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Capital punishment as deterrent under three different jurisdictions – America, India and UK - Do the merits outweigh the underlying the costs.

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Abstract

The capital punishment or the death penalty is considered to be one of the most controversial topics under the contemporary legal sphere of events. International intercourse has made it necessary for every legal body present – whether they derive their authority from legislative/statutory capacity, or a structured regime followed by tradition or by religious authority. The role these legal body's play provide the manner in which the question of death penalty should be evaluated – especially on the basis of its deterrent effect. The article attempts to first connect the idea of capital punishment and deterrence through a jurisprudential understanding of purpose of law. The jurisdictions that need to be considered for the purpose of the paper need to have heavy legal correspondence. The consideration for the same will be understood through the US, with its constitutional considerations under state and federal system of governance. The attention paid under UK will be done in a similar manner, with major focus upon how UK has developed the concept of death penalty as a punishment. The reflection in India will be two-fold in nature – the constitutional debate versus the judicial interpretation of the death penalty. The merits and costs of the contentions put forth under these jurisdictions will be two-fold – the merits and the costs of the capital punishment in terms of its deterrent effect. The evaluative framework here would be to consider whether or not death penalty has given its own source of justification. The idea is to consider whether the punitive framework of the death penalty has its own justification established without consideration for the scope of reformative justice. Ideals that provide justice to the victim rather than just purely creating a deterrent effect with the state governance will be discovered and concluded in this article.

Keywords: Death Penalty, Capital Punishment, Deterrence, America, United Kingdom, India

Introduction

The idea of deterrence under criminal law require two major considerations – law serving its definitive purpose and catering to the societal conditions and stances. The deterrence of a law is determined by whether the legal obligations set out under the source of governance authority is responsible for determining whether an individual has gone beyond certain boundaries. The purpose with which the idea of capital punishment sets out a serious standard of legislative versus constitutional versus judicial interpretations of it is massively intricate. The issue here with regards to whether the considerations should be given any credibility for the purpose understanding deterrence. Criminal law is filled two major categorizations – substantive content and procedural foundation. The procedural understanding holds a key position in terms of relevance and authority. Procedural law requires concentrated consideration to establish proper decorum of conducting and carrying out the criminal legal standards. The substantive portion of criminal law requires a simple and flexible understanding of criminal jurisprudence. The combination of two is essential in grasping the nature of death

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penalty needed to understand its establishment as a deterrent force.

The idea is to give understanding in two standardized modes of interpretation – the requirement of legal order and the idea of deterrent functionality. This idea of death penalty in relation to its deterrent effect needs to be scaled up to its qualitative effect rather than its quantitative conclusions. According to Victorian Judge Sir James Fitzjames Stephen – 'The plain truth is that statistics are no guide at all … the question as to the effect of capital punishment on crime must always be referred, not to statistics, but to the general principles of human nature.'[18] This is a major consideration due to the amount of factors that play into how data is formulated for the purposing of showing causation and correlation. The quantitative data that showcases a correlational element between how the death penalty decreases crime rates for certain crimes and where the deterrence is also observed in other crimes. However, this does not a causational relationship between the two aspects – simply because the argument behind deterrence takes merit in the fact that a short-term fall in crime rate has taken place, rather than a prolonged consideration of its effect. This required a consideration for whether legal or moral factors outweigh in examination of the death penalty and its deterrent effects.

The sociologist considerations behind the death penalty required a moral consideration of the death penalty and its requirement under current structure. One of the major sociologists, Ernst Van Den Haag, considered the death penalty through a moralistic lens, where the existence of the death penalty was purely for deterrent effect. He stated - 'The salient question about the death penalty was not – could innocents be executed by mistake? (the answers is – courts are fallible) but: does the death penalty save more innocent lives than it takes? Is there a net gain or loss?'[19] Moralistic implementation required multiple considerations from a legalistic and societal requirements standpoint. In relation to this, a growing hypothesis needs to be given due understanding - The brutalization hypothesis – the idea that that experiencing violence, whether as a victim or as a witness, can lead to an increased likelihood of perpetrating violence in the future. The hypothesis suggests that individuals who experience violence may become desensitized to it, which can make them more accepting of violent behavior and more likely to engage in violent behavior themselves. The hypothesis itself was first emphasized by Lonnie Athens in the 1970s – where he conducted interviews with convicted murderers that showcased that all of them had experienced some form of violence in their life, which led to their violent behavior.

The death penalty counters the barbarism presented by its individuals committing crimes of grave nature that destroy the sanctity of the criminal legal world. Cesare Beccaria stated back in the 1700s that – 'the death penalty cannot be useful because of the example of barbarity it gives men… it seems to me absurd that the laws, which are an expression of the public will, which detest and punish homicide, should themselves commit it.'[20] His idea was that the state itself cannot commit barbaric acts of taking away an individual's life without consideration for how absurdly dangerous such a proposition is. In the case of *Roper v. Simmons,* Justice Antonin Scalia, known for his very clear cut and tunnel visioned understanding of the law and its purpose, was against the proposition that the death penalty does not have a deterrent effect. The state and the courts should not work under the assumption, especially for juvenile case, as was the case here, that there is a loophole in the legal system for committing acts of atrocity and

[18] Roger Hood & Carolyn Hoyle, *The Death Penalty A Worldwide Perspective* 317 (4th ed. 2008).

[19] *Id*, 318.

[20] Marchese Beccaria Cesare Bonesana, *On Crimes and Punishments* 50-94 (5th ed. 2016).

getting away with it – either with imprisonment or just a fine.

The requirement of the death penalty is present with the general deterrence theory – which in turn states that when a criminal is considering the merits of a particular criminal act, they will also consider the punishment behind the commitment of a particular criminal act. The requirement behind the death penalty under this theory tries to state that if the death penalty for a particular crime is abolished, then the incidence of the crime itself would increase in terms of the number of cases. 'There are three standard methods by which the deterrent effect of the death penalty may be tested. First, the commission of capital crimes, such as murder may be measured in a given jurisdiction before and after the abolition or reintroduction of capital punishment. Secondly, the rate of crime of two or more jurisdictions – similar except that at least one has abolished the death penalty – may be compared. Thirdly, the commission of a crime such as murder within a single jurisdiction may be measured before and after widely publicized executions of murderers.'[21]

The idea behind the relation between crimes rates and the deterrent effect of death penalty needs to be observed in two ways – statistical and ground reality positions. The statistical points typically shows that the crimes rates show a sharp decline after the imposition of the death penalty, at least for that particular crime for a particular number of weeks. In the case of Canada, even after the abolition of the death penalty, the crime rate for homicide saw a decline of 44%, in the years after the abolition.[22] Thorsten Sellin conducted a study to consider the factors to control the rates of willful homicides in five groups – three presents in the Mid-West and two in New England. These groups were spread across three states – which were chosen on the basis that they reflected each other very similarly in terms of social organization and economic conditions – the only differing factor being that only one of the three states had the death penalty. The results showed that the average annual rate of homicide bore no relation to the fact that death penalty was the highest penalty bore for murder. The methodology used by Sellin cannot be considered to be full proof because of the manner in which it does not take into consideration of the various social and legally practical considerations when the study tries to consider the relationship between death penalty and the rate of homicide.[23]

Looking upon some of the major cities of America between 1980 and 1985 – the homicide rates in Florida fell by 21 percent whereas the homicide rates in Georgia fell by 25 percent – both jurisdictions with high rates of execution at the time. However, over that same time period, the homicide rate in New York, a state without the death penalty, fell by about 26 percent.[24] Once again, there is no definite causation between the two factors - the existence/non-existence of death penalty and the rate of homicide spiking upwards or downwards. In the 1980s, David Phillips wanted to see the trend in weekly murder rate in London of 22 notorious executions listed in *The Times* newspaper between 1858 to 1921. He compared the number of homicides that took place in the week before the execution took place, in the week that the actual execution took place and the weeks after the execution took place. The conclusion that Phillips drew from this that the execution had an effect on reducing the number of homicides both in the week of the execution and in the two weeks following. The decline that was observed was cancelled out by the increase of crime rate in the following weeks.[25]

The idea is to conduct studies upon observing the correlation between how the death penalty can cause deterrence in the short term but changes nothing over the long term. In order to

[21] Roger Hood & Carolyn Hoyle, *The Death Penalty A Worldwide Perspective* 324 (4th ed. 2008).
[22] *Id*, 325.
[23] *Id*, 329.
[24] *Id, 330.*
[25] *Id, 334.*

observe that consideration in a judicial and legislative settings, the scope will be narrowed down to USA, UK and India.

Death Penalty Under various Jurisdictions

United States

The US dual system of governance involves two levels of legislative capacity working together – the federal level and the state level. Each work together in concurrence with each other but the state has certain autonomy in terms in its jurisdictions and justification for conducting itself. This difference in legislative and administrative power creates a major contention regarding whether or not the death penalty is applicable according to state rules and considerations or should constitutional and federal locus be given elevated heedfulness. This is where the some of the major amendments of the US constitution come into the debate – especially amendments V, VI, VIII and XIV. The combination of these amendments showcase the understanding of death penalty as a deterrent method of punishment.

Amendments under the US Constitution

Amendment V of the US constitution states that - 'Amendment V - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, …'[26], amendment VI – 'Amendment VI - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.'[27], amendment VIII – 'Amendment VIII - Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'[28] and amendment XIV – 'Amendment XIV – Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'[29]

Legal Cases under US jurisdiction

In the Supreme Court of America case - *McGautha v. California*, the consideration was with regards to whether the non-existence of the standards for implementing the death penalty or life imprisonment in a particular case should be left up to the jury and was this constitutional in nature. 'The absence of standards to guide a jury's discretion in determining whether to impose or withhold the death penalty did not violate 'due process' and the procedure for determining guilt and punishment in capital cases' and would not be unconstitutional.[30]

Under the case of *Furman v. Georgia* – the case dealt with the consideration of the death penalty as a punishment for individuals who have been convicted to crimes – such as murder. The question before the court was with regards to whether the death penalty should be considered violative of the 8th amendment under all circumstances and unconstitutional in nature given the reading of the 8th amendment.[31] The contention was that less severe punishment for the crimes committed would still serve the punitive goals of the deterrence intended.

The ratio that was established and upheld by various jurists and courts was challenged by the case *Gregg v. Georgia.* This case questioned the rule established and held under Furman v

[26] US. Const. art. V.
[27] US. Const. art. VI.
[28] US. Const. art. VIII.
[29] US. Const. art. XIV, § 1.
[30] *McGautha v. California*, 402 U.S. 183 (1971)
[31] *Furman v. Georgia*, 408 U.S. 238 (1972)

Georgia and in fact held with a 7:2 majority that the death penalty was not cruel and unusual punishment as per the 8th amendment of the US constitution. The court had stated that the capital punishment was accepted as a common penalty during its adoption and the earlier amendments made. The sanction of capital punishment was extreme in nature, although balancing that application with extreme crimes as well.[32]

In *Woodson v North Carolina*, the court held that any law that would specifically and automatically render the death sentence for a particular criminal act under any statute or act would be inconsistent. The regulations behind the implementation of the death penalty require careful consideration of various factors – legal and extralegal in nature.[33]

The imposition of death penalty in USA is with regards to the nature of criminal law being plural – one that is regulated by the various state law's and the other by the federal law. The conditions under which the death penalty can be awarded in different case is dependent on the criminal jurisprudence of a particular state or upon the federal criminal act. The implementation of the death penalty is constitutionally valid in USA, although the standards are reflective of the contextual needs of various parts of USA – with the punishment being majorly reserved for heinous crimes in nature – murder and rape.

Polarity of Death Penalty in Comparison – United Kingdom

The abolition of the death penalty in UK took in 1965 although only for murder for that purpose. Bentham and Bright – English prominent thinkers were against the frequent use of punishment for offences other than heinous crimes. Sir Samuel Romily, a promiment member of the English community – had understood under the Judgment of Death Act, 1823 – giving judges the power to commute the death penalty for all capital crimes except for treason and murder.[34] This gives an idea of how different and opposite the jurisprudence upon the death penalty is in the United Kingdom. The consideration given to death penalty is far more graver in comparison to the US – at least to the extent that the human cost is considered with legal and unofficial needs. The unofficial needs would be considerations that go beyond the requirements of legislative and judicial institutions.

The consideration in UK with regards to the death penalty is the irrevocable and irreversible nature of the death penalty itself – giving public incentive to abolish the death penalty. There was a commission setup in 1949 in the UK to establish whether or not capital punishment had merits to it and what problems could be addressed to the same capacity – known as the British Royal Commission. Lord Tom Denning, one of the most prominent legal thinkers and practitioners, both on a domestic and international level, gave a statement to the royal commission with regards to whether or not the death penalty should be abolished.[35]

Lord Denning, one of most prominent legal scholars, at a national and international level, has a reputation of providing very non-normative stances on issues of significant importance. He stated, when the commission had asked for his opinion, that – 'The punishment inflicted for grave crimes should adequately reflect the revulsion held by the majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. The ultimate justification of my punishment is not that it is a deterrent but that there are some murders which in the present state of opinion the most emphatic denunciation of all, namely, the death penalty. The truth is that some crimes are so outrageous that death penalty is required to be imposed

[32] *Gregg v. Georgia*, 428 U.S. 153 (1976)
[33] *Woodson v. North Carolina*, 428 U.S. 280 (1976)
[34] Dr. Thrity D Patel & Rohini A Mahurkar, *Death Penalty National and International Perspective* 365-366 (1st ed. 2010).
[35] *Id*, 367.

irrespective of whether it is a determent or not?'[36] – The idea behind lord denning's contention seems to depend on two factors – the idea that punishment is not bound by various standards and norms, that are socially and legally circumscribed and the fact that some crimes are so grave in their commitment itself, that the obligation to impose the death penalty showcases itself as a matter of course. Lord denning's justification is considered meritorious as it provides scope for thinking outside of deterrent effect of punishment under any legal punishment. However, the issue remains that crimes of grave nature keep evolving in relativist terms – in relation to contemporary legal developments with moralistically virtuous values.

The royal commission aggreed with Lord Denning and yet again, death penalty was abolished in England and Wales – for a given period of five years starting from 1965 under Murder (Abolition of the death penalty) Act 1965.[37] Even in the case of R v. Fleming, it was established that in case a person is convicted with life imprisonment – there minimum term for serving that sentence should be no less than 12 years. The restoration of the death penalty has been on the agenda of the British parliament ever since it was abolished – constantly being brough up and rejected by the House of Commons. In 1998, after 33 years since the abolishment of death penalty for any crimes committed established under the legal sphere of UK, the House of Commons voted to ratify the 6th Protocol of the European Convention on Human Rights prohibiting capital punishment except 'in time of war or imminent threat of war'. Any remaining provisions for the death penalty, under military jurisdiction, were removed when the Human Rights act, 1998 came into force. The UK had acceded to the 13th protocol – prohibiting death penalty under all circumstances – this ensured that the UK could no longer legislate upon this matter as long as it was subject to the protocol and its conventions.[38] Although all these provisions, have been accepted and in existence in the US as well, the UK has been far more indiscreet regarding its disapproval with the death penalty. The UK has utilized national and international means of ensuring that the death penalty is not enacted under the legislative capacity of the UK.

The act of balancing the death penalty - India

Under the Indian jurisprudence, the punishment and deterrence behind the death penalty is largely considered to be a debate between constitution and legislative intent. The courts needs to find a balance between the two and their own analysis of how grave the implementation of the death penalty will be for societal understanding of the same. There are statutory requirements that require the imposition of the death penalty as a punishment. There is also societal reaction to how grave the nature of a particular crime is. Under section 121 of the IPC, it is stated that – 'Section 121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India. - Whoever wages war against the [Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or [imprisonment for life] [and shall also be liable to fine].'[39] Under section 194 of the IPC, the fabrication of evidence, leading to an innocent individual's execution, could impose the same penalty. It states that – 'Section 194:- Giving or fabricating false evidence with intent to procure conviction of capital offence - Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the laws for the time being in force in India shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; If innocent person be thereby convicted and

[36] *Id*, 367.
[37] *Id*, 367.
[38] *Id*, 368.
[39] Indian Penal Code, 1860, § 121.

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executed — and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.'[40]

After the implementation of the Criminal Law (Amendment) Act of 2013, in the backdrop of the Nirbhaya case, the statutory requirement of death penalty being imposed as a form of punishment was considered widely as an obligation that should be present with such a crime. Section 376 states that – 'Section 376 – Punishment for Rape. – 1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine. … Subsect 2) whoever, clause m) - commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. … 3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.'[41] It does not explicitly lay out that an individual will receive the death penalty, but the Criminal Amendment Act, 2013 gravely established that the death penalty should be present for the crimes committed under section 376 of the IPC. This was done in order to appeal to two major consideration – the societal need to get punitive justice without any cause of sympathy as the victim was shown none and the idea of how the death penalty needs to considered as a lending contributor towards deterrence from such a heinous crime being committed.

The Indian Constitution attempts to reply to the question of the death penalty through article 21, which states – '21. No person shall be deprived of his life or personal liberty except according to procedure established by law.'[42] This establishes the fundamental right of life and liberty, that individuals can hold without it being trampled by either state, legislative, executive, judicial or administrative capacity. This protects individuals from the death penalty as well although only to a certain extent. Under the case of Maneka Gandhi v. Union of India, it was imposed that the state must have a very rigorous and thorough understanding of how the death penalty must be imposed upon an individual as a punishment for deterrent effect.[43] In the case of Santosh Kumar Satishbhushan v. State of Maharashtra, it stated that – 'At this point we also wish to point out that the uncertainty in the law of capital sentencing has special consequence as the matter relates to death penalty - the gravest penalty arriving out of the exercise of extraordinarily wide sentencing discretion, which is irrevocable in nature. This extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle. The situation is unviable as legal discretion which is conferred on the executive, or the judiciary is only sustainable in law if there is any indication, either though law or precedent, as to the scope of the discretion and the manner of its exercise. There should also be sufficient clarity having regard to the legitimate aim of the measure in question.'[44]

Even in the case of Mukesh & Anr vs State For Nct Of Delhi & Ors, the court states the following – 'Learned amicus curiae would submit that the trial court as well as the High Court has failed to

[40] Indian Penal Code, 1860, § 194.
[41] Indian Penal Code, 1860, § 376.
[42] India Const. art. 21.
[43] *Maneka Gandhi v. Union of India,* (1978), AIR 1978 SC 597 (India).
[44] *Santosh Kumar Satishbhushan v. State of Maharashtra, (2009),* **CRIMINAL APPEAL NO. 1478 (India).**

put any of the accused persons to notice on the question of imposition of death sentence; that sufficient time was not granted to reflect on the question of death penalty; that none of the accused persons were heard in person; that the learned trial Judge has failed to elicit those circumstances of the accused which would have a bearing on the question of sentence, especially the mitigating factors in a case where death penalty is imposed; that no separate reasons were ascribed for the imposition of death penalty on each of the accused; and that it was obligatory on the part of the learned trial Judge to individually afford an opportunity to the accused persons. Learned amicus curiae would submit that the learned trial Judge has pronounced the sentence in a routine manner which vitiates the sentence in as much as the solemn duty of the sentencing court has not been kept in view.'[45] This imposition gives the Indian legal jurisprudence to consider two factors – how the death penalty is perceived by the accused/convicted individual and whether the death penalty will have deterrent effect if remedies are provided to individuals that commit heinous crimes even after admitting their guilt and crime. The deterrent effect of the death penalty is massively brought under consideration in India as it's a constant battle between legislative, judicial, and societal consideration. The Nirbhaya judgement reflected how the three components worked together to reach the same end goal - the imposition of the death penalty in this case. However, the deterrence behind the punishment established gave no guarantee of a reduction in future crime rate in rape cases. The society in India reflects a very diverse nature of legal correspondence – individuals will shy away from imposing heavy legal punishment if the damages are done to the interplay of future opportunities and extra burden they might have to suffer. However, the same individuals feel almost obligated to impose heavy punishment upon individuals that cause heinous bodily harm to individuals because of how atrocious certain acts are. This massive consideration that the judges must keep in their legal contentions.

Conclusion

The death penalty itself has some major considerations in terms of its deterrent effect – especially for the jurisdictions of India and US. The US considers it to be part of an old and established system - which has been existence for a long while. Indian jurisprudence strikes a balance between three forces of governance – legislative, judicial, and societal capacity. The combination of both these jurisdictions provide the manner in which the death penalty can be justified – through institutional mechanism that regulate the use and capacity of the death penalty. The court ensures a flexible understanding of how cases need to be dealt with when the question of death penalty shows up – especially with regards to punitive justice and reformative justice. The societal consideration is major factor in creating a framework for better imposition of the death penalty as the law should adhere to majoritarian view. In opposition to that, the stance taken by UK justify their deliberation through how the barbarity of taking another life should be reconsidered under legalistic and international reflection. The deterrent effect of death penalty in considered minute in nature by UK jurisprudence, especially one that only lasts for a couple of weeks or months at best until crime rates rise up again. Overall, the death penalty does serve to verify and justify its own existence, requiring more evaluation of whether the requirement should only be reserved for most heinous crimes or should more crimes be included for deterrence purposes.

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