

YES, NO, IT'S COMPLICATED

Relevant for: Indian Polity & Constitution | Topic: Judiciary in India: its Structure, Organisation & Functioning, Judges of SC & High Courts, Judgements and related Issues

As a punishment, the death penalty makes no sense: how does killing a person who has killed a person show that killing is wrong? Most of the civilised world has abolished it. India certainly does not need it as it serves no purpose. No study has shown that the death penalty deters murder more than life imprisonment. The evidence is all to the contrary. For deterrence to work, the severity of the punishment has to coexist with the certainty and swiftness of the punishment. The death penalty has not deterred terrorism, murder or even theft. For over a century, stealing attracted the death penalty in England, where spectators at public hangings often had their pockets picked!

The death penalty is error-ridden. Between January 1, 2000 and June 31, 2015, the Supreme Court imposed 60 death sentences. It subsequently admitted that it had erred in 15 of them (25%). Can this system be trusted to take a life? And that too based on evidence collected, or fabricated, by a police force not known for its probity or efficiency?

The death penalty unfairly targets the poor and marginalised. Those without capital get the punishment. Penurious prisoners on legal aid get it the most, while others with private lawyers remain untouched.

The death penalty is impossible to administer fairly or rationally. The Supreme Court has repeatedly admitted that it has arbitrarily imposed this most extreme punishment. Executions occurred in 5.2 cases for every 1 lakh murders. Such a selection cannot but be freakish. It depends overwhelmingly on the adjudicator's personal beliefs. Judges opposed to it never gave a death sentence; those in favour doled it out. Abolitionist Presidents (S. Radhakrishnan and A.P. J. Abdul Kalam) refused to reject mercy petitions, while others, differently inclined, readily denied clemency. Should the killing of a human being depend on the philosophy of a particular individual?

Abolishing the death penalty will ease, not enhance, the tax-payer's burden. The annual cost of maintaining a prisoner is about 30,000. The hangman is paid more, and we also save on the protracted litigation that death cases involve.

Constitutional, legal and policy issues cannot be determined by the victim's understandable hunger for revenge without leading to a frenzy where the death penalty is demanded, as it often is, for wholly inappropriate cases (accidental deaths, cheating, etc.). If life imprisonment sufficed for the 99.99% of victims' families, why not for the minuscule fraction in whose name the death penalty is demanded?

Punish, yes, but why in the same cold-blooded, premeditated and brutal manner as the prisoner killed his or her victim? Punishment should not imitate crime. We do not rape rapists, or maim and disfigure those who have done this to others. Why do we have to kill killers?

India's murder rate has declined continuously since 1991 and is at present the lowest in our recorded history except for 1963. Fearmongering aside, we are safer today than our parents or grandparents ever were. And this is not thanks to the death penalty whose infrequent and arbitrary implementation has made no real difference. It may as well have not been there. Studies show that a more equal sex ratio has more to do with declining murder rates than killing murderers.

Nobody wants to undergo the trauma of administering the death penalty — not the higher courts and not the hapless prison staff who have to see a human being die gasping at the end of a rope. Governments kill prisoners to show that they are tough on crime. There is nothing muscular or tough about killing a man who is at your mercy.

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The death penalty has been criticised for far too long without an understanding of its nuances. It is criticised mainly on three counts: arbitrariness, irreversibility and human rights. However, the punishment passes muster on all accounts. Its constitutionality has not only been upheld in India but also in the bastion of liberal democracy that is the U.S. The retention of the death penalty is not a reflection of “uncivilised” polity in theocratic states that have come to be defined by violence but a creation of the individual geopolitical circumstances of each state.

The Law Commission of India has attempted to analyse the need for the death penalty on two separate occasions. While the 35th Report correctly called for its retention in order to see its impact on a new republic, the more recent 262nd Report could not recommend the punishment’s absolute abolition despite a rather desperate attempt to do the same for the first 240 pages. The exception to abolition came in cases of terror. Herein comes the first defence of the death penalty: India’s neighbourhood is not peaceful, unlike Scandinavia, and it does not form a supranational conglomerate of nations that facilitate common growth, unlike the European Union. On the contrary, every day vested interests attempt to destabilise the very idea of our nation from across every border it shares. It is this peculiar nature of India’s polity that must inform any debate for abolition. As noted by the Commission itself, cases of violent terror are constant reminders of the need to protect national stability by ensuring appropriate responses to such actions, and the death penalty forms part of the national response.

It is in this idea that there exists a moral support for the death penalty. A punishment cannot be judged by its impact on criminals but by its impact on those who are still innocent. Those who defend the death penalty often do it on the basis of retributive justice. However, the retention of the death penalty is far more fundamental than an arrogant state interest to seek revenge. On the contrary, the punishment itself is a reflection of societal mores. It determines that there are certain acts which the society so essentially abhors that they justify the taking of the most crucial of rights – the right to life. For, the state acknowledges that the sacredness of life can only be seen to be protected if those who take it away are proportionately punished. The hanging of Ajmal Kasab and Yakub Memon strongly affirms India’s commitment to the protection of life.

The death penalty is also often criticised on its practical implementation. Some argue that it is arbitrarily meted out and others find its irreversibility repugnant. However, both these sets of criticisms are reflections of bad syllogism. The punishment is not arbitrary because it comes out of a judicial process. To term the punishment as arbitrary, one has to necessarily prove the process as flawed. However, in the cases of the death penalty, the courts have made sure that caution is exercised in giving the punishment. They are conscious of its irreversibility and have therefore restricted it to only rarest of rare cases that shock the conscience of society. This is reflective in the fact that in the last 13 years, only four people have been executed.

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The moral foundation of judicial killing has been questioned and it has been judged untenable in many countries. In 2007, the UN General Assembly passed a resolution calling for a moratorium on the administration of the death penalty by the 59 countries that still retained it. India is one of them, even if it does not employ it as frequently as countries such as Iran, China, Pakistan, Saudi Arabia, and the U.S.

Only a few political parties have demanded the abolition of the death penalty in India, including the Communist parties and the DMK. B.R. Ambedkar, in the Constituent Assembly debates, opposed it on the principle of non-violence. The Congress opposed it in 1931, after Bhagat Singh, Sukhdev and Rajguru were executed, but has not moved for its abolition during its multiple terms as a ruling party.

An eye for an eye has ancient appeal. Following the gang rape of a young woman in Delhi in December 2012, amendments were made to the Indian Penal Code adding the death penalty for certain categories of rapes and repeat offenders. This year India introduced the death penalty for those who rape minors. The polarised debate that surrounded Yakub Menon's execution in 2015 was yet another reminder of the pervasive popularity of the idea.

In 1962, the Law Commission supported the death penalty stating that India's particular circumstances were such that it could not "experiment" with its abolition. In 1991, the Supreme Court cited its use in defending law and order as the reason for its continuance. Its alleged usefulness extends from being a potential deterrent to serving as a primordial need for retribution.

That said, India has looked to the judicial administration of death with greater constitutional scepticism. In 1980, in *Bachan Singh v. State of Punjab*, a Constitution Bench articulated the "rarest of rare" threshold stating that "judges should never be bloodthirsty". Death must only be imposed where the alternative option is unquestionably foreclosed. The question is, under what circumstances are the retributive and deterrent effects of a life in prison so certainly insufficient that death is the only answer? And can such an answer be delivered without human error?

Implementation of the death penalty has also been deeply problematic. As the recent Death Penalty India Report by the National Law University, Delhi, indicates, the structural flaws in our criminal procedure and criminal justice system are most pronounced in death penalty cases. Due to biases in criminal investigations, the marginalised — whether by religious and caste denominations, or class — are disproportionately subject to the death penalty. And delays in the criminal justice system disproportionately affect those who suffer the tyranny of the uncertainty of their life. India also retains the death penalty as an option for non-homicide offences where the instrumentality argument is the most attenuated. Even so, the Supreme Court upheld it, as recently as 2015, for kidnapping with ransom.

In 2015, the Law Commission called for abolition of the death penalty for ordinary crimes, and activists continue to argue for abolishing it altogether. Political will in India is still bound by populism. However, the constitutionality of the death penalty will continue to be challenged and, sooner or later, the Supreme Court will have to answer whether absence of political will is sufficient ground to override the right to life.

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