



DEATH PENALTY: THE QUESTION OF IRREVERSIBILITY, COURT ARBITRARINESS AND JUDICIAL MISCARRIAGE, CASE STUDY.

Sociology

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ABSTRACT

Irreversibility of the penalty, judicial miscarriage, poor privilege accorded to the poor and the court's arbitrariness strengthens the idea of abolitionists. This article would like to argue the question of irreversibility can be arrested through thorough reviews. Socially privileged people, taking advantage of their privileges, do greater crime than the underprivileged people would perhaps commit. The argument that constitutional guarantees of the Supreme Court's arbitrary power in deciding "rarest of the rare" case is not fair since there is much variance and no uniformity among jurists in deciding upon what constitutes such a case. This article, however, asserts that arbitrariness of the court is the only autonomous space that the constitution offers to the jurists to display its penological wisdom. It further argues that the number of death penalties awarded would have actually been much higher, had it not been for the utilisation of this discretion.

KEYWORDS

Irreversibility, arbitrariness, judicial miscarriage, court's discretionary power, wrongful exoneration, and wrongful execution

Cases:

- (i) On September 22nd, 2016, 52-year-old Mohan Kumar who was a schoolteacher by profession and was later to be known as the cyanide man after his preferred weapon of choice, underwent a Special Trial Court process in Mangalore. On investigation, his crime was revealed to be much graver than it had been expected through his expertise of using cyanide chemical. He confessed that he was a serial killer and claimed to have taken the lives of more than thirty women in their late 20s and early 30s through his criminal career within a span of seven years between 2003-2009 across five districts of southern Karnataka. When asked if he felt any regret for his action, he said, "every time a woman died, I felt bad, but it lasted for only for about 15-20 days. Then when other women would come, and I would forget all about the past". (Source: *Bangalore Mirror Bureau*, 9th oct.2016).
- (ii) Dr. Devendra Sharma, an Ayurvedic doctor by profession, was accused and charge sheeted for killing 21 taxi drivers in Gurgaon and Aligarh area. His murder ploy come to light in the murder case of one Naresh, a tata sumo driver that he had hired on 3rd Feb.2002 from Gurgaon bus terminal to Bareilly. Upon investigations, Dr.Sharma confessed to have strangled the taxi drivers and dumped their bodies in Hazara canal. The irony was that until the day of the pronouncement of his death sentence, he showed no signs of remorse for the crimes that he had committed. His mental health had been sound, and no sign of abnormality had come to light according to the investigation reports. (Source: *The Times of India*, 15th May 2008)
- (iii) Darbara Singh, a former Air Force employee, crime was first exposed in an attempt to murder the daughter of a labourer after he had raped her in Kapurthala. His confession before the investigation agency further revealed that he had raped or sodomised as many as 23 children and murdered 17 of them. He was convicted and put in the Jalandhar Central Jail for a 30-year term. However, he was released from jail on 3rd Dec.2003 on the ground of good conduct. After his release, he had committed crimes much more grievous than the previous ones. He kidnapped, raped and murdered 14 more children. He did receive a death sentence, but it was revoked by the Punjab and Haryana High Court in July 2009. He would occasionally even rape the dead body of the victim and celebrated it with liquor. The victims included young boys. In total, he had killed 23 children through his criminal career. He died at the age of 75 at the Government Rajindra Hospital in natural death on 6th 2018 before he could be put to execution. (Source: *The Times of India* 10th June 2018)

INTRODUCTION.

The subject of death penalty as a public policy throws a conundrum that has evolved through wide scholarly discourses, debates, and the legal expertise of penologists. The subject provokes mixed feelings of intense emotion and sentiment that lies within two conflicting philosophies on life and death. Civil Liberties and Humans Right Organisations (ALCU) across the world believe that retaining the death penalty and the law of taking life violates human rights and therefore, campaigned against its practice ALCU (2018).

"Constitutional killing is a premediated murder", the campaigner staunchly believes this to be an inherently flawed practice in the civilised world.

The serious issue that invokes death penalty as a law of the state being challenged is the possibility of its 'miscarriage' in the judicial process and its 'irreversibility'. Another issue that the rejectionist finds hard to compromise with is that most often the accused in a fiendish crime happens to be belonging to the group of underprivileged, poor, deprived, disadvantaged and destitute people. What if the convict is found innocent after he has been executed or a judicial miscarriage has taken place in spite of having accessed every remedial provision? Considering the ever-present risk of judicial miscarriage and the element of irreversibility in death penalties, the abolitionist equates this act by the state of taking one's life as akin to vengeance, viewing it as the annihilation of the court's sanctity.

This article argues that, death penalty as a subject is not of vengeance-retributive or deterrent but instead is a rudimental element of justice for some crimes that fundamentally inhere death to be the only deserving penalty to bring justice. It is unwise to justify penalty on the ground of exacting crime based on its gravity. For serial killers like Mohan Kumar, Dr. Devendra Sharma, Darbara Singh, the punishment of any kind, even death, would not evenly justify the crime. Neither death nor life imprisonment would measure appropriately. The argument asserts its position by affirming that some heinous offenders would best serve the community through death. Civil courts punishing its own citizens according to the established law does not have any symmetrical derivatives to vengeance or retribution. It is not even close to the condition of deterring future crimes, rather it is an act of the society taking responsibility to prune its erring members who forfeits his right to life under the ambit of civil law and justice system Edward (2001).

There are discrepancies in public opinion over the subject of death penalty Berman (2018). In 2017, Gallup International Poll had come up with a result raising worldwide support for death penalty from non-supportive and some developed countries that had once resolutely asked for the removal of the death punishment but now sought to have it reinstated, some demanded for its reinstallation while others called for moratorium for all crimes DPIC (2019). As such, debates around it (Death penalty) created highly polarised positions and captured social and political discourses. Death penalty as a system of criminal justice bifurcates the basic ideologies of justice into disagreement. The debate over the two ideological juxtapositions is far from being saturated and is perhaps considered to be one of the widest ragingly debated issue to be continuously confronted since it had been first challenged by the abolitionists. The subject intuitively emotional instigation and has obtained the applause of abolitionists from two-third of the current world according to Amnesty International (2019). Many countries have completely abolished it from their statute books- some by law and some by practice, some have retained it while the remaining others have reinstated after it had been abolished Amnesty International (2018).

The reason for the debate, however, is simple - the choice one makes on

which side of the ideological spectrum one's sided of criminal justice in the judicial realm fits into. Irreversibility is one of the myriad drawbacks that the rejectionists claim over the rationality of capital punishment. Abolitionists assert apropos alternative over death penalty be 'Life Imprisonment Without Parole' (LIWP), because there are instances where the convict had been exonerated after having been executed DPIC (2017). Wright described it as the "penultimate penalty" Wright (1991). Penultimate activists insist that the highest order of punishment that the state should adhere to its citizen must not exceed LIWP.

The question of fallacy:

Fallacy can best be avoided by following a fair process in every single step, DPC US (2014). With these guidelines, the question of irreversibility is hardly to be anticipated. India legalised constitutional killing for crimes whose gravity hit the death penalty threshold. The institution of the highest order justice systematises and solidifies punishment for crimes that have shaken the community sentiment, thus embodying the practice into an evitable order to restore the equilibrium of society morally. To accord penalty lesser than death for a crime that has hit the death penalty threshold devalues the victim's life. Punishment of death topples all other forms of punishment agencies in retaining human value. It does not repay crime with the same gravity with which it was committed. Inasmuch mandatory death sentence been ordained constitutionally, there exists a mechanism of mandatory protection from false implication. Multiple reviews are involved in between, and death penalty is the final product.

In its practical sense, death penalty recipients avail more chances to acquit themselves than any other accused before the final sentence is awarded and thereby it does not commensurate to retribution. In fact, not a single human punishment can ever appropriately assign penalty for crimes like those committed by serial killers Mohan Kumar (Case I), Dr. Devendra Sharma (Case II) Darbara Singh (Case III). Deterrent is not the motive behind death penalty. Punishment in its original sense is meant for the offender alone and not for deterring potential committers who haven't yet committed a crime. Death penalty exist only because the offender forfeits his life not because it deters. Deterrent is the unaccounted by-product of the judicial process. It is unjust for the penal institution to give punishment for the sake of deterring future crimes. It is unfair, not just for the victim but also for the criminal, to be handed any punishment lesser than death in certain condition like cases studied above which were disaster to the society.

In case of a pre-mediated murder for instance, Mohan Kumar, (Case I) a teacher by profession who took the life of 30 women, what punishment would rightly compensate for the loss of 30 innocent lives? The harshest form of punishment, including death, does not commensurate thirty lives. Putting Mohan Kumar to death does not quantitatively proportionate his crimes and therefore abolitionists would argue that he must be given Rigorous Life Imprisonment without Parole (RLIWP) instead of death. The greater truth is that, neither death penalty nor RLIWP would appropriately correspond to his crimes. Nevertheless, he must be put to death only because he forfeited his life. That is fitting. Some call it "status competition" Franklin, David (2013).

Proponents of abolitionism unconvincingly do not die down and persistently negate the rebuttal based on the idea of irreversibility. In sporadic events there are incidents where innocent convicts were wrongfully executed (*Kali Ram Vs Himachal Pradesh*:1973) before their innocence had been proved. The negation, however, appears to be without substantial validity and a way out since if the whole work of the judiciary is captivated under reversibility then the Supreme Court would be stripped-off from having the final say and the state would be thrown into chaos. In the same vein, there is danger looming around acquitting the guilty criminal. Fair trial, which entails supplying the best jurist to speak on behalf and constituting adequate judicial reviews in every single step reasonably thwarts the objective requirement for reversibility, estimatedly. The two conditions – wrongful conviction and exoneration - have the same seriousness and one error bring no lesser consequence over the other. Both the condition mayhems the entire criminal justice system, Alvin (2006).

The case of Darbara Singh, (the III case) may be taken as a suitable example. His incomprehensible false compunction brought havoc to the society. After he was first released from the jail on the ground of good conduct, he failed the authority miserably by committing greater

destruction to the society. He committed the same crime in a worse manner than before; killed another 14 children and celebrated his crime with wine. Therefore, the logic of justice is only half-true when it only means avoidance of wrongful conviction and not of wrongful acquittal. Sometime in a rare case, there is possibility of wrongful conviction does lesser harm than wrongful exoneration. It may be added that, had the court taken the risk to eliminate Darbara Singh after his first conviction, the lives of 14 children would have been saved.

The debate over errors in judgment is cutting across concepts and ideas to such an extent that it singularly captures the jurisprudence space of both the supporter and rejector of justice. The debate is purely for the defendant and the society and not for the victim. This is the premier objective of the two contesting ideas regardless of social and political ideology. The proponent and the opponent alike strive toward achieving the common objective, that is, justice. India booked its berth on the list of the countries that have retained death penalty with limited application. Though it does not fully endorse Amnesty International's urge for immediate moratorium on death penalty in all cases, India narrowed down the scope considerably and retained it only in the "rarest of the rare case" with the court assigning the special reason for it, though the special reason clause is not without ambiguity. It does not pre-determinately define or demarcate what constitutes special category. The delineation instead rests upon the wisdom of the Supreme Court. The doctrine has endured criticism for this drawback.

The limited specification of the "rarest of the rare" doctrine is that it is required to first qualify three tests before it could be implicated. It must satisfy both the public and the awardee- first, the crime test- the magnitude, the manner in which the crime is committed or the extent to which the crime has aroused the indignation of the community; second, the criminal test – the depravity, meanness that does not have any mitigating circumstances; the third test must be public centric, that is, the public opinion about the accused, 262nd Law Commission Report (2015). This introduction greatly minimises the unbridled implication of death penalty.

As a result of this doctrine, India's rate of death penalty in reality is quite low when compared to the number of capital cases that is brought in front of the court. The doctrine has pretty much made death penalty sporadic than what has been speculated David (2010). Compared to the number of people in death row, actual execution in real time is relatively insignificant. The institution of the Presidential Mercy petition may also be accorded for the same.

DISCUSSION

Death penalty as a subject of justice inheres a plethora of connotations that cannot be simply ignored on the motive of pursuing justice alone. The simple fact is that it passes through a series of queries and the brutal accusation for not offering a second chance at rectification after it has been sentenced. The irreversibility has greater challenge of brute than rhetoric explanation, Monika, Maharukh (2005). The advancement of liberal idealism in western democracies in the latter half of the twentieth century accentuated the abolitionists' campaign against this savagery Catherine, Bent (2007). Some countries remained indifferent by the campaign and stood solidly behind their existing practice while others responded to the campaign by making its application extremely sporadic David (2019).

The ideological onslaught on the existing regime based on the state terminating the lives of citizens who do not value the life of fellow human beings has been equated with first-degree murderer by abolitionists on the grounds of human rights violation. However, one must be highly cautious to distinguish initiative violence and not be confused with reparative violence. They are not the same. The latter is remedial measure while the former is instigative. The existing order consolidates its penultimate position and responds to the provocation, at least on the dual connotation, in respect to the person having committed the crime first- it prunes perilous members from the society, secondly- it incapacitates the person permanently from future possibilities, and lastly - it gives the guilty person what he deserves.

Even if the taking of life is too resolute and enjoys constitutional or legal allegiance, what if the innocent is wrongfully convicted? Do constitution or legal forums revert life after one has been given to death? Can the state at any point of time return the physical life that has been taken or take back the judgment to revive the lost soul? Would any amount of compensation accountably commensurate the pain one has

undergone for being wrongfully convicted? This mind wrenching contestation creates conflict within the contesting groups. In as much as the danger of wrongful conviction looms to havoc the individual convict, the peril hinges on the death deserving convict escaping the noose. The matter requires serious cerebration. Since recompensing a wrongfully convicted person is purely calculative, it must also be considered that an actual offender escaping death punishment, or a wrongful exoneration would incur misery upon society just as giving death punishment out of misapprehension. Therefore, the jurist must be sceptical enough to avoid both a wrongful execution or, exoneration since both equally threaten the societal fabric. The possibility of fallacy must be excepted as a verity.

CONCLUSION

Meanwhile, dealing with the issue of false conviction that deprives the death penalty recipient of a second chance, it is also important to discuss the danger of not giving death punishment to the guilty who deserves it. Allowing the guilty a second chance might prove worse than depriving the possibly innocent the chance to prove his innocence. The data from the three cases mentioned earlier prove this fact. It would have been wrong to assume the sentences that are pronounced without giving the convict a chance to prove his innocence. The legal/technical error that would have resulted from exonerating the guilty convict or the innocent being turned into guilty represents a legitimacy crisis. Exonerating the guilty from the death row is a humiliation to the court and delegitimises the public policy of crime control mechanism. Similarly, detaining the innocent annihilates the court publicly. Neither of the two conditions are acceptable. It represents anomalies in the operation of criminal justice procedure or erroneous justice system that the state upholds Karen (2006).

The essence of justice in death penalty is not an independent entity. It is an institution dependent on two variables, that is, right and wrong. The existence of one variable completely demute the other. This means that both the right and the wrong cannot co-exist at the same time. The existence of one correspondingly eliminates the other. There cannot be a condition that neither qualifies nor disqualifies for death penalty in case of capital crime where justice is the instrument for measurement. Citizens have to accept that it only happens to a select few cases where the gravity of the crime hits the threshold of death penalty and is not based on the person's social background. Background influencing the judgement is not the system's fault, but rather the jurist's faulty handling of the case. It must be fixed. The death awardee too must also willingly accept his award for the good of the society.

We should not turn a blind eye to see the death deserving individual being exonerated as a capital error. Attention should not be diverted only to the exoneration of the innocent convict but also on the death deserving convict escaping penalty. Attention must also be directed to the error that might have taken place in the course of judicial process while trying to save the erred. Wrongful conviction erodes whereas unwarranted exoneration extirpates the sanctity of the Supreme Court. Either way, the condition is a mere speculation before it is proved with thorough review. Instituting multiple review thwarts both procedural and institution errors, false commission and omission out of the perfunctory, and faulty exoneration and wrongful convictions. This is where the Supreme Court has earned the public support. Therefore, as per my analysis, I would suggest that it would be unwise not to have faith in the judicial system and be sceptical regarding the possibility of error. The caveat of irreversibility without substantial error is a misconception.

Finally, justice system of death penalty is a refined process that involves multiple investigation. There exists a carefully balanced adjudicate policy of fairness. Otherwise, it is only a legitimization crisis. Criminal justice system is subject to state legitimization that includes exonerating the wrongfully convicted and executing the rightful criminal. No middle ground exists. Justice system has to take a biased disposition towards the truth. Judgment seeking the middle ground for truth is a weak legitimacy. The truth here refers to freeing the innocent and not letting the guilty escape. Justice should not be equated only with exoneration but also must be obligated to conviction to death.

The article thus concludes with a disagreement regarding the irreversibility and miscarriage to be factors supporting the abolishment of the death penalty. It also denies that belonging to an underprivileged background is inevitably and invariably linked to

capital crime. Instead, it seeks to advocate that misuse of privileges imprints greater misery than lack of it can possibly do. Another disagreement pertains to the accusation of court arbitrariness. Arbitrariness is the only space whereby the court may utilise its wisdom. Such an allegation demeans the sanctity of the Constitution and the prudence of the court. Disregard of its judgement wavers the faith of the people in the democratic institution that represents the highest order of justice. It is the duty of the citizenry to regard the court's direction with honour as long as the enquiry process follows the procedures established by the law and constitution and citizens are subjected to obedience. Additionally, citizens should take up on the burden to ensure that the court proceedings are conducted as per the established law.

In an unlikely case where the judgement of the court does not meet the expectation of the public, that is not because we have a wrong system, but because the problem lies in the inefficiency of the jurist handling the case. Public expectation may also have failed on two other conditions- first, the situation that results from the incompetence of a jurist and the second, created by the competent jurist. The former is the situation responsible for citizens having to fight for public good without targeting the system. The latter is the significance of civil court that must be acknowledged for. Death penalty becomes an issue only in the rarest case when the judgement appears to have surprised the public. Otherwise, death penalty is the most satisfying punishment that pacifies community sentiment in the highest order justice. Justice must not be confused with lifesaving alone, but it should also be life demanding. The death of the criminal who has committed a fiendish crime is constitutional and it is equally important not to kill the innocent who has been wrongfully convicted. Going by the definition, justice is "giving someone what it is due to", and this is the fundamental principle of penologist. In as much as exonerating the innocent convict deserves to be praised, sentencing a deserving person to death warrants equal appreciation. Justice directed only at saving lives is half justice. Peaceful living of the community is much more important than mere saving of lives or extirpating. Getting everyone what they deserve is all that we need for justice.

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