



Addressing the public opinion vis-à-vis appropriate criminal penalties

April 2018

Death Penalty: A violation of the right to life

"The right to life is the most fundamental of all human rights. The taking of life is too irreversible for one human being to inflict it on another."

--UN Secretary-General Ban Ki-moon speaking at panel on "Moving away from the Death Penalty and Halting Discrimination against Marginalized Groups", UN Headquarters, 24 April 2014.

- Since 1977, 141 countries, more than two-thirds of world's countries, have abolished death penalty in law and practice

Death Penalty in India

- Retained under the Indian Penal Code and other laws for offences which fall short of intentional killing.
- *Bachan Singh v. State of Punjab* : Defines criteria for “rarest of the rare” category in which other alternatives, including life imprisonment, are not an option.
- Amnesty International and the People’s Union for Civil Liberties have highlighted how the fate of death row prisoners in India is a ‘lethal lottery’, as the administration of the death penalty in practice is affected by several factors, ranging from the competence of legal representation to the personal views of judges.
- Concerns around the arbitrariness in the imposition of the death penalty have also been raised by the Supreme Court of India on several occasions, including in *Swamy Shraddananda (2) v. State of Karnataka*³⁷ and *Santosh Bariyar v State of Maharashtra*.

Public opinion and Death Penalty

- When a heinous crime occurs, public outcries for action and retribution are understandable responses. However, anger and grief – no matter how justified – should not be used to justify the resumption of executions or retention of the death penalty.
- The 35th Report of the Law Commission (1967) considered public opinion as an important factor in the context of the death penalty.
- (*Machi Singh vs State of Punjab*), the court defined “rarest of rare” as: “When the collective conscience of the society is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.”
- Many judgments have been passed where death penalty is awarded as it “shook the collective conscience of the society”
- In other words, the judges are expected to be guided by public opinion

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- Often, governments refer to the use of capital punishment to persuade the general public that they are taking tough measures to tackle high crime rates or particularly heinous crimes
- Governments, often simultaneously, refer to real or perceived public support for the death penalty as a reason to justify its retention and use, making little or no effort to challenge perceptions that the death penalty deters crime.

- Example:

India: In 2012 Delhi Bus gangrape and 2013 Mumbai Gangrape case, Parliament on both occasions demanded the death sentence for the accused

Trinidad and Tobago: In 2013, the government and Opposition moved to resume hangings in the wake of murder of six people, among them three teenagers, during a 20-hour period in East Port-of-Spain captured national attention

- Feelings in favour of the death penalty are more intense after a heinous murder has been carried out, and responses differ according to the precise question asked.

Should public opinion matter?

- Opinion polls that appear to give evidence of public support for the death penalty tend to simplify the complexities of public opinion; moreover public opinion about the death penalty--so far as it is possible to generalise about it--is often not based on a full or accurate understanding of the crime situation of the country, its causes and the means available for combating it.
- In Taiwan, findings emerged from a survey for the Taiwan Alliance to End the Death Penalty (TAEDP 2015). While 85% of respondents said that they were opposed to the abolition of the death penalty, only one-third thought that it would be the appropriate penalty when presented with the example of a young unemployed man who had killed the householder during a burglary. And while 83% said that the death penalty was the appropriate punishment when faced with a scenario of a random murder of a 10-year-old girl, the proportion fell to 34% when the same respondents were told that the defendant suffered from a mental disorder and had a long history of mental illness.

Case of Japan

- The Japanese government has conducted a regular survey of public opinion toward the death penalty since 1956.
- In 2009, a government survey found that 86% of respondents favoured the retention of the death penalty.
- In the report “The Death Penalty in Japan” published by The Death Penalty Project in 2014, data arising from other surveys that showed that evidence about attitudes of Japanese people towards capital punishment is seriously flawed
- The government survey phrased questions only in relation to the retention of the death penalty, for instance, while the alternative surveys showed that, when abolition was an answering option, the overall support for the death penalty is limited to less than half (44%) of the respondents.
- A significant proportion of the population did not have a clear view on the matter. Furthermore, the study found a correlation between retentionist views and misconceptions about rising murder rates, with people who believed that the number of murders had been increasing in recent years being more likely to support the retention of the death penalty.
- It also found that 20% of the interviewees changed their responses after being provided information on capital punishment in Japan and around the world. Both aspects emphasize the importance of informing and educating public views on crime and punishment.

Some facts on Public Opinion

- Most members of the public possess limited knowledge about the circumstances in which murders are committed, the characteristics of murderers, and all aspects of the administration of capital punishment, especially the faults in the system.
- There is no evidence to suggest that the death penalty has a deterrent effect over and above its alternative – life imprisonment (Law Commission of India 36th report ,2015)
- No concrete evidence to back the assumption in criminal law that the harsher the punishment, the less likely it is to be committed is not true. (Does Criminal Law Deter?)
- The primary objection to executing a person on grounds of incapacitation is the predictability problem. Theorists have argued that it is virtually impossible to be able to predict if the convicted offender is likely to reoffend.
- Retributive Theory: The retribution involved in the theory ‘tooth for tooth’ and ‘an eye for an eye’ has no place in the scheme of civilized jurisprudence. (Supreme Court of India, 1983)

Some facts on Public Opinion

- In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. Reliance on the death penalty diverts attention from other problems ailing the criminal justice system such as poor investigation, crime prevention and rights of victims of crime.
- Lack of resources, outdated modes of investigation, over-stretched police force, ineffective prosecution, and poor legal aid are some of the problems besetting the system. Death penalty operates within this context and therefore suffers from the same structural and systemic impediments.

Recommendations: Way Forward

- As a first step towards abolition, governments should support and facilitate meaningful and informed debate on the issue of the death penalty, including through human rights education programmes and initiatives that would provide information and promote a rights-respecting culture.
- Transparency on the use of the death penalty and human rights education are important for a meaningful public debate on capital punishment and its relationship to crime prevention.
- The death penalty is a human rights issue and should be examined from a human rights perspective.
- In line with UN General Assembly resolution 67/176, governments should make available relevant information with regard to their use of the death penalty, which can contribute to informed and transparent national debates on this issue



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