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Norms on Capital Punishment

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ABSTRACT

Capital punishment or death penalty is an archaic juridical punishment. It has always been a part of the society's law and order system. The jurisprudence can be trace back to the millennia of Babylonian Hammurabi codification of capital jurisprudence. It was a juridical norm that was just and legitimate and where retribution was taken synonymously to delivering justice. Capital punishment was not just confined to legal practices but was normalized into the culture and way of life of the people. Culture and attitude of the people play a major role in the emergence and maintenance of such jurisprudence, which is the reason why today some are capital punishment abolitionist states while others still retain it. By the beginning of the 20th century there was normative shift in the discourse on capital punishment. The human rights discourse and the imperfect legal system, human fallibility all amount to bringing about the changes on death penalty norms. The paper attempts to grasp the history and origin of capital punishment to illustrate how it was normalized as a part of a society. How norms on capital punishment were created and how an emergence of a new discourse brought about a normative shift on death penalty norms. The paper aims at understanding the process of norm creation around capital punishment and also the different types of norms surrounding it. The paper has been written using both primary and secondary sources: articles, reports, commentaries, debates and discussions.

1. INTRODUCTION

Norms in a broader sense means standard of behaviour where it specifies the appropriateness of our conduct in the society. Inviting either rewards or punishments as it is conformed or deviated from it. It is a framework within which certain compliance of rules are expected setting out in most cases a limitation to an alternative form of behaviour (Broom and Selznick 1963). And capital punishment which is a juridical practice is one such norm that has prevailed throughout human history. Capital punishment is the legal process whereby a person is put to death for a crime committed. The judicial decree is called 'death sentence' while the actual act of killing a person is execution. Crimes which are punishable by death are called capital crimes or capital offences. The term capital originates from the Latin word 'capitalis' meaning 'regarding the head' referring to beheading.

2. HISTORICAL BACKGROUND

The first established or codified law on death penalty is traced to the code of Prince Hammurabi of the 18th century B.C. Babylon. The Hammurabi code contains death penalty for 25 crimes which includes adultery (husband and wife cheating on each other) and helping a slave escape his master but curiously does not include death penalty for murder. The first death penalty was historically recorded in 16th century B.C. Egypt where a member of nobility was put to death on charges of magic. Death penalty was also part of the 14th century BC

Hittites' Code, 7th century B.C. Draconian Acts of Athens which made death the only punishment for all crimes, 5th century Roman law of the Twelfth Tablets, etc.

Crucifixion, drowning, beating to death, burning and impalement are different ways of carrying out death penalty. The Romans had a curious punishment for parricides (murder of a parent): the condemned was submersed in water in a sack, which also contained a dog, a rooster, a viper and an ape. According to the law of the Ancient Greeks a man who was condemned to death could choose to kill himself by drinking poison, but only citizens of Greece were eligible for this privilege. In 399 B.C., the Greek philosopher Socrates was made to drink poison as a death penalty for heresy and corruption of youth. At the other end of the scale, a slave who was condemned to death would simply be beaten until he gave up his fight for life.

Mosaic laws codified many crimes as capital and the Jews have different techniques of execution: stoning, hanging, beheading, crucifixion (copied from the Romans), throwing the criminal from a rock, and sawing asunder. The most infamous execution of history occurred approximately 29 AD with the crucifixion of Jesus Christ outside Jerusalem. One of the harshest of punishments was hanging, drawing and quartering where the criminal was hanged, cut down and disembowelled while still alive and then beheaded and the rest of the body cut into four quarters. This was actually a legal method of execution in Britain until 1814 (Jerome 2009).

Austria was the first country to abandon capital punishment in 1787 and Russia did the same for all offences except treason on the orders of Tsar Nicholas I in 1826, but when the communists took over control after the 1917 revolution, it was re-introduced. Most of the world's nations have now abolished capital punishment but sixty percent of the world's population actually lives in countries where the death penalty still exists. Most of these live in United States, India, Indonesia and China; and according to Amnesty International there is little likelihood of this situation changing any time soon (Jerome 2009).

The practice of capital punishment has always been a part of the Indian Judicial system. It was incorporated onto the IPC (Indian Penal Code) right from the beginning in 1860 (Krishnan 2010). During the reign of Mughal emperors, barbaric methods of putting an offender to death were used. It is interesting to note that the Sikh Emperor Maharaja Ranjit Singh never hanged anyone during his reign. The British, however, used 'death by hanging' as the only legalized mode of inflicting capital punishment. In the British era, death sentence was executed by hanging the convict by the neck till death. The same was reflected in the Indian Penal Code, 1860 (hereinafter referred to as the IPC) drafted by Lord Macaulay, which is still in force.

3. DISCOURSE ON CAPITAL PUNISHMENT

Death penalty is an archaic juridical punishment. It has always been a part of a human society's law and order system. It was a legitimate and just having its basis on the commitment of crime depending on the gravity of the crime and the damages inflicted upon the victim and its dear ones where retribution is sought which is taken as synonymous to delivering justice. It is embedded into the very fabric of the society's law and order system which they become habituated and acculturated to a particular mode of apathetical attitude towards death penalty. Some of the retentionist state made religious appeals for continuing death penalty. Especially under the Islamic principles based on the argument that it is sanction by religious laws and since most of the Islamic states have tied connexion between religion and the state especially the law and justice, death penalty is found to be a favourable form of

punishment. Religious appeals have also been made in the western countries as well both by the prosecutor and the defense attorney to influence court verdicts (Miller and Bornstein 2006).

Capital punishment was so far been normalized as a part of a just and civilized society. In fact, political philosophers like Hobbes, Kant and Rawls also supported death penalty. Unlike the religious moral justification for death penalty, their views are based on utilitarian motives based on the perceived frequency of crimes and the seriousness of offences. This utilitarian motive is expressed in the form of deterrence, retribution and incapacitation. Where retribution means an appropriate punishment equivalent to the gravity of the crime and deterrence means to prevent the recurrence of capital offences in the future and lastly incapacitation which means to curb the tendencies of potential capital offences. Through the historicity of capital punishment there is this social internalization of death penalty in the legal jurisprudence. The rationality behind such verdicts is that of giving appropriate punishment to the offender equivalent for its crime, deterring any potential offenders in the future and curbing such tendencies among the people (Warr, Meier and Erickson 1983).

Such rationalist and utilitarian justification is being criticised for the fact that its purpose failed. The rate of crime has not decreased as much was expected of it, if not increased which is one of the line of critique made by the death penalty abolitionist. By the beginning of the 20th century especially after the World War II, the morality of death penalty was questioned by the general public. In fact, the gaining of critical mass supports on the human rights discourse and the acute awareness of the legal error in the process of trial and executed brought about a change in the public opinion and attitudes towards death penalty. Methods of capital punishment are varied, no doubt, but what is interesting to observe is the attitude towards it. There has been a change in the way people observe capital punishment, to put it roughly by around late 19th and early 20th centuries, it was no longer the infliction of pain upon the body or control of a body but rather there was a concern with the disciplining of the mind.

There has been a transformation of penal practices in this modern era (Foucault 1975). The issue of death penalty is a crime justice related topic. Therefore, the public attitudes towards death penalty depend on their perception of the crime rate and their notions of prescriptive justice. Subsequently any changes around the death penalty norms require an informed and educated public. For a person who acknowledges a harsh treatment to offenders, grant powers to authorities, abstention from political participation and poorly educated youths seems to be supporting death penalty (Hessing, Keijser and Efflers 2003). The bold proposition forwarded in this paper is that the attitudes of the public informed by the current human rights discourse, ethical arguments on its utilitarian effectiveness and the legality errors has brought about a normative change around death penalty.

4. NORMATIVE SHIFT ON CAPITAL PUNISHMENT

Capital punishment is a crime- justice related issue where the notion of the state “right to kill” is accepted within the domestic legal system and without much resistance gain public support. By mid-20th century especially after the World War II humankind witnessed the untold sufferings and miseries that could happen to the perseverance of life. Life was never before valued and this experiences brought about a change in the attitudes and behaviours of human beings. The dignity of life gain greater emphasis and the norm “right to life” gain greater momentum. There was a normative shift from the state right to kill to a citizen right not to be executed by the state. The debate around the norm on death penalty was transcended

into the international sphere where we can find 4 international treaties prohibiting the practice of death penalty.

: Second Optional Protocol to the UN International Covenant on Civil and Political Rights

: Article 1 of both (1983) and Protocol 13 (2002) of the European Convention for the of Human Rights and Fundamental Freedoms of the Council of Europe

: Article 1of "The Protocol to the American Convention on Human Rights to abolish the Death Penalty (1990) of the Organisation of the States

(Amnesty International 2012)

The existence of these treaties debunk the notion that death penalty is a domestic, cultural, religious or a criminal justice issue but rather it is an international issue of humankind. It is a cruel and inhuman degrading penalty which threatens the international fabric of human dignity and life. The rationalist debate on death penalty which is interest-based motives which analyse the practice or abolition of death penalty purely as a matter of national sovereignty interests is to be abandoned and look at the constructivist debate which analyse the life cycle of norms in a society. Death penalty is such norm which emerges and sustains itself in a society which means that to have any changes on the practice of death penalty is to analyse the normative environment. Thomas Risse Kapen notion on state societal relations is of great importance where we can analyse state social interactions with the international and subjugate itself to the process of social learning.

The shifting of norm on death penalty can be trace through the process of norm emergence where a critical mass acting as a norm entrepreneurs create a life cycle of a particular norm where the states adopt it in its law. The existence of international treaties prohibiting the use of death penalty as a juridical punishment are putting countries under pressure to relent to the abolitionist trend. Through this process the norm against death penalty spreads or cascaded to other countries and where finally some of the states internalized this norm as a part of their way of life (Finnemore and Sikkink 1998). Norm internalization, according to Ted Hopf, implies a habit which is unquestioned and it is subject to the logic of unthinkability.

Such perception and internalization of norm against death penalty takes place because empirical studies show no deterrent effect for which death penalty is being justified for. And there is another issue of human fallibility of convicting innocents to death sentences due to some legal or human errors. A substantial move is to be made from the consideration of death penalty in its abstract terms to its application in the society, regardless of whether death penalty is justified for in its abstract, arbitrary prosecution can be made because of an imperfect legal system which renders it a morally unacceptable practice (Steiker 2005). To substantiate the arguments two cases have been taken up, namely, South Africa and India. To reiterate the argument made above, it is observed that death penalty seem to find no place in the emerging international justice blueprint. And that life imprisonment happens to be the maximum penalty even in the statute of the Special court of the UN Security Council and the International Criminal Court (Thornley 2011).

5. CASE STUDY

5.1 South Africa

The purpose of taking this case study is to explore how South Africa sought to embed an international human rights norm in the national consciousness, when the vast majority of people felt that the upsurge in crime and violence has devalued these very rights to "life and dignity". "Everyone, including the most abominable of human being, has a right to life, and

capital punishment is therefore unconstitutional," declared by Constitutional Court of South Africa on 06 June 1995 in *State v/s Makwanyane* case. The post-apartheid Constitutional Court chooses the death penalty as the first issue to be ruled on, shaping the New South Africa's arrangement of rules, values and identities (Sangmin Bae 2007: 41).

5.2 South Africa and Capital Punishment

The Capital Punishment began in South Africa since the Dutch East India Company started controlling South Africa. When British occupied South Africa in 1795, the death penalty was confined only to murdered (Ellison Kahn, 1979: 220). The Union of South Africa that was established in 1910 retained the practice of capital punishment. In 1948, the coming of the Afrikaner National Party to power increasingly implemented the policies of apartheid, and the use of the death penalty increased tremendously as much as that Pretoria came to known as the "hanging capital of the world" (Bouckart, 1996: 289). According to Amnesty International more people were executed between 1985 and mid-1988 than in any other country expect Iran. Between the years of Apartheid (1910-1975), "twenty seven times as many blacks as whites were executed" (Bouckart 1996) and from 1980s onwards the executions continued to increase almost every year. Hanging was the common method employed for execution in South Africa. This method was considered as "slow, dirty, horrible, brutal, uncivilized and unspeakably barbaric".

During the apartheid regime, capital punishment and death penalty became a socio-political tool of repression. Until the late 1980s death sentence that are politically motivated were also imposed (Bouckart 1996: 297). "Racial discrimination played a significant role in the administration of the death penalty in apartheid South Africa" (Holt 1989: 300). Hanging in South Africa became a way of life until the late 1980s so much that statistically a prisoner was given death penalty and hanged every other day (Herman Giliomee 1988).

5.3 Post-Apartheid and Capital Punishment

The Apartheid regime ended in 1994 with democratic election brought a government to power that was legitimate, but the question over capital punishment continued. There was a split within the government on the issue of capital punishment between Nelson Mandela and de Klerk. It was argued that the capital punishment was selectively applied to blacks and as such, the black ANC opposed to death penalty. The extensive use of the death penalty was seen as necessary instruments to protect the white minority and to preserve white dominance (Bae 2007).

The de Klerk's favoured for capital punishment because of the remarkable increases in the crime rate. Nelson Mandela also admitted that crime in South Africa was out of control. But the need to create a post-apartheid identity was felt so much in South Africa for promoting a shared commitment to human rights (Fruech 2003: 42). Capital punishment is considered as a manifestation of the apartheid system

Racial differences in its application were the main reason for the abolition of capital punishment in South Africa (Bae 2007). The Constitutional Court ruled that death penalty was based on *inter alia* the requirement of equal justice. Human rights principles became a central part of the national self-image in the post apartheid South Africa and such barbaric practice should not be subjected to citizens (Ginsberg 1998:39). Moreover, repealing and abolition of capital punishment meant cooperation and healthy image of South Africa with the International Human Rights project and admission to the western world (Giliomme 1995). In addition, the Constitution of post-apartheid South Africa has adopted the following rights as fundamental rights-

1. The prohibition on cruel, Inhuman and Degraded Punishment.
2. The right to life and the Right to human Dignity.
3. The right to Equality.

INDIA

India despite being the largest democracy in the world and a firm believer in the principles of non-violence, human rights and liberal values still retains death penalty on the ground that it will be awarded only in the rarest of rare cases and for special reasons. India is one of the few, in fact being exact one of the fifty four retentionist countries who have not signed the UN general assembly's resolution which called for all states that still maintain the death penalty to establish a moratorium on executions with a view to abolish the death penalty (Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General 2012).

India retains the death penalty as punishment for a number of crimes including murder, treason for waging war against the government of India, kidnapping, terrorism, inducement to suicide of a minor or a mentally retarded person, rape in certain circumstances, mutiny by a number of armed forces, gang robbery etc. It is mandatory second conviction for drug trafficking offences. Under Indian Penal Code, sections 109, 121, 132, 194, 302, 364, 396 and others provide for death penalties in the rarest of rare cases. Death sentences in India are carried out by hanging based on the constitutionality of the method and involving no barbarity or torture by the Supreme Court (Noorani, A.G., Challenges to Civil Rights guarantees in India, chap. 4, death penalty in India 2002).

Being one of the most controversial provisions of the constitution, death penalty raises a lot of questions. Even though being logically consistent it does not stand with the true spirit of the constitution. The sentences are at many times irreversible and sometimes it has proven that some judgements have been erroneous. No doubt, the constitution of India guarantees and safeguards the right to life of all its citizens, but also has provisions of death penalty and life imprisonment according to the procedure established by law in the rarest of rare cases. But the catch here is the ambiguity of the meaning of "rarest of rare" cases implying that the Indian juridical system leaves a lot of scope for the judges to interpret the rarest of rare term depending on the cases.

In fact, during 1980, the supreme court of India restricted the use of death penalty by characterising it as a punishment reserved only for the 'rarest of rare cases' on the basis of '*Bachan Singh Vs. State of Punjab case'* in which the court upheld that life imprisonment is the rule and death sentence is the exception (O B Kailasam's report, www.indiankanoon.org). But the provision had not delivered desired effects. According to a former chief justice, Delhi High court, Rajinder Sachar: 'after the rarest of rare doctrines was introduced in 1980- the supreme court confirmed death penalty in almost 50% of cases in the period from 1980-2000, while it was much less before that'. If every court trying a person for a capital offence finds that the case before it is the rarest, the progress of the abolitionists will become an illusion. Also the criteria to judge any crime to be rarest of rare is not defined and depends on the bench of judges dealing the case, which is often bound to be influenced by the then present conditions.

After observing an unofficial moratorium of eight years in India, the Indian government in November 2012, carried out the execution of Ajmal Kasab, convicted in the Mumbai Attacks. This then was followed by the execution of Afzal Guru convicted in the 2001 parliament attack in February 2013. In both these cases the executions were carried out right after the

president rejected their mercy petitions. A very important aspect of the death penalties in India is the Mercy Petition forwarded to the President of India in which the President reserves the right to either give life imprisonment by law or give death penalty with exception. Before these executions the last capital punishment awarded in India was to Dhananjay chatterjee in 2004 convicted of rape and murder of minor school girl.

One of the reasons that India still has faith in capital punishments is that it offers required deterrence. In a country as varied and diverse and vast as India, such rules are necessary to invoke fear in people. But studies and alarmingly rising no. of rape cases prove that it has not been able to provide the required deterrence. That the imposition of death penalty has proved to be ineffective in controlling crime rate.

"Inherently there are serious flaws in capital sentencing. Handing over the death penalty is dependent on various factors such as existing biases amongst law enforcers, social biases, media reports, public outrage, social and financial status of the culprit, quality of legal representation and last but not the least the bent of mind of the judges". (Abolish Death Penalty India, blogspot 2013).

CONCLUSION

The above two cases confirmed more than just showing the pros and cons of death penalty which is that the rationale provided for the justification of retaining death penalty is a failure. The norm against death penalty is slowly evolving through human rights discourse, ineffective argument for utilitarian basis, morality issues and legal errors. Death penalty is against the very notion of the right to life, it does not serve the very purpose i.e. to deter crime, but rather takes away the human agency of change and to repent, death is swift and easy but to live with the fact is not. The evolvement of norm against death penalty is not confine to the political and legal issues but it has trajectories at other dimension of life like art, music, films and literature. It challenges the notion of capital punishment. It is the product of oppression and injustice and planting a revolutionary thought into the mind of the people. It attacked the norm of capital punishment with lyrics, expression, acts and explicit words. An alternative can be life imprisonment, community service, solitary confinement, reforms (criminals, judicial system and society) and correctional institutes. To quote Singapore MP Laurence Lien in November 2012, "… Every human life is precious…it is not just about our criminal justice system, which we also want to be proportionate and restorative; it is about the type of society that we want to build – a society that values every person, and one that doesn't give up on its people." Life is precious; human beings must preserve it and not throw away one's life but rather give a chance to redeem it.

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