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Murder Most Foul: The Death Penalty and the Disadvantaged

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The death penalty has been, and continues to remain, a contentious issue in the field of criminal law and sentencing. Its supporters cite it as a vital tool in combating crime especially stressing on its value as a deterrent, its utility as a retributive tool and the inadequacy of life imprisonment for punishing somebody who has extinguished another life.\(^1\) Its opponents critique it as an anomaly from medieval times, cruel and barbaric in practice. Other frequently levelled criticisms include the arbitrary manner of its imposition, the inherent irony in the State emulating the murderer’s actions and the impossibility to make amends should proof of innocence be found later on.\(^2\)

These concerns have been the primary reason behind the recent abolitionist trend in the world.\(^3\) The European Union has taken the lead in this field having abolished it totally.\(^4\) More than half of the world’s population however still lives in countries that retain the death penalty.\(^5\)

A major criticism levelled against the death penalty is the amount of discretion vested in the judges during sentencing.\(^6\) It is argued that the judge’s personal beliefs, and not the writ of the

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\(^1\) See, *inter alia*, The Criminal Legal Justice Foundation’s reasons for retaining the death penalty, Available at [http://www.cjlf.org/deathpenalty/DPinformation.htm](http://www.cjlf.org/deathpenalty/DPinformation.htm), Last accessed on the 11th of April 2010


\(^4\) Article 2 of the Charter of Fundamental Rights of the European Union, It reads “*Everyone has the right to life; No one shall be condemned to the death penalty or executed*”

\(^5\) Supra, n.3

\(^6\) Supra, n.2
law, that decides who shall live or not. Capital punishment offers a form of direct democracy that is scarcely found in any other sphere of public policy. Judges drawn from the ranks of the commons make the decision to take or spare the life of a convict on death row, thus directly translating their personal beliefs into public policy. Such beliefs may take the form of arbitrariness in the best and outright bias in the worst.

This project aims to examine the veracity of this claim. It shall look at how markers like a person’s class, race and mental health affect his chances of being put to death. The term disadvantaged has been therefore given wide latitude. While not exclusively India-centric, this project also includes a study of a recent judgment of the Supreme Court of India that for the first time considered an accused’s socio-economic status as a mitigating factor during a death sentence hearing.

II. THE BIASED AND ARBITRARY NATURE OF THE DEATH PENALTY

The issue of arbitrariness in the imposition of death penalty has achieved prominence in the discourse on death penalty since Furman v. Georgia. In this landmark case, the Supreme Court of the US came around to the belief that for the vast majority of the people ‘eligible’ for the death penalty, a select few were chosen to be executed on no distinguishing grounds. This was a restatement of the ‘procedural argument’ claim put forward by the abolitionists. Even if one were to assume that certain killers need to be executed, no procedural system can possibly identify all of them. A brutal murder may see the perpetrator sentenced to death while in an equally heinous crime the Court may find life imprisonment to be sufficient. This holds true not only for the United States but also for India. The importance of this discretion to the Supreme

7 Jagmohan Singh v. State of UP., (1973) 1 SCC 20, Arguments on behalf of the plaintiff
10 Supra, n.7
11 408 US 238 (1972)
14 Ibid
15 See, inter alia, Dhananjoy Chatterjee alias Dhana v. State of West Bengal (1994) 2 SCC 220 and Rahul alias Raosaheb v. State of Maharashtra (2005) 10 SCC 322. Both cases involved rape and murder of minor girls and the factual matrix too was very similar. While the former resulted in the death sentence being awarded (and carried out), the latter saw the sentence being commuted to life imprisonment.
Court of India may be judged from their decision in *Mithu v. State of Punjab*\(^\text{16}\) where the Court struck down S. 303 of the Indian Penal Code that provided for a mandatory death sentence for murder committed by a life convict on, *inter alia*, it infringing upon judicial discretion. While general arbitrariness may be excused, if not condoned\(^\text{17}\), arbitrariness arising from bias cannot be.

2.1 Race and the Death Penalty

The issue of race in the imposition of death penalty is an important one in the US where available evidence suggests a wide difference in the way Whites and Blacks are treated by the law.\(^\text{18}\) Since the death penalty was reinstated in 1976 after *Gregg v. Georgia*\(^\text{19}\), 44% of the convicts executed have been ethnic minorities. This is in contrast to their 30% share in the population over the same period.\(^\text{20}\)

2.1.1 A Social Dominance Theory Explanation

Social dominance theory is a theory of group relations that states that societies tend to form group based social hierarchies based on agents like nature of social ideology and aggregated interpersonal and institutional behaviours.\(^\text{21}\) Social dominance theory does not categorize societies as hierarchical or not so. Instead it views social hierarchy as a continuum along which all societies can be located.\(^\text{22}\) Therefore there is at least one dominant (or hegemonic) group that dominates over one or more subordinate groups.\(^\text{23}\) This theory therefore views death penalty as much more than a crime control measure. It is also an instrument of social hierarchy enforcement.

\(^\text{16}\) AIR 1983 SC 473


\(^\text{19}\) 428 US 153 (1976)


\(^\text{22}\) Ibid

through institutional discrimination.\textsuperscript{24} If the primary function of the death penalty was indeed crime control, then one would have expected that groups that are the primary victims of violent crime (viz. the Blacks and the Hispanics) would have been its most ardent supporters.\textsuperscript{25} However a trend that has been observed consistently over surveys through the years is that the Whites are significantly stronger supporters of death penalty than other ethnic groups.\textsuperscript{26} Political ideology and the degree of social hierarchy are other factors that affect the use of death penalty.\textsuperscript{27} Political conservatives in general tend to be more supportive of the death penalty because it will never be equally applied across the social spectrum and will always be favourably biased towards the dominant sections of the society. As such it will further promote the cause of social hierarchy.\textsuperscript{28}

The very same reasons make the political liberals oppose the death penalty.\textsuperscript{29}

\textbf{2.1.2 The Reality Today}

The connection between the race of the defendant and the likelihood of his being put to death was ignored by the US Courts as well as the Academia till the turn of the century. There were exceptions however. In \textit{McCleskey v. Kemp}\textsuperscript{30}, the US Supreme Court was asked to overturn the verdict of death passed on the appellant, an African American convicted of murdering a White police officer, on the basis of a study conducted by Prof. David Baldus that showed that on an average a Black man accused of murdering a White person stood a risk four times greater of being executed than if it had been the other way round.\textsuperscript{31} In its widely criticized decision\textsuperscript{32}, the Court held that a mere \textit{discriminatory effect} is not enough to hold the Government guilty of violating the Fourteenth Amendment. A \textit{discriminatory act} needed to be proven. The Baldus Study was dismissed as an “inevitable part of the criminal justice system”.\textsuperscript{33}

\textsuperscript{24} J. Sidanius et al., \textit{The Death Penalty, Capital Punishment and the Beating of Rodney King: A Social Dominance Perspective}, Journal of Social Psychology 112 (1994)
\textsuperscript{25} Ibid
\textsuperscript{28} Ibid
\textsuperscript{29} Id
\textsuperscript{30} 481 US 279 (1987)
\textsuperscript{33} Supra, n.30
Things had largely changed by the advent of the 21st century as a study by Baumgartner found.\textsuperscript{34} Race as a factor in the handing out of capital sentences had entered the domain of public discussion. All the states of Union that still carry out executions have formed commissions to investigate allegations of such bias.\textsuperscript{35} As already pointed out, Blacks and other ethnic minorities are executed in numbers far beyond their proportion in the population.\textsuperscript{36} 55\% of the inmates on the death row in the United States today belong to ethnic minorities.\textsuperscript{37} In interracial murder cases while only 15 Whites have been executed for murdering a person of the other race, no less than 242 Blacks have been executed for the same offence.\textsuperscript{38} Beyond plain statistics, this has been borne out by academic studies as well.\textsuperscript{39} All this in a country that is around 70\% White! Evidence has also been presented for the phenomenon of ‘jury-bleaching’ where African-Americans are excluded from jury pools by District Attorneys in capital cases.\textsuperscript{40}

The American public has come around to accept this interplay between race and the death penalty as a fact of life. All kinds of racial stereotypes are used by many White Americans to justify these disproportionate statistics.\textsuperscript{41} A perception of discrimination has also taken root among the African-American population who see the death penalty as a highly racial form of punishment.\textsuperscript{42} This finds support in the studies that have shown that while Blacks and Whites favour equally punitive punishment for criminals, Blacks are far less likely to support the death penalty out of fear of victimization.\textsuperscript{43} Put simply, the death penalty is a form of state-tolerated, if not sponsored, violence perpetrated on the ethnic minorities, one of the faces of oppression identified by Iris Young.\textsuperscript{44}

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  \item \textsuperscript{34} Frank R. Baumgartner et al., \textit{An Evolutionary Factor Analysis Approach to the Study of Issue-Definition}, Meeting of the Midwest Political Science Association (2004)
  \item \textsuperscript{35} Ibid
  \item \textsuperscript{36} Supra, n.18
  \item \textsuperscript{37} Supra, n.18
  \item \textsuperscript{38} Supra, n.18
  \item \textsuperscript{40} Mark Peffley and Jon Hurwitz, \textit{Persuasion and Resistance: Race and the Death Penalty in America}, American Journal of Political Science, Vol.51, No.4, 998 (2007)
  \item \textsuperscript{42} Robert Young, Race, Conceptions of Crime and Justice, and Support for the Death Penalty, Social Psychology Quarterly, Vol.54, No.1, 67 (1991)
  \item \textsuperscript{43} Steven Cohn et al., \textit{Punitive Attitudes towards Criminals: Racial Consensus or Racial Conflict?}, Social Problems, Vol.38, No.2, 287 (1991)
  \item \textsuperscript{44} IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 61 (1990)
\end{itemize}
2.2 An Unequal Field: The Poor and the Death Penalty

Unlike racial discrimination in the imposition of death penalty where an obvious bias sends ethnic minorities to their deaths, the relationship between poverty and death penalty is a lot more complex.

Class describes an individual’s position with respect to the central economic and cultural institutions of society and, in turn, relates that position to the social resources available to the individual. Keeping this in mind it is perhaps a safe guess to hazard that in countries that impose the death penalty today, the difference between those who escape the gallows and those who don’t is one of wealth.

The right to legal representation forms the bedrock of our justice system. However it also must be recognized at the same time that merely having a lawyer will not do in capital punishment cases where winning or losing a case is a life or death question. Therefore as Bright argues, the right to a competent lawyer is essential in such cases. The importance of a competent lawyer is even greater in the adversarial system especially in the US where the jury system is followed. The poor, who are generally forced to rely on a Court appointed public defendant, probably have their fate sealed at that stage.

The standard of the Public defendants is abysmally low, even in the US. For instance, in the case of *Smith v. Kemp*, the lawyers for the defence, unaware of a recent Supreme Court decision that mandated an adequate representation of women in the jury for the trial to be not violative of the Sixth Amendment, failed to demand the same. His financially better off co-accused’s lawyers however did. As it turned out, the latter got a retrial where he was sentenced to life imprisonment while Smith was sentenced to death. He was executed on December 15, 1983. A

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45 This segment and the one following it draw heavily on Amnesty International and PUCL, *Lethal Lottery-The Death Penalty in India*, May 2008, especially for their India related sections
49 *Smith v. Kemp*, 715 F.2d 1459 (11th Cir. 1983)
50 *Taylor v. Louisiana*, 419 US 522 (1975)
51 The Sixth Amendment to the US Constitution provides for the accused’s rights during criminal prosecution
relative deprivation in terms of income leading to a lower standard of legal aid available becomes an absolute one as the death penalty has no midway.\textsuperscript{52}

The very scale of such miscarriages of justice is staggering. More than a hundred people on the death row in Japan are indigents who could not afford their own lawyers and depended on state supplied legal aid.\textsuperscript{53} Similarly in Malaysia, more than 270 out of the 300 on death row fall below the poverty line.\textsuperscript{54} In Arab Countries, where the victim’s family may let the murderer off the hook on his paying the \textit{diyat} (blood money), the poor are at an obvious disadvantage owing to their inability to pay.

India has both signed and ratified the International Covenant on Civil and Political Rights. Article 14(3)(d) of the Covenant states that at the minimum, every accused shall have the right to legal aid, without payment, if necessary. This is codified in Indian law under Section 304 of the Criminal Procedure Code, 1973. While evidence from the trial court stage is scarce, there have been many cases where the Supreme Court has lamented either the quality of, or absolute lack of, legal aid being rendered to the accused.

In \textit{Janardan Reddy and ors v The State}\textsuperscript{55}, the Supreme Court while conceding the fact that the Trial Court should have arranged for some sort of legal aid for the indigent accused, nevertheless held that the lack of such legal aid would not vitiate the trial.

In \textit{Bashira v. State of Uttar Pradesh}\textsuperscript{56}, where a person sentenced to death had had his lawyer appointed on the morning the witnesses were examined, the Supreme Court ordered a retrial giving a strict interpretation to procedure established by law. However, barely three years later, in an almost identical case\textsuperscript{57}, the Court took the opposite view holding that the witnesses to be examined were not important.

\textsuperscript{52} \textsc{Amartya Sen}, \textsc{Development as Freedom} 89 (1999): Sen argues that being poor in a rich country is a great capability handicap. More income is needed to buy enough commodities (in this case legal aid) to achieve the same social functioning. Thus while the rich get away owing to their better lawyers, the poor have no such luck.

\textsuperscript{53} IPS Death Abolition Project, \textit{Poverty and Capital Punishment Go Hand in Hand}, October 17\textsuperscript{th}, 2007. Available at http://ipsnews.net/news.asp?idnews=39683, Last accessed on 12\textsuperscript{th} April, 2010

\textsuperscript{54} Ibid

\textsuperscript{55} AIR 1951 SC 124

\textsuperscript{56} AIR 1968 SC 1313

\textsuperscript{57} \textit{Husaina v. State of Uttar Pradesh}, AIR 1971 SC 260
The litany of cases where poor legal aid led to the accused’s damnation is a long one indeed. It is perhaps not surprising given the remuneration of Rs.60 that is paid to senior lawyers who take up legal aid cases. In *Durga Domar v. State of Madhya Pradesh*\(^{58}\), the Court stated that as the accused had a legal aid lawyer, it is possible that they would have never communicated! In *Sheikh Ishaque and Ors v. State of Bihar*\(^{59}\), the Court castigated the High Court for upholding a death sentence even when the legal aid lawyer had not made any pleas regarding the sentence.

2.2.1 Poverty as a factor in sentencing: *Mulla v. State of UP*\(^{60}\)

The accused in this case were charged with the murder of four people, including a woman. The facts of the case were never in doubt and they were consequently sentenced to death by the Trial Court. The High Court upheld the verdict leading them to approach the Supreme Court. Here too their guilt was found to be proven beyond doubt. However the Court took a novel stance as far as the sentence was concerned.

Referring to their “circumstances generally”, the Court took into account the 48\(^{th}\) Law Commission Report that had suggested that many a times crime is the result of socio-economic factors. While not a justification for crime, such reasons may be counted among the mitigating circumstances in the Court’s opinion. The Court also ventured its opinion that socio-economic emancipation may lead to the criminal’s reform. To quote from the judgment, “…they have committed these heinous crimes for want of money. Though we are shocked by their deeds, we find no reason why they cannot be reformed over a period of time.”\(^{61}\)

The distinguishing facet of this case, thus, is its addition of socio-economic factors to the list of mitigating circumstances. The ‘socio’ bit has been overlooked in the decision as the judges confined themselves to discussing economic backwardness as a reason for crime. A laudable observation of the Court was its linking economic poverty with ability to reform. “It may not be misplaced to note” the Court says, “that a criminal who commits crimes due to his economic backwardness is most likely to reform.” The implications of this one statement are indeed far reaching. The motivations for an economic crime for a poor man are usually procuring basic

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\(^{58}\) (2002) 10 SCC 193  
\(^{59}\) (1995) 3 SCC 392  
\(^{60}\) Criminal Appeal No. 396 of 2008  
\(^{61}\) Ibid, Para 55
necessities of life for him and his family. As rightly remarked by the Court, this fact itself cannot be taken to be an excuse for crime; however it must not be lost sight of either. Where it becomes relevant is in the matter of sentencing where attempts at reform are usually very successful with the miserably poor, most of whom are first time criminals, drawn to crime by necessity. Hanging a person for a hunger induced crime will be as much a miscarriage of justice as freeing him on the same count. The Court’s via media of incarcerating him for a sufficiently long period to serve the ends of justice while at the same time attempting to reform him is praiseworthy.\footnote{Abdaal M. Akhtar and Mrinal Meena, \textit{To Hang or Not to: A Case Comment on Mulla v. State of UP}, AIR Web Journal, April 2010}

\subsection*{2.3 Barely concealed murder: The Death Penalty and the Mentally Retarded}

“The Death sentence shall not...be carried out on persons who have become insane.”

\begin{quote}
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The lack of authoritative information on mental retardation means that every year, retentionist countries around the world execute people who had no idea they were committing a crime when they did what they did. The American Association on Mental Retardation defines it as an IQ below 70, limitations in adaptive behaviour (for example interpersonal communication skills) and evidence that all these became apparent before the age of eighteen.\footnote{Diagnostic and Statistical Manual of Mental Disorders-Mental Retardation, Available at \texttt{http://emedicine.medscape.com/article/289117-overview}, Last accessed on 13\textsuperscript{th} April, 2010} Stigmatized and shunned by the society, the mentally retarded frequently suffer from a sense of devaluation. Coupled with the poverty they generally live in, it is the easiest thing for an ignorant society to condemn them to death.\footnote{Ruth Luckasson, \textit{The Death Penalty and the Mentally Retarded}, 22 Am. J. Crim. L. 276 (1994)}

The situation in the United States is complex. While the Supreme Court has held in \textit{Ford v. Wainwright}\footnote{477 US 399 (1986)} that executing the insane is \textit{ultra vires} the Constitution, it has left the definition of ‘insane’ to the States. This leads to the cases discussed here.

In the case of Horace Dunkin, the fact that he was in special education, had an IQ of 56 and was impaired in his intellectual functions was never disclosed to the jury by the inefficient Court appointed lawyers who never bothered going into his school records. The members of the jury
later wrote a letter to the Governor stating that they would have never held him guilty if they had been properly informed.\textsuperscript{66}

In the case of James Colburn\textsuperscript{67}, the prosecution never disputed the fact that the defendant suffered from paranoid schizophrenia and hallucinations and had a history of committal to psychiatric clinics. Yet the Court never considered it as reason enough to not execute him. So unfit was he that he was heavily sedated by antipsychotic drugs during his trial and spoke nary a word.

The record in India is relatively brighter, at least in the reported cases. Section 84 of the Indian Penal Code provides insanity as a general defence. The term is vague however and leaves much to the discretion of the judges who apply it in the way they please. In \textit{Amrit Bhushan Gupta v. Union of India and Ors}\textsuperscript{68}, the Supreme Court rejected a petition seeking a stay on the execution of a person with schizophrenia by observing that “(we) assume that at the time of trial, he had been...given proper legal aid...and did not suffer from insanity.” This was after the High Court as well as an expert committee had unequivocally voiced their concerns over his mental health.

A miscarriage of justice is however not the only fear of the accused. In many cases where the High Court or the Supreme Court discharge the defendant under Section 84, they send him to mental hospital for ‘treatment’ where he languishes for years, or even decades, before the doctor or the Court adjudges him fit to be released. A life term without parole, for ironically enough, committing no offence under the law.

\section*{III. EVALUATION AND CONCLUSION}

There is one very evident conclusion that can be reached through a study of the death penalty; it being that the current system of its administration is far from satisfactory. As detailed earlier, arbitrariness and bias pervade every stage of trial in capital cases. Two solutions therefore present themselves. Either we abolish the death penalty or its alternative, life imprisonment. The

\begin{thebibliography}{99}
\bibitem{67} The Death Penalty as applied in Texas: A Case Study of James Colburn, Available at http://www.tcadp.org/uploads/images/mental\%20illness\%James\%20colburn\%20Case\%20Study.pdf, Last accessed on 14\textsuperscript{th} April, 2010
\bibitem{68} (1977) 1 SCC 180
\end{thebibliography}
latter is of course unthinkable as it goes against the prevailing abolitionist trend in the world. It is perhaps not a surprise that the countries that make the maximum use of the death penalty have the worst human rights record in the world. These include China, Saudi Arabia and Iran. The presence of the US as the fourth member of the quartet says a lot about its adherence to the principle of “Equal Justice before the Law” embossed on its Supreme Court.

While it has adopted a midway approach between abolition and use of the death penalty, India’s record is far from exemplary. It has been pithily summed up by Justice Bhagwati in his dissenting judgment in the *Bachan Singh* case as “it is largely the poor and the down-trodden who are the victims of this extreme penalty. We would hardly find a rich or affluent person going to the gallows.” The father of the Indian Constitution, Dr. B.R Ambedkar had expressed similar sentiments in the Constituent Assembly debates.

Pending the necessary abolition of this barbaric punishment, some remedial measures may be taken. The precedent set by *Mulla v. State of UP* is one of such. The plight of the mentally disabled deserves focus as well. Condemning them to a lifetime in ‘mental hospitals’ where they live in inhuman conditions is hardly the kind of benefit Section 84 of the IPC envisages. Instead finding them guilty of culpable homicide not amounting to murder and sentencing them as such (owing to the absence of a specific *mens rea*) seems a much better option.

The role of the legal profession in this matter is an important, but ignored one. The people on trial in capital cases have more at stake than any other person brought before the law. They face a variety of handicaps—race, gender, class and mental health. To top it all they have a large section of the society baying for their blood in the name of crime control. Naturally, it is impossible for the judge (or jury) to remain immune to such public pressure, at least in practice. As such they need competent lawyers who can help them in overcoming these adversities, who can educate the public about fair process and who believe in the need for legal representation of the most vile ‘criminals’.

Unfortunately, we have case after case where proper legal aid was not made available to these unfortunate people on monetary grounds. Representing a poor person whose life is at stake is

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69 (1982) 3 SCC 25
looked upon as a sacrifice on the lawyer’s part as the indigent cannot afford to pay him astronomical sums. What is needed, but is sadly missing, is a spirit of rebellious lawyering that strives to empower the disadvantaged. Merely proceeding on a client to client basis is not enough. The entire community affected by the biased manner in which death penalty is administered needs to be mobilized. This collective belief can then be used to develop a countervailing power that may take on the established socio-legal structure.

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