

YAKUB MEMON'S CASE : THE QUESTION OF CAPITAL PUNISHMENT AND JUSTICE

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The debate on the topic of capital punishment is an old one in India, but recently it has taken a hike when one of the accused of the 1993 Bombay bombings was awarded capital punishment. It has just added oil to the burning fire. The topic of the debate is about the validity of the capital punishment on humanitarian and Constitutional grounds and whether it should be retained in the Indian Penal Code for the crimes like waging war against the State or murder for which the capital sentence is usually granted in 'rarest of the rare' cases. The two groups of intellectuals, i.e. the Retentionists (who want it to stay in the Code) and the Abolitionists (who want to abolish it from the Code), by giving different arguments for their cause, are trying not only to influence the people of the country but also the Judiciary and the Parliament to validate and prove their stakes.

Punishment to a criminal actually is the State's reaction to his/her act. The idea of giving punishments is based on: *firstly*, having a reformatory effect in order to bring about a reform in the offenders and to promote rehabilitation and secure "social justice", *secondly*, having a deterrent effect on the offenders, and *lastly*, comes the idea of retribution. The stick of punishment is used to reinforce the social values of the society and to secure compliance with it. Providing punishment to the offenders is necessary in some or the other way but to what extent can never be gauged on any kind of scale. Whenever a court of justice reaches to a certain conclusion, i.e. finding a particular person guilty in any case, it solely depends upon the discretion and mentality of the Judge(s) as to what extent the punishment should be given. It totally rests upon the wisdom of the judge(s), his moral approach, his understanding of justice and his own "measuring scales" to judge the gravity of the crime. Had it been the case that the presiding judges for that particular case were others but them, the verdict could have been different due to different approaches of different judges. As it was held in the case of *Bachan Singh v. State of Punjab*, wherein the verdict of punishment was given in a ratio of 4:1 with Bhagwati J. having a minority view of not providing the capital punishment to the accused. The other four judges were adamant at giving capital punishment, for which they gave a lot

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many arguments, but Bhagwati J. said that according to him death penalty is in contravention of article 14 and 21 of the constitution.

The first thing that is listed under sec. 53, i.e. Punishments, of the Indian Penal Code is “Death”. The Indian Penal Code was framed under the able guidance of Lord Macaulay, while India was under British rule and it is being used as a basis of criminal law till date. Even though the British have abolished death penalty, India is still clinging to it. Whenever a verdict of death penalty is given to any accused (turned guilty), he has a right to file an appeal in the upper court and when all the judiciary bodies at different levels provide no relief then he has the last option of “mercy petition” wherein the role of the President and the Cabinet Ministers comes into play. The President has a right to grant Royal Pardon, to any convict who asks for mercy, based upon his discretion and on the advice of the Cabinet Ministers. This aspect brings in political interferences into the matter of judiciary. Since Britain has abolished the death penalty, it also has no space for royal pardon now. But in India as we cling to the provision of capital punishment, we have a lot more things to come into picture. The involvement of politics in deciding a fate of a person makes it a worse case. Just as in the case of Yakub Memon, the rejection of his mercy petition raised so many questions regarding the Judiciary and the Politicians, many of which are unanswered till date.

Now if we talk about Justice in relation to capital punishment, many say that justice was done when Yakub Memon was hanged, or let it be any person hanged till date. At the moment of providing justice and giving punishment the idea of reformation goes down the gutter and what is left is only retribution, wherein people believe in the concept of “an eye for an eye” or “life for a life”. What if a person has killed more than hundreds of people? Should he be hanged those many times so as to provide justice to all? John Rawls in his famous work *Theory of Justice* talks about “veil of ignorance” wherein he maintains that the parties to any case should be placed behind the veil of ignorance so that no party is privileged in any way and that justice can be provided without any partiality. Just as in a case of giving death penalty, both the Retentionists and the Abolitionists are not at parity, the one who is in power will do what he wants. Right now we have a constant debate going on the topic of death penalty but still the people who are in favour of death penalty for some or the other reason are not letting it go. Many countries have given up the concept of capital punishment based on humanitarian grounds but India. It is said that capital punishment is given in “the rarest of rare” cases which still varies as the presiding Judge(s) may or may not take a particular case to come into this ambit. They say that death penalty serves as a deterrent and also serves the purpose of

retribution, and sometimes societies this view outweighs any other view and hence punishment is served. While those in favour of abolition take the humanitarian grounds as their weapon and ask for abolition of death penalty.

Doesn't it seem to be unjust to give death penalty by saying that it has a deterrent effect and that retribution is what the major chunk of the society wants? John Rawls in his work *A Theory of Justice* says that 'justice refers to a fair distribution of life chances to all' and the concept of death penalty goes against this concept of justice. There has been no proof ever that shows that death penalty has a deterrent effect, as there seems to be no statistics that proves that crime rates have declined as a result of capital punishment. In addition to above, having a feeling of retribution makes a person mentally blind and irrational, leaving no difference between the culprit and the self. Abolition of death penalty and taking life imprisonment as its alternative will give no harm to any citizen. Just because someone died due to an act of a person, it does not give any one any right to take away the life of that actor. If justice is to be done it should be done in fair means and by reaching at fair ends rather than having a feeling of "an eye for an eye" or "a life for a life".