

Death Penalty in India: An Overall View

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I. ABSTRACT

Human life place a great role in the society because of its importance where it paves a way to lot of emotions and attachments in cycle of nature. That could be a reason why human life is important in this eternal world which makes different from other living creatures in the world. Death penalty can be simply referred in simple sense, where it where the life of a person is taken by the State by following the due procedure of law for the grave offence, which the person has committed. But this death penalty is not new to this contemporary world, where it got its existence from ancient time, which stands to be immortal. It was practiced in all centuries of human life society. This 21st century has made something special , where it openly confesses that time has come for abolishment of death penalty, by making up satisfactory opinions and arguments and posing certain conditions on which death penalty should be imposed. This has become a debatable issue, where some of the developing countries has made concerned to this issue and has abolished death penalty. India is a well – known developing country, it didn't sort out any conclusion in abolishment of this capital punishment, but it has given in rarest of rare cases as far as cases are concerned. Though there are many enactments and punishments prescribed in law, concept of death penalty plays a vital role in criminal justice system. Imposing death penalty has led to many issues in current society. Hence, this paper highlights and stretches out the overall view in death penalty as far as India is concerned.

II. INTRODUCTION

Criminals do not die by the hands of the law. They die by the hands of other men.”

- George Bernard Shaw

Human life place a great role in the society because of its importance where it paves a way to lot of emotions and attachments in cycle of nature. That could be a reason why human life is important in this eternal world which makes different from other living creatures in the world. Death penalty can be simply referred in simple sense, **where it where the life of a person is taken by the State by following the due procedure of law for the grave offence**, which the person has committed. But this death penalty is not new to this contemporary world, where it got its existence from ancient time, which stands to be immortal. It was practiced in all

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centuries of human life society. This 21st century has made something special, where it openly confesses that time has come for abolishment of death penalty, by making up satisfactory opinions and arguments and posing certain conditions on which death penalty should be imposed. This has become a debatable issue, where some of the developing countries have become concerned to this issue and have abolished death penalty. India is a well-known developing country, it didn't sort out any conclusion in abolishment of this capital punishment, but it has given in **rarest of rare cases** as far as cases are concerned. Though there are many enactments and punishments prescribed in law, concept of death penalty plays a vital role in criminal justice system. Imposing death penalty has led to many issues in current society. Hence, this paper highlights and stretches out the contemporary issues in death penalty as far as India is concerned.

III. DEATH PENALTY

Death penalty, otherwise known as **capital punishment** which also paves a way to certain doubtful questions, where it enables us to think whether this capital punishment eliminates the criminals and crime from the society? Whether it could be an imaginable thing, in this society? Having deep concern on human nature, it is unimaginable. It can be done only when the criminals rehabilitate themselves, change their attitude for a better future. There has been a global trend towards the abolition of capital punishment; however, India has not adopted this position. This form of punishment is different from the others, because of the obvious element of irreversibility attached to it. A man once executed for a crime can never be brought back to life. So if any error has crept in while deciding on a matter, this error cannot be rectified at a later stage. As it is mentioned earlier, death penalty has its existence since antiquity, where it got started back as early as 1750 B.C, moreover it has been enumerated and its presence is notable in all ancient scriptures such as code of Hammurabi, Bible and more on.. Even great scholars, like Plato, John Locke, Thomas Hobbes who spoke about the social contract theory, supported and favored this type of punishment for grave offences. Where this was the case being followed, then this concept of punishment took a dimensional change in the society, whereby it led to the abolishment of this death penalty or capital punishment, where it became a debatable issue by one of the great criminologists named **Cesare Beccaria, who convinced many people that death penalty should be abolished because it is inhuman, useless and technically speaking, a public assassination.** In the year 1846, Michigan became the first State to abolish the capital punishment, followed by Portugal and Venezuela in 1867. Abolition of the death penalty was also supported by the United Nations during the drafting of Universal Declaration of Human Rights in the year 1948.

IV. INTERNATIONAL SCENARIO AND ITS POSITION

Death penalty considered as a global issue, also has its importance in international scenario and in many legislations of various countries all over the world, many arguments were held up in supporting the nature.

1 The United Nations (UN): The United Nations usually play a great role in protecting the human rights in that way, they recognised that there is a need for high standard of fair trial to be followed by every country, and Procedures to be followed must be just, fair and reasonable. Moreover, importance of human rights in criminal justice system has been declared in many international conventions. Some are mentioned below:

- **Article 5 of the Universal Declaration of Human Rights 1948** provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- **Article 7 of the International Covenant on Civil and Political Rights (ICCPR) 1966** provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment
- Later, the United Nations in regard to protection of human rights, instigated some suggestions when death penalty should be applied or it should be removed. Some suggestions are as follows
 - Countries which have not yet abolished capital punishment may impose it only for the most serious crimes.
 - Capital punishment may be imposed only in case of serious offences according to established law for the time being in force. There must not be any retrospective effect of the punishment.
 - Young persons at the time of commission of crime, whose age was below 16 years, should not be awarded death penalty.
 - Death penalty must not be imposed upon pregnant women or on new mothers or insane persons.
 - Any person sentenced to capital punishment shall have right to appeal to the higher court and steps should be taken to ensure him right to appeal.

V. POSITION AND CONSTITUTIONAL VALIDITY OF DEATH PENALTY IN INDIAN SCENARIO

Capital punishment has gone through many dimensional changes, which involved in many forms of punishment from immemorial period. Capital punishment in Indian scenario started from Indian penal code, where **The Indian Penal Code, 1860 (IPC)** is the Public Law and substantive Criminal Law which defines crimes and prescribes punishments. **Section 53 of the IPC provides for death sentence and imprisonment for life as alternative punishment.** In present scenario, capital punishment is recognized as a legal death penalty in India. Capital punishment has been declared to serious offences. Indian judiciary declares this, by giving importance to its constitution, where *Article 21 of the Indian constitution is “protection of life and personal liberty”.* *This article says “No person shall be deprived of his life or personal liberty except as according to procedure established by law”.* This article says right to life is promised to every citizens in India. In India IPC provides death sentence as a

punishment for various offences such as criminal conspiracy, murder, waging war against the government, abetment of mutiny, dacoity with murder, and anti-terrorism. The Indian Constitution has provision for mercy of capital punishment by the President. Whenever, question of death penalty or capital punishment arises, this article comes into play, where it instigates the judiciary members to analyse the case again, and make them to think before granting a death sentence or punishment. *Further Art. 14 of Constitution declares "equality before law and equal protection of the laws", which means that no person shall be discriminated against unless the discrimination is required to achieve equality. The concept of equality incorporated in Art. 14 finds echo in the preamble to the constitution.* Capital sentence, it seems, is therefore, an anti-thesis of one's right to life. It is an inseparable fact that there is nothing in the Constitution of India which expressly holds capital punishment as unconstitutional, though there are provisions that suggest that the constitutional scheme accepts the possibility of capital punishment. However, there are several provisions in the constitution such as the preamble, the Fundamental Rights and Directive Principles which can be relied upon for challenging the constitutionality of capital punishment. It is clear that only a limited category of serious offenders visited with capital punishment. That means a person's life is liable to be extinguished any time after he has extinguished the life of another or committed some other serious offence. The crux of the whole issue is that each one of us has an inherent right to life and none of us can divert any one of this precious right, and, if he does so, it has to be at the cost of his own life. There are numerous legal practitioners, scholars who argue that the very fact that the death penalty is retained in Indian criminal statutes runs counter to one's right to life. It is submitted that these learned jurists probably overlook the fact that even right to life is not an absolute right. Constitutional validity of the capital punishment as provided in the Indian Penal Code has been challenged in many cases and so far as the Supreme Court has always upheld that the capital punishment provided in the Indian Penal Code is constitutionally valid. There were many arguments in favour and against of capital punishment, moreover, Constitutionality of capital punishment may be considered in respect of two aspects of the matter. Firstly, the question is whether the capital punishment as such is unconstitutional and cannot be awarded in any case whatsoever. In other words, the problem is whether capital punishment cannot be awarded for any offence and by following any procedure at all. Secondly, the question is that even though the capital punishment as such may not be unconstitutional, whether capital punishment as provided in various sections of the Indian Penal Code is unconstitutional because the provisions of the Indian Penal Code forwarding capital punishment, is violative of certain provisions of the constitution. These two aspects of the matter may have to be considered separately so as to have a clear vision on the subject at issue.

(i) Constitutionality of capital punishment as such.

(ii) Constitutionality of the provisions of I.P.C. providing for capital punishment.

VI. DISCUSSION OF LAND MARK CASES DEALING WITH DEATH PENALTY IN INDIA

Testing the constitutional validity of death sentence or capital punishment made an important criterion to think in criminal justice system. Most of the landmark cases in India, involve in issues in granting death penalty as well as testing the validity of death sentence. Moreover, the concept of **RAREST OF RARE CASE** came into force, in discussing about the issue.

In the case of *Jagmohan Singh v. State of U.P* which was the first case dealing with the question of constitutional validity of capital punishment in India. The counsel for the appellant, in this case, put forward three arguments which invalidate section 302 of the IPC and judicial approach was carried on and where the council for the appellant put forth the argument that capital punishment takes away all the **rights guaranteed under Article 19 (1) of the Constitution**. The second argument **which was given that the discretion of which capital punishment was awarded did not follow any fixed standard or policy**. Thirdly it was argued that this unguided and **unfettered discretion violated Article 14 of the constitution**, which guarantees equality before the law. It was stated that in many cases, the situation arose that where two individuals had committed a murder, one was awarded the capital punishment, and other was awarded life imprisonment. . It was also contended that death penalty violates not only *article 14 but also articles 19 and 21 of the Constitution*. Here *procedure* is not clear because after the accused is found guilty, there is no other procedure established by law to determine whether death sentence or other less punishment is appropriate in that particular case.

But this contention was rejected by the Supreme Court and the Court held “*in important cases like murder the court always gives a chance to the accused to address the court on the question of death penalty*”. The Court also held “*deprivation of life is constitutionally permissible provided it is done according to procedure established by Law. The death sentence per se is not unreasonable or not against public interest. The policy of the Law in giving a very wide discretion in the matter of punishment to the Judges has its origin in the impossibility of laying down standards. Any attempt to lay down standards as to why in one case there should be more punishment and in the other less punishment would be an impossible task. What is true with regard to punishment imposed for other offences of the Code is equally true in the case of murder punishable under section 302 I.P.C. No formula is possible that would provide a reasonable criterion for infinite variety of circumstances that may affect the gravity of the crime of murder. The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment*”

But there was a contrast change in case of **RAJENDRA PRASAD VS STATE OF U.P** Krishna Iyer, J., observed that “*.....the humanistic imperative of the Indian Constitution, as paramount to the punitive strategy of*

the Penal Code, has hardly been explored by the courts in this field of 'life or death' at the hands of the Law. The main focus of our Judgement is on this poignant gap in human rights Jurisprudence within the limits of the Penal Code, impregnated by the Constitutionin the Post-Constitutional period section 302, IPC and section 354(3) of the Code of Criminal Procedure have to be read in the human rights of Parts III and IV, further illuminated by the Preamble to the Constitution." And moreover he held that capital punishment would not be justified unless it was shown that the criminal was dangerous to the society. further held that giving discretion to the judge to make choice between death sentence and life imprisonment on "special reasons" under section 354(3), Cr.P.C., would be violative of Art. 14 which condemns arbitrariness. He pleaded for the abolition of death sentence and retention of it only for punishing "white collar offences".It is submitted that the minority judgment is correct because after the amendment in the I.P.C. and the decision in Jag Mohan Singh's case the death penalty is only an exception and the life, imprisonment is the rule. The discretion to make choice between the two punishments is left to the judges and not to the executive.

VII. LAW COMMISSION REPORT

Discussing about the landmark decisions of death penalty in India, law commission report plays a vital role and remains as an inseparable component , where it discussion is based on validity of capital punishment which also relied upon by the judges in the case of Jagmohan too. The Law Commission of India, after making an intensive and extensive study of the subject of death penalty in India, having a deep research on particular area it **published and submitted its 36th Report in 1967 to the Government.** The issue of granting death penalty or capital punishment is based on balance of various arguments, arguments must be in fair, reasonable manner and should bring weightage to the argument. It is difficult to rule out the validity of the strength behind many of the arguments in all situations , and varies from different cases. The need for a modern approach, the severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

Next most important judgment and landmark case ***Ediga Anamma v. State of Andhra Pradesh*** V.R. Krishna Iyer and R.S. Sarkaria, JJ: substituted capital punishment by imprisonment for life not only for twelve years delay of hanging but also on personal grounds such as youth, imbalance, sex and expulsion from her conjugal relation.

VIII. CONCEPT OF RAREST OF RARE

The concept of rarest of rare cases came into existence in the case of **Bachan Singh v State of Punjab**, one of the most important cases, which brings out the question of the validity of capital punishment. This was the case that gave birth to the “rarest of the rare cases” doctrine and still where it resulted in debate on the question of the compatibility of the death sentence with Art. 21 of the Constitution. The Supreme Court while holding the validity of the death penalty expressed the opinion that a real and abiding concern for the dignity of human life postulates resistance for taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases, when the alternative option is unquestionably foreclosed. There was always a question in mind of judicial judges at what circumstances, death penalty can be given, offences which come under death penalty, the nature of crime and offence, how far it makes reliable over the punishment?, justice for the victim. It was also laid down that for ascertaining the existence *or absence of “special reasons” in a case*, the Court must pay due regard to both the criminal and the crime equally. The aggravating or mitigating factors need to be looked into. Things like age, mental condition, age of the accused and if the act was done under the command of a superior must be taken into consideration while deciding the punishment.

Justice Bhagwati alone dissented in this case but the issue was that his judgment came only 2 whole years after the verdict had been declared. So, some of the essential arguments that he made against the death penalty never came to the limelight. And this very principle he believed *clearly violates Article 14 which guarantees equality before the law. Also, it violates Article 19 and 21 as there are no procedural as to when the state has the power to take away the life and personal liberties of a person in such cases.* Justice Bhagwati not only talks about the brutality and indiscretion that accompanies death penalty but also with logic and statistical data shows us how capital punishment doesn't succeed in attaining any of the three penological goals

Mithu v. State of Punjab was another case where the mandatory death sentence under Section 303 was declared unconstitutional and hence invalid. The section was based on the logic that any criminal who has been convicted for life and still can kill someone is too cold-blooded and beyond reformation, to be allowed to live. The judges in Mithu's case held that Section 303 violated the Articles 14 and 21 of our Constitution and so it was deleted from the IPC.

Also in case of *T.V Vatheeswaram v. State of Tamil Nadu* and *Sher Singh v. State of Punjab*, the Supreme Court was faced with the question of delay in execution of the death sentence and whether a prolonged delay was reason enough to commute the death sentence to life imprisonment. While the first case laid down that such a situation gave reason enough for the convict to invoke section 21 and get the lesser punishment, the majority in the latter case differed on this point.

In the case of *Macchi Singh v. State of Punjab*, where four men were awarded death sentence by the sessions court and the High Court for shooting down seventeen persons including men, women and children within their homes at night, in five incidents. The motive was a family feud. The Supreme Court upheld the death sentence of the three of the four persons. Justice Thakkar, speaking for the court, was impelled to attempt a definition of the 'rarest of rare' case, determining sentence in order to further elucidate the "rarest of the rare rule", situations where the application of death sentence could be justified *Justice M.P Thakkar* gave some points:

- ✓ Manner of Commission of Murder
- ✓ Motive for the commission of murder
- ✓ Nature of crime
- ✓ Magnitude of crime
- ✓ The personality victim of the murder

IX. CONCLUSION

Every individual must have a note in their mind that "*No one has right to take away one's life*", unless it is prescribed law. Recent scenario, contemporary issues in death penalty mainly results because there is a failure in examining the nature of crime. There is question whether death penalty must exist still? most of all countries death penalty has been abolished, but it can be reiterated that death penalty is a requirement in the contemporary society where each man stands for himself. Harsh punishment is required to keep the potential convicts at bay, and ensuring that the society is not harmed or the peace, tranquility and order of the society is not compromised. The State cannot compromise the lives of hundreds and thousands of innocent persons only for the life of one convict who does not even deserve to live among a society of civilized persons. Thus, death penalty must continue to exist.