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Law

Relevance of Death Penalty in Indian Law

KEY WORDS:

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ABSTRACT

Recently, the Supreme Court in its final verdict in Nirbhaya Rape Case, gave death penalty to all the accused. This verdict has again triggered a debate over the law of Death Penalty and its relevance in India. The debate over the legality of Death Penalty has been brought to light in India's Law Commission report in 2015. Executions in the recent past have broken the gradual abandonment of death penalty. Indian legal system was seen abandoning the idea of death penalty as only one execution was recorded within a period of 1998-2007. The last execution to take place in India was in 2015, hanging of Yakub Memon, convicted of financing the 1993 Mumbai bombings. Its been long since we started debate over relevance of death penalty in India. Few quote it as justice for the victims and others call it an "aggravated murder". The proposed study would highlight and bring focus on all the factors raising questions over the relevance of death penalty in India. For the purpose of this research, data has been collected from newspapers, government reports, article and books. It includes research comprising of the landmark judgments over the issues involved.

INTRODUCTION

According to the Law Commission report, recent executions have been few and far between. While stating that it no longer serves the purpose and is not a deterrent, the commission quoted that murder rate has declined. The murder rate fell from 4.6 per 100,000 people in 1992 to 2.7 per 100,000 in 2013. That has coincided with a decline in the rate of executions, "raising questions about whether the death penalty has any greater deterrent effect than life imprisonment," the report said.¹

The recent trends have confirmed a global movement towards a restricted use of death penalty. India has retained capital punishment while 140 countries have abolished it in law. That leaves India in a club with the U.S., Iran, China, and Saudi Arabia as a country which retains it.

Once a method of punishing the offenders, death penalty is now seen as a violation of human rights.

China and Iran are amongst the countries executing highest number of offenders. According to the estimates, China executed largest number of prisoners. followed by Iran with 977 executions in 2015. The Chinese government is notorious for keeping statistics about their criminal executions secret. Since that number was always drastically lower than the assumed reality, researchers now use reliable media sources and human rights groups—rather than official government sources—to estimate the number of executions in China.²

Where on one hand countries are giving up on death penalty as a punishment, countries like Japan, Pakistan, India have resumed executing criminals after being execution-free for a considerable long period of time.

In Indian context, the 35th Report ("Capital Punishment", 1967) of the law commission recommended that death penalty must be retained in India seeing country's economic, social and cultural conditions. The question which is of utmost concern to legal fraternity is the existence of arbitrariness in the decisions of death penalty. The judicial system is not untouched with the arbitrariness which is why the Supreme Court in Bachan Singh v. UOI while it upheld the constitutionality of the death penalty, it also raised concerns over unreasonableness in the decisions.

The hesitation in the experiment of abolition of the death penalty at present seems to be justified due to the existence of high crimes rate. It expressed its concern in the following manner: "The figures of homicide in India during the several years have not shown any marked decline. The rate of homicide per million of the population is considerably higher in India than in many of the countries where capital punishment has been abolished."³

It is essential to give reference of the Code of Criminal Procedure, 1973 which has changed the entire scenario of this issue. Section 354(3) which states that in order to give a convict death sentence, special reasons are required to be given, it has introduced a shift in the judicial approach towards death penalty.

In the landmark judgement of Bachan Singh v. State of Punjab while reiterating Section 354(3), the Apex court held life imprisonment as a rule and death penalty as an exception in awarding punishment. This has introduced a novice rule of "rarest of rare cases" in which death sentence could be given. We shall look into this aspect at a later stage of our research.

Most of the countries have removed death penalty but what one must keep in mind is that these nations are developed countries with very low crime rates and in India the decision of completely eliminating the punishment of death penalty would cause an altogether different impact on the country's prevailing conditions. Moreover, the retributive aspect of justice is often criticised on the ground that an eye for eye makes everybody blind and it cannot be applied to every case possible.

The arguments on both the sides of the debate are quite deep seated and convincing. In India it cannot be affirmed that though the country has retained death penalty it has proved to be effective for us in any way keeping the society free from criminals and the crimes. The crimes are increasing everyday and there is hardly any evidence of any positive effect of executing the criminals.

The question to be pondered upon is whether it provides deterrence and helps in maintaining the law and order in the society. It is quite evident that the death penalty has not in any way helped in reducing the crime rate in the country so what's the use of this?

We are now witnessing a global shift from this deterrent theory of punishment to reformative one as most of the developed countries have abandoned the concept of death penalty altogether. Death penalty is now seen as an anti-thesis to one's right to life guaranteed by the constitution of India. The administration of the death penalty in India law is full of error and is often questioned on the ground of the arbitrariness in the decisions of the court.

There exists no doubt on the fact that under the Indian law everyday thousands of innocent people are trapped in fake cases. The people are left with no option of saving themselves once a charge is laid against them by the police authorities. In refusing over the years to declare the death penalty unconstitutional, the Supreme Court has relied on the fact that those framing the Constitution did not see it fit to abolish capital punishment. On the other side, the arguments for abolishing the death penalty remain

forceful and persuasive. State killing condones violence and brutalises society. The ever present risk of the execution of the innocent is enhanced by an unsafe judicial system.

As the nation continues to meet its aspirations, it is vital to raise concern over the issues revolving around Death Penalty.

Intricate Issues Involved

• Questioning the constitutionality of Death Penalty

The supreme court in United States found death penalty to be unconstitutional in *Furman v. Georgia*. By 5:4 majority judgement the judges declared it as morally and socially wrong and impermissible. It was stated as against the interest of general public and unreasonable.

In India, the constitutionality was first challenged in *Jagmohan Singh v. State of U.P.* – the High Court gave death sentence to the appellant for the murder of one Chhotey Singh.

The validity of the sentence under Sec.302 was challenged on the following grounds:

- 1) Death penalty puts an end to all freedoms guaranteed by Article 19 of the constitution clause (a) to (g) and therefore it is unreasonable
- 2) The death penalty imposed is based upon the discretion of judges for which no standards have been laid down and such discretion violates Article 14 of the constitution which guarantees 'equality before law'
- 3) There exists no procedure for making a reasonable choice between Death Penalty and Imprisonment for life and which violates Article 21

Art. 21, provides that "no person shall be deprived of his life except according to procedure established by law". Deprivation of life is constitutionally permissible if that is done according to procedure established by law.

The facts and circumstances differ widely from case to case and decision of the courts in sentencing a person is exercised after considering all the available facts and circumstances. Therefore, there hardly exists a possibility of challenging the death sentence under Article 14 of the constitution. Also, the irregularities in the sentence is liable to be corrected by the superior courts. It was also stated that the accused in a trial for murder has opportunities at various stages of the trial to bring on record facts and circumstances that would justify, on conviction, the lesser penalty of life imprisonment. There existed no reason to show that section 302 is unconstitutional.

Held- The death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Art.14, 19 and 21 of the constitution.

After *Jagmohan Singh's* case questions over the constitutional validity were raised multiple times. It is essential to mention the reference of Section 354(3) of CrPC which has been incorporated in 1973 which reads: -

"When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

It has made death sentence an exception and life imprisonment as a rule wherein the judges are required to record special reasons before giving death sentence.

The language of Section 354(3) demonstrates the legislative concern and the conditions which need to be satisfied prior to imposition of death penalty. The words, "in the case of sentence of death, the special reasons for such sentence" unambiguously

demonstrate the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence. It has led to the emergence of the 'rarest of rare' cases and that special reasons to be recorded while sentencing any person.

• "Rarest of Rare" Principle

Bachan Singh v. State of Punjab⁷ – It was in this case where the court propounded the concept of rarest of the rare. The appellant was given death penalty for the murder of *Desa Singh, Durga Bai and Veeran Bai*.

Issues were with regards to the constitutional validity of the section 302 of IPC and the procedure prescribed by section 354(3) related to recording of the special reasons.

In this case again the apex court held that Article 21 lays down the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by law. Other provisions have also been laid down in the constitution itself for death penalty - **Article 72(1)©, Article 161, Article 134** to state a few.

Instances of these provisions been constantly used can be seen in various cases. In **Amit v. State of U.P.**⁸ the death sentence was commuted to life imprisonment. The court considered the fact that the accused will get a chance of reformation where the case is short of the 'rarest of rare'. In this case, a young man of 28 years was charged for rape and murder of 3 years old.

The court while converting death sentence into life imprisonment relied upon the view that when the appellant committed the offence he was a young person aged about 28 years only and there is no evidence to show that he had committed the offences of kidnapping, rape or murder on any earlier occasion. There is nothing on evidence to suggest that he is likely to repeat similar crimes in future.⁹

In view of the aforesaid constitutional postulates and cases, by no stretch of imagination can it be said that death penalty under section exists to defile "the dignity of the individual" and that it is unconstitutional.

Machhi Singh v. State of Punjab¹⁰ - Seventeen lives including men, women and children were lost as a consequence of a dispute between two families. The accused was given death penalty under section 302 IPC for murder. The apex court in this case laid down guidelines to determine the cases as rarest of rare.

A Three-Judge Bench of this Court while following the ratio in *Bachan Singh* laid down certain guidelines amongst which the following is relevant in the present case: "A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. The guidelines comprised of :

- a) Manner in which the offence of murder is committed
- b) Motive behind the commission of the offence – cold-blooded, for ransom
- c) Magnitude of crime
- d) Personality of the accused
- e) Crimes of abhorrent and anti-social nature

• Inconsistency in applying "Rarest of Rare"

The supreme court in multiple cases has laid down that the doctrine of rarest of rare is not applied uniformly in all the cases and there exists inconsistency due to the absence of any firm legal principle.

Swamy Shradhdhananda v. State of Karnataka¹¹ -

Giving death penalty for any crime in India is not untouched by subjective element and discretion of the judges. It is because of lack of inconsistency and proper guidelines that the decisions are mostly based on the wide discretion of judges. Thus the overall larger picture gets asymmetric and lopsided.

There are two sides of the debate. It is accepted that the rarest of the rare case is to be determined in the light of facts and circumstance of a given case and there is no hard-and-fast rule for that purpose. There are no strict guidelines. But a sentencing procedure is suggested. This procedure is in the nature of safeguards and has an overarching embrace of the *rarest of rare* dictum. Therefore, it is to be read with Articles 21 and 14.¹²

Also, there exists no doubt that death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches. This circumstance also adds to the arbitrary and capricious nature of the death penalty. Therefore, it must be restricted to only the rarest of the rare cases.

• Delay in Execution

Dhananjay Chatterjee alias Dhana v State of West Bengal¹³

Brief facts are - Dhananjay Chatterjee a security guard who was executed for the 1990 rape and murder of a girl in the apartment building. The Supreme Court considered the case as a menace to society. An aggravating factor recorded by the Court in the case of Dhananjay Chatterjee was his position as a security guard, whose duty was to protect and he was hanged in 2004, nine years after the apex court gave its dictum.

No action had been taken on his case for nine years because the West Bengal state officials had failed to inform the High Court of the rejection of his mercy petition by the state governor. Justice Anand accepted that there were huge disparities in sentencing and the inconsistency continues to exist in death penalty cases and executions of the criminals.¹⁴

Prisoners sentenced to death may wait many years while their cases are under consideration. The length of time a person spends on death row presents conflicting problems. Too short a time will not allow for an adequate appeals process or for further evidence of the possible innocence of the person to emerge. The study showed great disparities in whether and for how long a delay in the process would be considered by the Supreme Court to justify commutation of a death sentence. Following a long period of legal ambiguity, during which time a number of death sentences were commuted on grounds of delay.

• Whether Death Penalty provides deterrence

Although the provisions of death penalty have been restricted to only the rarest of the rare cases but the question of utmost importance is whether it has helped in any way in producing a deterrent effect in the country.

This can simply be understood in the light of the 2012 Nirbhaya gang rape case after which the Criminal Law (Amendment) act was passed in 2013. It introduced section 376E in Indian Penal Code which prescribes death penalty for repeat offenders of rape. The Sessions Court in Mumbai, Maharashtra became the first in the country to impose death penalty to three repeat offenders of rape under the new Section 376E of the IPC in the infamous Shakti Mill gang rape case.

After the court ruling, Maharashtra Home Minister R. R. Patil said "No one will dare commit such a crime after this verdict. The death penalty is necessary to deter such criminal acts." However, the statistics provided by Mumbai Police show that 273 rape cases were reported in Mumbai from January – 15 June 2014 including 138 cases registered during January to March 2014. This means 135 rape cases were reported from April to 15 June 2014. This clearly suggests that the award of death penalty to those three convicts in the Mumbai's Shakti Mill gang rape case had no deterrent impact on sexual predators. Even now everyday there

are reports of women being raped in India thus indicating that death penalty is unable in serving the purpose.

According to the report of Delhi police an estimated 6 rape cases were reported everyday in 2015. Thus death penalty is never a deterrent.

The hanging of Yakub Memon in 2015 for financing the 1993 Mumbai bombings gives us a good reason to start the debate over the deterrence of death penalty. If someone intends to kill, not out of some degree of temporary insanity or driven by extreme emotions then nothing would work as deterrent. If someone plots to kill other, then he is prepared for any consequences. So death penalty is not a deterrent in such a situation.

As held in **Mithu v. State of Punjab**, mandatory death penalty was held unconstitutional. While subsequent legislation for drug and atrocity offenses prescribes the mandatory death penalty but the courts in India does not impose mandatory death penalty after the ruling of Bachan Singh's case where death penalty was restricted to only the rarest of rare cases. Thus, the courts cannot apply mandatory death penalty in cases where the statute provides or it. It must be done in light of the mitigating facts and circumstances.

• Commutation of Death Penalty

In a rare gesture, President Pranab Mukherjee recently in January 2017 commuted the death sentence of four persons convicted for killing 34 upper caste people at Bara village in Gaya district of Bihar in 1992. President's decision to commute is seen as a measure for abolishing the death penalty from the Indian laws. Various researches have affirmed the fact that death penalty in India is based on arbitrariness and inconsistency and has revealed that it disproportionately affects those with little wealth or influence.¹⁶

The very nature of death penalty, being irreversible, fragile, is vulnerable to misapplication. In a report on the death penalty in August 2015, India's Law Commission said the administration of the punishment is fallible, vulnerable to misapplication, and disproportionately used against socially and economically marginalized people.

In **TV Vatheeswaran v State of Tamil Nadu¹⁷** the court laid down that any accused who was under a death sentence for more than two years, was entitled to have the sentence of death commuted to that of life imprisonment. This two-years rule was later in **Triveniben v. State of Gujrat¹⁸** was held very unrealistic and was overruled. It stated that the court can consider the question of delay for the purpose of deciding whether the execution should be carried out or not. No fixed period of delay could be held to make the death sentence inexecutable.

In the past year, the Supreme Court dealt with the question of delay in landmark judgement of **Shatrughan Chauhan v. Union of India** delivered in 2014. In The bench passed a decision in favour of commuting death sentences on grounds of delay and held that delay in execution can be the sole ground for commutation of death sentence. Particularly, the judgment sought to frame guidelines for dealing with the procedural aspects surrounding commutation/acceptance of mercy petitions.

The death sentence is commuted to life imprisonment in most of the cases keeping in view the facts and circumstances of each case but as a practice death penalty has been restricted to only handful of cases which pointing towards the gradual abandonment of this punishment altogether.

¹Corinne Abrams, "The Reasons India's Law Commission Says the Death Penalty Should Be Scrapped" The Wall Street Journal (2015)

²Alexis Manning, Surprising Facts About the Death Penalty Worldwide, Amnesty International Annual Report (2013)

³Law Commission of India, 35th report, 1967, at paras 262, 263, available at <http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf>

⁴legalawarenessworldwide.blogspot.in - "Should capital punishment be abolished" 20th July 2013

⁵1973 AIR 947

⁶legalblog.in "Death Sentence and Principles Governing its Conversion to Life Imprisonment" (2012)

⁷AIR 1980 SC 898

⁸(2012) 4 SCC 107

⁹Supremecourtcases.com

¹⁰1983 AIR 957

¹¹(2008) 13 SCC 767

¹²www.lawcommissionofindia.nic.in ,*Consultation paper on Capital Punishment* (2014)

¹³1994 (1) ALT Cri 388, Rahul alias Raosaheb v. State of Maharashtra (2005) 10 SCC 322

¹⁴R Jagannathan Why India still needs capital punishment (2015)

¹⁵See Asian Centre for Human Rights report- "**India: Death Penalty Has No Deterrence**"

¹⁶amnesty.org.in See Amnesty International Report and the People's Union for Civil Liberties' Report (2017)

¹⁷AIR 1983 SC 361

¹⁸AIR 1989 SC 1335

Conclusion

In the light of all the arguments and landmark judgements it is quite evident that death penalty does not serve the goal of repressing the crime and producing deterrence any more than life imprisonment.

The criminal justice system in India suffers from multiple drawbacks, deadlocks and other problems prevailing in the system such as poor investigation, crime prevention, protection of rights of an individual guaranteed by the constitution. The need for police reforms for better and more effective investigation and prosecution has also been universally felt for some time now and measures regarding the same need to be taken on a priority basis.

The Apex court of the country has expressed concerns about presence of arbitrariness in decisions of death penalty. Even after the guidelines laid down in Bachan Singh it has failed to reduce the uncertainty and possibility of arbitrariness which falls foul of constitutional due process and principle of equality enshrined in article 14 of the constitution.

There exists no principled method to remove such arbitrariness from capital sentencing in a system where the decisions are based on the judicial discretion which itself falls short of justification. Death penalty operates within this context and therefore suffers from some structural and systemic impediments such as lack of resources, outdated modes of investigation, over-stretched police forces, etc.

Safeguards in the law have failed in providing a constitutionally secure environment for administration of this irrevocable punishment. The court attempt to constitutionally discipline the execution of the death sentence have not always borne fruit. The provision of death penalty does not by any stretch of imagination seems to be fit for a country like India. No doubt that the criminals must be punished for the wrong they commit but a system with miscellaneous and multifarious issues cannot take the risk of administrating death-penalty. This would defeat the very purpose of justice system which exists in order to protect the rights of the citizens.

Thus, this calls for a more rational, principled and informed debate on the abolition of death penalty from India as the movement towards absolute abolition will be swift and irreversible.

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