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CONCEPT OF CAPITAL PUNISHMENT IN INDIAN JUDICIARY

By: Ravi Prakash Singh

ABSTRACT

Capital punishment is the highest form of punishment that can be imposed by any society for any offense committed against the law of the land. But the question must be asked that is it fair to kill a person for the sake of justice. It's always been a topic of debate that the judicial system should be focused on eliminating the crime from the society and not the criminal. We follow the rule of **Rarest of the Rare Case** in awarding death sentences. The simple rule is that if the crime committed is within the ambit of rarest of the rare case, the convict can be punished with capital punishment in that case. In India, capital punishment gets converted into life imprisonment in most of the cases. A total of 4 criminals were executed by hanging to death between the year 2002 and 2015 in our country. Lastly on 20th March 2020, all four convicts of Nirbhaya case were hanged to death. Many judicial systems in the world award capital punishment for serious offenses. The United Nations is against the concept of capital punishment and remarked that "Life is precious and death is irrevocable". Instead of killing a person, we should focus on an alternative approach to punish the offenders such as the reformatory approach, giving every offender the chance to improve himself so that they can live peacefully thereafter. Also, many countries have restricted awarding capital punishment because there is no doubt that it violates human rights.

INTRODUCTION

India is among those countries in the world which still practices capital punishment, as it is rarely used. Capital punishment is the highest form of punishment that can be imposed by any society for any offense committed against the law of the land. In primitive society, the offenses were punished by brutal and excessive methods of execution. But with the advent of civilization, the punishment was governed by a predefined law of the land. **Shooting and hanging** are two modes used to carry out the execution of death sentence in India. The Indian Constitution is an amalgamation of many Constitutions to adopt the best administration for the largest democracy in the world. Capital punishment has always been a subject that has time and again been questioned for being unconstitutional. Many human rights activists, NGOs and other organizations have been asking to abolish this practice of the death penalty in India but the ones supporting the death penalty is of the opinion that deterrent punishment is necessary for criminal jurisprudence otherwise it would become impossible to control the crime in the country. Although in the Indian Constitution no clause that expressly holds capital punishment to be unconstitutional but some

clauses like Art 21¹ which talks of depriving one of his life by the procedure established by the law, can be seen as the acceptance of the Constitution for the death penalty. Although, there are many provisions in the Indian Constitution such as preamble, fundamental rights, and DPSP based on which the constitutionality of the death sentence can be challenged.

THEORIES and KINDS OF PUNISHMENT

Theories of punishment are broadly divided into two categories

1. Reformatory, and
2. Preventive

Reformatory Theory of Punishment

India is the land of Mahatma and Buddha. They spend their whole life spreading the message of non-violence. Father of Nation Mahatma Gandhivas of the opinion that people should learn how to forgive as was clearly depicted by his quote ‘An eye for an eye will make the whole world blind’.Ironically Mahatma Gandhi’s assassins were hanged to death. Reformatory theory says that a chance must be given to the offender to reform himself. The purpose of the theory is to reform people with criminal mindset in the best possible way so that they can live their lives like a normal citizen. According to thereformatory theory, if we educate and provide criminals a better livelihood, even criminals can live like normal citizens of society.

Preventive Theory of Punishment

This theory is based on the basic principle of Prevention is better than cure. This theory of punishment believes in isolating criminals from the society and to punish the criminals in such a way so as to set an example for others with the same mentality and prevent them from indulging in criminal or illegal activities. Offenders are punished in a harsh manner withharsh punishments such as death sentence or rigorous imprisonment. Many law reformers are in support of this theory. According to them preventive theory has humanizing Penal law. Basically in this theory, the convicted person is punished in such a way that it sets an example for the others that their illegal/criminal acts will have consequences.Its main purpose is to create a sense of fear so that people refrain from committing any such act. Though the Indian judicial system believes in the reformatory theory, as prisons are considered as rehabilitation centres but at the same time, it also has a few elements of preventive theory of punishment as death penalty is still awarded in rarest of rare cases.

SITUATION IN INDIA

India is a developing country, with its total population of more than 130 crore. The crime rate is also increasing in the country. There are various laws and legislations in place to stop the crimes andto maintain a proper law and order situation. The IPC is the official criminal code of the country and punishments given to the offenders under IPC are fine, imprisonment, imprisonment with fine,

¹Indian Constitution, Art. 21

life imprisonment, and the death penalty. In India, It has the provision of the death penalty as a punishment for various offenses such as:-

- Sec. 120B- Punishment for Criminal Conspiracy.
- Sec. 121- Waging, attempting or abetting waging of war against the Government of India.
- Sec. 132- Abetment of mutiny.
- Sec. 194- Giving or fabricating false evidence with the intention to convict an innocent person for the capital offense.
- Sec. 195A- Threatening another person to give false evidence.
- Sec. 302- Punishment for Murder.
- Sec. 303- Punishment for murder for life convict.
- Sec. 305- Abetting a child or insane person to commit suicide.
- Sec. 364 A- Kidnapping for ransom.
- Sec. 396- Dacoity with murder.

In these offenses the criminal courts in India can award the offender with a death sentence. In many cases, the question of the legality of the death penalty arose before the Apex Court as many human rights organizations contended that giving death for the sake of justice is nowhere justified and also it is against the provisions of Article 21 which ensures every citizen of the country a right to live with dignity. The Indian judicial system has the provision to pardon the death penalty unlike China where if a criminal has been awarded the death sentence, it cannot be revoked. **Article 72**² empowers the President of the nation to pardon or to suspend the death penalty of any person convicted.

RAREST OF RARE

In **Bachan Singh**³ case, when the question of whom to award the death penalty arose before SC, it remarked that the death penalty should be awarded only in those cases which falls within the ambit of rarest of the rare cases. The judgment was supported by many jurists, activists, and organizations who work towards the abolishment of capital punishment. In a verdict given by Delhi HC, the Hon'ble court also opined that imprisonment for life should be awarded when there is a prospect of rehabilitation and reformation and death sentence should be the last resort. The court relied on the judgments by the Supreme Court of India in **Alok Nath Dutta**⁴ and **Mohinder Singh**⁵. In **Santosh Kumar's**⁶ case, the SC remarked that the rule of rarest of the rare case is only a guideline in enforcing the provision under Sec. 354(3) of the Criminal Procedure Code and affirmed that life is the rule and death is an exception. The courts should take the utmost care while examining the

²Indian Constitution, Art 72

³Bachan Singh vs. State of Punjab; AIR 1980 SC 898

⁴Aloke Nath Dutta v. State of WB; (2007) 12 SCC 230

⁵Mohinder Singh v. State of Punjab; AIR 2013 SC 3622

⁶Santosh Kumar Satishbhusan Bariyar v. State Of Maharashtra; (2009) 6 SCC 498

cases in which death sentence can be imposed because in those cases in which the court gives capital punishment, it limits the scope to introduce new facts or law in the case and once executed, it is irrevocable. The verdict by the Apex court in the case of Bachan Singh tried to bring some rationality in awarding death penalty but it cannot be said that this judgment is sufficient from removing arbitrariness from imposing death penalty.

CONSTITUTIONAL VALIDITY OF DEATH SENTENCE

The constitutional bench of the SC in **Jagmohan Singh** case⁷ upheld the validity of death sentence. The bench held that capital punishment does not violate the provisions under Art.14⁸, Art.19⁹, and Art 21 of the Constitution. In this case, the constitutionality of capital punishment was challenged on the ground that it violates fundamental rights. The Honorable Court concluded that the death sentence is awarded by the courts under the procedure prescribed by the law. It was observed that the judge chooses between a capital sentence or life imprisonment after examining the facts and the circumstances of the case and the nature of the crime committed. However, the Apex Court had also ruled that compulsory capital punishment is unconstitutional. Section 416 of the Cr.P.C. empowers the High court to either commute the sentence to life imprisonment or postpone the execution of a woman if she is pregnant. While discussing **Bachan Singh v. State of Punjab**¹⁰ one cannot ignore the dissenting opinion of the Justice Bhagwati who was of the opinion that death penalty is arbitrary and discriminatory. Justice Bhagwati reasoned that the death penalty is discriminatory as it most of the times affects only the under-privileged sections of the community and the wealthy and the prosperous escape. He further held that capital punishment is unconstitutional as it violates Articles 14 and 21.

MANDATORY DEATH PENALTY

In a judgment delivered by the SC in 1983, the Apex Court opined that the provision of mandatory death penalty is unconstitutional¹¹ as it violates fundamental rights. The Apex court repealed the Sec. 303¹². Section 303 the IPC provides for the mandatory death sentence for a person who commits murder while serving a life term in another case. While dealing with the case, Apex Court opined that this Sec. 303 violates right to equality and right to life because it creates an unjustified difference between two classes of murders. In 2012, the Apex Court held that mandatory death sentence under Sec 27 (3) of the Arms Act, 1959, unconstitutional¹³.

⁷Jagmohan Singh vs. State of U.P; AIR 1973 SC 947

⁸Indian Constitution, Art14

⁹Indian Constitution, Art19

¹⁰Bachan Singh v. State of Punjab, 1982 3 SCC 24 (J. Bhagwati, dissenting), at para 81

¹¹**Mithu v. State of Punjab**; AIR 1983 SC 473

¹² Indian Penal Code, Sec. 303

¹³State of Punjab v. Dalbir Singh; 2012 (3) SCC 441

REPORT NO. 262, THE DEATH PENALTY- LAW COMMISSION OF INDIA, 2015

The Law Commission, after an extensive study on this particular issue, in its report has suggested that our country should abolish the use of death penalty. The commission also raised serious concerns in arbitrariness in imposing death sentences. The Apex Court in the case of **Santosh Bariyar¹⁴ and Shankar Khade¹⁵** referred this issue to the commission. Previously in its 35th report the commission had recommended to retain the death penalty. The report also mentioned that India has seen many changes in its cultural, social, and economic contexts since the 35th report of the commission and arbitrariness in awarding the death punishment is a major concern. The report stated that it failed to achieve any constitutionally valid reasons for punishment. The Commission further stated that if the judiciary keeps regarding the death penalty as the best way of awarding justice to the victims, the rehabilitative and restorative aspects of justice will lose its value. The SC has upheld the constitutionality of the death sentence in the Bachan Singh case, but the Honorable Court has restricted its application to the rarest of the rare cases. The Commission also stated that the uneven application of the guidelines laid in the Bachan Singh case has given rise to a state of uncertainty in laws related to the death sentence. Further it was said that the constitutional regulation of death sentence tried in Bachan Singh has failed to prevent death sentences from being arbitrarily imposed and there exists no way to prevent it.

LEGAL PROCEDURE TO BE FOLLOWED

In India, the sessions court has the power to award the death penalty but the death penalty awarded by a sessions court must be approved by the **HC**. Then, if the HC also confirms the sentence, the convicted person has the right to file an appeal to the **SC**. If the convicted person didn't get any relief from **the SC or the SC** refused to hear the petition a convicted person still has a right to submit a mercy petition to the President or the Governor. The constitution of India empowers President under article 72 to commute the death penalty.

PROTECTION AGAINST CAPITAL PUNISHMENT UNDER THE CONSTITUTION

- Article 21: Article 21 gives every citizen of the nation a right to life with dignity and protects them against arbitrary and discriminatory executive actions and the legislation.
- Article 72: It gives the power to the President of the nation to commute a death sentence into life imprisonment. Although the governor also possesses the power to grant pardon but the governor cannot commute a death sentence into life imprisonment, under Article 161¹⁶. If the pardon is denied to a convict, he can go for judicial review if he is not satisfied by the President's decision and thinks it to be arbitrary, irrational or discriminatory.

¹⁴Supra 6

¹⁵Shankar Kisanrao Khade v. State of Maharashtra; (2013) 5 SCC 546

¹⁶Indian Constitution, Art.161

- Article 134¹⁷: It gives a right to file an appeal in the SC against the high court judgment those cases where capital punishment imposed on the convicted person.

DELAY IN DECIDING THE MERCY PETITION.

Under Article 72 of the Indian Constitution, the President is empowered to commute a death penalty into life imprisonment. But there is no time limit due to which there is always a delay in the execution. After trial, many years pass by without execution and a pending mercy petition. This question of delay is often raised before the Apex Court as well. While dealing with the question of whether the delay in deciding mercy petition can be a valid ground for commutation of sentence the SC concluded that delay in deciding mercy petition is not a valid ground for commutation in terror cases¹⁸. But in the case of **Mahendra Das**¹⁹ the court opined that the duration of twelve years amounts to an inordinate delay and remarked that it is a valid ground for reducing the death penalty to life imprisonment. Even in the case of **Shatrughan Chauhan**²⁰ the bench passed a decision in favour of converting the death penalty and held that delay in execution of the sentence is a sufficient ground for the commutation of the death penalty. The petitioner here argued that death sentence along with prolonged delay amounts to inhuman punishment, causes mental agony it is against human rights and even violates the principle against double jeopardy. In **V. Sriharan**²¹ case the Apex court held that Article 72 and Article 161 provides some hope to the convicts and their family members that the death penalty might get converted into life imprisonment and therefore, the executive should exercise its power within a reasonable time frame. The provisions regarding the time taken by the president to take any decision on the mercy petition need some development. The unnecessary delay is acting as barriers to justice and also defeating the purpose of the mercy petition.

EFFECT OF DELAY IN EXECUTION ON ACCUSED:

1. More painful than the actual execution

The pain of waiting to be executed hurts and kills the convict many more times than the actual execution. Once the sentence is awarded the same must be executed within 14 days. No one can be left to live in the fear of death.

2. Double Jeopardy

¹⁷Indian Constitution, Art.134

¹⁸Devender Pal Singh Bhullar vs. State (NCT of Delhi);(2013) 6 SCC 195

¹⁹MahendraNath Das vs. Union of India;(2013) 6 SCC 253

²⁰ShatrughanChauhan vs. Union of India;(2014) 3 SCC 1

²¹V. SriharanandMurugan vs. Union of India;(2014) 4 SCC 242

The delay or wait to be hanged also acts as double jeopardy for the accused. It is against the common law principle of *Nemo debet bis vexari* means that no man should be punished twice for the same offense. This is also against the provisions of Article 20(b)²².

SUGGESTIONS

- India should consider abolishing Death Penalty.
- Inmates must be educated so that they can live a normal life and can earn their livelihood in a proper and by legal means.

CONCLUDING OBSERVATIONS

Amnesty International published a report stating that two-thirds of nations in the world have abolished the punishment of the death penalty while many other countries are considering it. In our country, the death penalty has been in practice since ancient times. The crime rate in our country is still increasing which implies that the death penalty has not proved to be a deterrent for doing offense. Now the law-makers should consider reforming old rules, particularly while awarding death penalty. The judicial system is there to punish the offenders and they should do so but not necessarily by awarding death penalty. The ones not following the laws should bear the consequences. But they should be punished in a manner where they get a chance to reform themselves. Law should be more focused on how to eliminate crime in society instead of trying to eliminate criminals. Justice has to be done considering all the aspects of human rights as well we cannot work in ignorance of that. The changes in the current judicial system are very much needed. The death penalty is the inhuman and cruel practice but it is constitutionally valid in our country. The Constitution which gives the right to life has also provided death as a penalty for some offenses. This situation requires a change. Best example is of South Africa, a country which records highest number of executions abolished this practice in the year 1995. The constitutional court there held that capital punishment is against the constitution of the country²³. Every person deserves a chance to improve himself and death penalty eradicates every chance of it. In the 21st century, the modern era does require some changes in this regard as well. There has to be some difference between the judicial act and an act of a criminal. The judicial system of any country cannot function in ignorance of human rights. One must always remember that Humanity is above all.

Abraham Lincoln once said, "I have always found that mercy bears richer fruits than strict justice."

²²Indian Constitution, Art.20(b)

²³S v Makwanyane & Anr (CCT 3/94)