

DEATH PENALTY: SHOULD IT BE ABOLISHED?

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Abstract

Every time a death sentence is pronounced by a court, a serious debate starts to retain it or to abolish it otherwise the need of death penalty. It is argued that many countries have banned death penalty. Human rights activists have always opposed death penalty on grounds of violation of human rights. But the barbarous and inhuman manner in which the accused has taken the life of another person or many persons en-masse does not violate the human rights of people whose life they have perished in the most cruel and inhuman manner. This paper is an endeavor to find the answer of the question: whether death penalty should be abolished.

Despite the global anti-death penalty campaign, it is the part of our criminal justice system as our Apex Court has consistently held that it should be awarded in '**rarest of rare**' cases. The doctrine of "right and just and fair" procedure has been evolved by the Supreme Court for the deprivation of life and personal liberty. Currently, capital punishment is included as a penalty in a number of provisions of the Indian Penal Code.

Key Words: Death penalty, Criminal justice, Rarest of rare

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Introduction

Every time a death sentence is pronounced by a court, a serious debate starts to retain it or to abolish it otherwise the need of death penalty. It is argued that 107 countries have completely abolished it for all crimes, seven have abolished it for ordinary crimes (while maintaining it for special circumstances such as war crimes), and 27 are abolitionist in practice.¹ Although most nations have abolished capital punishment, over 60% of the world's population live in countries where the death penalty is retained. This paper is an endeavour to find the answer of the question: whether death penalty should be abolished. One of the most interesting developments that occurred with regard to the future of the death penalty in India was a report of the Law Commission in 2015. The law commission under the chairmanship of Justice A. P. Shah recommended the abolition of death penalty in a swift manner except in terror related cases. It is to be noted however that the commission did not recommend this abolition immediately, but in a way that its complete abolition can be brought about in the near future. The Commission in its report argued that the aim of any penal law was to act as a deterrent, and the capital punishment was unable to fulfill its role in this regard. On the point of exception in terror related cases, the Commission came to the conclusion that getting rid of the death penalty as a whole in terror related cases might compromise national security.¹

International Position

The United Nations (UN): Capital punishment is one of the most debated issues around the world. The UN General Assembly recognised that in case of capital punishment there is a need for high standard of fair trial to be followed by every country. Procedures to be followed must be just, fair and reasonable. For example, the UN Economic and Social Council (ECOSOC) in resolution No. 15 of 1996 (23 July 1996) encouraged member countries to abolish death sentence and recommended that those countries who retain it must ensure defendants a speedy and fair trial.

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. By several resolutions the United Nations suggested protection of human rights of the persons facing

¹ See Law Commission of India Report, No 262.

capital punishment which were again approved by Economic and Social Council in resolution No. 50 of 1984 (26th May, 1984). These may be summarised as follows:

- (I) Countries which have not yet abolished capital punishment may impose it only for the most serious crimes;
- (II) 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;
- (III) Young persons at the time of commission of crime, whose age was below 16 years, should not be awarded death penalty;
- (IV) Death penalty must not be imposed upon pregnant women or on new mothers or insane persons;
- (V) Capital punishment must be imposed after following fair procedure according to Article 14 of the ICCPR and when guilt is clearly proved leaving no room for reasonable doubt or alternative explanation of the fact;
- (VI) 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;
- (VII) Any one sentenced to capital punishment should be given the right to seek pardon or commutation of sentence;
- (VIII) When appeal, pardon or commutation of sentence proceeding is pending, capital punishment shall not be executed;
- (IX) Execution of capital punishment must be by way of minimum possible suffering.

The European Union: During 19th century due to work of Prof. Beccaria and other criminologists, political and economic changes as well as due to initiatives of Central and Eastern Europe, the European countries almost became capital punishment-free area and recognised death penalty as cruel and inhuman, which imposes psychological terror and gives scope for disproportional punishment. The 6th protocol to the European convention on Human Rights 1982 provides for the complete abolition of death sentence in peacetime by all members. The Assembly of the Council of Europe in the year 1994 with further protocol to the European convention on Human Rights recommended for the complete abolition of death penalty even in war time and under the Military Laws.

On 3rd May 2002 the 13th protocol to the European convention for the protection of Human Rights and Fundamental Freedoms was open for signature of member states which provides for the total abolition of death penalty in all circumstances. Most of the countries in the European Union have abolished death sentence. Capital Punishment has been recognised as

cruel, degrading and inhuman punishment which infringes upon the basic human rights of the accused as expressed in article 3 of the European Convention on Human Rights. Article 3 of the UDHR also provides for right to life, liberty and security of human beings.

Following the resolutions of the European Union and the United Nations, several countries abolished death penalty completely. For example, Germany is a death penalty-free zone. However, China imposed maximum death penalty. Saudi Arabia, Iran, Iraq, the United States of America (USA) are also in the first row so far, the application of capital punishment is concerned. In England it was abolished by the Murder (Abolition of Death Penalty) Act, 1965 though at the end of 18th century about 200 offences were punishable by death.

Indian Position

The Indian jurisprudence is a blend of reformatory and deterrent theories. While the punishments are to be imposed to deter the offenders, it is also an inalienable part of Indian penal jurisprudence that the offenders should be given opportunity for reformation. Bearing in mind these fundamental tenets, the legislatures drafted Sec. 354 (3) of the Cr.P.C. This subsection basically lays down those special reasons are to be recorded by the Court for imposing death punishment in capital offences. Thus, the position of law after Cr.P.C. 1973 became that the general rule was life imprisonment while the death sentence was to be imposed only in special cases.

Crime has rightly been described as an act of warfare against the community touching new depths of lawlessness. The object of imposing deterrent sentences is threefold:

- (1) To protect the community against callous criminals for a long time.
- (2) To administer as clearly as possible to others tempted to follow them into lawlessness on a war scale if they are brought to and convicted, deterrent punishment will follow, and
- (3) To deter criminals who are forced to undergo long-term imprisonment from repeating their criminal acts in future. Even from the point of view of reformatory form of punishment. "Prolonged and indefinite detention is justified not only in the name of prevention but cure. The offender has been regarded in one sense as a patient to be discharged only when he responds to the treatment and can be regarded as safe" 1 for the society.

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 punishments.

Despite the global anti-death penalty campaign,² it is the part of our criminal justice system as our Apex Court has consistently held that it should be awarded in 'rarest of rare' cases. The doctrine of "right and just and fair" procedure has been evolved by the Supreme Court for the deprivation of life and personal liberty. Currently, capital punishment is included as a penalty in a number of provisions of the Indian Penal Code.

The Supreme Court upheld the constitutionality of the death penalty in *Jagmohan Singh v. State of U.P.*³ but in so doing, articulated a standard, which gave rise to an understanding that the death penalty should be a narrow exception, not the rule, in sentencing. The Court also explained that the law could not prescribe the death penalty for all persons committing certain crimes, but instead the circumstances of each offence would be considered. The Court concluded that the death penalty could be imposed only if the circumstances of the case indicated that state security; public order and the interests of the general public compel it.

In *Bachan Singh v. State of Punjab*,⁴ the Supreme Court held that the death sentence was not violative of Article 21 of the Constitution. The Court announced important limitations on the death penalty thus solidifying the so-called "rarest of rare" doctrine. Several factors determine whether a case should be considered the "rarest of rare," including the manner of commission of the crime, motive, anti-social or socially abhorrent nature of the crime, magnitude of the crime and the personality of the victim. Paradoxically, it has arguably been the development of the "rarest of rare" doctrine, which has helped the death penalty survive as a form of punishment over the years. In *Malichi Singh v. State of Punjab*,⁵ the Supreme Court has emphasised that death penalty need not be inflicted except in the 'gravest of cases of extreme culpability' and that life imprisonment is the rule and death sentence is an exception. The Court has emphasised that death sentence is to be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to relevant circumstances of crime. The court opined that while one is killed by another, the society may not feel bound by this doctrine. It has to realise that every person must live with safety. Rarest of rare doctrine has to be determined according to following factors:

2 Nearly 67 countries have abolished death penalty. England and few states of U.S.A. have also joined hands with these countries.

3 AIR1973 SC 947.

4 AIR 1980 SC 898.

5 AIR 1983 SC 947.

- Manner of Commission of murder: If the murder is committed in an extremely brutal, revolting, grotesque, diabolical or dastardly manner to intense indignation of the community.
- If motive for the Commission of Murder shows depravity and meanness.
- Anti-social or socially abhorrent nature of the Crime.
- Magnitude of the Crime.
- Personality of Victim of the murder that is, Child, helpless Woman, public figure and so forth.

In *Darshan Singh v. State of Punjab*,⁶ the Supreme Court upheld the death sentence because the attack was cruel in – as – much as the appellant had chopped off the neck of the deceased, had given repeated blows by gandasa on the body of another deceased, who was a young girl, indeed his own uncle's daughter, which has been done to see that she did not escape. The brutality of the crime prevailed over the judges to approve the death penalty. The Supreme Court in *Allauddin Mian v. State of Bihar*,⁷ rejected the plea that *Bachan Singh* needs reconsideration by the Court. The Court reiterated the proposition that only in those exceptional cases in which the crime is so brutal, diabolical and revolting as to shock the collective conscience of the community, would it be permissible to award the death sentence.

In *Laxmi Naik v. State of Punjab*,⁸ Supreme Court held that the evidence on record had indicated how diabolically the accused had conceived of his plan and brutally executed it and such calculated, cold blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of "rarest of rare" case attracting no punishment other than the capital punishment and consequently confirmed the capital punishment. In *Surja Ram v. State of Rajasthan*,⁹ the appellant killed his real brother, his two minor sons, aunt and nearly killed his brother's wife and daughter while asleep. There was no provocation for the ghastly act. The Supreme Court refused to interfere with the death sentence passed on him by the Sessions Judge and the High Court. The Supreme Court observed:

It appears to us that for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed

6 AIR 1988 SC 747.

7 AIR 1989 SC 1456.

8 AIR 1995 SC 1387.

9 AIR 1997 SC 18.

are to be delicately balanced in a dispassionate manner ... and (that) punishment must also respond to the society's cry for justice against the criminal. (Emphasis added)

In *Madhu Mehta v. Union of India*,¹⁰ the mercy petition of the accused was pending before the President of India for about nine years. This matter was brought to the notice of the court by the petitioner. The court directed to commute death sentence to imprisonment for life because there were no reasons to justify prolonged delay and speedy trial was said to be included in article 21 of the Constitution. There was nine years' delay in execution of death sentence. Sabyosachi Mukharji J. and B.C. Roy J. held

“.....undue long delay in execution of the sentence of death would entitle the condemned person to approach this court or to approach under Article 32 of the constitution, but this court would only examine the nature of delay caused and circumstances.... No fixed period of delay can be considered to be decisive. It has been emphasised that Article 21 is relevant here. Speedy trial in criminal cases though may not be fundamental right is implicit in the broad sweep and context of article 21. Speedy trial is part of one's basic fundamental right i.e., right to life and liberty. This principle is no less important for disposal of mercy petitions. It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture.....”

Life imprisonment in our country is not of much significance as it can be substantially reduced (limitation is that it cannot be reduced below 14 years). Life imprisonment under no circumstances should be reduced as it is in most heinous crimes that the sentence life imprisonment is awarded. Even if this is accepted still there are other valid objections. Death penalty cannot be removed or abolished on humanitarian grounds or on the grounds of other alternative mode of punishment are available. A killer who is a perpetrator of other's right to live can't claim to have an inviolable right to live. The focus should be on the mischief flowing from what the criminal has done to his victim and those near and dear to him and greater attention be paid to victimology and therefore to the retributive aspect of punishment. The abolitionist needs to shift their focus from criminal to victim, as a killer is a proven enemy of society. Even if option to decide on death penalty or life imprisonment is to be given it should be left to the victim's family who have suffered due to the killer and know more about cruelty than the abolitionists. The demand of abolition of death penalty is a demand in wrong direction and represents a trend reversal when society is considering the issue whether mercy killing be accepted or not. Death penalty to a killer is a sort of mercy to an ailing society, which wants to

10 (1989) 4 SCC 62.

get rid of its enemy. The process of reformation of criminals with an unascertained record would entail a great risk as a sizable number of criminals instead of being reformed may be encouraged to commit offences after offences and become a serious and horrendous hazard to the society. The question, therefore, is--should the country take the risk of innocent lives being lost at the hands of criminals committing heinous crimes in the holy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be, will reform himself.

Even for the sake of argument if it is accepted that capital punishment has no deterrence then it means that criminal is not afraid of death and it will be difficult for the state to keep such a person in prison after all it is the fear of death that keeps a criminal in jail. After all criminal facing life imprisonment need a single chance to set himself free for taking a revenge from adverse witnesses and the prosecution who according to him were responsible for sending him to jail. Judge may also become the victim of his anger. As there is a saying so long as there is life, there is scope for irrepressible hope and hope for a break for freedom. A prisoner serving life imprisonment can go on a killing spree and there can be no further punishment from the punishment he is already facing. One important question that arises is shall we sacrifice the lives of future victims in order to spare the life of a murderer. Argument that goes against death penalty is that the societies do not have the right to take anyone's life since it cannot give life then why to kill soldiers of enemy, terrorist. One may say what is the need of providing arms to security forces if no human being can be deprived of his/her life whatever may be the circumstances. Prima Facie, the penalty of death is likely to have a stronger effect as a deterrent to normal human behavior than any other form of punishment, though it is difficult to unravel the innermost recesses of the minds of potential murderers. The conditions prevailing in some western countries that have abolished death penalty are incomparable with India. In abolitionist States even the most notorious criminals are effectively segregated from civil society for the rest of their natural life.

Contrastingly, in India life sentence can be reduced to 14 years. Our prison system is inadequate and unable to hold capital offenders for longer periods as in most western countries. How many times we have read the reports in newspaper about recovery of cell phones from prisons and many criminals find it suitable to operate from jails as they are protected from their rival criminals.

Sentenced in 2013 for the gang rape and murder in *Nirbhaya Case*, Vinay Kumar Sharma, Pawan Gupta, Mukesh Singh and Akshay Thakur were executed by hanging on 20 March 2020. *Nirbhaya Case* had provoked a wave of anger in India and around the world, prompting the

government to change the law to include an amendment (the Nirbhaya law) in 2013 making gang rape punishable by death. The Criminal Law (Amendment) Act, 2013 was passed in the aftermath of the Nirbhaya case wherein a female student was gang-raped in December 2012. The Act amended several provisions of the Indian Penal Code, Indian Evidence Act, and the Criminal Procedure Code.¹¹

Concluding Remarks

The concept of death penalty does not appear to be out of place particularly when the murder has been committed in well-planned manner with the sole intention of taking the life or lives of people. Many international instruments, most notably including the ICCPR, prohibit application of the death penalty for other than the "most serious crimes."¹² Second Optional Protocol to the International Covenant on Civil and Political Rights 1966 aiming at the abolition of the Death Penalty was adopted by the General Assembly in 1989. The Amnesty International has pointed out that death penalty has never been shown to deter crime more effectively than other punishment.¹³ It is submitted that this judicial discourse is the right one and the necessary too. 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 words of Pt. Jawahar Lal Nehru¹⁴ are worth mentioning here:

“At one time I was strongly opposed to death penalty and in theory my opposition still continues. And yet with all my repugnance for executions, I feel that some method of eliminating utterly undesirable human beings will have to be adopted and used with discretion.”

11 See the <https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf> for additional amendments to rape and sexual violence crimes.

12 The International Covenant on Civil and Political Rights, Article 6.

13 See, Natrajan, C.N., “Death Sentence: Need for Critical Review”, in Thilagraj, R (ed.), *Human Rights and Criminal Justice Administration*, 103 (2002).

14 Rao, Venugopal, *Facets of Crime in India* (1962)136.