Volume 6, July 2019 ISSN 2581-5504

"Anatomizing the Reconsideration of Death Penalty vis-a-vis with Social, Legal and Ethical Conundrums"

***Vagish Yadav[1]**
Amity Law School,
Lucknow

****Harshita Sonkar[2]**
RMLNLU,
Lucknow

INTRODUCTION

The introspection of death penalty proliferated with the awareness of basic first generation human rights and second generation human rights. The society had self realized in the preceding decades that this immemorial practice of creating a deterrent effect in the hearts of the people in the society is not a humanistic approach towards bringing societal change and death penalty needs to be reanalyzed. Death penalty has always found it's connotation with capital punishment which is considered to be the gruesome form of punishment known to mankind. But the pertinent point to be deliberated upon here is not about the execution and how it is carried out but the experience of living under the sentence of death, its long term effect on the prisoners and the families and concerned, their socio economic background among others. There is capital punishment prescribed for both homicide and non-homicide offences under various sections of Central and state legislature. But there is no exhaustive list of such provisions as of now. There are about 59 sections in 18 of its legislature containing both homicide and non homicide offences which provide for death penalty as a form of punishment.

A little bit delving into the history of proliferation of death penalty in India dates back to May 1980, wherein the constitutionality of death penalty was first upheld before a bench of 5 judges of the supreme Court in the case of *Bacchan Singh vs. State of Punjab*[3]. Though majority judgement pronounced by the bench comprising of CJ Y.V. Chandrachud, Justices R.S. Sarkaria, A.C. Gupta and N.S. Untawalia upheld the constitutional validity of the death penalty ,thus ruling and drawing a conjecture that it is not violative of article 14, and 21 of the Indian Constitution 1950, but P.N. Bhagwati J. pronounced a dissenting opinion declaring death penalty as unconstitutional.

[1] 2nd Year, BALLB, Amity University Lucknow.
[2] 1st Year, BALLB, Ram Manohar Lohia National law University Lucknow.
[3] (1980) 2 SCC 684.

Volume 6, July 2019 ISSN 2581-5504

The figures might just surprise one when it comes to the death penalty awarded to a prisoner in case of homicide and non- homicide offenses. There are about 41 non- homicide offenses in central legislature awarding death penalty and 13 homicide offences punishable by death[4].

Death Penalty in light of principles of penology

Retributive or deterrent, as one may interpret, death penalty finds its roots in the ancient times as well. Since, people were not civilized and vengeance ran in the blood of the tribal people, warfare was the only means of survival. But the quantum of punishment depended on the seriousness of the crime. For instance marriage with the kin or incest was considered to be destroying or posing a threat to the holiness or the sanctity existing established relationship. Death penalty as a punishment was only reserved for grievous forms of crime. Death penalty is the social condemnation of a person who has no regard for the life of the other being and has gruesomely deprived the other being of his life. Rendering any kind of leniency towards the perpetrator in awarding the punishment taking into account that it balances with the quantum of his crime would send a wrong message to the society at large and to the potential criminals in particular.

I. **Pronouncements of Death Sentences Under Hindu Law**

The concept of punishment and the rationale behind the same which existed in the ancient Hindu Law did not materially differ from the modern concept of punishment, since both of these are premised on the principle of morality and good conduct. Laws related to death sentences are as old as the Hindu society itself. There has been no condemnation from the Hindu law givers; rather they find it appropriate and just. It's more of a retribution wherein the justice is the yardstick, measuring the crime and the punishment one is subjected to. But then, we witnessed a change in this status quo, a reformation, from relying on the principle of retribution to an inclination towards the principle of forgiveness, since people in the ancient Indian Civilization were truthful, benevolent and vocal demurrer sufficed ,but if that didn't work then corporal punishment were awarded to the offenders.[5]

There is some affinity which can be drawn with the present day offences like homicide, theft, rape, murder etc, but the punishment they were met out with. There were different punishments for different offences which are considered, by modern standards too cruel or excessive and not

[4] https://barandbench.com/wp-content/uploads/2016/05/Death-Penalty-India-Report-Volume-1.pdf

[5] https://www.jstor.org/stable/1140200?Search=yes&resultItemClick=true&searchText=death&searchText=sentences&searchText=under&searchText=hindu&searchText=law&searchUri=%2Faction%2FdoBasicSearch%3Ffc%3Doff%26amp%3BQuery%3Ddeath%2Bsentences%2Bunder%2Bhindu%2Blaw%26amp%3Bacc%3Don%26amp%3Bgroup%3Dnone%26amp%3Bwc%3Don&ab_segments=0%2Ftbsub-1%2Frelevance_config_with_tbsub&refreqid=search%3Ac8a4d7592327727a027c4c93ba5e05b4&seq=1#metadata_info_tab_contents

Volume 6, July 2019 ISSN 2581-5504

in consonance with the offence. The reasons to arrive at such a conclusion were subjecting the offender of theft of gold and clothes and other valuable articles to capital punishment. The science of penology was highly developed as a subject of study and statecraft in India. Kalidasa has beautifully narrated the need for such punishment and its necessity as prevention against all sorts of heinous crimes. The same idea is manifested in Mahabharata, enunciated as "if by destroying an individual or a whole family, the kingdom becomes safe and danger-proof it ought to be done (in the interest of Society).The same ideology has been disseminated by Brahaspati. Talking of Dandaniti, which is not a recent growth in India, its fundamental are premised on the deterrence and mental rehabilitation and does not support the retribution and vengeance. Hence, corporal punishment was awarded to ensure the effective implementation of law and order in the society.[6]

II. Death Sentences Under Muslim Law

Death sentences awarded under Muslim law lies on the principle of deterrence. So if an accused is found guilty then he would be punished in a public place so that it would act as an eye opener for a potential criminal. This point has been lucidly illustrated through 179 SURA II from the Holy Quran. Punishment is a natural reaction which would follow in form of any kind or bodily injury, inflicting pain or aggression towards that person per se. Islamic doctrines have distinguished three types of criminality, (A) hadd,(b) Qisas (c) Ta'zir. These all have their own set of punishment and preventive measures prescribed under it and may differ from one another. The other comes is the Shanah, which has divides the crime into two different categories.

When it comes to hudood, the main focus of shariah is to safeguard the people, and laying down such strict punishment against offences is to prevent the society from disintegrating since any laxity would lead to decadence, disorder and discontent in the society. Certain other crimes sharing same are qisas (retaliation) and diyat(blood money),which affect the social life. Such offences constitute cases of homicide and infliction of wound or hurt, whether intentional or other way round. Shariah has prescribed punishment against such offences for instance if the act was intentional then it would attract qisas else diyat and no change or alteration can be made to the punishment or the gravity of the punishment.[7]

III. Death Sentences during the British Rule in India

The history of death penalty dates as far back as the eighteenth century B.C. Before that it was not recognized as punishment.

With time the concept of death penalty became normalized and started to gain a civilized look with the recognition of human rights and ethical procedures like for instance hanging became

[6] http://shodhganga.inflibnet.ac.in/bitstream/10603/12841/9/09_chapter%203.pdf

[7] http://shodhganga.inflibnet.ac.in/bitstream/10603/12841/9/09_chapter%203.pdf

Volume 6, July 2019 ISSN 2581-5504

usual method of execution by Britain. By the 1700s, around the number of crimes punishable by death penalty rose to 222, which comprised of stealing, cutting down a tree, robbing, etc. Because of the severity of the crime, the judges exempted the defendants if the offence was not serious in nature. This actually led to the reformation of the Britain's death penalty. From 1823-1837, the death penalty was eliminated for over 100 out of 222 crimes.

Before the application of the Indian Penal Code, the modification made to the Muslim law was taken into consideration. The British tried to interfere as little as possible and Mohammedan law with some reasonable and necessary modifications used to govern the people of India for a considerable period of East India Company' s administration. These modified laws could be superseded in case if there are some other penalties prescribed in the regulation or in the Mohammedan law were in contrast to each other. So for the purpose of removing some of the glaring defects with regard to the homicide only, the Bengal Resolution of 1773 was made (Section 50, 52, 55 and 76, substituted by Regulation 4, 1797).[8]

The East India Company attempted to standardize the capital punishment in Bengal in 1830. The Resolution of 1773 provided the punishment for homicide, intention being immaterial and reliance just made on the evidences produced. The Bengal Resolution of 1797 provided that the judgment was premised on the principle of "retaliation". As regard to the principle for "fine of blood", it can be commuted to imprisonment which might extend to life imprisonment. Sections XXVI, and various clauses mentioned under the Bombay regulation XIV, 1827, dealt with punishment for the offence of murder, it could be rendering death sentences, flogging etc. Then came the report of Law Commission of 1846 which dealt with the culpable homicide. In the year, 1851, the revised code was circulated and in year 1854, a committee consisting of Barnes, Peacock, Sir James Colvills etc was made to consider the revised code. They did not make any substantiate alteration and subsequently referred it to a Special committee on 28th December, 1857. It was then passed by the legislative council and soon the governor general gave his assent to it. Now it was left with the Britishers to give a systemized penal code which strictly limited the number of capital offences and reserved only for grave offences. Here it was examined that there was decline of capital punishment, since it was not in accordance with the current standard and decency, and quite inhuman if it would be awarded for every other offence. Hence Indian penal code, 1860 came into existence.

Precedents leading to the evolution of death penalty

Indian Judiciary has come up with the principle of pronouncing or awarding death sentences in the 'rarest of the rare cases. It was laid down in the case of Bacchan Singh v. State Of Punjab

[8] http://www.legalservicesindia.com/article/2418/Death-Penalty-in-India.html

Volume 6, July 2019 ISSN 2581-5504

that the nature of the crime embodies such special and unique nature that no other alternative could have been accounted for except for death penalty. It has been enunciated time and again that the nature of crime and the nature of criminal, both have to be taken into account.

The constitutional validity of death penalty was first taken in the case of *Jagmohan Singh v. State of UP*[9] in 1972 in which the Supreme Court held that the death penalty is not in violation of "right to life" which is guaranteed under Article-21 of the Constitution of India. But in Rajendra Prasad v. State of UP, Justice Iyer declared that the death penalty violated article 14, 19 and 21 of the Constitution of India. The views of Indian Judiciary for the validity of death penalty finally founded settling criteria in the case of Bacchan Singh v. State of Punjab. In this case, the SC said that the death penalty is not unreasonable punishment for murder and it doesn't violate Article 14, 19 and 21 of the Constitution and a principle was given that it must be taken in the "rarest of rare" cases. The judgment of Bacchan Singh case mitigated awarding of death penalty due to its rarest of rare doctrine and also the death penalty became constitutionally valid by this judgment.

Further in case of *Macchi Singh v. State of Punjab*, the Court, while justifying the death sentence imposed on the appellants, recollected with approval the principles laid down in *Bachan Singh* and supplemented them with a few more elaborate guidelines regarding the test of 'rarest of rare' cases as given below :

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

In Macchi Singh case, certain illustrations were given under which the death penalty must be awarded that were:

1. *Manner of Commission of Murder*
2. *Motive for Commission of Murder*
3. *Anti Social or Socially abhorrent nature of the crime*
4. *Magnitude of Crime*
5. *Personality of victim of murder*

The doctrine of "rarest of rare" was to be applied only under certain principles that were laid down by the Apex Court. The principles defined were regarding aggravating and mitigating circumstances. It has been said that a balance sheet of aggravating and mitigating circumstances must be drawn in the particular case which can be further used in applying the "rarest of rare" doctrine. The SC further discussed some aggravating and mitigating circumstances which were:

[9] (1973) 1 SCC 20.

Volume 6, July 2019 ISSN 2581-5504

Aggravating Circumstances:

1. *Murder committed in an extremely brutal, grotesque, diabolical , revolting or dastardly manner so as to arouse intense and extreme indignation of the community.*
2. *Murder- for a motive which demonstrates total depravity and meanness.*
3. *Murder of a Scheduled Cast or Scheduled tribe- arousing social wrath (npt for personal reasons).*
4. *Bride burning/ Dowry death.*
5. *Murderer in a dominating position , position of trust or in course of betrayal of the motherland.*
6. *Where it is enormous in proportion.*
7. *Victim- innocent child, helpless woman, old/infirm person, public figure generally loved and respected by the community.*

The Mitigating Circumstances are as follows:

1. *That the offence was committed under the influence of extreme mental or emotional distribution;*
2. *If the accused is young or old, he shall not be sentenced to death;*
3. *The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society;*
4. *The probability that the accused can be reformed and rehabilitated; The state shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above;*
5. *That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence;*
6. *That the accused acted under the duress of domination of another person;*
7. *That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.*

The development of the abovementioned circumstances was followed in some landmark judgments. In *State of Madhya Pradesh v. Mehtab*[10], it was said that sentence has to be fair not only to the accused but also the victim and the society. Also in *Brajendra Singh v. State of Madhya Pradesh*[11], the Apex court held that the law enunciated by the Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh and thereafter, in the case of Machhi Singh. The aforesaid judgments, primarily dissect these principles into two different compartments one being the aggravating circumstances while the other being the mitigating circumstances.

[10] (2015) SCC 5 197.
[11] 2008 AIR SC 1056.

Volume 6, July 2019 ISSN 2581-5504

In *Shankar Kisanrao Khade v. State of Maharashtra*[12], the court stressed on the fact that the balancing is not as important as the three tests i.e. Crime Test, Criminal Test and R-R test i.e. Rarest of the Rare Case test. The consideration of the rarest of the rare shall be society centric and not judge centric. The court further referred the reconsideration and analysis of death penalty if it is a deterrent punishment or retributive justice or incapacitated goal, to the Law Commission of India[13]. The Commission reported with important conclusions about witness protection scheme and support to the victims but most importantly including the conclusion that the capital punishment fails to achieve any constitutionally valid penological goals. Furthermore, the commission recommended the abolition of death penalty except in terrorism related and waging war cases.

Recent Judgments on Death Penalty

A lot of judgments have come in recent years where death penalty has been awarded in India. In the concern of High Courts, the Rajasthan HC awarded death to a man who was convicted of sexual harassment and murder of a 8-year old girl in which the crime as termed as "rarest of rare". Apart from this, the NIA Court of Hyderabad awarded death penalty to Yaseen Bhatkal with four other Indian Mujahideen operators for carrying out bomb explosions in Hyderabad. But there were some judgments in which the death penalty was commuted. In *Shyam Singh v. State of Madhya Pradesh*[14], the apex court commuted the death penalty given to Shyam Singh after he was found guilty for triple murder. Also in rape- cum- murder of 7 year old, the SC commuted the death sentence awarded by the Madhya Pradesh HC to the man accused of raping and murdering a 7 year old girl to life imprisonment.

In case of *BA Umesh v. Registrar*[15], review plea against death penalty was dismissed by the SC bench headed by Justice Ranjan Gogai. The death penalty was imposed by the Karnataka HC on BA Umesh for rape-cum-murder of a housewife. The doctrine formed in Bacchan Singh case has always been considered while deciding different cases related to the death penalty. In number of cases, the judgement of death penalty was reversed to life imprisonment as the crime committed did not follow the "rarest of rare" case. On the other hand, it is observed that the death penalty imposed by the court in some cases did not get repealed as they follow the doctrine of Bacchan Singh case.

[12] (2013) 5 SCC 546.
[13] http:// lawcommissionofindia.nic.in/1–50/Report35Vol1and3.pdf
[14] 2010 JLJ 1 97.
[15] 2016 SCC ONLINE SC 1141.

Volume 6, July 2019 ISSN 2581-5504

In 2018, a landmark case came into the light which questioned the validity of the death penalty in India. It was the case of *Channu Lal Verma vs. State of Chattishgarh*[16] in which the three judge bench comprising of Justice Joseph, Deepak Gupta and Hemant Gupta commuted the death penalty of a man for murdering three people including two women and awarded him life imprisonment. A lot of views were generated by the three judges regarding the provision of the death penalty. The previous decision of death penalty was commuted to life imprisonment. In the light of Channulal verma v. state of Chhattisgarh, what the court has excellently pointed out is the basic understanding of the "rarest of the rare case".

As the facts of the case have been lucidly pointed out, the appellant was in favor of commuting his death sentence as pronounced by the session court and upheld by the High court, the court has failed to understand the basic underlying rationale behind this "rarest of the rare case". Before pronouncing its judgment and awarding death sentence, the court needs to take into account both the aggravating and mitigating factor and creating a balance between the both, for instance, the court failed to take into account the other factors, such as rehabilitation, social and economic background among others. If by the conduct of the appellant or by the psychological tests, it could be deduced that he is willing to change himself for better, then the court has to commute the punishment. If all the hopes regarding the betterment of the offender are in vain and that it is evident that the offence so committed is of a nature that life imprisonment as a punishment won't suffice also the society won't accept the offender, then in those rare cases the death penalty is awarded.

Conclusion

Executing the convict only affixes the state as a murderer. There can be innumerable number of reasons as to why the state shall do away with the death penalty. Firstly, it doesn't serve the purpose as is claimed by some, it does not have deterrent effect on the society. National law university, Delhi under the death penalty project demonstrated that there has been no deterrent effect whatsoever. Of three decades from 1980 onwards, there was a drastic decrease in the number of murders with the decrease of number of convictions. Hence, the empirical results shoe otherwise. Secondly there is presence of arbitrariness. The R-R Test gives judges the power to decide the punishment, laying no reliance on the judiciary, the third being, the socio- economic background of the convicts, which is not taken into accounts. There are about 2/3 convicts under death row who belong to marginalized group, dalits and backward. The fourth and the most important, it is an anathema to the society and state, which represents the victim is answerable for such act and thus carrying out execution portrays the vengeance of the state, the state might be led by emotions , boiling it all down to biasness towards the convicts.

[16] Crl.A. No.-001482-001483 / 2018.