

“Death Penalty: Extent of Discretion & Justification”

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Our criminal justice system is fallible. We know it, even though we don't like to admit it. It is fallible despite the best efforts of most within it to do justice. And this fallibility is, at the end of the day, the most compelling, persuasive, and winning argument against a death penalty.

-Eliot Spitzer

Introduction

Punishments are awarded to wrongdoers by the state in order to maintain law and order in the society. The State not only defines but also protects the rights and enforces the duties of its citizens. When any right of an individual is violated by another individual, the latter needs to be punished. In olden days, when a wrong was done against an individual they resorted to private vengeance but with changing time, modern theories of punishment evolved viz., preventive theory, deterrent theory, reformatory theory, retributive theory and expiatory theory. Punishments are awarded keeping two things in mind, firstly that the wrongdoer must suffer for the wrong done and secondly that the punishment creates an awe in the minds of others and prevents them from committing the same. The highest level of punishment awarded in the present time is the “Death Penalty” also known as the “Capital Punishment”. Capital punishment is the legal killing of a person who has committed a crime prohibited by the law.** The sentence condemning a convicted defendant to death is known as ‘Death Sentence’ and the act of carrying out the death sentence is known as ‘ Execution’.**

Death Penalty in India

An execution is a violent public spectacle of an official homicide and one that endorses killing to solve social problems and is probably the worst example of citizenry. It is uncivilized in theory, unfair and inequitable in practice. Therefore through litigation, legislation, communication and commutation by helping to foster a renewed public outcry against this often considered barbarous and brutalizing institution, we strive to prevent executions as much as possible and seek to save a person from Capital punishment. The most recent case of death penalty was in *Mukesh and Anrs. V. NCT Delhi*¹ also known as the **Nirbhaya Case**, where the four convicts for Nirbhaya’s gangrape and murder, were hanged

¹ Mukesh and Anrs. Vs. NCT Delhi, (2017) 6 SCC 1

to death in Tihar jail on 20th March, 2020. Death sentence of **Chandrabhan Sanap**² was executed on 30 October 2015, and he was hanged till death, after affirmation by a Special Women's court and rejection of his mercy Petition by the president. The case against him was that he raped 23-year-old Esther Anuhuya in Kanjurmarg, Mumbai on 5 January 2014, strangled the victim with her *dupatta* and burned the body, also convicted of destruction of evidence. While the majority of people in this country welcomed the execution, there were a few organizations & people who straight away outlaw capital punishment for any kind of offence and therefore, they opposed. This outcry faintly resembled to the hue and cry about **Dhananjay Chatterjee**³'s death sentence as well where on 14th August 2004, and he was hanged till death, after affirmation by the Supreme Court and rejection of his mercy Petition by the president. The case against him was that he hit a girl aged 14 years, brutally on head, and while the girl was dying, she was raped by the accused. Result: ultimately the girl died. The session's court considered it as the rarest of rare case. High Court affirmed the death sentence and the appeal against the High Court's order were dismissed by the S.C.

We as students of the legal fraternity have seen this issue tossed up numerous times and every time it has been settled down by the honorable Courts. Still we all have had our debates on "whether capital punishment should be abolished or not" time and time again. However, at this point of time when the issue is still raging, it will be appropriate to remind ourselves as to how the legislatures and the apex Court have dealt with this issue every time it has come up before them. Another issue is regarding the extent of judicial discretion. At least 100 people in 2007, 40 in 2006, 77 in 2005, 23 in 2002, and 33 in 2001 were sentenced to death (but not executed), according to Amnesty International figures. No official statistics of those sentenced to death have been released. There are a number of mercy petitions pending before the president to this date, some of them from 1992. In colonial India, death was prescribed as one of the punishments in the Indian Penal Code, 1860 (IPC), which listed a number of capital crimes. It remained in effect after independence in 1947. The first hanging in Independent India was that of Nathuram Godse and Narayan Apte in the Mahatma Gandhi assassination case on 15 November 1949. Under Article 21 of the Constitution of India, no person can be deprived of his life except according to procedure established by law. The Constitution Bench judgment of Supreme Court of India in **Bachan Singh vs State of Punjab (1980) (2 SCC 683)**⁴ made it very clear that Capital punishment in India can be given only in rarest of rare cases. This judgment was in line with the previous verdicts in **Jagmohan Singh vs State of UP (1973)**⁵, and then in **Rajendra Prasad vs State of UP (1979)**⁶. The Supreme

² Har Sharan Varma vs Chandra Bhan Gupta And Ors. on 15 February, AIR 1962 All 301

³ Dhananjay Chatterjee vs State Of W.B on 11 January, 1994 SCR (1) 37, 1994 SCC (2) 220

⁴ Bachan Singh vs State of Punjab (1980) (2 SCC 689)

⁵ Jagmohan Singh vs The State of U.P, 1972 AIR 947; 1973 SCR (2) 541

Court of India ruled that the death penalty should be imposed only in "the rarest of rare cases." While stating that honour killings fall within the "rarest of the rare" category, Supreme Court has recommended the death penalty be extended to those found guilty of committing "honour killings", which deserve to be a capital crime. The Supreme Court also recommended death sentences to be imposed on police officials who commit police brutality in the form of encounter killings. In addition to the Indian Penal Code, a series of legislation enacted by the Parliament of India have provisions for the death penalty.

Sati is an inhumane practice involving the burning or burying alive of any widow or woman along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband or such relative. Under the Commission of Sathi (Prevention) Act, 1987 Part. II, Section 4(1), if any person commits sati, whoever abets the commission of such sati, either directly or indirectly, shall be punishable with death. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes.

Under Section 3(2)(i) of the Act, bearing false witness in a capital case against a member of a scheduled caste or tribe, resulting in that person's conviction and execution, carries the death penalty. In 1989, the Narcotic Drugs and Psychotropic Substances (NDPS) Act was passed which applied a mandatory death penalty for a second offence of "large scale narcotics trafficking".

In recent years, the death penalty has been imposed under new anti-terrorism legislation for people convicted of terrorist activities. On 3 February 2013, in response to public outcry over a brutal gang rape in Delhi, the Indian Government passed an ordinance which applied the death penalty in cases of rape that leads to death or leaves the victim in a "persistent vegetative state". The death penalty can also be handed down to repeat rape offenders under the Criminal Law (Amendment) Act, 2013. In January 2014, a three-judge panel headed by Chief Justice of India *Palanisamy Sathasivam* commuted sentences of 15 death row convicts, ruling that the "inordinate and inexplicable delay is a ground for commuting death penalty to life sentence". Supreme Court of India ruled that delays ranging from seven to 11 years in the disposal of mercy pleas are grounds for clemency. The same panel also passed a set of guidelines for the execution of a death row convict, which includes a 14-day gap from the

⁶ Rajendra Prasad Etc. vs State Of Uttar Pradesh on 9 February, AIR 916, 1979 SCR (3) 78

receipt of communication of the rejection of the mercy petition to the scheduled execution date, after going through the *Shatrughan Chouhan vs Union of India*⁷ case.

The Indian penal code was drafted by the 1st law commission of India. The authors of the Code had to say about death as a punishment:- " We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the state has been committed." It may be pertinent to mention here that the Indian Criminal jurisprudence is based on a combination of deterrent and reformatory theories of punishment. While the punishments are to be imposed to create deter amongst the offenders, the offenders are also to be given opportunity for reformation Therefore the legislatures drafted Sec. 354 (3) of the CR.P.C. This subsection basically lays down that 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.

By virtue of section 354(3) of CR.P.C., it can be said that death sentence be inflicted in special cases only. The apex court modified this terminology in *Bachan Singh's Case*⁸ and observed-

" A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed." To decide whether a case falls under the category of rarest of rare case or not was completely left upon the court's discretion. However the apex court laid down a few principles which were to be kept in mind while deciding the question of sentence. It has been the view of the court that while deciding the question of sentence, a balance sheet of aggravating and mitigating circumstances in that particular case has to be drawn. Full weight should be given to the mitigating circumstances and even after that if the court feels that justice will not be done if any punishment less than the death sentence is awarded, then and then only death sentence should be imposed. Aggravation here means of an offence made more serious by attendant circumstances. Mitigation here means the action of reducing the severity, seriousness, or painfulness of something. The principles laid down by the apex court were reiterated in the judgment of *Sushil Murmu Vs. State of Jharkhand*⁹ "In rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty

⁷ Shatrughan Chauhan & Anr vs Union Of India & Ors on 21 January, 2014

⁸ Bachan Singh vs State Of Punjab on 9 May, 1980 AIR 1980 SC 898, 1980 CriLJ 636, 1982 (1) SCALE 713, (1980) 2 SCC 684, 1 SCR 145

⁹ Sushil Murmu vs State Of Jharkhand on 12 December, 2003

irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded".

CONCLUSION

Despite the fact that full discretion is given to judges, in ultimate analysis, it can safely be said that such wide discretion has resulted into enormously varying judgments, which does not portray a good picture of the justice delivery system. What is needed to be done; therefore; is to revise and review the guidelines and principles laid down in cases like Bachan Singh, or if it is felt that these guidelines still stand firm and fit perfectly in the present social scenario, then these guidelines have to be strictly complied with, so that the persons convicted for offence of similar nature are awarded punishments of identical degree. Can it be said that justice was done? In order to avoid controversies and to put forward their liberal approach, Judges often change the degree of offence avoiding the guidelines laid down by the apex court itself. Humans carry the notion of hope within them. It's the law's duty spark or ignites the light within all the citizens. When the law calls for elimination of a criminal it chooses one ideal over the other. Embodied within the ideal of hope is the fundamental belief of potential of every person to be a force for good. Every person includes, yes the criminals too. After all our society is a forgiving society and wants to rehabilitate criminals. Executing someone clearly states that a person cannot be a force for good. In other words, there is no hope for this person. The ideals of the laws are guiding principles and not moral absolutes and the legislation would at times have to put weight on one ideal more than the other. These guiding principles are needed to be used to navigate citizens in a complex, chaotic and often inconvenient reality. If we hope to embody these ideals as well we have to understand how extreme some people can be and take conscious measures to not be put in such situations. Because with all its powers, the law still cannot control the choices others make. The ideas that the death penalty is inhumane or ineffective as a deterrent to crime are both incorrect. Proverbs 19 says that a hot tempered man must pay the penalty, if you rescue a hot tempered man you will have to do it again. If there is no penalty there is no order. As for the question of the death penalty being inhumane, the death penalty is a just penalty for a person who has maliciously taken human life. Thus, the death penalty, in some cases, must be done. It is very hard for a rational person to argue against this. There are surely some cases in which the death penalty should be used. For example, let us think about Hitler. This man and his perverted beliefs were responsible for the killings of millions of innocent human beings. He was also responsible for one of the worst atrocities ever made in the history of mankind namely, the holocaust. The death penalty is the only appropriate punishment for this monster and his heinous crimes. I believe that we are completely justified in punishing people like Hitler with the death penalty because they really deserve it. Indeed, if the punishment should

fit the crime, then the death penalty is what fits these heinous crimes made by Hitler. Anything less would be a failure to approximate justice and to carry out minimally deterrence.