



## CAPITAL PUNISHMENT: MISERY OF DEATH ROW CONVICT

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### ABSTRACT

Even in 2018, India is one of the few countries in the world which still considers punishing the convicts with capital punishment even for peacetime crimes. 140 countries have totally given up the use of capital punishment and even the Law Commission in its report in 2015 suggested the Indian courts to do away with this form of punishment for peacetime crimes and use it only for the ones convicted under section 121 of the Indian Penal Code for waging war against the country. The common answer given the judiciary and the legislature who still want to retain the use of this aggravated form of punishment is the notion that this form of punishment is a huge deterrent for the individuals in the society to commit grave offenses like murder, rape etc. But many jurists have opined against it and reports suggest the opposite of it. Also the common trend seen with the Judiciary while they award capital punishment is the arbitrariness of the term 'rarest of rare' which they employ while giving such decisions. Also only 0.0037% of the people who are condemned to death sentence are actually executed as the rest of them are reprieved either by the higher courts or are pardoned by the President as was seen recently in the case of Channu Lal Verma vs. The State of Chhattisgarh where the Apex Court commuted the death sentence

given to the convict to life imprisonment citing various reasons. The agony faced by the rest 99.9963% death row convicts who and their families live under a constant fear of looming threat of execution, till they are reprieved, is immeasurable. The methods used to execute the Death row convicts are also very barbarous and inhumane in India. The trend of giving death penalty thus has no significance in the present era, and this article tries to provide a brief overview of the above stated points and also tries to present an alternative to this type of punishment.

**KEY WORDS:** DEATH PENALTY, DETERRENCE, MENTAL AGONY, RAREST OF THE RARE

### INTRODUCTION

There are three pillars of our Indian constitution namely Article 14, Article 19 and Article 21 which guarantee us the Right to Equality, Right to Freedom of Speech and Right to Life respectively. This all being our fundamental rights cannot be taken away by anyone except for the due process established by law. In *Bachan Singh vs State of Punjab*,<sup>1</sup> Supreme Court held the validity of capital punishment and found it not to be violative of Article 21 as the state can take away this right of the citizen by procedure established by law. This was again justified by the apex court in the case of *Channu Lal Verma vs. The State of Chhattisgarh*,<sup>2</sup> where the 3 judge bench held the constitutional validity of the capital punishment. Thus, capital punishment being an institution established by the law has the liberty to take

<sup>1</sup>1980 (2) SCC 684

<sup>2</sup>2018(15)SCALE306



away the life. But the concept of 'Right to Live with Dignity' which also comes under the ambit of Right to life<sup>3</sup> is taken away by the functionaries of the government when the Death Row convicts and their families await the dooms day for years only to find their sentences being commuted to lesser sentences in majority of the cases. The Supreme Court has tried to remove this anomaly, but only to find each of the steps taken by them becoming ineffective and being rendered useless. For example, the Supreme Court in *T.S. Vatheeswaran vs. State of Tamil Nadu*<sup>4</sup> held that if the appeal for a case has a time lapse of more than two years in it then the term of death sentence can be commuted to that of life imprisonment. This means the highest appellate court, i.e. the Supreme Court has only two years to uphold the decision of the lower court or to overturn it. But if it takes more than two years, then the death sentence automatically gets commuted to life imprisonment.

This decision, however, was modified later, in the case of *Smt. Triveniben vs. State of Gujarat*<sup>5</sup>. It was held that the time period of two years must be taken from the time when the Supreme Court has finally declared its verdict. This was held because the convict sentenced to death can delay his time period in the process of making appeals to the higher courts. If we consider the first rule, it is more accurate than the second rule because the death row convicts and their families live a life of hopelessness, glum and despair and start waiting for that eventual day when they will finally be executed. Thus

in this mental state, each day they live waiting takes a heavy toll on them and their families and the Indian Judiciary has seen cases in which the convicts are kept waiting for even more than ten to twelve years.

One more thing that makes this punishment of death penalty more unacceptable is its such (as was shown by a report given by Amnesty International in the year 2008) is that the Indian Courts on an average give death penalty to 60 persons in a year but only 4 people have actually been hanged since 2000<sup>6</sup>. If we calculate it mathematically, 0.0037 out of every 100 people have actually been executed. Out of the four which have actually been executed since 2000, only Dhananjay Chatterjee was prosecuted for normal peacetime crime. Even then today, many are being prosecuted for normal peacetime crimes, only to be appealed and be commuted by the higher courts or to be pardoned by the President.

Italian philosopher, Cesar Beccaria in his article wrote-

*"To serve a penalty such as capital punishment may urge the people to commit or engage in lesser forms of crime simply to avoid capital punishment."*<sup>7</sup>

Thus, according to Beccaria, instead of deterring people, it urges them to commit lesser proportionate crime. He did believe

<sup>3</sup>Maneka Gandhi vs. The Union of India, 1978 AIR 597

<sup>4</sup> (1983), 2 SCC 68

<sup>5</sup> (1989), 1SCC 678

<sup>6</sup> According to Government of India reports –

(1) Dhananjay Chatterjee in 2004 for rape and murder

(2) Ajmal Kasab in 2012 for terrorism and waging war against the country

(3) Afzal Guru in 2013 for terrorism and waging war against the country

(4) Yakub Menon in 2015 for terrorism and waging war against the country

<sup>7</sup> Cesare Beccaria, Crime and Punishment, 1764



that the death penalty was useful in some situations, such as when there was a need to protect the security of a nation or a government but not in other cases. Thus according to him, giving capital punishment also does not deter the other members of the society too. Thomas Jefferson too, in his Bill for Proportioning Crimes and Punishment 1779, agreed to ideas of Cesare Beccaria<sup>8</sup>. Following are the parameters on which when death penalty is measured, it is found to be untenable.

#### (1) THE ARBITRARINESS OF THE DEATH PENALTY

In *Bachan Singh vs The State of Punjab*<sup>9</sup> the doctrine of 'rarest of the rare' was evolved which said that the court has power to give death sentence only in cases where the court believes that the case belongs to the rarest of the rare category. This doctrine of rarest of the rare however has always been left open ended. Very little is different between the cases of *Mukesh & Ors. Vs. State for NCT of Delhi and Ors.*<sup>10</sup> (Nirbhaya case) or *Govindaswamy vs. State of Kerala*<sup>11</sup> (Soumya's Murder Case). In both the cases, the victim was brutally raped and was later thrown out of a moving vehicle, and both of them died. But death penalty was awarded only in the former case and not in

the latter one. Only one difference which we can find in both these cases was that of media coverage. Nirbhaya Case was more politically publicised than the Soumya's case, and therefore we can somewhat say that the public outcry in the first case forced the Delhi High court and later the Supreme Court to give death penalty, however as Soumya's case did not receive that much publicity, the offender was only awarded life imprisonment. This is the first type of arbitrariness shown by the courts, i.e. where the publicity received by the case determines the type of punishment.

Another type of arbitrariness can be seen in these two examples. In 1984 after Indira Gandhi's death, Anti-Sikh riots broke out and it is estimated that around 3000 people were killed in Delhi alone. But no one was punished for the mass murders until recently because many political leaders were involved in these crimes or to say these acts were done by their consent.<sup>12</sup> Or even in the case of Gujarat riots in 2002, same happened there too. But now let us take the case of 2008 Mumbai terror attacks. The only assailant or the terrorist who survived was Ajmal Kasab. He was convicted and hanged in just four years from the date when the crime was committed. To put into perspective only 166 were killed in Mumbai attacks, which is way lesser than the figure of Anti-Sikh riots of 1984 in Delhi alone. So, do these examples lead us to a conclusion that only poor and under privileged (as Ajmal was poor and illiterate) are generally prosecuted. This is also a common trend seen in the number of convicts given capital punishment in the

<sup>8</sup>Vinay Naidoo, Can Society Escape the Noose..., Pg. No. 43 (HRLN Publication, 2005)

<sup>9</sup>Supra 1

<sup>10</sup>Criminal Appeal NO. 607-608 of 2017 Supreme Court

In this case, the victim was gang raped by 6 men and thrown out of the moving bus in the state of Delhi. She died because of the injuries suffered to her later.

<sup>11</sup>AIR 2016 SC 4299

In this case the victim was raped by an handicapped man in the compartment reserved for women in a moving train and was thrown out of the moving train. She also died owing to her injuries.

<sup>12</sup>Pav Singh, 1984 India's Guilty Secret, 2017

In his book Pav Singh expresses these ideas with proofs of the people who have actually seen it.



post-Independence era.<sup>13</sup> This also shows the arbitrariness of the courts while deciding a case for a poor or a rich man.

## (2) THE AGONY OF THE CONVICTS

One shocking trend which has been seen is that the death row convicts are kept waiting for their D-day in India for a very long time and rules like the Vatheeswaran rule<sup>14</sup> or the Triveniben rule<sup>15</sup>, have been openly violated. Many have criticised the Vatheeswaran rule saying that it always takes more than 2 years for the appellate courts to give their decisions. Even if we accept this point, then also we see that in some cases the appellate courts have taken even as much as ten to twelve years to decide which is way more than the two-year rule.

One case which describes the above said inference is *Purushottam Borate and ors. vs State of Maharashtra*<sup>16</sup>. In this case the convict was given death penalty in the year 2008 by the trial court and this was reconfirmed by the Supreme court in the year 2015. So, this shows that there is a gap of 7 years in. Also in the case of *Md. Jamaluddin Nasir vs State of West Bengal*<sup>17</sup>, the Supreme Court agreed with the decision of trial court to give death penalty after 9 yrs of the said judgment. However in both the above said cases, the convicts were never hanged and in the fear of which they had to spend a decade of extreme pain and agony.

But, in the cases such as that of *Amar Ku. Singh vs State of Uttar Pradesh*<sup>18</sup> and *Santosh Kumar Singh vs. State of Madhya Pradesh*<sup>19</sup> even though the Appellate Courts commuted the decision of death penalty to that of life imprisonment, it took them 4 to 5 years in each of the cases which is a very long time considering the agony faced by them.

Also in the only case where the convict was actually hanged i.e. in the case of *Dhananjay Chatterjee vs. State of West Bengal*<sup>20</sup> the convict was hanged 10 years after Supreme Court agreed to the decision of the lower courts in 1994 and it is a well-documented fact that his family had to suffer a lot because of this. Now consider that the Law Commission in its report in 2015<sup>21</sup> gave instructions to the courts that they should only give death penalties in the cases where the said individual is booked under Section 121 of the Indian Penal Code that is for waging war against the country or spreading terrorism. But in all the above stated cases, none of them were for terrorism or waging war against the country. Each of these cases were crimes committed during the peacetime of the country. Another interesting fact shown by the Amnesty international in its report in 2017 said that there was an increased in the number of cases where the court condemned the accused to death penalty by 81% in 2016 from 2015. This is after the law commission gave its suggestion to the courts to stop using death penalty in normal crimes.

Now suppose that a person is given death

<sup>13</sup> Vinay Naidoo, Can Society Escape the Noose..., Pg. No. 73(HRLN, 2015)

<sup>14</sup> Supra 3

<sup>15</sup> Supra 4

<sup>16</sup> AIR 2015 SC 2170

<sup>17</sup> Criminal Appeal no. 1240-1241 of 2014, Supreme Court

<sup>18</sup> AIR 2012 SC 1995

<sup>19</sup> AIR 2014 SC 2754

<sup>20</sup> (1994) 2 SCC 22

<sup>21</sup> 35<sup>th</sup> Law Commission Report of 2015



penalty, his term is reduced to life imprisonment either by the appellate courts or he also has the right to ask mercy from the President, and in majority of the cases he gets respite from the either. The result of this is that only 5 have been actually hanged in India since 1995 and only 4 after 2000. Out these 4 after 2000, only Dhananjay Chatterjee remains the one who has been hanged for a peacetime crime. So, if we do not actually want to execute the ones condemned to death, then why are we actually giving them this cruel punishment. Only to cause mental agony to them and their family members. The question remains unanswered.

### (3) THE BARBARITY OF CAPITAL PUNISHMENT IN INDIA

In India we still find that methods of execution are that of pre-medieval era (execution is carried by hanging the convicts by rope) unlike the others countries like U.S. and U.K. where newer methods like electrocution or lethal injections are used which are considered to be less barbaric and inhuman than the methods used in India. Also there are many instances where the convict faces experiences like rope with which he is hanged breaks, without him actually dying which cause extreme pain. Also the tortures that he has to go through like weighing of him and others are beyond imagination<sup>22</sup>.

<sup>22</sup> Justice Bhagwati in 'Bachan Singh vs State of Punjab' (1980 (2) SCC 684) -

"29. The physical pain and suffering which the execution of the sentence of death involves is also no less cruel and inhuman. In India, the method of execution followed is hanging by the rope. Electrocution or application of lethal gas has not yet taken its place as in some of the western countries. It is therefore with reference to execution by hanging that I must consider whether the sentence

of death is barbaric and inhuman as entailing physical pain and agony. It is no doubt true that the Royal Commission on Capital Punishment 1949-53 found that hanging is the most humane method of execution and so also in *Ichikawa v. Japan*, Vide : David Pannick on "Judicial Review of Death Penalty, page 73 the Japanese Supreme Court held that execution by hanging does not correspond to 'cruel punishment' inhibited by Article 36 of the Japanese Constitution. But whether amongst all the methods of execution, hanging is the most humane or in the view of the Japanese Supreme Court, hanging is not cruel punishment within the meaning of Article 36, one thing is clear that hanging is undoubtedly accompanied by intense physical torture and pain. Warden Duffy of San Quentin, a high security prison in the United States of America, describes the hanging process with brutal frankness in lurid details: The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurement et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face and that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few minutes there is usually considerable struggling in an effort to breathe.

If the drop is too short, there will be a slow and agonising death by strangulation on the other hand, if the drop is too long, the head will be torn off. In England centuries of practice have produced a detailed chart relating a man's weight and physical condition to the proper length of drop, but even there mistakes have been made. In 1927, a surgeon who witnessed a double execution wrote:



#### (4) IS CAPITAL PUNISHMENT REALLY DETERRENT

As Thomas Jefferson in his statement once said

*“Capital Punishments, become inconsistent with the safety of their fellow citizens...[capital punishment] also weakens the state by cutting off so many who, if reformed might be which exterminate instead of reforming...should be the last melancholy resource against those who existence is restored sound members of the society, who even under a course of correction, might be rendered useful in*

The bodies were cut down after fifteen minutes and placed in an antechamber, when I was horrified to hear one of the supposed corpses give a gasp and find him making respiratory efforts, evidently a prelude to revival. The two bodies were quickly suspended again for a quarter of an hour longer...Dislocation of the neck is the ideal aimed at, but, out of all my post-mortem findings, that has proved rather an exception, which in the majority of instances the cause of death was strangulation and asphyxia.

These passages clearly establish beyond doubt that the execution of sentence of death by hanging does involve intense physical pain and suffering, though it may be regarded by some as more humane than electrocution or application of lethal gas.

30. If this be the true mental and physical effect of death sentence on the condemned prisoner and if it causes such mental anguish, psychological strain and physical agony and suffering, it is difficult to see how it can be regarded as anything but cruel and inhuman. The only answer which can be given for justifying this infliction of mental and physical pain and suffering is that the condemned prisoner having killed a human, being does not merit any sympathy and must suffer this punishment because he 'deserves' it. No mercy can be shown to one who did not show any mercy to others. But, as I shall presently point out, this justificatory reason cannot commend itself to any civilised society because it is based on the theory of retribution or retaliation and at the bottom of it lies the desire of the society to avenge itself against the wrong doer. That is not a permissible oenological goal.”

*various labors for public and would be living and long continued spectacles to deter others from committing like offences”<sup>23</sup>*

Even as Beccaria said that it may force the individual to commit crimes of lesser punishment or find ways to escape the punishment rather than not committing the crime<sup>24</sup>. The statistics show that even after the Nirbhaya's convicts were condemned the number of rape cases recorded in the country have shot up significantly. It has also been scientifically proven the deterrent types of punishment such as the death penalty don't have a long-term effect but only have a short-term effect<sup>25</sup> and over 88% of the criminologists in USA believe that the capital punishment is not deterrent in nature<sup>26</sup>. There are clear-cut statistics to prove the point mentioned above. One more fact that goes against the deterrent form of punishment is that resources are wasted for maintaining this institution and many researchers believe that this force could be used in a better way to prevent the crimes rather using it to deter the people.

#### CONCLUSION

John Rawls (1971) once said, *“Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.”* The above stated facts in

<sup>23</sup> Supra 7

<sup>24</sup> Supra 6

<sup>25</sup> David P. Philips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, 1980

<sup>26</sup> A study conducted by the University of Colorado in 2012



this article clearly mention the injustice which is being caused to the death row convicts by the judicial and the executive machineries which force us to look for alternatives.

One alternative which can be implemented is by giving 'Life Sentence without Parole'. The above-mentioned is one of the most talked about alternative when it comes to alternatives to capital punishment. Although a lot of Death penalty proponents fear the picture when these convicted criminals will be back on the streets and posing a threat of committing the crimes for which he was convicted again. Also he / she coming out may also pose a risk towards the ones who had testified against him. But if we look at the reality, most people who are sentenced to life without parole are not released at all, and even if someone is released, it is at least after 25-30 years, by then they are old men and women anyway. What we as a society need to realize here is that life without parole costs a lot less and also allows for mistakes to be corrected.

Another alternative which can be considered is the theory of reformation, where the individual is given a second chance to reform himself and be useful to the society. This is done through a method of Individualisation and it is conceived that even though the person has committed a crime, it is possible that the circumstance under which he committed the crime may not arise again in his future and thus he could be reproductive for the society<sup>27</sup>.

Thus, the theory of Capital Punishment has been spoken against from the times of justice Bhagwati in the case of *Bachan vs*

*The State of Punjab*<sup>28</sup> to the present day where 140 countries have totally stopped using it and the Law commission report of 2015 also suggests the same. But we see an increase in the number of death sentences in the last few years where as only a meagre percentage of them are actually being hanged. This article doesn't tries to challenge the constitutionality of Capital punishment, but tries to bring out the flaws, which requires to be rectified.

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<sup>27</sup> Tanu Priya, Reformative Theory of Punishment, 2014

<sup>28</sup> Supra 1