



CAPITAL PUNISHMENT: RETHINKING THE NEED IN INDIAN JUDICIAL SYSTEMS.?

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ABSTRACT

Death penalty is essentially the legal process of punishment wherein an individual is awarded with the gravest punishment of death by the State. Considered the ultimate denial of human rights, the process is not only fundamentally incoherent, but also encompasses various practical blemishes existent in our society. From improper representation of the accused to abuse of the due process, this punishment is considered to be the premeditated and cold-blooded killing of a human being by the State in the name of justice.¹ The Indian jurisprudence lacks on a well-defined legislation leading to ambiguity on the Country's stance. With the global trend moving towards an abolitionist stance, this practice is considered to be desecrating to the right to life. Contended as deterrent, capital punishment has proved to be inefficient in preventing crime.² While the retributive nature of this punishment is compelling, retributive justice, however, invalidates the very basis of human rights.³ Since the rationality of punishment is reformation, execution cannot be considered anything less than State sanctioned murder.

¹CESARE BECCARIA, ON CRIMES AND PUNISHMENTS, London: Facsimile edition of the first edition.

²Amnesty International, available at: <https://www.amnestyusa.org/a-clear-scientific-consensus-that-the-death-penalty-does-not-deter/>

³Amnesty International, available at: <https://www.amnesty.org/download/Documents/56000/act510022007en.pdf>

The author endeavors to study the legislations and decisions of the courts, heeding the international jurisprudence and attempts to make a case for a complete abolition of death penalty in India.

KEY WORDS: Capital punishment, judicial trends, comparative, reformation, deterrence

INTRODUCTION

"Criminals do not die by the hands of the law. They die by the hands of other men."

- George Bernard Shaw⁴

Capital punishment, also referred to as death penalty, is essentially the execution of an offender sentenced to death after conviction by a court of law for a criminal offense. The disparity between the two terms, however, is that imposition of the penalty may not always be followed by execution (despite being upheld on appeal), due to the possibility of commutation to life imprisonment. The most severe form of punishment, irreversible by nature, this punishment is to be awarded for the most heinous, grievous and detestable crimes against humanity. The definition and purview of such crimes may vary, depending on the legal code of each country. For instance, capital punishment can only be used by a State, hence the use of a non-state organization through 'execution' of a person, is actually the commission of a murder.⁵ However, under common jurisprudence,

⁴Nobel prize winner, author, critic, polemicist and political activist.

⁵Bbc.co.uk. (2020). *BBC - Ethics - Capital punishment: Introduction*. [online] Available at: <http://www.bbc.co.uk/ethics/capitalpunishment/intro.shtml> [Accessed 4 Jan. 2020].



penology and criminology, capital sentence denotes a sentence of death.

The objective of capital punishment is said to be two-fold:- instilling fear in the minds of others, by putting the offender to death; and/or prevent the repetition of the crime by that person on a permanent basis in case of an incorrigible offender. This form of punishment is fundamentally not reformative in nature. Instead, it appears to be a step in the direction of State despair. The instance of a man killing constitutes of actions to be breaking of the law. Contrarily, the same act resulting in death, in the form of punishment by the State establishes upholding the law. The principle at play here is that the man murders and the State executes. The resultant of one is death and the same comprises to be a reward for the other. While murder annihilates life, capital punishment ceases the right to life. The rationale behind both the actions might be widely divergent, but the aftermath remains the same- a carcass in place of a life.⁶

Indian jurisprudence however finds itself at an ambiguous position, wherein it is unsure of the deterrent effect of the death penalty as well as when it is ought to be awarded. Regardless of the abovementioned issue, it is pertinent to note that death penalty does not serve any reasonable penological resolution. At the very most, it appears to fulfil the aberrant sense of catharsis that maybe offered to the public in order to bay for blood.⁷

⁶GOPALKRISHNA GANDHI, *ABOLISHING THE DEATH PENALTY*, Aleph Book Company.

⁷Suhrith Parthasarathy, *Law Commission Report on 'Death Penalty': A Chance to overcome incoherence in Indian Jurisprudence?*; *ECONOMIC AND POLITICAL WEEKLY*, VOL. 49, NO. 29 (JULY 19, 2014), pp. 15-18

⁸Amnesty International USA. (2020), *Research Shows a Global Trend Towards Abolition of the Death*

The recent global trend reaffirms the stance of countries towards abolition of death penalty. A recent survey states that 106 countries have abolished the death penalty in law for all crimes and about 142 countries had abolished the death penalty in law or practice.⁸ India, nonetheless, is positioned on the two edges:- to end capital punishment or be a nation that continues to execute. Although the judicial precedent has focused on a decrease in the number of executions carried out, the judicial trend for death penalty restricts it to the "rarest of rare" cases, inevitably injecting an element of subjectivity in the decision. However, this instruction has been practically contradicted by the legislature widening the ambit for number of offences punishable by death.

The objections hence behind the abolishment of death penalty appear to be well founded.⁹ Apart from the contemporary juristic thinking being against death penalty, the main contention that prevails is related to the irreversible nature of such a punishment. The fallibility of human judgment, evidenced by reversal of judgments by appellate court and irrevocability of the death sentence- give factors enough to not promote state sanctioned killings, especially in a country such as India wherein the maximum population lacks the resources (economical as well as social) to even adequately represent themselves. A victim of such execution due to miscarriage of justice which

Penalty, But More Work Remains – Amnesty International USA. [online] Available at: <https://www.amnestyusa.org/reports/research-shows-a-global-trend-towards-abolition-of-the-death-penalty-but-more-work-remains/> [Accessed 4 Jan. 2020].

⁹BAKSHI P.M., *CONSTITUTION OF INDIA*; Universal Law Publishing, 2002.



is subsequently discovered cannot be led to a path of restoration.

CAPITAL PUNISHMENT: PENOLOGICAL ASPECT

The problem faced by the dialectical nature of capital punishment does not merely encompass the rights under state policy, but also the profound question of moral values in a civil society. Additionally, the heterogeneity, intrinsic alienation and individualism of the modern society become hindering factors when a common culture with shared values is envisaged.¹⁰

DETERRENT FORM OF PUNISHMENT

It is pertinent to note that the primary objective of punishment is infliction of a deterrent effect by creating an apprehensive consequence so as to circumvent the repetition of crime for the offender himself as well as others. Historically, these punishments were of a rigorous nature chopping off hands of thieves or robbers, castrating organs of sexual offenders etc. The rationale behind such severity is that only the punishment that is unsympathetic or hardhearted would serve the deterrent effect. The infliction of fear amongst the population should operate as a restraining factor for the commission of such grievous offences.¹¹ However, the shortcoming of the deterrent theory is that it diminishes to have its effect on hardened criminals as they are

accustomed to such severe punishment. With regards to first time offenders, this theory is in the least, not very effective as most of those crimes are committed in a non-premeditated, unplanned manner. Hence, practically, the implementation of the deterrent punishment is usually blended with other punishments for reformatory purposes in case of a non-habitual offender, since the very determination behind punishments is reformation and rehabilitation.¹² The Apex court upheld this view in the case of *Phul Singh v. State of Haryana*,¹³ wherein it was observed that “the incriminating company of lifers and others for long may be counterproductive and in perspective, we blend deterrence with correction, and reduce the sentence to rigorous imprisonment for two years.”

PREVENTIVE THEORY OF PUNISHMENT

Preventive philosophy of punishment is based on the proposition of 'not to avenge crime but to prevent it,' by removing the danger from the society and placing the offender under imprisonment.¹⁴ The offender is hence, prevented from committing the crime by either being imprisoned or being inflicted by death penalty or by culminating the modes which steered the commission of the offense, hence eliminating the re-occurrence of crime by the same offenders, in the very least. Derivation of the offender is the ultimate remedy in the principle of this theory. By abstaining the criminal from the

¹⁰Nalini Rajan, *Is there an ethical basis for capital punishment?*, ECONOMIC AND POLITICAL WEEKLY, VOL. 33, NO. 13 (Mar. 26 - Apr. 3, 1998), pp. 701-704.

¹¹N.V. PARANJAPE, CRIMINOLOGY AND PENOLOGY, Central Law Publication Allahabad, 2005.

¹²William Schabas, *The abolition of the death penalty in International Law*, CAMBRIDGE UNIVERSITY PRESS. ISBN 0-521-81491-X.

¹³*Phul Singh v. State of Haryana* [1980. Cri. L. J. 8].

¹⁴ N. V. PARANJAPE, CRIMINOLOGY AND PENOLOGY, 9th ed., p. 145.



society, prevention of crime is palpable. However, a critical angle of this theory is that preventive punishment may lead to the detrimental effect of desensitizing first time offenders, or juveniles by associating them with gangs of hardened criminal, hence ceasing to be an effective form of punishment.¹⁵

REFORMATIVE THEORY OF PUNISHMENT

The reformatory theory advocates moral reforming of criminals by sensitizing them towards their “human” side. The criteria for awarding punishment encourages the judge to consider factors such as the character, age of the offender, family background, education and environment as well as the circumstances under which the crime was committed. The objective ultimately is to met out the punishment to serve the ends of justice.¹⁶ Therefore, this reformatory view of penology is only justifiable if the future is considered and not the past conducts of the offender.¹⁷ The aim of rehabilitation is to re-socialize and reintegrate the offender by ingraining the motivation to obey the law into their psyche.¹⁸

THE RETRIBUTIVE THEORY OF PUNISHMENT

An archaic theory in nature, this form of punishment has prevailed since the time of

private vengeance. Based on the principle of “eye for eye”, “blood for blood” or “life for life”, the state takes over the dispensation of justice. However, this method of punishment has not been advocated by criminologists.¹⁹ The rationale behind this form in itself is flawed as it aims at restoring the social balance disturbed by the offender, equating the amount of pain that the offender should receive with the suffering inflicted by him on his victim to assuage the angry sentiments of the victim and the community.²⁰ Punishment of this sort is merely vindictive as it gratifies the instinct for revenge, not only in the victim but society at large. In the recent times, however, the notion of private vengeance has been forsaken and punishment in itself considered malevolent and is only justified if it concedes better results. Revenge, therefore is justice gone wild.²¹

Owing to the difficulties in the practical implementation of a single theory, it can be safely said that no theory in itself is sufficient to curb crime and hence mostly a combination is employed to have a deterrent effect on the society that will prevent the commission of crime. In the landmark case of *Narinder Singh & Ors. v. State of Punjab & Anr.*,²² it was observed that:-

“Firstly, there are certain acts which are prohibited by the law. Such prohibited acts are offences. Whoever commits an offence has to face the consequences of his wrong doing. Such consequences are in penal form.

¹⁵ The library of criminology, Elizabeth Orman Tuttle, London Steven’s sourceluit, Chicago Poured, Book 1961

¹⁶ K. D. GAUR, COMMENTARY ON THE INDIAN PENAL CODE, p. 162.

¹⁷ N. V. PARANJPE, CRIMINOLOGY AND PENOLOGY, 9th ed., p. 14

¹⁸ R. P. KATHURIA, LAW OF CRIME AND CRIMINOLOGY, VOL. 1, (2000), p. 35

¹⁹ POOJA SOOD, CONSTITUTIONAL CHALLENGES IPC PROVISIONS JUDICIAL APPROACH, Deep and Deep pub.pvt.Ltd.2007

²⁰ AHMED SIDDIQUE, CRIMINOLOGY PROBLEMS AND PERSPECTIVE, 4th ed., (1997), P.- 111.

²¹ K . D. GAUR, COMMENTARY ON INDIAN PENAL CODE, Pp. 161-162.

²² *Narinder Singh & Ors. v. State of Punjab & Anr* (1999) 7 SCC 409 [2].



It may be an imprisonment, monetarily or both and for serious offences capital punishment. In fact even imprisonment has its gravity. It may be simple one or rigorous. Secondly, the question arose as to why the persons who commit crime have to be subjected to the penal consequences. Many philosophies/jurisprudence justify the penal consequences as having retributive, rehabilitative, deterrence or restoration effects. Any or combination of this is the ultimate goal of sentencing.

Thirdly, sentence guidelines are provided to guide the judges in awarding sentences in various countries. Such guidelines are provided statutorily or otherwise. Whereas till date in India we do not have such policy. The aim of such policies might not only aim at achieving consistencies in awarding punishment but to prescribe sentence policy or purpose for awarding it, like whether deterrence, retribution etc. In India the courts go by their own perception on awarding sentences. If the nature of a judge is to give punishment in form of retribution he'll grant that. If other judge is of different outlook and believes in rehabilitation he'll follow that. It depends on all the philosophy of the judge."

*However, in cases wherein crime has been committed against the society, the deterrent theory of punishing the offender becomes relevant. The stance of Indian jurisprudence was given a clearer interpretation in the case of *Hari Singh v. Sukhbir Singh and Ors*²³, wherein it was observed that: "The 154th Law Commission Report on the CrPC devoted an entire chapter to "Victimology" in which the growing emphasis on victim's*

rights in criminal trials was discussed extensively as under:

"1. Increasingly the attention of criminologists, penologists and reformers of criminal justice system has been directed to victimology, control of victimization and protection of victims of crimes. Crimes often entail substantive harms to people and not merely symbolic harm to the social order. Consequently the needs and rights of victims of crime should receive priority attention in the total response to crime. One recognized method of protection of victims is compensation to victims of crime. The needs of victims and their family are extensive and varied..... The principles of victimology has foundations in Indian constitutional jurisprudence. The provision on Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) form the bulwark for a new social order in which social and economic justice would blossom in the national life of the country (Article 38). Article 41 mandates inter alia that the State shall make effective provisions for "securing the right to public assistance in cases of disablement and in other cases of undeserved want." So also Article 51-A makes it a fundamental duty of every Indian citizen, inter alia "to have compassion for living creatures" and to "develop humanism". If emphatically interpreted and imaginatively expanded these provisions can form the constitutional underpinnings for victimology."

It can therefore be articulated that the deterrent and the reformatory theories coincide; however, there also exists conflict between the two. The deterrent theory imposes the punishment of imprisonment,

²³ Hari Kishan & Anr v. Sukhbir Singh & Ors 1988 AIR 2127



fine, or even death-penalty (retributive in nature), but according to the reformatory theory, all modes of punishment other than imprisonment are barbaric. The Indian jurisprudence hence is facilitative with a blend of reformatory and deterrent theories. Herein, while the objective of punishment is to deter the offender, it is also an inalienable part of the system to provide the offender with an opportunity to reform.

LEGAL STANDING IN THE INDIAN JURISPRUDENCE SYSTEM

The basis of awarding capital punishment is determined through judicial pronouncements. Based on the facts and circumstances of each case, it is at the discretion of the court to decide whether the case presents a situation calling for death penalty or life imprisonment. The Constitution of India provides its citizens with the right to life and personal liberty under Article 21. However, according to this article, no person shall be deprived of his life and personal liberty except rendering the procedure established by law. Therefore the state has the right to abridge this right by law for maintaining public order following the procedure established by law. Being a fundamental right representing the sacrosanct life of a human being, this can only be curtailed by "due process"²⁴ which must be just, fair and reasonable.

One of the most discussed cases in the study of capital punishment, especially in the wake of circumstantial evidence was the case of *Dhananjay Chatterji v. State of west Bengal*²⁵

wherein the accused was convicted and awarded death penalty in the case of rape and murder of a minor from the trial court to the Supreme court on the basis of circumstantial evidence. Relying on dubious inputs, a lack of proper representation for an individual from an economically weaker background and the absence of coherent evidence, the courts failed to establish guilt beyond reasonable doubt. Several speculations regarding this judicial murder were subsequently raised.

It was however in the landmark case of *Bachan Singh and Machhi Singh v. State of Punjab*²⁶ wherein the issue of constitutional validity of death penalty was raised. The Apex Court herein discussed the aggravating and mitigating circumstances, laying down the principles to serve as guidelines for deciding the sentence to be awarded in murder cases. Justice Bhagwati however gave a powerful dissent, observing that the death penalty is in gross violation of Article 19 and 21 of the Constitution.

RAREST OF RARE DOCTRINE

Article 21 of the Indian Constitution is legally construed to connote that if there is a fair and valid procedure, then the state by framing a law with due process can deprive a person of his life. While the executive limb has consistently maintained that death penalty is to act as a deterrent for those who are a threat to the society, the judiciary has upheld the constitutional validity of capital punishment in "rarest of rare" cases.

The "rarest of rare" doctrine has transfused death penalty literature in India like a ruminating omnipresence. The doctrine's

²⁴ Maneka Gandhi v. Union Of India 1978 AIR 597

²⁵ Dhananjay Chatterji v. State of west Bengal [(1994) 2 SCC p.220]

²⁶ Bachan Singh and Machhi Singh v. State of Punjab [AIR 1980 SC 898]



foremost proposition is that capital punishment ought to be awarded sparingly. The case of *Bachan Singh and Machhi Singh v. State of Punjab*²⁷ deduced an unambiguous definition of a "rarest of rare" case by stipulating concrete instances of diverse categories of cases wherein the collective conscience of the community is shook to the extent that for the sake of justice, holders of judicial power are expected to inflict death penalty. These categories (namely, "manner of commission of murder", 'motive for commission', the "anti-social or socially abhorrent nature of the crime", the "magnitude of crime", and "personality of victim of murder") are however crime focused as opposed to the criminal, or even his reformation. Therefore, in practice, instead of the death sentence being awarded only in cases where the alternative choice was foreclosed by a supposed incapability to reform the offender, capital punishment was also painstaking the appropriate penalty for murder purely on the basis of the nature and characteristic of the crime.²⁸

The doctrine laid down by this case, however, ingrained a perplexity in the jurisprudence of death penalty. The Supreme Court finally in the case of *Swami Shraddananda v. State of Karnataka*²⁹, recognized the shortcomings put forth in the *Machhi Singh's* decision. Hence, the abovementioned case ruled that the categorization put forth in *Machhi Singh's*, although useful, cannot be strictly construed as it is 'inflexible, absolute or immutable.'

Subsequently, in another case, the incoherence bred by *Machhi Singh* was pointed out asserting the uncertainty in capital sentencing law. Despite the latest judicial precedents, in practice, courts continue to apply *Machhi Singh's* requisites as a litmus test, giving the 'rarest of rare' doctrine a complete go-by, making this subject pertinent to be addressed.

In another landmark case, *Bariyar v. State of Maharashtra*³⁰, the Supreme Court expressed its concern over the constitutional implications including the arbitrariness that pertains in the legal system while ruling on capital punishment. It was observed that the rarest of the rare doctrine is being applied by various courts wherein the paucity of a standard rule has compelled the courts to give their own meaning to the doctrine. A variation in a matter that interferes with the fundamental right to life amounts to constitutionally infirmity. This concern was also highlighted in *Mohd. Farooq Abdul Gafur and Anr. v. State of Maharashtra*.³¹

In the recent case of *Ajit Harnamsingh Gujral v. State of Maharashtra*³², the Apex Court confirmed the death sentence of the accused solely on the basis of the nature of the crime, without taking in consideration the social and economic status of the criminal. The opinion neither cited *Bariyar* nor the justification of the offender being incapable of reform.

²⁷ *Maachhi Singh v. State of Punjab* (1983) 3 SCC 470

²⁸ Justice P N Bhagwati famously dissented from the majority's decision in *Bachan Singh*. However, his opinion was rendered nearly two years after the majority's verdict was announced. In his dissent, he held that the death penalty violates both Articles 14 and 21 of the Constitution.

²⁹ *Swami Shraddananda (2) v. State of Karnataka* (2008) 13 SCC 767

³⁰ *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009)

³¹ *Mohd. Farooq Abdul Gafur and Anr. v. State of Maharashtra*

³² *Ajitsingh Harnamsingh Gujral v. State of Maharashtra*, AIR 2011 SC



This incoherence that is deep rooted in the death penalty jurisprudence of our country was further exacerbated by a series of verdicts by the Apex Court. In the case of *Gurvail Singh v. State of Punjab*,³³ a new interpretation was given to *Macchi Singh* and a new system was deduced wherein the “crime test” (aggravating circumstances) and the “criminal test” (no mitigating circumstance favouring the accused) had to be fully satisfied for the grant of death penalty. Essentially, unless it is corroborated that the crime is particularly reprehensible and immoral and the criminal’s background suggest that he is fully incapable of reform, death penalty is ought to not be awarded.³⁴ This principle has been ostensibly amplified by the Court through several of its decisions. However, in the case of *Shankar Khade v. State of Maharashtra*,³⁵ Justice Radhakrishnan interpreted the *Macchi Singh’s* dictum differently. He held that the “rarest of the rare” test does not seem to consider the socio-economic aspect of the offender. Although there ought to be no mitigating circumstance that favours the accused whilst the awarding of death penalty, the “R-R test”, nonetheless has to be conducted in order to respect the society’s abhorrence and hence the demand of death penalty. This conclusion controverts the central thesis around the *Macchi Singh* doctrine indicating the ambiguity in the legislation pertaining to capital punishment in our system. Subsequently, in the case of *Mahesh Dhanaji Shinde v. State of*

*Maharashtra*³⁶, the mandates of *Macchi Singh* were treaded beyond, not only leaving the jurisprudence at a questionable position, but also in a perplexing position.

Therefore, the jurisprudence regarding death penalty stands at an abstruse position whereby we are unsure of its deterrent effect as well as the requisites to follow before granting this irreversible condition. It is hence apparent that apart from fulfilling the aberrant sense of catharsis to a public baying for blood, there is no reasonable penological purpose of capital punishment. When the State decides to please the anger of the public by ignoring the rights of another citizen, it does not act as a state but a biased authority. The death penalty, howsoever implemented, can never fulfil the demands of constitutional due process.

The report presented by the Law Commission³⁷ on this matter however stressed on the abolishment of the death penalty in all cases except for those relating to terror cases and waging war. The rationale presented by the Commission weighs in on the “deep crisis” that the administration of criminal justice in India is suffering from. Citing a lack of resources, an overstretched police force and ineffective prosecution, amongst other reasons, has resulted in misapplication of administration of capital punishment. Additionally, even the mercy powers have been unsuccessful in being a final safeguard against miscarriage of justice. This has also been corroborated by the Apex

³³ *Gurvail Singh v. State of Punjab* (2013) 2 SCC 713.

³⁴ A G Noorani, *Death Penalty and the Constitution*, EPW, Vol XVII, No 36, 4 September

³⁵ *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 5.

³⁶ *Mahesh Dhanaji Shinde v. State of Maharashtra*, (2014) 4 SCC 292.

³⁷ Law Commission of India, Report No. 262, The Death Penalty, August 2015, Govt. of India; available at: <http://lawcommissionofindia.nic.in/reports/Report262.pdf>



Court wherein the court has also pointed out gaps and illegalities in discharging of these powers.³⁸

INTERNATIONAL LEGAL STANCE

Another important facet in the jurisprudence of capital punishment is the violation of human rights. The stance of United Nations High Commission for Human Rights has been published in its 1997 resolution wherein it stated that progressive development of human rights and enhancement of human dignity can only be done through the abolition of the capital punishment.³⁹ Subsequently several resolutions demanded for a restriction of offences for which death penalty can be imposed and a moratorium for all executions.

Challenging death penalty cannot be restricted to being considered as an internal state matter. For instance, Countries like Canada, Mexico, most European countries, etc have resisted the extradition of persons to the United States, unless they are assured that the death penalty will not be sought. The European Union has the prerequisite of an abolitionist policy on death penalty for being eligible to enter the union, leading to faltering of executions in many eastern European countries which have applied for membership. Being the backbone of a democratic set up, a system of democracy

tries to recognize and respect the concept of human rights in one way or the other. However, in the case of capital punishment, the right to life may not seem as inviolable because there exist a number of situations wherein the states may be allowed to deprive individuals of life to which international human rights law does not raise an objection. Capital punishment is an example of the same. Essentially, international human rights law does not necessarily proscribe the use of the capital punishment, but does encourage its abolition and seek to limit its use.⁴⁰

GLOBAL JUDICIAL TRENDS: A COMPARATIVE

Currently more than two-thirds of the countries in the world have abolished death penalty.⁴¹ It is, however, difficult to divide all the countries of the world into two groups of abolitionists and retentionists. Hence this has to be approached from the point of view of the actual practice of various jurisdictions. There are countries that are abolitionist *de jure* while on the other hand there are countries that are abolitionist *de facto*.⁴² According to the International Amnesty report⁴³, 106 countries had abolished the death penalty in law for all crimes by the end of 2018 and 142 countries had abolished the death penalty in law or practice. These figures reaffirm the global trend towards abolition of the death penalty. Only a few

³⁸C. Abrams, *The Reasons India's Law Commission Says the Death Penalty Should Be Scrapped*, [online] WSJ. Available at: <https://blogs.wsj.com/indiarealtime/2015/09/03/the-reasons-indias-law-commission-says-the-death-penalty-should-be-scrapped/> [Accessed 5 Jan. 2020].

³⁹United Nations High Commission for Human Rights Resolution/CN.4/1997/12(April 3, 1997).

⁴⁰ Willam A. Schabas, *The Abolition of the death Penalty in International Law*, OUP, OXFORD, 1997

⁴¹Amnesty International; available at: <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>

⁴² Clarence H. Patrick, *The Status of Capital Punishment: A World Perspective*, JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY Volume 56 Issue 4 December

⁴³ *Ibid*



countries carry out executions. Just four countries were responsible for 84% of all recorded executions in 2018.

RECENT INDIAN JUDICIAL TRENDS

In India, however, the legislative development on the concept of death penalty has introduced capital punishment for rape of minor girls (under 12 years) through Criminal Law Amendment Act, 2018.⁴⁴ The amendment of Protection of Children from Sexual Offences Act, 2012 in January 2019⁴⁵ also brought upon the imposition of death sentence for aggravated penetrative sexual assault with children below the age of 18 years.

The recent judicial trend, however, due to ambiguity in law has been indefinable in its stance towards capital punishment. 2018 witnessed trial courts imposing the highest number of death sentences in nearly two decades.⁴⁶ The Apex Court however moved in the contrary direction. In the recent case of *Chhannu Lal Verma v. State of Chhattisgarh*⁴⁷, in a minority judgment, Justice Kurian Joseph called for the reconsideration of the constitutionality of the death penalty. It was however also laid down that a proper psychological or psychiatric analysis of the accused must be done by courts in order to assess the possibility of reformation of the criminal. Nonetheless, the Supreme Court even in the recent years has not been able to establish an invariable doctrine on this issue. In 2019, the Court confirmed death sentence in five cases.

In the infamous Nirbhaya case, wherein the victim was brutally raped and murdered in an unnatural way, Supreme Court dismissed the last review plea filed by one of the four convicts in the case of *Akshay Kumar Singh v. State*⁴⁸ on the ground that no apparent error in the judgement. One of the accused, Vinay, who was 19 at the time of the commission of the offence, has also filed a curative petition pleading mitigating circumstances (poor socio-economic background) and the precedent of 17 other cases wherein the Apex Court commuted death penalty to life imprisonment. The same has however been dismissed on the lack of a new ground.

In the case of *Manoharan v. State*⁴⁹, the Supreme Court upheld the death sentence awarded to the accused whereby he was involved in the gang rape and murder of a 10 year old girl and her brother. In a powerful dissent, Justice Sanjiv Khanna opined that the case cannot be categorized as 'rarest of rare' and falls into the special category of cases where the appellant should be directed to suffer sentence for life i.e. till his natural death, without remission/commutation.

In the case of *Ravi v. State of Maharashtra*⁵⁰, the Supreme Court by a ratio of 2:1 upheld the death penalty for a person found guilty for murder and rape of a minor, with a dissent by Justice Subash Reddy.

⁴⁴https://mha.gov.in/sites/default/files/CSdivTheCriminalLawAct_14082018_0.pdf

⁴⁵<https://wcd.nic.in/sites/default/files/Protection%20of%20Children%20From%20Sexual%20Offences%20%28Amendment%29%20Act%2C%202019.pdf>

⁴⁶ *Death Penalty in India*, ANNUAL STATISTICS REPORT 2018, PROJECT 39A, NLU DELHI.

⁴⁷ *Chhannu Lal Verma v. State of Chhattisgarh* 2018 SCC OnLine SC 2570.

⁴⁸ *Akshay Kumar Singh v. State* (NCT of Delhi) Criminal Appeal no. 609-610 of 2019.

⁴⁹ *Manohar v. State* By Inspector of Police Crl Appeal No. 1174-1175/2019.

⁵⁰ *Ravi v. State of Maharashtra* (2019) 9 SCC 622].



In another case, *Khushwinder Singh v. State of Punjab*⁵¹, the Supreme Court confirmed the death sentence given to a man accused of killing six persons. Ironically, however, in the case of *Santosh Maruti Mane v. State of Maharashtra*⁵², the Supreme Court bench commuted the death sentence and deputized it with the sentence of life imprisonment observing the scope of reform. The Court stated that the appellant might already be a reformed person as the Court was informed that the appellant is regretting the action undertaken by him under unwarranted palpitation.

In the case of *X v. State of Maharashtra*⁵³, the Supreme Court commuted the death penalty of an individual convicted of rape and murder of two minors. The Court gave an interesting interpretation to Mental Healthcare Act, 2017 and used the “test of severity” stating that post-conviction mental illness will be a mitigating factor while considering appeals of death convicts. The convict had been on death row since 17 years. The Court was, hence, called upon to decide on the culpability for sentencing those with mental illness and if the treatment is better suited rather than punishment. Recognizing no set disorders/disabilities for evaluating “severe mental illness” for exemption, the Court stated that a “test of severity” can be a guiding factor in such a case:

“The test envisaged herein predicates that the offender needs to have a severe mental illness or disability,

which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment. These disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders-with schizophrenia.”

In another case, *Nand Kishore v. State of Madhya Pradesh*⁵⁴, the Apex Court commuted the death sentence which was confirmed by Madhya Pradesh High Court. The accused was convicted for the rape and murder of a minor girl wherein the appellant was charged with Section 5 and 6 of POSCO, 2012 and Section 302, 363, 366 and 376(2)(i) of the Indian Penal Code, 1860.

In the case of *Yogendra@ Jogendra Singh v. State of Madhya Pradesh*⁵⁵, the bench commuted the death sentence of the accused, convicted of murder of a woman by pouring acid on her, stating that a second conviction for murder would warrant the imposition of a death sentence only if there is a pattern discernible across both the cases.

Even in the case of *Digamber Vaishnav v. State of Chhattisgarh*⁵⁶, the Court acquitted two men whose death sentence had been confirmed by Chhattisgarh High Court in the case of robbery and murder of 5 women.

⁵¹Khushwinder Singh v. State of Punjab Crl Appeal No. 1433-1434/2014.

⁵² Santosh Maruti Mane v. State of Maharashtra Crl Appeal Nos. 45-46 of 2019 (Arising out of S.L.P. (CRL.) No. 3169-3170 of 2015).

⁵³ X v. State of Maharashtra 2019 SCC OnLine SC 543.

⁵⁴ Nand Kishore v. State of Madhya Pradesh Crl Appeal No. 94 of 2019 (Arising out of S.L.P.(CRL.) No. 7645 of 2013).

⁵⁵ Yogendra@ Jogendra Singh v. State of Madhya Pradesh Crl Appeal Nos. 84-85 of 2019 (Arising out of S.L.P. (CRL.) Nos. 3167-3168 of 2015).

⁵⁶ Digamber Vaishnav v. State of Chhattisgarh Crl Appeal No. 428-430 of 2019 (Arising out of S.L.P. (Crl.) Nos.5530-5532 of 2015).



In the case of *Anokhilal v. State of Madhya Pradesh*⁵⁷, the Supreme Court bench issued guidelines while setting aside the death penalty awarded in a case of rape and murder in a trial that was concluded in 13 days. It was emphasized that the expeditious disposal of a case must not be pursued at the cost of a burial of the cause of justice. The attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. In the pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed.

Essentially, the jurisprudence regarding capital punishment seems to be arbitrary and haphazard. In the above cases, it appears that the judicial precedents have also not reached a static conclusion. The commutation of death penalty has been on a subjective case to case basis, depicting a weak and uncertain legal system. Apart from the humanitarian facet, the problem with having an ill defined capital punishment system is that it is irreversible in nature. The judges are prone to human errors and an error in the said arena cannot be fixed. The fundamental issue with regard to judicial condemnation of a man to death is regarding the degree or errors and omissions that the trial process is susceptible to.⁵⁸ Additionally, considering the practical intricacies of this problem, in a country like India, most persons accused of such grievous offences hail from poor socio-economic

backgrounds. More often than not, such persons do not receive proper and efficient representation and are often victims of abusive and corrupt police system. Furthermore, trial delays as well as execution delays make the death sentence ineffective and result in protracted waits for the accused and their families subjecting them to a lifetime of torture. Interfering with the fundamental right of life of an individual, considering the extenuating conditions present in our system seems to be a gross violation carried out by the State.

CONCLUSION AND FINDINGS

The penalty of death does not differ in degree, but in kind from all other forms of criminal punishment. Its total irrevocability makes it treacherous and grave. The absolute rejection of the possibility of rehabilitation of the convict, which is the paramount purpose of criminal justice, makes it inane. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of human.

India's stance on capital punishment cannot be said to be absolute abolitionist but the situation does endure a need to address the ambiguous stance. Despite being retentionist in practice, India voted against a motion which sought prohibition of death penalty as a mode of punishment at the 42nd Session of the United Nations Human Rights Council,⁶⁰ hence depicting its nebulous standpoint. With a plethora of conflicting judgements this very year, the promotion of this state entitled murder, especially in a democratic

⁵⁷ *Anokhilal v. State of Madhya Pradesh* decided on 18.10.2019 (Crl Appeal No. 62-63 of 2014).

⁵⁸ S.B. Sinha, *To kill or not to kill: the unending Conundrum*, NATIONAL LAW SCHOOL OF INDIA REVIEW, VOL. 24, NO. 1 (2012), pp. 1-29.

⁵⁹ Justice Potter Stewart, *Furman vs Georgia*, 408 U.S. 238.

⁶⁰ "General Assembly GA/10678 Sixty-second General Assembly Plenary 76th & 77th Meetings". ANNEX VI.

Retrieved 30 July 2013.



institution, not only is against human rights but also defies the logic of reformation. In lieu of the growing modern conviction and the new penological school of thought, the principal object of punishment is the reformation of the offender so as to restore him into the society. Unfortunately, in the Indian society, the risk of jeopardizing the life of an innocent person who may be condemned to death on vicarious or constructive liability, or a lack of proper representation, or abuse of due process is far more. The very foundation of the Indian Constitution of “presumption of innocence” often fails in such scenarios. Subjecting such individuals to incalculable harm goes against the very spirit of a democratic institution.

The very jurisprudence of capital punishment is against the rationale of punishment itself. When the state takes a step as drastic as death of an individual, it undertakes the role of an angry citizen and neglects to function as an institution. By killing a prisoner, vindication is not restored as no one’s life, liberty or limit is pressurized, saved or restored. A practice that involves the destruction of a human being is cruel and degrading. A state sanctioning such an act, even if legalized, seems to be unjustified.

Additionally, a human being with abilities, capacity for autonomous conduct and moral development is killed. Moreover, when the state decides to determine a punishment such as this, an alternative (incarceration, isolation, temporary sedation), which is usually more effective in terms of reducing the risk of harm to others is always available.⁶¹ The contention of death penalty

being “painless” contains no merit. The most efficient methods of execution also do not result in instantaneous death. In addition to that, the mental agony of a prisoner during the period of pronouncement of the sentence and the execution is incomparable. Life in a death cell is no life but death itself.⁶²

Instead of doing away with the criminal, the State’s responsibility is to devise other effective prophylactic methods of nipping the crime in bud to protect the society.⁶³ The very concept of a social welfare state goes against the practice of capital punishment. With a complete paradigm shift in the social conditions, from the time when death penalty was considered indispensable to curb crime, to protecting the human and social rights of the citizens, this punishment seems inept and unnecessary. It has to be stressed that the victim’s anguish and the cruelty of death are two independent truths. Hence this State sanctioned “quid pro quo” for death serves only the purpose of vengeance.

⁶¹ John F. Karns & L.S. Weinberg, *The Death Sentence In Pennsylvania - 1978- 1990*, 95 DICK LAW REVIEW SUM. 1991, P. 771.

⁶² K.S. Ajay Kumar, 1980 (Ja) 4 CUCL p. 175.

⁶³ Lok Sabha Debates, 1962 p. 307-320.