CAPITAL PUNISHMENT IN INDIA AND ITS DETERRENT EFFECT OR NOT

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ABSTRACT

Death penalty in our country has become an exception because of the concept of rare of the rarest case phenomena. The principle of the death penalty being practically applied in the rarest of rare case laid down in the pointer judgment of Bachan Singh v State of Punjab has been interpreted in a different way in a variety of cases. This paper proposes to scrutinize the purpose of the test of rarest of rare in following cases and tries to sketch down the modern trend of the death penalty, its usefulness, and its sound effects on society.

Even after ratify the concept of rare of the rarest case death penalty is not that deter then the solitary confinement or public censure because these punishment directly harm through mental or physiological way. And we should have to make fast track court victim can get immediate punishment and in this justice is not denied also.

INTRODUCTION

All punishments are based on the same proposition i.e. there must be a penalty for wrongdoing. There are two main reasons for inflicting the punishment. One is the belief that it is both right and just that a person who has done wrong should suffer for it; on the other hand it is belief that inflicting penalty on wrongdoers discourages other from doing wrong. The capital punishment also rests on the same scheme as other punishments. The capital punishment ponders the most generally relevant debate, keeping in mind the circumstances that have been brought about by today. Capital punishment is an integral part of the Indian criminal justice system. Increasing potency of the human rights movement in India, the existence of capital punishment is questioned as immoral. However, this is an odd argument as keeping one person breathing at the cost of the lives of numerous members or probable victims in the society is amazing and in fact, that is morally wrong.

The framers of the Indian Penal Code were that capital punishment ought to be used cautiously. The position of capital punishment in the Penal Code has not changed as such in more than hundred years of its existence but the trend in the direction of the abolition of capital punishment many countries has affected legislative as well as judicial thinking on the subject. The legislative thinking is reflected in some subtle changes in the Criminal Procedures Code during the last two decades or so. Before the amendment of the Criminal Procedures Code of 1898 in 1955 it was obligatory for a court to give reasons for not awarding death sentence in a case of murder.

Capital punishment is one those subjects of human concern which give rise to an endless debate without producing any conclusions which can be scientifically tested to make them convincing to both the parties to the debate. To abolish or not to abolish is the problem which has been faced in many counties and is being faced in others even now.

The crusade against capital punishment started in England and Europe as a result of the works of utilitarian's like Bentham and Beccaria who insisted that punishment being an evil in itself should be just sufficient to curb the menace of the crime and no excessive punishment, including capital punishment, ought to be inflicted where some lesser penalty could achieve the same result. In England the movement against capital punishment was carried on by the Romilly and some other reformers, and in the recent past by Sydney Silverman, whose efforts

led to the almost total abolition of capital punishment under the Murder (Abolition of Death Penalty) Act, 1965. The present position is far different from the position obtaining in England at the end of the 18th century when about 200 offences were punishable with death. In India too, the problem has been engaging government and public attention over the years but the death sentence is still there on the statute book though its use has been sparingly made in the "rarest of rare cases" an there is a tendency to restrict its to grave offences committed under aggravating circumstances.

In England a sentence of death can still be given for high treason (Treason Act, 1814), piracy with violence (Piracy Act, 1837), setting fire to the Queen's ships, arsenals, etc. (Dockyards, etc. Protection Act, 1772). As for murder, the Act of 1965 provides life imprisonment; the court may at the same time recommended a minimum period to the Secretary of State which in its view should elapse before the person could be released under section 29 of the Prisoners Act, 1952. In R v. Flemming (1973), it has been suggested that no such recommendation be made for a period of less than 12 years.

In the USA, the trend for abolition of capital punishment commenced in the19th century when the State of Michigan abolished it, expect for treason, in 1847. Since then many more states have followed suits.

Capital punishment or the death penalty is a legal process whereby a person is put to death by the state as a warning for a crime. The judicial decree that somebody be punish in this mode is a death sentence, while the definite enforcement is an implementation. Crimes that can result in a death penalty are known as capital crimes or capital offences. The term capital originate from the Latin word "capitalis", actual meaning "regarding the head" (referring to execution by beheading).

According to Encyclopedia Britannica, capital punishment or death penalty refers to implementation of a perpetrator sentenced to death after conviction by a court of law of a criminal offence. Capital offence refers to any criminal accuse which is carrying a punishment of by the death penalty. Crimes carrying a punishment of by death differ from state to state and country to country. In some American states these offense may include first degree murder (planned), murder with special situation (such as premeditated, multiple, concerned with another crime, with guns, of a police officer, or a repeat felony), and rape with extra bodily

harm, and the national crime of treason. A indict of a capital offense typically means no bail will be allowed.

Ethical, philosophical and religious values are fundamental to the ongoing controversy over capital punishment. Nevertheless, truthful evidence can and ought to inform policy making. The evidence for capital punishment as a distinctively effective deterrent to murder is especially important since deterrence is the only main pragmatic fight on the pro-death penalty side. The rationale of this paper is to survey and evaluate the evidence for preclusion. We must define the question correctly. We are not asking whether the danger of punishment in general deters crime, or whether there ought to be heavy penalties for murder. The issue at stake is this: Does capital punishment, in a shape which has been or may be practiced in the United States, provide a better deterrent to murder than long imprisonment? In meticulous, is it likely that increasing the death penalty in New Hampshire will lead to fewer murders? If not, capital punishment offers no sensible benefits to weigh against its social expenses.

CAPITAL PUNISHMENT

A vigilant scrutiny of the debate in British India's Legislative Assembly reveal that no issue was raised concerning capital punishment in the Assembly until 1931, while one of the Members from Bihar, Shri Gaya Prasad Singh sought to initiate a Bill to eradicate the punishment of death for the offences under the Indian Penal Code. However, the motion was negative after the then Home Minister replied to the motion. The Government's policy on capital punishment in British India previous to Independence was evidently stated twice in 1946 by the then Home Minister, Sir John Thorne, in the debate of the Legislative Assembly. "The Government does not believe it wise to put an end to capital punishment for any kind of crime for which that punishment is now provided.

Next to independence, India retain numerous laws put in place by the British colonial government, which incorporated the Code of Criminal Procedure, 1898 (‘Cr.P.C. 1898’), and the Indian Penal Code, 1860 (‘IPC’). The IPC approved six punishments that could be imposed beneath the law, including death. For offences where the death penalty was an alternative, Section 367(5) of the CrPC 1898 obligate courts to record reason where the court determined not to compel a sentence of death:

If the accuse is convict of an offence punishable by means of death, and the court sentence him to some other punishment than death, the court shall in its judgment utter the reason why sentence of death was not passed. In 1955, the Parliament repeal Section 367(5), CrPC 1898, extensively varying the position of the death sentence. The death penalty was no longer the norm and courts did not require special reasons for why they were not daunting the death penalty in cases where it was a prescribed punishment. The Code of Criminal Procedure was re-enacted in 1973 ('CrPC'), and numerous changes were made, notably to Section 354(3):

When the assurance is for an offence punishable with death or, in the substitute, with imprisonment for life or imprisonment for a term of years, the ruling shall state the reason for the sentence awarded and, in the case of sentence of death, the extraordinary reasons for such sentence. This was a important modification from the situation following the 1955 alteration (where terms of imprisonment and the death penalty were equal possibilities in a capital case), and a turnaround of the position under the 1898 law (where death sentence was the norm and reasons had to be recorded if any other punishment was forced). Now, judges wanted to provide special reason for why they obligate the death sentence.

These amendments also introduce the opportunity of a post-conviction examination on sentence, counting the death sentence, in Section 235(2), which states:

If the accused is convicted the Judge shall, if not he proceed in accord with the provisions of section 360, attend to the accused on the query of sentence, and after that pass sentence on him according to law.

INTERNATIONAL SCENARIO

The international background concerning the death penalty – together in stipulations of international law and state perform – has evolve in the past decades. Internationally, countries are broadly classified on their death penalty status, based on the following categories:

1) Abolitionist for all crimes
2) Abolitionist for ordinary crimes
3) Abolitionist de facto
4) Retentions

At the end of 2014, 98 countries were abolitionist for all crimes, 7 countries were abolitionist for normal crimes only, and 35 were abolitionist in perform, creating 140 countries in the world abolitionist in law or carry out. 58 countries are regard as retentions, who still have the death penalty on their statute book, and contain use it in the recent past. Whereas only a marginal of countries hold and utilize the death penalty, this list include some of the most densely inhabited nations in the world, counting India, China, Indonesia and the United States, creating a majority of inhabitants in the world potentially focus to this punishment.

CAPITAL PUNISHMENT POSITION IN INDIA

Article 21 of the Indian Constitution states that no person shall be deprived of his life and liberty except according to the procedure laid down by law. Under Article 21, every person has the Right to Life which has been guaranteed by the Constitution.

The Indian Penal Code, 1860 provides for the provision of a death sentence for various offenses like criminal conspiracy, murder, waging war against the nation, dacoity and murder, etc. Various other legislations like the NDPS ACT and Unlawful Activities Prevention Act also provides for the death penalty.

Under Article 72, the Constitution has created a provision for clemency of capital punishment. Under this Article, the President of India has the power to grant pardon, or commute or remit the death sentence in certain cases. Similarly, Article 161 provides for powers of the Governor of the State to grant clemency.

Also, when a Sessions Court awards the capital punishment, it must be confirmed by the High Court of the particular state, and then only the execution can be carried out.

These measures are necessary so as to remove any room for error. These days, awarding life sentence has become the rule, and death penalty an exception, which is awarded only in the rarest of the rare case.

The case of Jagmohan Singh v State of U.P Was the first case in which the court had the opportunity to discuss the Constitutionality of capital punishment. The council for the appellant put forth the argument that capital punishment takes away all the rights guaranteed under Article 19 (1) of the Constitution.

The second argument which was given that the discretion of which capital punishment was awarded did not follow any fixed standard or policy.

Thirdly it was argued that this unguided and unfettered discretion violated Article 14 of the constitution, which guarantees equality before the law. It was stated that in many cases, the situation arose that where two individuals had committed a murder, one was awarded the capital punishment, and other was awarded life imprisonment.

The last argument which was put forward was that the law does not provide any guidelines which consider different factors and circumstances while awarding death penalty or life imprisonment.[1]

Death penalty has been a mode of punishment since time immemorial which is adept for the removal of criminals and is worn as the punishment for the atrocious crimes. Indian Criminal jurisprudence is based on a mixture of deterrent and reformative theories of punishment. While the punishments are to be forced to build deter amongst the offenders, the perpetrator are also to be given chance for restoration.

There has been a various opinion as regards the death penalty in India as a few are in the favor of the preservation of the punishment while others are in the favors of its abolishment.

India is one of the 78 retentionist countries which have been retain death penalty on the ground that it will be awarded only in the ‘rarest of rare cases’ and for ‘special reasons’. Though what constitutes a ‘rarest of rare case’ or ‘special reasons’ has not been answered either by the legislature or by the Supreme Court.

[1] Available at https://blog.ipleaders.in/capital-punishment-india-overview/last view on 18.07.18 at 11:00p.m.

The constitution of India guarantee to every person a fundamental right to life focus to its withdrawal by the procedure recognized by law, it has been argued by abolitionists that sentence of death in the current form violate the citizen's right to life. There are abundant legal luminary who squabble that the incredible fact that the death penalty is retain in Indian criminal statutes run contradict to one's right to life. It is submitted that these scholarly jurists most likely overlook the fact that even right to life is not an unconditional right.

Additionally Art. 14 of Constitution declare "equality before law and equal protection of the laws", which meant that no person shall be discriminated against unless the discrimination is obligatory to realize equality.

The concept of equality integrated under Art. 14 find resonance in the overture to the constitution. Capital condemnation, it seems, for that reason, an anti-thesis of one's right to life. However, it is an indubitable fact that there is zilch in the Constitution of India which explicitly holds capital punishment as undemocratic.

36th LAW COMMISSION REPORT

A debate on death penalty cannot be absolute without taking into contemplation of 36th Report of the Law Commission of India, which was submitted by the Law Commission in 1967.

The Report stated that the question of abolition or preservation of capital punishment should be determined after harmonizing the arguments agreed in favor and in beside of death penalty. A sole factor cannot make a decision of the question of elimination or retention of death penalty in the country. The Report also raucously affirmed that the question of shielding the society must be given prime deliberation while deciding the issue.

The Commission does believe in relation to the strong arguments given for abolition of capital punishment. They also well thought-out about the concept of decisiveness attached with the sentence of a death penalty. Nor did they overlook the fact that capital punishment was very rigorous, and a contemporary approach was required to deal with criminals. But in view of the state of the nation, the Commission affirmed that, keeping in mind the way of upbringing of the citizen, the discrepancy level in educational and moral levels of the people, the enormity of

the area, the assortment of the nation and the paramount need to preserve law and order, India cannot risk abolishing the capital punishment yet.

In the judicial announcement of Ediga Anamma v State of Andhra Pradesh, Justice Krishna Iyer commute the death sentence of the accuse to life imprisonment considering factors like gender, age and socio-economic surroundings of the accused. In this case, the Court lay out that apart from looking into the state of affairs of the crime, the Court should also look into the stipulation of the accused. This case was follow by some imperative developments. Section 354 (3) was added to the Code of Criminal Procedure, 1973 which avowed that in cases where capital punishment was being awarded, the Court has to provide special reason for it. This made life imprisonment a decree, and death penalty an exemption, which was the other way around previous.

In 1979, India also become a participant to the International Covenant on Civil and Political rights (ICCPR). In the case of Rajendra Prasad v State of U.P the Apex Court, on the other hand, confirmed that the difficulty whether capital punishment should be abolished or retained was a problem for the Legislature and not for the Courts to make a decision.

The case of Bachchan Singh v State of Punjab again brought up the question of the legitimacy of capital punishment and in this case, the doctrine of "rarest of the rare" was formulated. The five Judge Bench acknowledged that the captivating of human life shouldn't be expectant even in the appearance of punishment except in "rarest of the rare" cases where no substitute method can be worn and is foreclosed.

When the legality of capital punishment was questioned, the bench (mass decision) opined that capital punishment did not infringe either Article 19 or Article 21 of the Constitution. They also piercing out to the fact that the makers of the Constitution were totally conscious that the capital punishment might be awarded in some cases, and it was proved by the subsistence of the provision of petition and provision of remissive powers of the President and the Governor. It was in addition to laid down that extenuating, and frustrating factors should be careful whereas deciding the matter.

CONSTITUTIONALITY OF CAPITAL PUNISHMENT

Whereas the death penalty has for all time been questioned as mortal violative of the fundamental rights, the courts include, after widespread discussions, discarded this viewpoint. Jagmohan Singh v State of U.P was the first harass by abolitionists on death penalty, demanding the soundness of the punishment adjacent to multiple constitutional rights. The dispute of constitutionality of the punishment was redundant by the constitutional bench of the Supreme Court. Validity of the punishment was attack on four crucial points. It was said to be infringing fundamental right surefire by the Constitution of India. Firstly, it was contend that it infringed all the freedoms guaranteed under art. 19(1) (a)-(g).

Secondly, the procedure of awarding the punishment ran divergent to the article 14 of the Constitution guarantee equality. It was contended that the judgment the judges had to reward two persons guilty of the similar crime with diverse punishments of whichever a verdict of life or death was violative of equality before the law.

Thirdly, there was no modus operandi in CrPC for the willpower of the punishments to be awarded. The nonappearance of any course of action established by law beneath which life could be extinguished resulted in violation of the right to life and liberty.

Lastly, the disputation was that the comprehensive prudence the judges had to award punishments devoid of any legislative policy or customary formulated by legislature was a case of extreme allocation. The Supreme Court was not convinced by the contention raised in the case. In opposition to the argument of unnecessary delegation, court held that the impracticality of surroundings down the principles was at very hub of the criminal law which invests judge with a very extensive discretion of power which is accountable to be corrected by superior courts. It has also opined that dispossession of life was constitutionally permitted as it was forced after a trial in harmony with the system established by law.

The Bachan Singh Test

Following the prior landmark judgment, came out nearly all fundamental case in the jurisprudence of the death penalty in Bachan Singh v State of Punjab. Legality of the

punishment was once more challenged in this case determined before the constitutional bench of the Supreme Court. The court confirmed the decision of Jagmohan and overrules Rajendra Prasad. It abandoned the constraint on the annoyance of death penalty barely if the safety of state and society, public benefit and sort of the general public duty-bound of that course. It support the retention of the penalty as an substitute punishment and seized that circumstances pertaining to crime and state of affairs pertaining to immoral cannot be held in two separate water tight compartments. It said: "The expression 'special reasons' in the context of this provision perceptibly means 'outstanding reasons' founded on the remarkably vital circumstances of the fastidious case linking to the crime as well as the criminal." On the proposition of amicus curiae, court record the following probable infuriating conditions to be measured prior to awarding death penalty:

1) Murder dedicated after preceding preparation and involves extreme brutality;

2) Murder involving extraordinary depravity; and

3) Murder of a member of some of the armed forces or any police force or of any public servant and devoted:

    a. while such associate of public servant was on duty

    b. in corollary of anything done or attempt to be done by such member of public servant in the lawful emancipation of his duty.

Extenuating circumstances suggested by amicus curiae were:

1) An offence committed under the manipulation of extreme mental or emotional interruption.
2) The age of the accused. If accused was juvenile or old, he was not to be sentenced to death.
3) The likelihood that the accused would not entrust criminal acts of the violent behavior as would comprise a continuing threat to a society.
4) The possibility that the accused could be transformed and rehabilitated.
5) The accused supposed that he was vindicated morally while committing the offence.

6) The accused acted beneath the compulsion or domination of another person
7) The accused was psychologically defective and that the said flaw impaired his competence to be grateful for the criminality of his conduct.

The principle laid in Bachan Singh was followed by Supreme Court in the case of Machhi Singh v State of Punjab. It took in front the principle lay in Bachan Singh and apprehended that a balance-sheet if annoying and explanatory state of affairs has to be made previous to awarding the punishment:

The tremendous consequence of death require not be inflicted except in gravest luggage of extreme blameworthiness…In other words death condemnation must be imposed only when life imprisonment appears to be an altogether insufficient punishment having look upon to the pertinent circumstances of the crime, and provided, and only provided, the alternative to enforce condemnation of imprisonment for life cannot be conscientiously exercised having look upon to the temperament and circumstances of the crime and all the pertinent circumstances. A balance sheet of infuriating and mitigating circumstances has to be pinched up and in responsibility of the mitigating state of affairs has to be accorded full weight age and a just equilibrium has to be strike between the maddening and the mitigating circumstances prior to the option are exercised."

CAPITAL PUNISHMENT- DETERRENT OR NOT

Three main theories on which the penology system is based are: retribution, deterrence and rehabilitation. The chief argument of retentionists is the deterrence outcome formed by the death penalty. But the actuality is that there is no technical or empirical foundation to demonstrate that the death penalty is deterrent adjacent to any crime. On the contrary, the figures tell the different story altogether. In 1980, the majority judgment in Bachan Singh, said that the majority of countries including India and judges, jurists, and other progressive people of India, consider that the death penalty acts as a deterrent effect in the society. Nevertheless, Justice Bhagwati in his dissenting outlook on Bachan Singh noted the figures on the states of Travancore and Cochin where incidence of murders did not enhance in the six years despite capital punishment being on abeyance. The story is not different today. Incidents of murder cases have been reduced from 36,202 cases in 2001 to 33,335 in 2010 with only one execution

of Dhananjoy Chatterjee reported in 2004; in the meantime the population of India grew from 1.028 million to 1.21 million in the given decade. The statistics clearly ascertain that the death penalty has no such deterrence and the effectiveness of deterrence of the tremendous punishment remnants unproven.

A rational man although committing murder does not get further scared of being paid executed and less frightened of ending his whole life in the prison. Together, the death sentence and life imprisonment are so rigorous to demolish the future of anybody subjected to them, so the only thing that deters anyone from committing any offence is the likelihood of getting trapped. A person will not commit any offence if there is not probability that he will go scot-free irrespective of the punishment, sentence of death or sentence of life. As observed by Justice Bhagwati in his dissenting judgment in Bachan Singh: "More than the severity of the sentence, it is the certainty of detection and punishment that acts as a deterrent." On the conviction of the punishment, Justice Bhagwati was of view that a convicted assassin would dubiously be deterred by the contemplation of the death consequence during the commission of his crime due to the uncertainty and of the punishment. Contrary to the majority confidence that death penalty acts disincentive, the empirical data have exposed that the murder rate has declined proving the deterrent-effect theory wrong. In addition to, the belief that internment is not as brutal as death penalty is false. Life imprisonment is equally disparaging as a person lives devoid of any liberty and does not have any hope of receiving it. Deterrence is the lifeblood of the receptionist's argument, but it is motionless been empirically unproven. With the continuation of life imprisonment, death penalty serves no supplementary purpose. It is good time to think again the performance of death penalty at what time it has been abolished by 66% of the nations.

CONCLUSION

I would like to conclude that after doing a research on such a debatable issue that is "Capital Punishment and its deterrent effect or not". "Our country penal code provide for capital punishment for extensive range of offence. But sorrowfully, the death penalty has in no way reduced these crimes in the country.

While over 66% of the countries in the world abolishing death penalty, but India still retains it, largely believing it to have a deterring effect. The retaliatory system is based on three major theories of retribution, deterrence and rehabilitation. Deterrence and retribution, where the society hassle revenge, fail to grant sufficient reasons for the use of the death penalty. It is evident that killing a assassin has not at all stopped from a new killer budding. Furthermore, the death penalty neglects the analysis or reformative theory from the very beginning. India desires to move from a retributive model to reformative-punitive system. Killing is and has never been a elucidation. The answer lies in the efficient system to take in for questioning the perpetrators and efficient prosecution so that no one escapes from the hands of law. If that happen, life imprisonment will adequately accomplish the deterrence and retributive theory; the death penalty will not serve up any additional rationale. It is high time that India renews its concentration towards the abolishment of the death penalty.

Instead of death penalty there many new forms of punishments are made which have the deter effect also:

1) Externment
2) Compensation to victims of crime
3) Public Censure
4) Community services
5) Disqualification from holding public office and contest Elections.

From my point of view to creating a deterrence in people death penalty is not that good option because the one who can take life without thinking it is damn sure that he doesn't scared of death penalty so to create a deter effect in people we should have to choose the multiple approach theory in this theory the offender get insulted in public, and which is more shameful than death penalty and in our country proceedings of awarding punishments are very slow so in order to get immediate relief we have think of these kind of punishments which are deter also.