

SUPREME COURT ON DEATH PENALTY

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But if there is harm, then you shall pay life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe¹.

Abstract

The below article deals purely with the reliance on constitutional aspect of Hon'ble Supreme Court of India in delivering the judgments relating to cases challenging the constitutionality of death penalty in various cases and tries to answer the long debated question whether the death penalty in India must be retained or abolished? The Indian courts constantly face with the situation where they are required to answer to new challenges and mould the sentencing system to meet those challenges. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing appropriate sentence. The change in the legislative intendment relating to award of capital punishment notwithstanding, the opposition by the protagonist of abolition of capital sentence, shows that it is expected of the courts to so operate the sentencing system as to impose such sentence which reflects the social conscience of the society. ***The sentencing process has to be stern where it should be*** this is what the Indian Judicial System is trying to say every time it has delivered a judgment on death penalty.

¹ Exodus 21:23 Or so that her children come out and it is clear who was to blame, he shall be fined as the woman's husband shall impose on him, and he alone shall pay.

INTRODUCTION

Public debate on Retention and abolishment of Death penalty has been witnessed since ages all around the world. But in India the practical example can be traced during the execution of Raj guru, Bhagat singh and Sukhdev by British Government in March 1931, when Congress moved a resolution in Karachi session to abolish death penalty². Even after 6 decades of Independence, the INDIAN legal system is still in dilemma as far as the topic of death penalty is concerned and it is the reason that recently The Law Commission³ of India received a reference from the Hon'ble Supreme Court in a case *Santosh Kumar Satishbhushan Bariyar v. Maharashtra* [(2009) 6 SCC 498] and *Shankar Kisanrao Khade v. Maharashtra* [(2013) 5 SCC 546], to study the issue of the death penalty in India to “allow for an up-to-date and informed discussion and debate on the subject.” Between the year 2001 and 2011 courts in INDIA sentenced 1,455 prisoners to death, according to the National Crime Records Bureau.

WHAT IS DEATH PENALTY?

The death penalty is a legal process whereby a person is put to death by the state as a punishment for a crime. The judicial decree that someone be punished in this manner is a death sentence, while the actual process of killing the person is an execution⁴. Grave offences such

² Special Correspondent, It's time death penalty is abolished: Aiyar, The Hindu, 7 August 2015, available at <http://www.thehindu.com/news/national/its-time-deathpenalty-is-abolished-aiyar/article7509444.ece>

³ lawcommissionofindia.nic.in/reports/report262.pdf

⁴ DeathQuest, An Introduction to the Theory and Practice of Capital Punishment in united states 4th edition

as murder, rape with injuries that may result in the death of a victim and a repeat offender, waging war against the State, and terrorism-related offences causing death are some major crimes punishable with death under the Indian Penal Code⁵.

Under Indian Law i.e IPC, the death sentence may be awarded for twelve different offences which are including Murder, Rape, Abetment of suicide by a minor or insane person, Dacioty with murder. Apart from them, a number of other laws also lay down the death penalty as a possible punishment. As per the commission's report, there are about 22 such laws in the country including The Air Force Act, 1950, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, The Unlawful Activities Prevention Act, 1967, The Commission of Sati (Prevention) Act, 1987.

"From Jagmohan to Bachan Singh to Purushottam borate and now the Nirbhaya gangrape case."

The first test to the constitutionality of the death penalty in India came in the 1973 case of Jagmohan Singh v. State of U. P. ('Jagmohan')⁶. The case of Jagmohan Singh is unique because it was decided before the Criminal Proceudue Code CrPC was re-enacted in 1973, making the death penalty an exceptional sentence. The petitioners argued:

⁵ <http://indianexpress.com/article/explained/explained-in-the-supreme-court-some-questions-of-life-and-death/>

⁶ (1973) 1 SCC 20.

i) That the death penalty violated Articles 14⁷, 19⁸ and 21 of the Constitution of India.

It was argued that since the death sentence extinguishes, along with life, all the freedoms guaranteed under Article 19(1) (a) to (g), it was an unreasonable denial of these freedoms and not in the interests of the public.

ii) The second argument was that the discretion vested in judges

The petitioner argued that it was the discretion of judges in deciding to impose death sentence was uncontrolled and unguided and violated Article 14.

Lastly, the provisions of the law did not provide a procedure for the consideration of circumstances crucial for making the choice between capital punishment and imprisonment for life, it violated Article 21. The Petitioners also placed before the Constitution Bench the decision of the US Supreme Court in *Furman v. Georgia* in which the death penalty was declared to be unconstitutional as being cruel and unusual punishment.

. In **Jagmohan**, the Supreme Court found that the death penalty was a permissible punishment, and did not violate the Constitution.

The Court also held that:

⁷ Article 14 in The Constitution Of India 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

⁸ Article 19 in The Constitution Protection of certain rights regarding freedom of speech etc(1) All citizens shall have the right(a) to freedom of speech and expression;(b) to assemble peaceably and without arms;(c) to form associations or unions;(d) to move freely throughout the territory of India;(e) to reside and settle in any part of the territory of India; and(f) omitted(g) to practise any profession, or to carry on any occupation, trade or business industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

If the law has given to the judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstances of one case can hardly be the same as the facts and circumstances of another.

After looking into the arguments the five judge bench upheld the constitutionality of death penalty and held that deprivation of life is constitutionally permissible for being recognized as a permissible punishment by the drafters of our Constitution. Also the drafter of our Indian constitution were quite aware of the death penalty as a punishment is not unconstitutional because in constitution itself they provided rights to Governor and the PRESIDENT of India to entertain the plea of mercy .

In 1979, the case of *Rajendra Prasad v. State of Uttar Pradesh*⁹ discussed what the “special reasons” in imposing the death sentence could be. The Court found itself confronting, not the constitutionality of the death sentence, but that of sentencing discretion. The Court per majority (of two judges) said, “*special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal.*” They drew the focus in sentencing to reformation, even as they held that it was not the nature of the crime alone that would be relevant in deciding the sentence. The Court said, “**the retributive theory has had its day and is no longer valid.** Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal panacea. Four of the five judges hearing this case did not accept the contention that the death penalty was unconstitutional.

In *Bachan Singh*, for the first time in the history of India the Hon'ble Court adopted the ‘**rarest of rare**’ guideline for the imposition of the death penalty, saying that reasons to impose or not

⁹ 1979 AIR 916, 1979 SCR (3) 78

impose the death penalty must include the circumstances of the crime and the criminal. This was also the case where the court made a definitive shift in its approach to sentencing. The Court held: The expression 'special reasons' in the context of this provision, obviously means 'exceptional reasons' founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.

In the past few years, attention has also been drawn to the subjective application of the **Bachan Singh** framework by courts as also to the possibility of judicial error in cases where the death sentence has been imposed. The Supreme Court in *Aloke Nath Dutta v. State of West Bengal*¹⁰, *Swamy Shraddhananda v. State of Karnataka*¹¹, *Santosh Bariyar v. State of Maharashtra*¹², and *Farooq Abdul Gafur v. State of Maharashtra*¹³, amongst other cases, has noticed that sentencing in capital cases has become subjective and that the sentencing law of Bachan Singh has been interpreted in varied ways by different Benches of the Court

The challenge to the death penalty in **Bachan Singh** was premised, among other things, on :

- i) Irreversibility, fallibility, and that the punishment is necessarily cruel, inhuman and degrading.
- ii) Penological purpose of deterrence remained unproven.
- iii) Retribution was not an acceptable basis of punishment, and that it was reformation and rehabilitation which were the purposes of punishment.

¹⁰ (2007) 12 SCC 230

¹¹ (2008) 13 SCC 767

¹² (2009) 6 SCC 498

¹³ (2010) 14 SCC 641

A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. Justice P.N Bhagwati took almost 2 years to pronounce his judgment in this case explaining his judgment he said that when he dealt with the capital punishment, he must admit that philosophically every punishment is a crime. Death penalty, in reality, is a murder; if there was no such exemption as mentioned in Sec. 77 and 78 of the Penal Code (any Act in exercise of judicial function is exempted). Everybody involved in that murder including the Judge who pronounces it with a direction that the convicted person shall be hanged till he is dead, the Jail officials who help in carrying out that direction, the magistrate who finally executes the warrant and even the doctor who is supposed to declare that he is dead, of course the executioner also would have been guilty of murder, if Sec. 77 and 78 were not incorporated in the IPC. In his lengthy judgement he also focused on the point that in capital punishment alone reformatory object is totally extinguished as the life of the offender is extinguished once and for all what remains to be achieved are only retribution and deterrence.¹⁴

In Machhi Singh and Ors Vs State of Punjab¹⁵

Supreme Court of India followed the guidelines flowing from Bachan Singh's case and held that death sentence could be imposed only in the rarest of rare cases when the collective conscience of the community is so shocked that it would expect the holders of judicial power to inflict the death penalty irrespective of their personal opinion as regards the desirability or otherwise of retaining death penalty as a sentencing option.

¹⁴ <http://www.livelaw.in/constitutionality-of-death-penalty/>

¹⁵ (1983) 3 SCC 470

In 1991, *Shashi Nayar v. Union of India*¹⁶, the death sentence was once again challenged, among other reasons, for the reliance placed in Bachan Singh on the 35th Report of the Commission. The Court turned down the petition, citing the deteriorating law and order in the country, with the observation that the time was not right for reconsidering the law on the subject. The plea stating that the execution of death penalty which is a capital punishment by hanging was very barbaric and dehumanizing which is surely against the human rights, and it should be substituted by some other decent and less painful method in executing the sentence, was also **rejected**.

In *Mithu vs State of Punjab (1983)*, the Supreme Court ruled that the mandatory death penalty is **unconstitutional** and made a remarkable change in the history of the criminal law and brought a change in one of the oldest statute of british era by striking down Section 303 in the IPC, which entailed a mandatory death sentence for a person who commits murder while serving a life term in another case. The Supreme Court has always said that the death sentence should be given rarely the Supreme Court held Section 303 violated Articles 14 (right to equality) and 21 (right to life) since an unreasonable distinction was sought to be made between two classes of murderers. It said all murders would come under the ambit of Section 302, where a court would have the discretion to award life term or death sentence.

In *Purushottam Dashrath Borate & Anr vs State Of Maharashtra* the court gave the decision taking into account to the judgement of bachan singh which gave the rarest of rare term. While balancing the balance sheet of aggravating and mitigating factors the Hon'ble Supreme Court in the above case held that age factor though it is a mitigating factor but in this case it did not overweigh the aggravated factors, accused not only raped but also murdered the victim in

¹⁶ (1992) 1 SCC 96

heinous manner and after commencement of offence they even tried to misguide the court and held it fell under the term rarest of the rare and awarded death penalty to the accused.

And in the latest judgement of death penalty by Hon'ble Supreme court in the Nirbhaya Gang rape case upheld the sentence ordered by lower courts by stating, "*The incident of gang-rape on the night of 16.12.2012 in the capital sparked public protest not only in Delhi but nationwide. We live in a civilized society where law and order is supreme and the citizens enjoy inviolable fundamental human rights. But when the incident of gang-rape like the present one surfaces, it causes ripples in the conscience of society and serious doubts are raised as to whether we really live in a civilized society and whether both men and women feel the same sense of liberty and freedom which they should have felt in the ordinary course of a civilized society, driven by rule of law. Certainly, whenever such grave violations of human dignity come to fore, an unknown sense of insecurity and helplessness grabs the entire society, women in particular, and the only succor people look for, is the State to take command of the situation and remedy it effectively.*"

CONCLUSION

There has been a trend across the globe towards the abolition of capital punishment; however, India has not adopted this position, because the form of capital punishment is different in INDIA and, what makes this form of DEATH punishment in INDIA different from the others is the obvious element of 'RAREST OF RARE' attached to it. The recent observation by the Supreme Court, "*perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal,*" reflects the conflict within the judicial systems also. But after analysis of

various judgement as cited above we feel the death penalty must not be abolished in India as Padma Shri Ujjwal nikam while addressing law students at GLS university Ahmedabad said that India must not abolish death penalty rather it must work upon to reduce the time period between its actual execution and sentence imposed.

