
AN INNER CONFLICT IN JUDICIAL DISCRETION TO CAPITAL PUNISHMENT AND CRITICISM TOWARDS ITS ABOLISHMENT

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ABSTRACT

The degree of punishment is decided on the degree of culpability of the criminal act and how far the society was shaken to experience such act. The punishment of these heinous crimes should be punished in such a way that will be a deterrent to the society and which would create a sense of respect towards the law of the land. The reformatory justice system does not work efficiently in these extreme criminal acts and the need of the extreme punishment is warranted. Death penalty has been an instrument of retributive justice since a long time back, but the continuing criminal act has caused the scholars and legislators to believe that this form of punishment has failed.

The present trend, however, is to keep the number of offences punishable by death to a minimum and avoid death penalty as far as possible but its retention in the statute book is favoured even to this day.

The present research paper will examine the judicial inner conflict regarding the award of capital punishment; reasons for lesser punishment; and special reasons for extreme one as per provision 354(3) CrPC (now 393(3) BNSS) procedural law and also the law commissions report on the abolishment of death penalty for all offences except “terrorism”.

Keywords: Capital punishment, Abolishment, Retention, Judicial discretion, Murder.

I. INTRODUCTION

The society is deterred in the fear of being condemned to death which keeps them away from any criminal activity. The common mode of execution of death penalty since long has been hanging by neck till death which creates a deterrence effect. Dr. Johnson defined ‘Deterrence’ as discouraging the offender by terror or naked fear from repeating his crime and at the same time preventing others from following his path. Undoubtedly, of all the punishments, death penalty appears to be the strongest deterrent for there can nothing for which a man would be willing to give away his life.¹

The Capital punishment is legal in India at this point in time, but the inner conflict regarding the degree of punishment which is to be awarded to the convict is still prevalent despite several formulas have been laid down. This research paper is based upon the judicial inner conflict, reasons for a lesser degree of punishment and special reasons for the alternative and gives a critic towards the 262nd Law Commission Report on “The Death Penalty” which suggests abolition of the death penalty in all offences except “terrorism”.

First, the paper acknowledges the award of discriminatory capital punishment prevalent in the Vedic Era; *Second*, the 35th Law Commission Report on “Capital Punishment” for its Retention; *Third*, the shift in trend regarding ‘Reasons’ to support the judgement for award of lesser punishment than ‘Death’ with current ‘Special Reasons’ for the award of Death Penalty; *Fourth*, the legal discourse in various case laws and opinion of Hon’ble Judges with the Law Commission Recommendations for Abolition and Retention; *Fifth*, Conclusion with researcher’s personal opinion and critic towards the abolition of capital punishment.

II. CAPITAL PUNISHMENT IN INDIA

The ancient Indian law of crimes provided death sentence for quite a good number of offences. The great epics did contain references about offender being punished with ‘Vadhadand’ which meant amputation bits by bits. Before the Hindu synthesis, the Aryans lived not in Bharat or India, but in ‘Aryavarta’ the ‘Abode of Aryans’ and these fair skinned men were Brahmanas, who incorporated the text of ‘Manusmriti’ among themselves and the Anarya (non – arya) in which contained numerous punishment specially ‘Death Penalty’ to those who were out – castes and not the blood of Aryans. To those who were Aryans, even if the offence was heinous,

¹ N.V. Paranjape, *Criminology & Penology* 362 (Central Law Publications, Prayagraj, 19th edn.).

were let off with few penance and sacrifices or cleansing process. The death penalty at that point of time was very subjective and discriminative due to caste discrimination. The lower caste were generally the Dravidians often called as 'Dasas' or those which were categorised by the Manusmriti to be born in lower caste, and were punished with the highest form of punishment as per the 'Manava Dharmasastra' (Laws of Manu). This was a short account of the very ancient form of punishment which was prevalent in our country around the period of circa 1900 – 1500 BCE or BC, the timeline around which the Aryans Invaded or as some scholars say, migrated into South Asia Dravidian land. The reason why the researcher calls it a 'Dravidian land' is because the current India was earlier populated with Dravidians which were rushed towards South India due to Indus Valley civilisation of Aryans.

This short overview of the death penalty which was prevalent earlier is mentioned to acknowledge the discrimination practices regarding award the award of death sentence which was prevalent and it all started with a corrupt writer of 'Manava Dharmasastra' whose identity is itself under conflict, who can be either, 'Bhrigu Maharishi' or 'Swyambhuva Manu' the first Manu/Human.

The Capital Punishment was prescribed and held to be valid in early Vedic Era as mentioned earlier, further we will acknowledge the opinion of the Law Commission Report for its retention.

III. RETENTION OF CAPITAL PUNISHMENT

The Indian history depicts to us that capital punishment was not discarded as a form of punishment, though its disuse at some point in time in history has been effected because,

“the people were most helpful, soft hearted and benevolent and to them vocal remonstrance sufficed. But in the event of failure of these measures, corporal punishment and death sentences were invoked to protect the society from violent criminals²”.

There have been different views by the supporters of retention and abolitionist of the death penalty. Retentionist, believe it has great deterrent value and commands obedience for law in general public; on the other hand, the abolitionist believer that the increase in the number of

² P.V Kane, *History of Dharmasastra* 399 (Bhandarkar Oriental Research Institute, Poona, 1968).

barbaric, gruesome, and cruel criminal activity itself depicts the failure of death penalty as causing a deterrent effect. The Law commission of India in its 35th Report, 1967 observed as follow:

*“Having Regard, however to the conditions in India, to the variety of the social upbringing of its inhabitants to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment. On the consideration of all the issues involved, the commission is of the opinion, that capital punishment should be retained in the present state of the country”*³

In this report the law commission of India concluded that capital punishment should be retained. There was a need to give ‘reasons’ for the sentencing with lesser punishment than death, but this requirement was amended later on, let us look at the requirement and the point of its amendment in the next head.

IV. THE SHIFTING TREND

There was a shifting trend towards imposition of death sentence for the offence of murder is clearly discernible from the amendments made in criminal law from time to time. Prior to 1955, judicial discretion in awarding a lesser penalty instead of death sentence was circumscribed by requiring the judge to record his reasons for awarding a lesser punishment.

The reason which was first considered as a valid reason for awarding a lesser punishment than death, was the fear of death hanging over the head of the convict for a long period of time and thought it proper to commute it to life imprisonment, this reasoning is considered as ‘Extenuating Circumstances’, as firstly observed in *Avtar Singh v. Emperor*⁴.

The restriction of reasons to be given for awarding lesser punishment was withdrawn by the

³ Law commission of India, “35th Report on Capital Punishment, 1967” 354 (September, 1967).

⁴ 17 CWN 1213.

amending act of 1955⁵. Thus, this was a shifting trend. Section 354 (3) of the Criminal Procedure Code⁶ provides that while awarding the sentence of death, the court must record 'Special Reasons' for the award of death sentence and why a lesser punishment would not suffice. Now, the judge does not need to give reasons for commutation of sentence from the alternative punishment. In other words, no reasons to be given for awarding life imprisonment than death sentence.

The provision of hearing the convicted person on sentence finds its place under section 235(2) criminal procedure code⁷ (now 258(2) BNSS), where the trial court has to hear the convicted person; later the high court also needs to confirm such sentence for its execution but only if such sentence is Death Penalty. This provision provides the convicted to place his antecedents, social and economic background and mitigating and extenuating circumstances before the court.

The perusal of the apex court decisions involving the award of death penalty would reveal to us that sudden impulse, provocation, uncontrollable hatred arising out of sex indulgence, family feud, land dispute, infidelity of wife or the sentence of death hanging over the head of the accused for a considerable long period of time due to laws delay have been accepted as 'Extenuating Circumstances' justifying lesser sentence of life imprisonment instead of death sentence.

In the next head we will discuss those set of case laws which are important to understand the 'Extenuating Circumstances' and how it is to be analysed as per opinion of Hon'ble judges.

V. THE LEGAL DISCOURSE

There are several case laws where the extenuating circumstances are explained briefly and those circumstances were considered to award a lesser punishment than death. Let us look into those case laws.

In *Rajendra Prasad vs. State of Uttar Pradesh*⁸, Hon'ble Justice Mr. V.R. Krishna Iyer of the supreme court India made it clear that where the murder is deliberate, premeditated, cold –

⁵ Criminal Amendment Act, s. 66.

⁶ Criminal Procedure Code, 1973 (Act 2 of 1974), s. 354(3).

⁷ *Id.*, s. 235 (2).

⁸ AIR 1979 SC 916.

blooded and gruesome and there if there are no extenuating circumstances, the offender must be sentenced to death as a measure of social defence; but in this above mentioned case the judge attributed failure of penal institutions to cure criminality within the criminal as the sole cause of a cruel murder committed again by the appellant and allowed commutation of death sentence of the appellant accused to that of life imprisonment.

Expressing his compassion for the condemned accused the learned judge further observed:

*“This convict has had the hanging agony over his head since 1973 with near solitary confinement to boot! He must by now be more a ‘vegetable’ than a person and hanging a ‘vegetable’ is not death penalty. This is additional ground for our reduction.”*⁹

Hon’ble Justice A.P Sen reacted sharply and gave a dissenting judgment in this case and pleaded that the accused deserves no leniency in the award of death sentence. To quote his words:

*“The case of this accused is destructive of the theory of reformation. The ‘therapeutic touch’ which it is said is the best way of preventing repetition of the offence has been of no avail. Punishment must be designed so as to deter, as far as possible, from commission of similar offences. It should also serve as a warning to other members of society. In both respects, the experiment of reformation has miserably failed. I am quite sure that with the commutation of his death sentence, the accused will commit a few more murders and he would again become a menace to the community.”*¹⁰

Hon’ble Justice A.P Sen also observed:

“The humanistic approach should not obscure our sense of realities. When a man commits a crime against the society by committing a diabolical, cold-blooded, pre-planned murder, of

⁹ *Ibid.*, para. 119.

¹⁰ *Ibid.*, para. 236.

an innocent person the brutality of which shocks the conscience of the Court, he must face the consequences of his act. Such a person forfeits his right to life.”¹¹

Hon’ble Justice tried to derive at the point that special reasons referred to under section 354(3) criminal procedure code, 1973 must be liberally construed so as to limit death penalty only to rare categories of cases such as white-collar crimes, anti-social offences like hijacking or selling spurious liquor and hardened criminals.

In *Guruswamy vs. State of Tamil Nadu*¹², the ruling laid down in *Rajendra Prasad’s*¹³ case was followed and the accused conviction was commuted to life imprisonment due to extenuating circumstances.

Again, in *Dalbir Singh and Ors. vs. State of Punjab*¹⁴, this very case was also similar to what has been already been laid down and the circumstances which are extenuating. The supreme court in appeal commuted it to one of imprisonment for life.

In *Bachan Singh vs. State of Punjab*¹⁵, the supreme court was again in conflict of judicial discretion regarding award of death sentence or a lesser punishment. The five judge bench overruled the earlier precedent laid down in *Rajendra Prasad’s*¹⁶ case and ruled that, though imprisonment for life is the rule, death sentence must be retained as an exception for the offence of murder under section 302 IPC, 1860 and also expressed its view that death sentence as an alternative punishment for murder is not unreasonable and hence not violative of article 14, 19 and 21 of the Constitution of India because the ‘public order’ contemplated by clause (2) to (4) of Article 19 is different from ‘Law and Order’. This case led to the emergence of the ‘Rarest of Rare’ Doctrine.

In *Machhi Singh and Ors. Vs. State of Punjab*¹⁷, the court realised that the doctrine of ‘Rarest of Rare’ has caused inner conflict in the minds of the judges because it was much left to the judicial discretion to decide whether the case fell within the category of rarest of rare or not

¹¹ *Ibid.*, para. 140.

¹² AIR 1979 SC 1177.

¹³ *Supra* note 8.

¹⁴ AIR 1979 SC 1384.

¹⁵ AIR 1980 SC 898.

¹⁶ *Supra* note 8.

¹⁷ AIR 1983 SC 957.

and laid down the five-point formula and also held that the motive, manner, magnitude, personality or anti-social and abhorrent nature of crime are some relevant considerations to justify death penalty.

The first three cases we examined laid down the death sentences being commuted to life imprisonment and latter two cases attracted the 'Rarest of Rare' Doctrine for justifying the alternative punishment under section 302 IPC, 1860 (now 103 BNS). The reason why the researcher examined these previous above-mentioned cases was because of the contradictions it has created with the Law commission report of 262nd on "*The Death Penalty (मृत्युदंड)*"¹⁸ headed by Hon'ble justice A.P. Shah. In this commission report it was strongly recommended for abolishment of death penalty in all offences, except in 'Terrorism'. The report replaces the rarest of rare standard as the exception to death penalty with 'terrorism' cases. The term "replace" is however an uneasy fit in describing what the report does because of a curious conflation at play: rarest of rare is a standard of judicial scrutiny, while 'terrorism' is a category of criminal offence.¹⁹

The next sub-head describes in brief the arguments which the 262nd Law commission report gave for abolition of death penalty and also for retention, strongly for abolition.

Arguments the law commission gave for recommending the abolition of death penalty

First, the commission suggests that "the passage of thirty-five years since" *Bachan Singh vs. State of Punjab*²⁰, along with "considerably altered global and constitutional landscape in that time" necessitates a re-evaluation of Bachan Singh case itself. It reiterates a thick conception of rule of law, substantive due process and reaffirms *Maneka Gandhi Vs. Union of India (UOI) and Ors*²¹'s reading of Article 21, that life and personal liberty can be deprived only "according to procedure established by law," where the procedure, through a harmonious construction of Articles 14, 19 and 21 has been interpreted as a substantive due-process clause. This introduces a stricter test on grounds of cruelty, reasonableness, dignity and proportionality in the sentencing process especially because these are cases concerning infringement of fundamental

¹⁸ Law Commission of India, "262nd Report on The Death Penalty" 2015 (August, 2015).

¹⁹ Rajgopal Saikumar, "Negotiating constitutionalism and democracy: The 262nd report of the law commission of India on death penalty" 12 *Socio – legal review* 83 (2016).

²⁰ *Supra* note 15.

²¹ AIR 1978 SC 597.

rights.²²

Second, the commission strongly agrees that death penalty does not serve the goal of deterrence. It also rejects the retributive claim, stating that “the notion of ‘an eye for an eye, tooth for a tooth’ has no place in our constitutionally mediated criminal justice system. Capital punishment fails to achieve any constitutionally valid penological goals.”²³

Third, although *Bachan Singh* laid down the ‘rarest of rare’ exception as a “demanding and compelling” standard, the evolution of this guideline has been dismal.²⁴

Fourth, the exercise of clemency powers by State and Union governments has been insensitive, delayed, procedurally inefficient and politicised, and the decisions lack proper application of mind.²⁵

Fifth, that religious, caste and class biases are deeply entrenched in our criminal justice system. An overwhelming majority of the convicts are Dalits, religious minorities and from backward castes; almost all of them are poor, from the poorer geographical regions, and a majority of them, at some point in the investigation, were tortured into confessions.²⁶

As is evident, the *first* argument is a universalist, human rights-like argument (based on the presumption of an inviolable sanctity of human life). The *second* is a functionalist argument (that the punishment does not serve the purpose/objective was intended for); The *third* indicates the problem of indeterminateness in legal decision-making; The, *fourth* and *fifth* indicate problems of institutional prejudices. The commission seems to argue that because these aforementioned reasons ultimately jeopardise due process and render the application of rule of law on shaky ground, capital punishment deserves to be abolished. Both due process and rule of law are crucial devices that, enabled by the Constitution, set limits on the scope and powers of the democratic institutions.²⁷

Retentionist arguments by dissenting members of the 262nd Law Commission report

First, Human Fallibility Argument: As Justice Usha Mehra states in all platitude, “to err is

²² *Supra* note 19 at 94.

²³ *Id.* at 94 – 95.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Id.* at 96.

human. Almighty alone is the dispenser of absolute justice. Judges of the highest court do their best, subject of course to the limitation of human fallibility.” As per this line of argument, indeterminacy and error in judgment is inherent and all too human, and so this is not reason enough to abolish death penalty. Since errors in judgment are unavoidable, these ‘accidental’ deaths are inevitable by-products of a system.²⁸

Second, Due Process of Law Argument: The three members agree that there is an unbridled, arbitrary and judge-centric application of death penalty in several cases. But they assert their faith in the due process of law, rule of law, procedural safeguards and institutional checks and balances to remedy this arbitrariness. As per this line of reasoning, the problem with death penalty in India is the poor application of law: the problem is not essential, it is incidental. That is, the legal framework in essence can handle death sentence cases in a principled manner and so, as this argument goes, we just have to start doing it right.²⁹

Third, Legislative Supremacy Argument: Per this view, it is the will of the majority, expressed through the law-makers, which justifies retention of the sentence. As Mr. Malhotra states “The Parliament which reflects the will of the people passed law with death penalty for certain offences against women as late as in 2013.” With a paternalistic subtext, Mr. Malhotra laments “that the will of the Parliament shows that looking into the prevalent situation in the country, the Indian society has not matured for total abolition of death penalty” and that the “time is not ripe” yet.³⁰

Earlier in 1971 the law commission also submitted its 42nd report³¹ on exempting certain categories of person from death sentence in which children below the age of 18 and women generally were to be exempted and felt that the capital punishment acts as effective deterrent “which is the most important object and even if all objects were to be kept aside, this object would by itself furnish a rational basis for its retention” under the statute books.

VI. CONCLUSION

If our society is leading towards abolishment of death penalty as an alternative punishment for murder considering a humanitarian approach towards the convict, then we should also not look

²⁸ *Id.* at 97.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Law Commission of India, “42nd Report on The Indian Penal Code” 1971 (June, 1971).

aside the extreme brutality which a man is capable of. A brutal, gruesome, barbaric & heinous rape coupled with murder would again be committed as in 2012 and other similar cases and we as a society would still consider that 'vegetable' capable of reformation and not term it as a 'rarest of rare' incident which warrants capital punishment. Thereby, the researcher is of the opinion to Retain the Death penalty as an alternative punishment for offences which attracts the 'rarest of rare' category, even though it causes an inner conflict in the judicial discretion.