

---

## DEATH PENALTY -A NEED FOR ABOLITION IN INDIA

---

Vaishali. T, Assistant Professor of Law, Saveetha School Of Law (SIMATS), Chennai

### ABSTRACT

Death penalty a cruel and unreversible form of sentence once it is been executed. An order to take way one's life is not play thing. India still retains the death penalty in the cases of serious crimes. Hon'ble supreme court has also strived its way to pronounce a principled guideline in sentencing and imposing death penalty against an offender. The application of court's precedent on determining the aggravating and mitigating circumstances in the case on inflicting death penalty is also inconstantly applied by the judiciary. The principled guideline prescribed in *Bachan singh case* is inconstantly applied and imposing death penalty in rarest of rare case is also no more been a rare. The judiciary has also accepted *per incuriam* in certain cases as death penalty is imposed the convicts in erroneous. The death penalty is no more awarded based on principled sentencing, it has become judge centric sentencing and if execution on convicts based on judgement is made and later if it is discovered that the executed accused is not guilt then no mechanism can bring back the life of dead person thus in order to evade this cruel circumstance , death penalty need to be abolished.

Keywords: death penalty, per incuriam, judge centric, principled guideline, erroneous and abolition

## INTRODUCTION:

Death penalty is one of the controversial topics around the world. The need for abolition of capital punishment is urged by human rights activist around the world. Death penalty is the cruel and ultimate punishment for an offence. Whereas capital punishment is imposed on the offender in respect of their culpability in crime in respect of deterrent principle and in order to prevent the accused from committing the any offence further as in accordance with retributive theory of sentence. The penalty could be the cost that is imposed against the person who commits crime. Death penalty is awarded by the judiciary based on aggravated and heinous crime committed against the society. Former law minister Hon'ble Dr. Ambedkar has also favoured for the abolition of death penalty.

United Nation General Assembly Resolution on abolition of death penalty by stating the reason as, *"it goes against statutory law in India and in India death penalty is exercised in "rarest of rare cases" where the crime committed is heinous and it shocks the conscience of society"*<sup>1</sup>. Till the year of 2019 over 657 executions around the world, excluding China 5 countries that carried out most executions were China, Iran, Saudi Arabia, Iraq, and Egypt. over 657 executions about 86% are carried out by just four countries: Iran (at least 251), Saudi Arabia (at least 184), Iraq (at least 100), and Egypt (at least 26)<sup>2</sup>.

The mental agony and stress faced by the convicts who are in death row need to be concentrated. The central question that rest in court endeavours court to consider assessment of culpability for sentencing to death those in mental agony out of death row. The convicts who are in death row need proper counselling and mental preparedness to face the capital punishment. in a circumstance to avoid this human right activist have urged for the abolition of capital punishment in order to emphasise the rehabilitative principle of sentencing and to entrust humanity.

## MEANING AND DEFINITION OF DEATH PENALTY:

Collins's dictionary defines death penalty as *"The death penalty is the punishment of death used*

---

<sup>1</sup> India votes against UNGA draft resolution on use of death penalty <https://www.thehindu.com/news/international/india-votes-against-unga-draft-resolution-on-use-of-death-penalty/article25491909.ece>, viewed on 03.03.2019.

<sup>2</sup> World day against penalty available at [World Day Against the Death Penalty: 4 countries carry out 86% of documented executions - International Observatory of Human Rights \(observatoryihr.org\)](http://WorldDayAgainsttheDeathPenalty.org)

in some countries for people who have committed very serious crimes”<sup>3</sup> . Merriam law dictionary has defined death penalty as “*Death as a punishment given by a court of law for very serious crimes: capital punishment*”<sup>4</sup> and Cambridge dictionary defines “*the legal punishment of death for a crime as death penalty*”<sup>5</sup> The phrase 'capital punishment' comes from the Latin word “*capitalis*” means “*regarding the head*”.<sup>6</sup>

### **PRINCIPLE BEHIND IMPOSING CAPITAL PUNISHMENT:**

The sentencing principle behind imposing death sentence is based on deterrent theory of punishment whereas to prevent the offender from committing the crime again. The reputed founder of this deterrent theory jurist Jeremy Bentham has pin pointed that this deterrent theory is the principle of hedonism as “*the man would be deterred from committing the crime, if the punishment applied was swift, certain and severe*”<sup>7</sup>The rigorous punishment imposed on other accused will eventually invoke a fear and restrain in minds of the other crime attempters before they commit any heinous crime.

Retributive theory of punishment also frames death penalty . the retributive justice that pay back the offender. This retributive theory of punishment exist way back from ancient Near East, including the Code of Ur-Nammu (c. 2050 BC), the Laws of Eshnunna (c. 2000 BC), and the Babylonian Code of Hammurabi (c. 1750 BC). These legal systems are collectively framed as cuneiform laws, that is crimes which are violations of other people’s rights. Retribution is based on the concept of *lex talionis*—that is, the law of retaliation as “*an eye for an eye and a tooth for a tooth.*” This retributive theory was disapproved by supreme court cases as the retributive theory based approach on punishment is of revenge based approach. . In *Deena v. Union of India*,<sup>8</sup> Hon’ble court held “*retribution involved in the theory ‘tooth for tooth’ and ‘an eye for an eye’ has no place in the scheme of civilized jurisprudence.*”<sup>9</sup> And in the case of *Shatrughan*

---

<sup>3</sup> <https://www.collinsdictionary.com/dictionary/english/death-sentence>. viewed

<sup>4</sup> <https://www.merriam-webster.com/dictionary/death%20penalty>

<sup>5</sup> <https://dictionary.cambridge.org/dictionary/english/death-penalty>

<sup>6</sup> <http://www.bbc.co.uk/ethics/capitalpunishment/intro.shtml>, viewed on 03.03.2019

<sup>7</sup> Prof.N.V. Pranjape, Criminology &Penology With Victimology ,Theories of Punishment (Page 281) Central Law Publication Reprint 2015<sup>th</sup> Edition ,ISBN :978-93-82676-68-3

<sup>8</sup> (1983) 4 SCC 645

<sup>9</sup> Deena v. Union of India, (1983) 4 SCC 645, at para 10.

*Chauhan v. Union of India*<sup>10</sup>, Supreme Court ruled that “retribution has no Constitutional value”<sup>11</sup>

## **LEGISLATIVE BACK DROP ON DEATH PENALTY**

After several laws still retained by India government after British colonial government, which includes the code of criminal procedure 1898 (Cr. P.C) ., Indian Penal Code 1860(I.P.C)., The Explosive Substance Act ,1908. The other legislations that imposes death penalty are The Air Force Act ,1950., The Navy Act ,1957., The Army Act ,1950., The Boarder Security Force Act, 1968., The Defence Of India Act, 1971., The Coast Guard Act, 1978.,Narcotic Drugs And Psychotropic Substances Act, 1985 ., The Commission Of Sati (Prevention) Act , 1987.,The Scheduled Castes And Scheduled Tribes (Prevention Of Atrocities)Act,1989.,The Indo-Tibetan Border Police Force Act, 1992

Sec 367(5) of Cr.P.C requires the trial court to record reason if the court decide not to impose death sentence this was the stage before 1955 amendment on cr.p.c takes place. The 1955 criminal law amendment has altered the position on imposing death penalty as no longer a norm and it constrain the court that the trial court need not need special reason for not imposing death penalty.

The Criminal procedural code was re enacted by the year of 1973. A notable change is made under section 354(3) as “When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence”. Thus the 1973 enactment has shown the death penalty imposition is no more a norm and in case if the trail court imposes death penalty the court need to mention the special reason for imposing death penalty. The timeline of amendment has invoked the Criminal Law Amendment Act, 2013 deliberated imprisonment for life as “the remainder of that person’s natural life.” In December 2015, a Constitution Bench of the Supreme Court in

---

<sup>10</sup> (2014) 3 SCC 1.

<sup>11</sup> Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1, at para 245.

*Union of India. V. Sriharan*<sup>12</sup>, laid down that life imprisonment can mean imprisonment for the remainder of one's natural life.

The criminal amendment Act 2018 has inserted certain offences and punishment for the offences relating to rape on woman under twelve year of age and punishment for raping women between the age of 12 and 6 years.

### **ROLE OF LAW COMMISSIONS IN INDIA ON RETENTION AND ABOLITION OF DEATH PENALTY:**

The 35<sup>th</sup> law commission has report on "CAPITAL PUNISHMENT" published in 1967 has recommended for retention of death penalty in India. The commission has analysed various arguments of various death penalty abolitionist and retentionist and objectives of capital punishment. 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.<sup>13</sup> 35<sup>th</sup> law commission has recommended for the retention of section 303 of Indian penal code 1860 which prescribes mandatory death penalty whereas, In *Mithu v. State of Punjab*<sup>14</sup> Hon'ble Supreme court has held section 303 of Indian penal code as unconstitutional.

The 35<sup>th</sup> law commission's view on retention of death penalty retracted by 187<sup>th</sup> law commission report. 187<sup>th</sup> law commission report has released its report on 2003 bearing the title named "Mode of Execution of Death and incidental matters" The Commission had taken up this matter suo motu because of the "technological advances in the field of science, technology, medicine, anaesthetics". The method of execution should be no more as tradition like hanging the person in rope and making the person to strive for sufficient time for death. 187<sup>th</sup> law commission report has recommended for easing the death penalty execution mode by utilising technological or scientific method of execution.

---

<sup>12</sup> (2016) 7 SCC 1

<sup>13</sup> 262<sup>nd</sup> law commission report available at [Report262.pdf \(lawcommissionofindia.nic.in\)](https://www.lawcommissionofindia.nic.in/Report262.pdf) in page no : 19 viewed on 23.06.2021

<sup>14</sup> (1983) 2 SCC 277

The commission runned with three issues one with respect to the method of execution of death sentence ., secondly on the process of eliminating differences in judicial opinions among Judges of the apex Court in passing sentence of death penalty, and thirdly on the need to provide a right of appeal to the accused to the Supreme Court in death sentence matters. In 262<sup>nd</sup> law commission report the commission has strived hard to propose need of abolition of death penalty in India. The commission has stated that the concept retribution has failed to achieve the valid penological goals.

### **ARBITRARINESS IN SENTENCING – JUDGE CENTRIC SENTENCE:**

Hon'ble supreme court in several occasion has pin pointed the need of sentencing guideline specially in imposing death sentence. There exists no principled method present in Indian legislation for removing arbitrariness in sentencing as well grab on discretionary power of judiciary in imposing death penalty. *Bachan Singh v. State of Punjab*<sup>15</sup> has prescribed the principle in imposing death sentence under the categorisation of rarest of rare doctrine in the distinguishment of aggravating and mitigating circumstance. In order to prevent the sentence imposed by trial court becoming arbitrary *Bachan Singh* case is considered as remarkable precedent named “ *principled sentencing* ” . The point of argument is, whether the principled guideline entrusted by *Bachan Singh* case is considered as principle precedent in following cases which invokes death penalty? The phase of principled sentencing has moved its corner towards judge centric sentencing. The discretionary power given in the hands of judiciary lies unguided till now. The discretion to choose between life and death lies in the shoulders of judiciary.

Indian constituent assembly debates held up in the year of 1947 and 1949 has raised the issue in respect of judge centric sentencing nature of death penalty in India, arbitrariness in imposition, judiciary's discretion, poverty of the people and possibility of error in imposing death penalty is concerned in constitutional debate<sup>16</sup>. The discretion invokes judge to award punishment based on their social values and philosophy. The Inconsistency in the application of aggravating and mitigating circumstance is absorbed in many cases of supreme court and the rarest of rare principle is no more remained as rare in imposing death penalty against convicts.

---

<sup>15</sup> (1980) 2 SCC 684

<sup>16</sup> Ibid 13 , refer page no :15

Cases like, *Lok Pal Singh v. State of MP*,<sup>17</sup> *Ranjeet Singh v. State of Rajasthan*,<sup>18</sup> and *Darshan Singh v. State of Punjab*,<sup>19</sup> death sentence was upheld without referring to the “rarest of rare” doctrine of sentencing.

Death penalty is an ulterior punishment, once the sentence is executed it cannot bring back the life of person. In certain circumstance the hon’ble supreme court has accepted error occurred in imposing death penalty in the cases of *Bariyar*<sup>20</sup>, *Sangeet*<sup>21</sup>, and *Khade*<sup>22</sup>, Supreme Court has acknowledged that the conviction imposed on convicts of over 16 number of cases between the year of 2000-2013 (an error of 23.2%) occurred and death penalty imposed against those convicts are erroneous.

## CONCLUSION:

Thus, on analyzing various aspects of death penalty imposition and its unreversible consequence on those convicts who faced death penalty and to the person who are in the death row with mental agony need to be prevented. The only way-out of this dilemma to abolish the inhuman practice sentencing, that is imposing death penalty over the offender. As the discretion that vest with judges who are human have possibility to get influenced by many other factors and own values or personal approach towards the crime committed the accused. In order to avoid this situation and to protect the justice abolition of death penalty is needed.

---

<sup>17</sup> A.I.R. 1985 SC 891.

<sup>18</sup> (1980) 1 SCC 683

<sup>19</sup> (1988) 1 SCC 618.

<sup>20</sup> *Bariyar V. State of Maharashtra*, (2009) 6 SCC 498

<sup>21</sup> *Sangeet V. State of Haryana*, (2013) 2 SCC 452, At Para 33

<sup>22</sup> *Shankar Kisanrao Khade V. State of Maharashtra*, (2013) 5 SCC 546 (2011) 2 SCC 764.