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Constitutional Validity of Death Penalty

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ABSTRACT

Capital punishment or commonly known as 'death penalty or death sentence' is awarded for capital offences like murder or multiple murders, rape or for any other offence where there is provision of death sentence prescribed in the law. The basic argument for awarding death penalty is the theory of retributive justice. This theory embarks upon that the person who has committed such a grave offence he must also suffer the same fate. Death penalty is awarded to create a deterrent effect on society so that the people fear the consequences of the offence. In this research paper the author will discuss about the constitutional validity of death penalty and the recent trends about death penalty through various case laws and the opinions of eminent jurists and Hon'ble Judges and in the end would like to conclude with recommendations about constitutional validity of death penalty.

Keywords: *Death Penalty, Constitutional Validity, Capital Punishment, Deterrent Effect, Retributive Justice*

I. INTRODUCTION

One Capital punishment or commonly known as 'death penalty or death sentence' is awarded for capital offences like murder or multiple murders, rape or for any other offence where there is provision of death sentence prescribed in the law. The basic idea for awarding death sentence is that the people who commit such offence are considered as a threat to the society. Death penalty is also awarded to have a deterrent effect in the society. Although India follows the theory of restorative justice which is that the offender after being punished for the offence and after serving the awarded punishment may redeem itself for the harm he caused to the society and also to make him/her understand that the offence committed by him/her caused harm and to discourage them from causing any further harm to the society.

The basic argument for awarding death penalty is the theory of retributive justice. This theory embarks upon that the person who has committed such a grave offence he must also suffer the same fate. Death penalty is awarded to create a deterrent effect on society so that the people fear the consequences of the offence.

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As death penalty is abolished in many countries and United Nations is also of the view that countries must abolish death penalty the question of constitutional validity has come up before the Apex court in many cases. Since the Right to Life enshrined under Article 21 of the Indian Constitution is a basic fundamental right which cannot be taken away, it is one of the most major and foremost arguments for abolishing death penalty even in the rarest of the rare cases but the Apex court till now has not ruled out capital punishment.

The Apex court in a catena of judgments has ruled in the favour of death penalty but it has changed its stand on awarding of death penalty from abolishing Section 303 of The Indian Penal Code, 1860 awarding mandatory death penalty to awarding death penalty in the rarest of rare cases.

(A) Historical Background

Since the enactment of The Indian Penal Code, 1860 death penalty was a part of the code. It has survived since its inception but with a few and subtle changes which were required to be done due to change in times and it was also the way forward. When the code was enacted there was Section 303 which was to give mandatory death penalty. But section 303 there was mandatory death sentence to only those who were earlier convicted of life imprisonment and they commit the offence of murder. There was no classification of murders as such but the only difference between Section 302 and 303 was that mandatory death penalty would only be given to offenders who have committed the offence of murder who were convicted and serving life sentence.

II. CONSTITUTIONAL VALIDITY

Jagmohan Singh V. State of U.P.² was the first case where the question of constitutional validity of death penalty came before the apex court. Section 302 of IPC, 1960 (Death penalty for murder) was put under the test of constitutional validity. The main contention put forward before the Supreme Court was that it was violative of many fundamental rights granted to citizens and especially violative of Article 14 stating the reason that in two similar cases the punishment given for murder is life imprisonment and in some cases death penalty is given. The Apex court rejecting this contention held that the discretion of awarding death penalty or giving life imprisonment. The judges have to look into the merits of the case and even the circumstances of the crime and thus Section 302 of The Indian Penal Code, 1860 was not held to be unconstitutional.

²Jagmohan Singh V. State of U.P, AIR 1973 SC 947.

After the case of Jagmohan Singh V. State of U.P.,³ The Code of Criminal Procedure 1898, was replaced by Code of Criminal Procedure 1973 and this new code contains two provisions [Section 235(2) and 354(3)] which regulates the infliction of death sentence wherever provided in the law. The former sections embarks a duty upon the judge to hear the person convicted of an offence on the question of sentencing before awarding of the sentence and the later provision requires the judge to state reasons for the sentence awarded to the convict in capital cases. If the judge exercises his discretion and awards death penalty than he must record the special reasons for the same.

The constitutional desirability of death penalty came up before the apex court in Rajindra Prasad V. State of U.P.⁴ though the main question was not of constitutional validity of death penalty but the court was invited to consider as to on what grounds and circumstances death penalty can be awarded. Justice Krishna Iyer while pronouncing the majority judgment of the court discussed wide range of grounds concerning death penalty. Justice Iyer pointed out that “*Section 302 of Penal simply gave discretion to the judges to impose either death sentence or life imprisonment on the persons convicted for the offence for murder, without giving any guidelines as to the exercise of that discretion*”⁵. He stated that “*unguided discretion in this matter even in the hands of the judges was grave risk as the question is of life and death. The matter should be reviewed because of the irrevocable nature of the death penalty. The error committed by the Judges in sentencing a person to death was beyond correction.*”⁶

Justice Krishna Iyer gave some factors on which the guidelines for awarding death penalty should be formulated:

1. Change is legislative policy towards life and death.
2. Increased awareness or growth for abolition or restricted use of death penalty.
3. Human rights as well as the concept of social justice which are an integral part of the Indian Constitution.

According to Justice Krishna Iyer “*Death penalty could be validly inflicted in case of hardened murderers posing a consistent threat to social security.*”⁷ He further observed “*If the murderous operation of a diehard criminal jeopardises social security in persistent, planned and perilous fashion, than his enjoyment of fundamental rights may be rightly annihilated*”.

³ Ibid.

⁴Rajindra Prasad V. State of U.P, AIR 1979 SC 916.

⁵ Ibid.

⁶ Supra Note 3.

⁷ Ibid.

The observations made by Justice Krishna Iyer clearly establishes that he was not against complete abolishment of death penalty but the court can impose death sentence upon a person when it feels reasonable and necessary. It could be further said that death penalty was constitutionally valid only if given to persons who are a persistent threat to society and if not hanged may cause further harm to the society.

In *Bachan Singh V. State of Punjab*⁸ the case of Rajindra Prasad⁹ was overruled and it was firmly established that death penalty for the offence of murder was constitutional. In *Bachan Singh* case it was argued that the case of *Jagmohan Singh*¹⁰ needs to be reconsidered on the following points:

1. *Jagmohan* case was decided keeping in mind the old code of criminal procedure whereas in the new code of criminal procedure death penalty is limited in cases of murder.
2. India being a signatory member to International Covenant on Civil and Political Rights and according to the covenant capital punishment has been abolished, so as a signatory member to the covenant it is admitted that death penalty be abolished.

The court by a majority of 4:1 ruled that Section 302 of the Indian Penal Code, 1860 and Section 354(3) of The Code of Criminal Procedure, 1973 were not violative of the Indian constitution

Justice Sarkaria in his majority judgement had taken the view that “*sentencing discretion was inherent and desirable and the sentencing process would be unjust unfair and blindly uniform if this discretion was taken away from the judges*”.

Justice Bhagwati in his dissenting opinion took a view that Section 302 of the Indian Penal Code, 1860 and Section 354(3) of The Code of Criminal Procedure, 1973 were both violating articles 14 and 21 of the Indian Constitution. He also pointed towards the changing trend in the international scenario towards abolishment of death penalty. He also in his view opined that death penalty is different from all other punishments merely because of its nature as it is irreversible and this sole discretion of courts to decide the question of someone’s life and death was not proper.

The decision of *Bachan Singh*’s case still holds ground as the courts are still awarding death penalty but with great care and caution and are awarding death penalty only is brutal, gruesome

⁸*Bachan Singh V. State of Punjab*, 1980 2 SCC 684.

⁹ *Supra* Note 3.

¹⁰ *Supra* Note 1.

and rarest of the rare cases.

In *Machhi Singh V. State of Punjab*¹¹ the apex court reiterated its view and held that death penalty should be awarded in the rarest of the rare cases but in this case the apex court went a step further and gave some guidelines for determining rarest of the rare cases. The guidelines related to the manner in which the murder was committed, motive for commission of the murder, personality and magnitude of the murder and anti social or socially abhorrent nature of the crime.

*Kehar Singh V. Union of India*¹² the question of constitutional validity of death penalty was again raised before the apex court relying upon the dissenting opinion given by Justice Bhagwati in *Bachan Singh's* case. The contention was rejected by the apex court.

In *Jumman Khan V. State of U.P.*¹³ the supreme court holding firm rejected the plea of the petitioners for death penalty being unconstitutional for being unpersuasive was rejected.

(A) Mandatory Death Penalty

This means that if a person commits a certain kind of offence than he will be punished only with death sentence. In India mandatory death sentence existed in the Indian Penal Code, 1860. Section 303 of the Indian Penal Code, 1860 provided for mandatory death sentence but the main ingredient for attraction of this penal provision was that person who was already serving a life sentence commits a murder would be punished for death. The basic condition to get charged under this section and to get a mandatory death sentence a person must commit murder who is already serving life sentence.

The question of constitutional validity of mandatory death sentence (Section 303 of the Indian Penal Code, 1860) came up before the Apex court in the case of *Mithu V. State of Punjab*¹⁴. The main and basic contention for challenging the constitutional validity of mandatory death penalty was that Section 303 of the Indian Penal Code, 1860 is violative of Article 14 (Right to Equality) and Article 21(Right to Life) of the Indian Constitution, 1950. It was further contended that the intention of legislature was wrong in classifying different kind of murders as it was violative of Article 14 of the Indian Constitution, 1950.

(B) Recent Trend

In the current era death penalty still holds firm and is still awarded in the rarest of the rare

¹¹*Machhi Singh V. State of Punjab*, 1983 AIR 957.

¹²*Kehar Singh V. Union of India*, AIR 1989 SC 653

¹³*Jumman Khan V. State of U.P.*, 1991 AIR 345

¹⁴*Mithu V. State of Punjab*, AIR 1983 SC 473.

cases.

In the year 2018 on delivering the judgement in the case of ChhannuLal v. State of Chattisgarh¹⁵, the Supreme court judge, Justice K. Joseph said that *"The constitutional regulation of capital punishment attempted in Bachan Singh versus State of Punjab in 1980 has failed to prevent death sentences from being 'arbitrarily and freakishly imposed' and that capital punishment has failed to achieve any constitutionally valid penological goals, we are of the view that a time has come where we view the need for death penalty as a punishment, especially its purpose and practice."*

Furthermore, Justice Deepak stated that *"In our view, since the Constitution Bench in Bachan Singh vs. State of Punjab, has upheld capital punishment, there is no need to re-examine the same at this stage,"*

The constitution validity of death penalty has been restored in India by the Supreme Court. Although it is difficult to award death penalty as compared to other Middle East countries. This is so because in India it is considered as every case where capital punishment is awarded deals with a human life and that life enjoys some constitutional protections given under Article 21 of the Indian Constitution. While giving death penalty to that life the process should maintain some high constitutional standards and should be as per the constitutional principles.

In the recent judgment of Mukesh&Anr. V. State of N.C.T. of Delhi¹⁶ (commonly known as 'Nirbhaya Gang Rape Case) which took the entire country by storm and caused a tsunami in the Apex court. This case was a case of absolute brutality where a girl was brutally gang raped which lead to her death. In this case the motive behind the commission of this brutality was considered and also the brutality which was done by the convicts. When the incident came to limelight it caused a stir in the country leading to protests, candle marches all across the country wanting justice for the victim. Looking into the gravity of the offence and the way the offence was done it brought about a change in rape laws and the Indian Penal Code, 1860 was amended. Death Penalty was also added as a punishment in cases where during the offence of rape an injury is caused which causes death of the victim or to be in persistent vegetative state¹⁷. Death penalty was awarded to the four 4 convicts. Last ditch efforts were made to stay the execution

¹⁵ChhannuLal v. State of Chhattisgarh, SCC OnLine SC 2570.

¹⁶Mukesh&Anr V. State of N.C.T. of Delhi, (2017) 6 SCC 1.

¹⁷ Section 376A. Punishment for causing death or resulting in persistent vegetative state of victim.— Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

of death penalty or to commute the sentence but to no avail. The Apex court did not stay the execution and after all the legal remedies available they were hanged.

III. CONCLUSION

If we see the historical background regarding death penalty, it was present from time immemorial the kings when they were the rulers of their dynasties used to give death penalties the British India there was presence of death penalty. The Indian Penal Code, 1860 which was made during the time of British India there was presence of death penalty. Before 1955 death penalty was a rule and life imprisonment was an exception but in today's scenario life imprisonment is a rule and death penalty is in rarest of the rare cases. In the international scenario there are two different theories i.e. some countries are in favour of death penalty and in the United States there are some states who still have death penalty but some states have abolished it. In India the apex court through its various judgments have not completely abolished death penalty and are in favour of death penalty. Although through various cases and with change in time the apex court have changed in the manner that it abolished mandatory death penalty stating it to be violative of Article 14 and Article 21 of The Indian Constitution. But now the scenario is that death penalty is awarded in the rarest of the rare cases. At the end author would like to conclude that death penalty should not be abolished as we can see in the Nirbhaya case that so many last ditch efforts were made to avoid execution of death sentence. The basic fundamental reason for death penalty to be valid and present is to have a deterrent effect on the society. There are some cases in which the restorative theory of justice does not apply and offenders should be treated by retributive theory of justice. Even in author's eyes death penalty should not be completely abolished as it still holds ground and it creates a deterrent effect in the society. Death penalty should be awarded in the rarest of the rare cases and it might not create a deterrent effect on the society completely but even if it creates fear in mind of some than it is good for the society.

4. RECOMMENDATIONS

The author would like to recommend that death penalty should never be abolished and it must be awarded in the rarest of the rare cases. Even though many countries across the globe and even India is a signatory to International Covenant on Civil and Political Rights and as per the covenant, death penalty should be abolished but many of the signatory members have not abolished it and are keeping it as a part of their system. Death penalty should never be abolished for the reason for having just that fear of death penalty. The argument that death penalty is violative of Article 14, 19 and 21 of The Indian Constitution and should be abolished but it is

given in rarest of the rare case and what the rights of those people whose rights were violated by these criminals. Death penalty should never be abolished though some guidelines must be there for sentencing a convict death penalty but it should not be abolished and should stay in the penal provision.