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Abolition of Death Penalty in India: A Critical Study

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ABSTRACT

There has been an unprecedented controversy about the status of death penalty in India. The endless debate on the question seems to have been accelerated by the developments having taken place in western liberal societies, particularly the developed countries, such as, the U.K. & the U.S.A. The question of death penalty brings at forefront many related issues and also the confusion existing about the penological purposes served by it. It also touches a larger issue as to which model of punishment- crime control model or due process model- better serves the needs of modern India. The question needs to be examined in this context is whether death penalty is a product of such weighing of interests. Retention of death penalty has become a burning issue in this country since 1980. Although in theory death penalty continues to be a supreme punishment but has to be awarded in the rarest of rare cases. The question arises where the supremacy lies if the punishment cannot be awarded in 99% cases. Even the doctrine of rarest of rare cases has been attacked on various grounds from time to time. The perception of the judges is also not uniform in this regard. This paper critically examines the developments towards the abolition of death penalty.

I. INTRODUCTION

It is challenging to assume a society without crime. Initially, the King used to provide punishment to the guilty persons. Then the concept of police state came into existence which protect you from outside attack. But the concept of police state has its shortcomings and eventually it led to evolution of concept of welfare state. Death Penalty is one of the numerous forms of punishment given to the offenders since ancient time. Death Penalty means terminating a person's life if he is found guilty of serious crimes mentioned under various laws including Indian Penal Code. There are three theories of punishment. According to Deterrent theory, the object of punishment is not only to prevent the wrong doer from doing a wrong a second time, but also to set him as an example before the society. According

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to retributive theory, the victim is allowed to take revenge against the culprit. According to Reformative theory, the object of punishment is the reformation of criminals. The researcher in this paper will discuss various cases to understand the meaning and scope of the term 'rarest of rare'. After this, comparative study of the trends of abolition of death penalty in the world will be done and India's stand on the same will be evaluated. The researcher in this paper will study the recommendations given by the Law Commission of India in its 262nd Report for abolition of death penalty in India.

(A) Objectives of the Study

- i. To analyse the 'rarest of rare' doctrine where awarding of death penalty is justified.
- ii. To analyse the judgments given by different High Courts and the Supreme Court of India in which death penalty is awarded.
- iii. To analyse the need for abolishing death penalty in the light of various Law Commission Reports.

(B) Research questions:

- i. Whether excessive discretion is given to the Judiciary while deciding 'rarest of rare' doctrine which leads to abuse of power?
- ii. What is the international trend towards abolition of death penalty in rest of world?
- iii. Whether there is a need to reform in existing Criminal Law Justice System by abolishing death penalty?

(C) Methodology

The present research is based on doctrinal methodology and critical research which aims at finding out the loopholes in the existing law and suggesting reforms to improve the law. The researcher wants to do comparative analysis of the countries where death penalty has been abolished. The research method adopted is qualitative, in which the comparison of different judiciary decisions will be done for the research paper.

II. ANALYSIS OF CASES ON DEATH PENALTY

In *Bachan Singh vs State of Punjab*,³ four Judges upheld the constitutional validity of the Death Penalty. Justice Bhagwati disagreed and wrote a dissenting opinion. The majority

³*Bachan Singh v State of Punjab*, AIR 1982 SC 1325.

proceeded to develop a framework for future sentencing when deciding between life imprisonment and death penalty. The framework required considering intensifying and diminishing circumstances concerning both crime and the accused and to use death sentence only in rarest of rare cases. Though it has been mandated in *Bachan Singh* that factors concerning both crime and accused must be considered, yet Death Penalty in last few years has been crime-centric meaning Judges have focused mainly on the brutality of the crime without sufficiently taking circumstances of the accused into account.

In *Machi Singh vs State of Punjab*,⁴ the accused killed 17 persons including men, women and children when they were sleeping as a result of family enmity with the victim's family. The Supreme Court observed that when the community is so shaken that it anticipate that Judges to pass order for death penalty irrespective of their personal viewpoint, then Judges must pass such order for death penalty.⁵ "Manner of commission of murder", "Motive for the commission of murder", "Anti-social or socially abhorrent nature of the crime", "Magnitude of crime" and "Personality of victim of murder" are some factors need to be observed before awarding death sentence.⁶ It can be argued that is not the Legislature a better judge than the society? The word community has been used several times. If capital punishment is to be decided by the community, how the Supreme Court decide what the community wants. So far as interpretation is concerned, Supreme Court has the last word. The Court has no constitutional mechanism to determine what the society wants. The Court can only say whether Constitution prohibits capital punishment or not.

So, the Apex Court has held that the trial court can pass a sentence for death penalty only if after paying attention to the mitigating factors, there is no option except passing of sentence for death penalty. It is observed that generally the analysis done by Courts is flawed because too much emphasis is given to the nature of the offence, brutality involved and the Judges personal viewpoint about crime and Law.⁷ The likelihood of reformation of the accused is completely ignored.⁸

*Ediga Anamma case*⁹ is another landmark judgment, where Justice Krishna Iyer speaking through the Court observed that very young age or old age of the accused is a relevant factor in converting the punishment from death penalty to life imprisonment. Also, socio-economic and psychic factors are to be considered before inflicting death penalty.

⁴*Machi Singh v State of Punjab*, AIR 1983 SC 957.

⁵ *Ibid*

⁶ *Ibid*

⁷ KD GAUR, TEXTBOOK ON INDIAN PENAL CODE 500 (2016).

⁸ *Ibid*

⁹*Ediga Anamma v State of Andhra Pradesh*, 1974 AIR 799, 1974 SCR (3) 329.

In *Deen Dayal case*¹⁰—The constitutional validity of Section 354 (5) of CrPC, 1973 was challenged before the Supreme Court. The Court upheld the section 354(5) on the basis of medical expert from AIIMS who appeared before Supreme Court in favor of the Government. It was held that the method of hanging the prisoner by neck does not violate the Article 21 of the Constitution.

In *Dhananjay Chatterjee case*¹¹—Death Penalty was awarded to the accused who committed rape and murder of a school going girl. The Supreme Court held that the punishment must depend upon the brutality of the crime, the behavior of the accused and the helpless and vulnerable state of the victim. Also, the incident has shaken the very foundation of the society because the security guard who was supposed to protect the inhabitants of society has committed such a barbaric crime.

Applying the aforesaid principles, the Supreme Court in a recent judgment of *Mukesh and another vs. State of NCT of Delhi*¹² (Nirbhaya case) involving the brutal rape and murder of paramedical student, observed that Court has to consider simultaneous effect of both the intensifying and diminishing factors and has to strike a balance between the two to see in which side scale of justice tilts. In the present case, though there were diminishing factors like young age of the offender, helpless and sick parents, post crime regret and good conduct in jail, yet the intensifying factors outweighed them.¹³

Though the ‘rarest of rare’ doctrine has been formulated in *Bachhan Singh*¹⁴ case and *Machi Singh*¹⁵ case, the notion of Judges regarding crime and law is a decisive factor in deciding the cases. In *Ediga Anamma*¹⁶ case, the mental condition and financial condition and the fact that the female accused belongs to rural village were taken into account for converting death penalty into the life imprisonment. There is a thin line between the ‘rarest of rare’ and ordinary case but again its judicial discretion that plays the deciding factor. In *Dhananjay Chatterjee*¹⁷ case and in *Mukesh and another vs. State of NCT of Delhi*¹⁸ (Nirbhaya case), the accused charged for raping and murdering the victims were sentenced to death. On the other hand, in a similar case in *Kumudi Lal vs State of Uttar Pradesh*¹⁹, where the appellant was

¹⁰ *Deena @ Deena Dayal Etc. Etc v Union Of India And Others* , AIR 1983 SC 1155.

¹¹ *Dhananjay Chatterjee v State of West Bengal & Ors.*, (1994)2 SCC 220.

¹² *Mukesh and another v State of NCT of Delhi*, (2017)6 SCC 1

¹³ *Ibid*

¹⁴ *Supra* note 1

¹⁵ *Supra* note 2

¹⁶ *Supra* note 7

¹⁷ *Supra* note 9

¹⁸ *Supra* note 10

¹⁹ *Kumudi Lal v State of Uttar Pradesh*, (1999)4SCC 108

convicted for rape and murder of a 14 –years-old girl who had gone to the fields for urinating was given the benefit of conversion of death sentence to life imprisonment on the ground that since the victim did not raise the cries for help earlier, this was not the ‘rarest of rare’ case.²⁰ It can be argued that Supreme Court is making contradictory statements and a larger bench should examine the question regarding death penalty in India.

From the analysis of the above cases, it is clear that application of ‘rarest of rare’ test might lead to erroneous judgments and depends on the discretion of the Judiciary. There is no consistency in the practice followed by Judiciary when it comes to awarding of death sentence. In some cases death punishment is given to the accused while in other cases it is not. Also, many times death penalty is reduced to life imprisonment. This approach of giving too much discretion to the Judges results in uncertainty in criminal law justice system which might prove fatal to its existence. While deciding ‘rarest of rare’, Judges substitute their own subjective opinion as what should be done instead of clearly pre-determined legal criteria. So, standardized guidelines should be set that covers grounds for identification of case as rarest of rare.²¹ The decision must be taken with due care and rationality and death penalty should not be decided in hurriedness.²² Also, death penalty does not give any opportunity to the accused to reform and rehabilitate himself by improving his ways. This is in sharp contrast to reformatory theory of punishment which states that an opportunity should be given to the convict so that he can reform himself. Three main grounds for abolition of death penalty raised by the abolitionists are: 1) Irrevocability of the capital punishment and the chances of innocent persons being put to death.²³ 2) Death Penalty does not serve any purpose for rendering punishment. The fact that death penalty has deterrent effect is not established. The retribution effect is contrary to humanness and international trend. The idea of reformation is rendered invalid by the death sentence.²⁴ 3) Putting to death by all modes is a cruel, inhuman and undignified punishment.²⁵

III. ABOLITION OF DEATH PENALTY: A COMPARATIVE ANALYSIS

The death penalty in the country will definitely be abolished one day, thus permitting the country to respect the objectives and purposes of its international treaty commitments that has

²⁰ *Ibid*

²¹ Raashi Vaishya, *The Doctrine of Rarest of The Rare*, available at <http://www.legalserviceindia.com/legal/article-726-the-doctrine-of-rarest-of-the-rare.html> (Last visited on 19.11.2020).

²² *Ibid*

²³ Swasit Mahapatro, *Rarest of rare doctrine and the concept of Social engineering*, 1(5) Journal of International Academic Research for Multidisciplinary 277(2013).

²⁴ *Ibid*

²⁵ *Ibid*

been in line with the other countries of the world.²⁶

In 1948, the UN General Assembly adopted Universal Declaration of Human Rights (UDHR), which strongly advocates the right to life.²⁷ Article 5 of UDHR condemns the use of torture, cruel and inhuman and undignified punishment.²⁸

Article 6 of ICCPR observes that the death penalty will be given only in the case of ‘most serious crimes’ and in consonance with the ICCPR.²⁹ However, the term ‘most serious crimes’ is not defined anywhere and it is open to various interpretations and it may be interpreted in a broader way by different nations to include various crimes. Further, the Second Optional Protocol to ICCPR aiming at the abolition of death penalty was adopted on 15th December, 1989.³⁰

Protocol No. 6 to the ECHR seeks for elimination of the death penalty and no one shall be sentenced to death penalty except in times of conflict or imminent danger of conflict.³¹ In 2002, Protocol No. 13 to the ECHR has abolished death penalty in all circumstances and no exemption is allowed from this Protocol in all circumstances.³²

Some of the countries like India, China, USA, Iran and Japan are not following international trend and has retained death penalty as one of the forms of punishment.³³ So, unlike international trends, India has retained death penalty on the ground that it will be awarded only in the ‘rarest of rare’ cases and for ‘special reasons’.³⁴ It is very crucial that India should realize the importance of abolishing death penalty in order to be in consonance with the other countries in the world. India’s stand in retaining death penalty is contrary to the international trend but it always seeks for one or other ground to award such punishments.

IV. REPORTS ON DEATH PENALTY:

In 1967, Law Commission in its 35th Report opined for retention of Capital Punishment in

²⁶Autri Saha & Pritika Rai Advani, *The Death Penalty: A New Perspective in Light of Santosh Bariyar Case*, 2 NUJS L. Rev. 669(2009).

²⁷ Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

²⁸ *Ibid*

²⁹ International Covenant on Civil and Political Rights art.6, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].

³⁰ Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, 15 December 1989, A/RES/44/128.

³¹ Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty, 28 April 1983, ETS 114.

³² Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances, 3 May 2002, ETS 187.

³³ *Supra* note 5.

³⁴ Monica Sakhrani & Maharukh Adenwalla, *Death Penalty: Case for Its Abolition*, 40(11) EPW 1026 (2005).

India.³⁵

In 2003, Law Commission in its 187th Report observed that the medical science has made enough progress to reconsider *Deen Dayal's position*.³⁶ It states that lethal injection be used. The Commission is of the view that administering the lethal injection should be provided as an alternative mode of execution of death sentence.³⁷

Law Commission in its 262nd report has recommended that there should not be any death penalty for crimes other than terrorism related offences and waging war.³⁸ First, the commission strongly agrees that death penalty does not serve the goal of deterrence.³⁹ Second, the Commission is of the view that the chance of error while rendering death penalty as punishment cannot be ruled out because of pitiable condition of police investigation, unwarranted delay and lack of proper representation to the accused by the lawyers during all stages of proceedings.⁴⁰ The Commission suggested that adequate compensation should be provided to the victims and security should be provided to the witnesses as well as victims so that restorative attributes of justice are achieved.⁴¹ Thirdly, the Commission further observed that unprincipled approach is followed by the Judges while imposing death penalty and there is arbitrariness in identifying 'rarest of rare' cases and there is failure of justice because the doctrine of rarest of rare is inconsistent.⁴² Three members of the commission however argued that indeterminacy and error in judgment is inherent and all too human, and so this is not reason enough to abolish death penalty in all situations.⁴³

According to Death Penalty India Report, "74.1% of India's Prisoners sentenced to death are very poor and belongs to backward and religious minority sections of the society. 62% of India's prisoners have not completed their secondary school education."⁴⁴ Also, Death Penalty India Report conducted by National Law University Delhi indicates that majority of the prisoners who were given death penalty are economically weak and poor and belongs to

³⁵ Law Commission of India, *Capital Punishment*, Report no. 35 (September 1967).

³⁶ Law Commission of India, *Mode of Execution of Death Sentence and Incidental Matters*, Report no. 187 (October 2003).

³⁷ *Ibid*

³⁸ Law Commission of India, *The Death Penalty*, Report no.262 (August 2015), <http://lawcommissionofindia.nic.in/reports/Report262.pdf> (Last visited on 19.11.2020).

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ *Ibid*

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ National Law University Delhi, *Death Penalty India Report* (2016). Available at https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5b4ced7b1ae6cfe4db494040/1531768280079/Death+Penalty+India+Report_Summary.pdf (Last visited on 19.11.2020).

backward classes and religious minorities sections of the society.⁴⁵ So, if a prisoner is poor and not educated, there are more chances that he did not get proper legal representation and the chances that he is not present in most legal proceedings dates are more because the person is not aware about how important it is for him to be present in all legal proceedings. The Judicial System is supposed to be fair and equal for all. Any lapses in it are a problem. With the death penalty in particular, there is even less room for faults because it is unique in the sense that it ends someone's life. A crucial factor in the outcome of case is the quality of legal representation. But poor people don't have access to quality lawyers and are left clueless about the proceedings in their own case. We cannot turn a blind eye to this any longer as the death penalty is having flaws in India.

V. DEATH PENALTY AND WOMEN SAFETY

Capital punishment supports the retributive theory of punishment which believes in seeking revenge from the offender by the family of the victim. Capital punishment is irreversible and it cannot be reversed if there is error in the judgment. There is a likelihood that the death punishment may result in a miscarriage of justice in some cases and to the conviction of innocent persons. It can be argued that the Judges too have their own viewpoint regarding the retention or abolition of death penalty and they might award death to one and life imprisonment to another in similar situations and the possibility of inaccurate judgments cannot be ruled out. The death penalty – instead of acting as a deterrent, it could lead to murder of rape victims.⁴⁶ Moreover, if the punishment for murder is death and the punishment for rape is also death, then there are more chances that rape culprits will kill the rape victims so that there is lesser chances of their conviction by the Law Authorities.⁴⁷ It can be argued that many-a-times the accused are punished with death penalty by the Judiciary because they are focusing on Utilitarian philosophy which aims at satisfaction of the maximum number of people in the society so that maximum people have a soothing effect on their minds. Suggestions for improving the current situations relating to death penalty and women safety:

- i. In case of death penalty, a separate legislation is required or amendment in the existing law is required so as to incorporate a detailed procedure in awarding death sentence.⁴⁸ In my view, the 'rarest of rare' doctrine needs to be re-examined as it has failed to

⁴⁵ *Ibid*

⁴⁶ Jahnavi Sen, Seven Reasons Why We Shouldn't Demand the Death Penalty for Rape (January 31, 2020). Available at <https://thewire.in/women/rape-death-penalty> (Last visited on 19.11.2020).

⁴⁷ *Ibid*

⁴⁸ Dr. Sunaina, *A Critique on 262nd Report of the Law Commission of India*, 2 (7) International Journal of Law

deliver on its promise and must be re-examined. We can keep the accused in jail till the end of his life as an alternative to death penalty.

ii. The matters on death penalty should be decided by not less than thirteen judges since it involves the termination of one's life and death penalty should be given only when majority of Judges decided in favor of execution by analyzing the facts and applying legal reasoning.⁴⁹

iii. The expenses of persons who are punished with death penalty must be borne by the State and his case must be heard by the Supreme Court in all cases where death penalty has been awarded by the subordinate courts.⁵⁰ This will remove the unfairness done to the poor persons who are awarded with death penalty but is unable to file appeal against their conviction in the Supreme Court due to financial hardship.

iv. Law Schools in association with the Bar Council of India and States can help in generating new ideas relating to the punishment of death penalty by holding debates and organizing seminars and conferences and by having active involvement of legal professionals.⁵¹

v. It is noticed that the stigma attached to a rape victim stops her from reporting the crime or makes her delay in reporting the incident to the police.⁵² Hence, it is necessary that proper counseling should be provided to rape victims to inculcate confidence in them and initiate action immediately without delay.⁵³

vi. The delay in disposal of rape cases, which at present ranges between 4 to 6 years, be reduced.⁵⁴

vii. Incest rape should be made a statutory offence-Incest which consists in sexual intercourse between persons within a specified degree of consanguinity(related by birth),namely sexual intercourse by a man with his grand-daughter, daughter, sister or mother, etc. and by a woman with her father, grandfather, brother or son is not a separate crime under Indian Penal Code.⁵⁵ Of course, marriage between the prohibited degrees of relationship is not valid according to the Hindu Law unless such marriage is sanctioned by custom.

and Legal Jurisprudence Studies 68 (2015).

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ *Ibid*

⁵² *Supra* note 5

⁵³ *Ibid*

⁵⁴ *Ibid*

⁵⁵ *Ibid*

viii. In view of special nature of sexual offences as explained earlier therapeutic approach that considers criminals a sick person would be most suitable.⁵⁶ It is therefore in some of the states in the United States sex offenders are considered as neurotic persons and psychotherapy treatment is given to them during the period of their detention in jail.⁵⁷ In India, no such treatment is available in jail.⁵⁸ However, it is felt that if the offenders are treated psychologically they may not repeat the offence in future and may feel repentant of having committed a dastardly crime.⁵⁹

VI. CONCLUSION

Proper guidelines and detailed procedure must be issued so that there is no disparity in identifying the 'rarest of rare' case. The comparative analysis of various countries show that majority of the countries have abolished the death penalty. Moreover, if the punishment for murder and rape would be death penalty, then there are more chances that rape perpetrators will kill the rape victims so that there is lesser chances of their conviction by Law Authorities. Law Commission in its 262nd report has rightly recommended that there should not be any death penalty for crimes other than terrorism related offences and waging war. So, death penalty should not be given except for terrorism and waging war crimes. Since the existing punishments are adequate, there is hardly any justification for death punishment, which, in fact, might be retrogressive, instead of having any deterrent effect. The problem of shoddy First Information Reports, poor investigation and poor collection of evidence must be resolved by providing adequate training to the Police Officials.

⁵⁶ *Ibid*

⁵⁷ *Ibid*

⁵⁸ *Ibid*

⁵⁹ *Ibid*