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CAPITAL PUNISHMENT AND SENTENCING POLICIES

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ABSTRACT

All punishments are based on the same proposition i.e., there must be a penalty for wrongdoing. There are two main reasons for inflicting the punishment. One is the belief that it is both right and just that a person who has done wrong should suffer for it; the other is the belief that inflicting punishment on wrongdoers discourages other from doing wrong. The death penalty or capital punishment also rests on the same proposition as other punishments.

Keyword: *punishments, penalty, proposition, crime, criminal, justice, victims*

1. INTRODUCTION

"I cannot in all conscience agree to anyone being sent to the gallows. God alone can take life because he alone gives it".

- Mahatma Gandhi

All punishments are based on the same proposition i.e., there must be a penalty for wrongdoing. There are two main reasons for inflicting the punishment. One is the belief that it is both right and just that a person who has done wrong should suffer for it; the other is the belief that inflicting punishment on wrongdoers discourages other from doing wrong. The death penalty or capital punishment also rests on the same proposition as other punishments.

Death penalty is an integral part of the Indian criminal justice system. Increasing strength of the human rights movement in India, the existence of Death penalty is questioned as immoral. However, this is an odd argument as keeping one person alive at the cost of the lives of numerous members or potential victims in the society is unbelievable and in fact, that is morally wrong.

Death penalty is to be very sparingly applied with special reasons in cases of brutal murder and gravest offences against the state. About retention or abolition of capital punishment, debates are raging the world over amongst social activists, legal reformers, judges, jurists, lawyers and administrators. Criminologists and penologists are engaged in intensive study and research to know the answer to some perennially perplexing questions on Capital Punishment.

- Whether capital punishment serves the objectives of Punishment?
- Whether complete elimination of criminals through capital punishment will eliminate crime from the society?
- Whether complete elimination of crime from society is at all possible or imaginable?

Human beings are neither angels capable of doing only good nor are they demons determined to destroy each other even at the cost of self-destruction. Taking human nature as it is, complete elimination of crime from society is not only impossible but also unimaginable. Criminologists and penologists are concerned about and working on reduction of crime rate in the society. Social attitude also needs to change towards the deviants so that they do enjoy some rights as normal citizens though within certain circumscribed limits or under reasonable restrictions.

But we also have to think from victims' point of view. If victims realize that the state is reluctant to punish the offenders in the name of reform and correction, they may take the Law in their own hands and they themselves may try to punish their offenders and that will lead to anarchy. Therefore, to avoid this situation, there is a great need for prescribed and proportional punishment following Bentham's theory of penal objectives that pain of offender should be higher than pleasure he enjoys by commission of the crime. But this "higher" must have proportionality and uniformity too; for example, for theft, trespass, extortion and so forth, capital punishment is not reasonable and even life imprisonment is disproportionate and unreasonable.

2. MEANING OF DEATH PENALTY

Death penalty, also called Capital Punishment, execution of an offender sentenced to death after conviction by a court of law for a criminal offense. Capital punishment

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should be distinguished from extrajudicial executions carried out without due process of law. The term death penalty is sometimes used interchangeably with capital punishment, though imposition of the penalty is not always followed by execution (even when it is upheld on appeal), because of the possibility of commutation to life imprisonment.

The term "Capital Punishment" stands for most severe form of punishment. It is the punishment which is to be awarded for the most heinous, grievous and detestable crimes against humanity. While the definition and extent of such crimes vary from country to country, state to state, age to age, the implication of capital punishment has always been the death sentence. By common usage in jurisprudence, criminology and penology, Capital sentence means a sentence of death.

3. HISTORICAL BACKGROUND

Capital punishment is an ancient sanction. There is practically no country in the world where the death penalty has never existed. History of human civilization reveals that during no period of time capital punishment has been discarded as a mode of punishment. Capital punishment for murder, treason, arson, and rape was widely employed in ancient Greece under the laws of Draco (7th century BCE), though Plato argued that it should be used only for the incorrigible. The Romans also used it for a wide range of offenses, though citizens were exempted for a short time during the republic.

This finds support in the observation made by Sir Henry Marine who stated that "Roman Republic did not abolish death sentence though its non-use was primarily directed by the practice of punishment or exile and the procedure of questions.

4. CAPITAL PUNISHMENT IN INDIA

I. GENERAL

A careful scrutiny of the debates in British India's Legislative Assembly reveals that no issue was raised about capital punishment in the Assembly until 1931, when one of the Members from Bihar, Shri Gaya Prasad Singh sought to introduce a Bill to abolish the punishment of death for the offences under the Indian Penal Code. However, the motion was negative after the then Home Minister replied to the motion.

The Government's policy on capital punishment in British India prior to Independence was clearly stated twice in 1946 by the then Home Minister, Sir John Thorne, in the debates of the Legislative Assembly. "The Government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided".

At independence, India retained several laws put in place by the British colonial government, which included the Code of Criminal Procedure, 1898 ('CrPC. 1898'), and the Indian Penal Code, 1860 ('IPC'). The IPC prescribed six punishments that could be imposed under the law, including death. For offences where the death penalty was an option, Section 367(5) of the CrPC 1898 required courts to record reasons where the court decided not to impose a sentence of death:

"If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed."

In 1955, the Parliament repealed Section 367(5), CrPC 1898, significantly altering the position of the death sentence. The death penalty was no longer the norm, and courts did not need special reasons for why they were not imposing the death penalty in cases where it was a prescribed punishment. The Code of Criminal Procedure was re-enacted in 1973 ('CrPC'), and several changes were made, notably to Section 354(3):

"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."

This was a significant modification from the situation following the 1955 amendment (where terms of imprisonment and the death penalty were equal possibilities in a capital case), and a reversal of the position under the 1898 law (where death sentence was the norm and reasons had to be recorded if any other punishment was imposed). Now, judges needed to provide special reasons for why they imposed the death sentence.

These amendments also introduced the possibility of a post-conviction hearing on sentence, including the death sentence, in Section 235(2), which states:

"If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

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Various laws under which death penalty can be prescribed as a possible punishment in India are given at Annexure-I

The punishment to which offenders are sentenced under the provision of Indian penal Code.

- Capital punishment
- Life Imprisonment
- Imprisonment (rigorous and simple)
- Forfeiture of property
- Fine.

Capital punishment is one of the abrasive punishments which are provided under the IPC which involve taking of life of accused of his wrongful act. The risk of penalty is the cost of crime or wrongful act which the offender has to pay; when this suffering is high as compared to benefit which the crime is expected to yield, it will be useful to deter a considerable number of people. Here the question arises whether a State has right to take a life of a person, however he crosses the any limit of barbarousness. The people distributed in two group about this question First is Moralists who feel that this penalty is necessary to deter the other like-minded person; Second is Progressive, who argue that this is only a judicial taking of life which court mandated.

An analysis of Criminal jurisprudence would explore that the penalty of Death is given only in extreme or "Rarest of rare cases" in which a high degree of guilt is involved, which threat the society highly. Not only culpability of dangerousness of the act is taken into consideration to decide whether or not he deserve this penalty of death but also his personal attributes and circumstances and gravity of offence has also to be taken into deliberation. So, the penalty should depend upon the gravity of offender's act and societal reaction on it.

II. AIM AND OBJECTIVE OF DEATH PENALTY

The objectives of death penalty are found in making the evil doer an example and deter other likeminded people. Out of the various theory of punishment the two i.e., the retributive and the deterrent provides justification for death penalty. Retributive theory emphasizes retention of death punishment for horrendous crimes. This theory is based on principle "An eye for an eye", ''a tooth for a tooth'". It consists not in simple but in proportionate retaliation, that is in receiving in return for a wrongful act not the same thing but its equivalent. Deterrent theory set an example for the wrong doer. This theory operates on two counts:

I. Firstly, when the offender is punished by infliction of death; the society gets rid of him.
II. Secondly, it impresses the consciousness of people at large and thus serves the purpose of preventing others from committing crimes.

This is the theory also emphasize the need of death penalty as a token of emphatic disapproval of the society for murderous crime. The aims of punishments are now considered to be retribution, justice, deterrence, information and protection and modem sentencing policy reflects combination of several or all these aims. The retributive element is intended to show public repulsion to the offence and to punish the offender for his wrong conduct. In the concept of justice as an aim of punishment growing emphasis is laid upon it by much modem legislation but judicial opinion towards this particular aim is varied a rehabilitation will not usually be accorded precedence over deterrence means both the punishment should fit the offence and also that like offences should receive similar punishment.

5. INTERNATIONAL SCENARIO

The international landscape regarding the death penalty - both in terms of international law and state practice - has evolved in the past decades. Internationally, countries are classified on their death penalty status, based on the following categories:

- Abolitionist for all crimes
- Abolitionist for ordinary crimes
- Abolitionist de facto
- Retentionist

At the end of 2014, 98 countries were abolitionist for all crimes, 7 countries were abolitionist for ordinary crimes only, and 35 were abolitionist in practice, making 140 countries in the world abolitionist in law or practice. 58 countries are regarded as retentionist, who still have the death penalty on their statute book and have used it in the recent past. While only a minority of countries retain and use the death penalty, this list includes some of the most populous nations in the world, including India, China, Indonesia and the United States, making a majority of population in the world potentially subject to this punishment. Country wise list of these four categories is given at Annexure-II.

I. CAPITAL PUNISHMENT IN INTERNATIONAL HUMAN RIGHTS TREATIES

- The International Covenant on Civil and Political Rights ('ICCPR') is one of the key documents

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discussing the imposition of death penalty in international human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees regarding the right to life and contains important safeguards to be followed by signatories who retain the death penalty.

- The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death penalty, which is open to signatures from all countries in the world. It came into force in 1991 and has 81 states parties and 3 signatories.
- Similar to the ICCPR, Article 37(a) of the Convention on the Rights of the Child ('CRC') explicitly prohibits the use of the death penalty against persons under the age of 18. As of July 2015, 195 countries had ratified the CRC.
- The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment ('the Torture Convention') and the UN Committee against Torture have been sources of jurisprudence for limitations on the death penalty as well as necessary safeguards. The Torture Convention does not regard the imposition of death penalty per se as a form of torture or cruel, inhuman or degrading treatment or punishment ('CIDT'). However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by UN bodies.
- In the evolution of international criminal law, the death penalty was a permissible punishment in the Nuremberg and Tokyo tribunals, both of which were established following World War II. Since then, however, international criminal courts exclude the death penalty as a permissible punishment'.

Of the treaties mentioned above, India has ratified the ICCPR and the CRC, and is signatory to the Torture Convention but has not ratified it. Under international law, treaty obligations are binding on states once they have ratified the treaty. Even where a treaty has been signed but not ratified, the state is bound to "refrain from acts which would defeat the object and purpose of a treaty.

II. POLITICAL COMMITMENTS REGARDING CAPITAL PUNISHMENT GLOBALLY

- Several resolutions of the UN General Assembly (UNGA) have called for a moratorium on the use of the death penalty. In 2007, the UNGA called on states to "progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed" and "establish a moratorium on executions with a view to abolishing the death penalty." In 2008, the GA reaffirmed this resolution, which was reinforced in subsequent resolutions in 2010, 2012, and 2014. Many of these resolutions noted that, "a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights." In 2014, 117 States had voted in favour of the most recent resolution. India has not voted in favour of these resolutions.
- In a 2013 resolution, the UN Human Rights Council acknowledged "the negative impact of a parent's death sentence and his or her execution on his or her children," and urged "States to provide those children with the protection and assistance they may require," Human Rights Council resolution, 2014 noted that "States with different legal systems, traditions, cultures and religious backgrounds have abolished the death penalty or are applying a moratorium on its use" and deplored the fact that "the use of the death penalty leads to violations of the human rights of those facing the death penalty and of other affected persons." The Human Rights Council urged states to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.
- The law of extradition has been another tool for countries pushing for the abolition of the death penalty. Several abolitionist countries either require assurances that retentionist-extraditing countries not impose the death penalty or have included such a clause in bilateral extradition treaties.

6. CAPITAL PUNISHMENT: THE CURRENT STATUS

I. SUPREME COURT ON VALIDITY OF CAPITAL PUNISHMENT IN INDIA

Article 21 of the Indian Constitution ensures the Fundamental Right to life and liberty for all persons. It adds no person shall be deprived of his life or personal liberty except according to procedure established by law. This has been legally construed to mean if there is a procedure, which is fair and valid, then the state by framing a law can deprive a person of his life. While the central government has consistently maintained it would keep the death penalty in the statute books to act as a deterrent, and for those who are a threat to society, the Supreme Courttoo has upheld the constitutional validity of capital punishment in "rarest of rare" cases. In

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Jagmohan Singh v. State of Uttar Pradesh (1973), then in Rajendra Prasad v. State of Uttar Pradesh (1979), and finally in Bachan Singh v State of Punjab (1980) , the Supreme Court affirmed the constitutional validity of the death penalty. It said that if capital punishment is provided in the law and the procedure is a fair, just and reasonable one, the death sentence can be awarded to a convict. This will, however, only be in the "rarest of rare" cases and the courts should render "specialreasons" while sending a person to the gallows.

II. CRITERIA FOR RAREST OF RARE

The principles as to what would constitute the "rarest of rare" has been laid down by the top Court in the landmark judgment in Bachan Singh v. State of Punjab (1980).

Supreme Court formulated certain broad illustrative guidelines and said it should be given only when the option of awarding the sentence of life imprisonment is "unquestionably foreclosed". It was left completely upon the court's discretion to reach this conclusion. However, the apex court also laid down the principle of weighing, aggravating and mitigating circumstances. A balance-sheet of aggravating and mitigating circumstances in a particular case has to be drawn to ascertain whether justice will not be done if any punishment less than the death sentence is awarded. Two prime questions, the top court held, may be asked and answered. First, is there something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for a death sentence? Second, are there circumstances of the crime such that there is no alternative but to impose the death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offenders?

III. EMERGENCE OF ALTERNATIVE PUNISHMENT TO CAPITAL PUNISHMENT

In the last few years, Supreme Court has entrenched the punishment of "full life" or life sentence of determinate number of years as a response to challenges presented in death cases. The Supreme Court speaking through a three-judge bench decision in Swamy Shraddhanand case laid the foundation of this emerging penal option in following terms:

"The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh, or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

Further, the formalization of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases"

The observations in Swamy Shraddhanand case have been followed by the Court in a multitude of cases such as Haru Ghosh v. State of West Bengal, State of Uttar Pradesh v. Sanjay Kumar, Sebastian v. State of Kerala, Gurvail Singh v. State of Punjab where full life or sentence of determinate number of years has been awarded as opposed to death penalty.

IV. JUDICIAL REVIEW OF EXERCISE OF MERCY POWERS

The Supreme Court in Shatrughan Chauhan case has recorded that the Home Ministry considers the following factors while deciding mercy petitions:

- Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);
- Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction.
- Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified.

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- Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence.
- Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench?
- Consideration of evidence in fixation of responsibility in gang murder case.
- Long delays in investigation and trial etc.

However, when the actual exercise of the Ministry of Home Affairs (on whose recommendations mercy petitions are decided) is analysed, it is seen that many times these guidelines have not been adhered to. Writ Courts in numerous cases have examined the manner in which the Executive has considered mercy petitions. In fact, the Supreme Court as part of the batch matter Shatrughan Chauhan case heard 11 writ petitions challenging the rejection of the mercy petition by the Executive. Supreme Court last year held that judicial clemency could be granted on the ground of inordinate delay even after a mercy petition is rejected.

V. LAW COMMISSION OF INDIA'S REPORT ON DEATH PENALTY

The Law Commission of India in its 262nd Report (August 2015) recommended that death penalty be abolished for all crimes other than terrorism related offences and waging war. Complete recommendations of the Report are as follows:

- The Commission recommended that measures suggested that police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.
- The march of our own jurisprudence -- from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to the rarest of rare cases - shows the direction in which we have to head.
- Informed also by the expanded and deepened contents and horizons of the Right to life and strengthened due process requirements in the interactions between the State and the individual, prevailing standards of constitutional morality and human dignity, the Commission felt that time has come for India to move towards abolition of the death penalty.
- Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism-related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the Commission did not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

The Commission accordingly recommended that the death penalty be abolished for all crimes other than terrorism related offences and waging war. Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible

7. INDIAN SCENARIO

I. LEGISLATION

The Indian Penal Code, 1860 (IPC) is the Public Law and substantive Criminal Law which defines crimes and prescribes punishments. Section 53 of the IPC provides for death sentence and imprisonment for life as alternative punishments.

In Mithu v. State of Panjab the apex court declared that section 303 is unconstitutional because it is not in tune with articles 14 and 21 of the constitution. In India, non-governmental organizations as well as generalpeople are fighting against inhuman, degrading and cruel punishment and protection of human rights. Nevertheless, capital punishment still remains in force. Although judiciary has evolved the principle of “rarest of rare cases” and has indicated that it is with special reasons that death penalty must be imposed in cases of exceptional and aggravating circumstances where offences are very grave in nature, the application of the principle itself, as evident from a plethora of cases, is violative of Constitutional provisions.

II. CONSTITUTIONAL LAW:

Article 21 of the constitution guarantees right to life and personal liberty to all which includes right to live with human dignity. No person shall be deprived of his right except according to the procedure established by law. Therefore, the state may take away or abridge even right to life in the name of Law and public order following the procedure established by Law. But this procedure must be “due process” as held in Maneka Gandhi v. Union of India. The procedure which takes away the sacrosanct life of a human being must be just, fair and reasonable. So, fair

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trial following principles of natural justice and procedural Laws are of utmost importance when capital punishment is on the statute book. Therefore, our constitutional principle is in tune with procedural requirements of Natural Law which constitute the inner morality of Law which may be stated as follows:

- Death sentence is to be used very sparingly only in special cases.
- Death sentence is treated as an exceptional punishment to be imposed with special reasons.
- The accused has a right of hearing.
- There should be individualization of sentence considering individual circumstances.
- Death sentence must be confirmed by the High Court with proper application of mind.
- There is right to appeal to the Supreme Court under article 136 of the Constitution and under section 379 of the CrPC. The Supreme Court should examine the matter to its own satisfaction.
- The accused can pray for pardon, commutation etc. of sentence under sections 433 and 434 of the CrPC. and under articles 72 and 161 to the President or the Governors. Articles 72 and 161 contain discretionary power of the President and the Governor beyond judicial power to interfere on merits of the matter; though judiciary has limited power to review the matter to ensure that all relevant documents and materials are placed before the President or the Governor. However, the essence of the power of the Governor should be based on rule of Law and rational considerations and not on race, religion, caste or political affiliations.
- The accused has a right to speedy and fair trial under articles 21 and 22 of the Constitution.
- The accused under article 21 and 22 has right not to be tortured.
- The accused has freedom of speech and expression within jail custody under articles 21 and 19 of the Constitution.
- The accused has right to be represented by duly qualified and appointed legal practitioners.

III. JUDICIAL APPROACH

In Jagmohan Singh v. State of U.P. it was argued that capital punishment for murder violates articles 21 and 14 of the Constitution. The counsel for the appellant contended that when there is discretionary power conferred on the judiciary to impose life imprisonment or death sentence, imposing death sentence is violative of article 14 of the Constitution if in two similar cases one gets death sentence and the other life imprisonment. On this point the Supreme Court held that there is no merit in the argument. If the Law has given to the judiciary wide discretionary power in the matter of sentence to be passed, it will be difficult to expect that there would be uniform application of Law and perfectly consistent decisions because facts and circumstances of one case cannot be the same as that of the other and thus these will remain sufficient ground for scale of values of judges and their attitude and perception to play a role. It was also contended that death penalty violates not only article 14 but also articles 19 and 21 of the Constitution. Here procedure is not clear because after the accused is found guilty, there is no other procedure established by law to determine whether death sentence or other less punishment is appropriate in that particular case.

But this contention was rejected by the Supreme Court and the Court held "in important cases like murder the court always gives a chance to the accused to address the court on the question of death penalty". The Court also held "deprivation of life is constitutionally permissible provided it is done according to procedure established by Law. The death sentence per se is not unreasonable or not against public interest. The policy of the Law in giving a very wide discretion in the matter of punishment to the Judges has its origin in the impossibility of laying down standards. Any attempt to lay down standards as to why in one case there should be more punishment and in the other less punishment would be an impossible task. What is true with regard to punishment imposed for other offences of the Code is equally true in the case of murder punishable under section 302 I.P.C. No formula impossible that would provide a reasonable criterion for infinite variety of circumstances that may affect the gravity of the crime of murder. The impossibility of laying down standards is at the very core of the criminal law as 'administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment"

In Rajendra Prasad v. State of U.P. V. R. Krishna Iyer, J. observed

"the humanistic imperative of the Indian Constitution, as paramount to the punitive strategy of the Penal Code, has hardly been explored by the courts in this field of 'life or death' at the hands of the Law. The main focus of our Judgement is on this poignant gap in human rights Jurisprudence within the limits of the Penal Code,

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impregnated by the Constitution…. in the Post-Constitutional period section 302, IPC and section 354(3) of the Code of Criminal Procedure have to be read in the human rights of Parts III and IV, further illuminated by the Preamble to the Constitution."

The Court held that it is constitutionally permissible to swing a criminal out of corporal existence only if the security of state and society, public order and the interests of the general public compel that course as provided in article 19(2) to (6). Social justice has to be read with reasonableness under article 19 and non-arbitrariness under article 14. V. R. Krishna Iyer, J. also observed that such extraordinary grounds alone constitutionally qualify as special reasons as to leave no option to the court but to execute the offender if the state and society are to survive and progress. He was in favour of abolition of death penalty in general and retention of it only for White Collar Crimes.

In Bachan Singh v. State of Punjab the Supreme Court by 4:1 majority has overruled its earlier Judgment pronounced in Rajendra Prasad's case and held that death sentence under section 302 IPC does not violate article 21. The International Covenant on Civil and Political Rights, to which India has become a party in the year 1979, does not abolish imposition of death penalty wholly. But it must be reasonably imposed and not arbitrary; it should be imposed in most serious crimes. In this case the Court held that

"Judges should not be blood thirsty. A real and abiding concern for the dignity of human life postulates resistance to taking a life through laws' instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

In Sher Singh v. State of Punjab (Y. V. Chandrachud C.J.; V.D. Tulzapurkar and A.Varadrajan, J.J.) Chief Justice disaffirmed the decision in Vatheeswaran where the court had held that two years delay in execution of death sentence would be replaced by life imprisonment as binding rule and rejected the plea for replacement of death sentence by life imprisonment. When delay in execution is in issue, the court must find out reasons for delay. Therefore, two judges' decision was overruled by three judges' bench. The court held that prolonged delay in the execution of a death sentence is an important consideration to determine whether the sentence should be allowed to be executed.

In T.V.Vatheeswaran v. State of Tamil Nadu the issue was whether delay in execution of death sentence violates Art 21 of the Constitution and whether on that ground death sentence may be replaced by life imprisonment. A Division Bench consisting of Chinnappa Reddy and R B. Misra JJ. held that prolonged delay in execution of death penalty is unjust, unfair, unreasonable and inhuman, which also deprives him of basic rights of human being, guaranteed under article 21 of the Constitution i.e., right to life and personal liberty. Mr. Reddy and Mr. Mishra JJ. Observed thus,

"Making all reasonable allowance for the time necessary for appeal and consideration of reprive, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 of the Constitution and demand quashing of the sentence of death."

Therefore, 'due process' i.e. just, fair and reasonable process as held in Maneka Gandhi does not end with only reasonable pronouncement of death sentence rather it extends till the proper and due execution of sentence. There was two years delay in execution of death sentence. The court reiterated that speedy trial is an integral part of Part III of our Constitution and it is included under article 21 and there was prolonged detention before execution of death sentence and the accused was waiting every moment for due execution of death sentence. Every moment he was terrorized. Therefore, it must be treated as violation of the Constitutional mandate.

As the doctrine of rarest of rare cases evolved in Bachan Singh v. State of Punjab, the Supreme Court tried to formulate specific criteria to determine scope of 'rarest of rare' in Macchi Singh v. State of Punjab. The court opined that while one is killed by another, the society may not feel bound by this doctrine. It has to realize that every person must live with safety. Rarest of rare doctrine has to be determined according to following factors

- Manner of Commission of murder: If the murder is committed in an extremely brutal, revolting, grotesque, diabolical or dastardly manner to intense indignation of the community.
- If Motive for the Commission of Murder shows depravity and meanness.
- Anti-social or socially abhorrent nature of the Crime.
- Magnitude of the Crime.
- Personality of Victim of the murder that is, Child, helpless Woman, public figure and so forth.

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The Supreme Court held in Attorney General of India v. Lachmi Devi that the mode of carrying out death penalty by public hanging is barbaric and violative of Art.21 and that there must be procedural fairness till last breath of life as held in Triveniben v. State of Gujarat.

In Madhu Mehta v. Union of India, the mercy petition of the accused was pending before the President of India for about nine years. This matter was brought to the notice of the court by the petitioner. The court directed to commute death sentence to imprisonment for life because there were no reasons to justify prolonged delay and speedy trial was said to be included in article 21 of the Constitution. There was nine years' delay in execution of death sentence.

8. CONCLUSION

Death as a penalty has plagued human mind perennially. Death sentence must fulfil the conditions for protection of human rights in Criminal Justice Administration in India. In European countries the agitation against capital punishment started with criminologists Jeremy Bentham and J.S. Mill's writings for due punishment, who maintained that punishment must be just, adequate, fair, reasonable and proportionate to the crime to achieve the goal and should never be excessive. This is also a problem in Indian socio-legal system. Delay in execution is not infrequent which is a violation of accused's basic human rights including right to live with dignity which is enshrined under article 21 of the Indian Constitution and the Universal Declaration of Human Rights. The accused in death sentence who is waiting for execution of punishment is living with terror of death every moment he is waiting for. Delay in execution is another punishment on him which is inhuman, degrading and must not be allowed in any civilised society.

Execution of Dhananjay Chatterjee in 2004, after fourteen years in death cell and thereafter in the year 2006 Md. Afzal's instance of capital punishment again gave new impetus to the debate between abolitionists and Retentionist concerning speedy justice, fair trial, protection of human rights of the persons under death sentence, their human dignity as well as the victimological perspective to maintain law and order in society.

In India the issue of death sentence is hotly debated and has attracted the attention of general public as well as government and non-governmental organisations. Though India is an active member of the United Nations and has signed and ratified most of the International Instruments on human rights, capital punishment still remains in our statute book. According to our judiciary it must be imposed in exceptional cases i.e. in rarest of rare cases with special reasons. Article 72 of the Indian constitution confers on the President power to grant pardons etc. and to suspend, remit or commute sentences in certain circumstances.

In the words of P.N. Bhagwati, J. in Bachan Singh v. state of Punjab "the judges have been awarding death penalty according to their own scale of values and social philosophy and it is not possible to discern any consistent approach to the problem in the judicial decisions". Therefore, whether the sentence will be for death or for life imprisonment depends, in a large measure, on the court or composition of bench of the court. We have seen earlier about execution and commutation of death sentences into life imprisonment, there are several judgments which show that there are no fix principles to determine delay and other factors in the similar cases. Even in Dhananjay Chatterjee's case there was fourteen years' delay in execution of death sentence, but it was not commuted to life imprisonment although in some earlier cases two years, two and half years, three years and nine years delay in execution was treated as violation of human rights and fair procedure and their sentences were commuted to life imprisonment. Is this not a violation of articles 14 and 21 of the Constitution which enshrine fundamental and sacrosanct rights of human beings?

Due to arbitrary and discriminatory decisions and unjust procedures, basic rights of accused are violated in inhuman and brutal manner which are not only contrary to the National Human Rights principles envisaged in the Constitution but also contrary to the Universal Human Rights ethos. In order to serve as a just and effective mechanism for administration of justice to all sections of society, law should be nourished by and nurtured in human rights. There is nothing to prove the fact that extreme measure of death sentence reduces crime rates in contemporary society; rather death sentence has failed as a deterrent. Life imprisonment is enough for deterrence as well as for mental and moral metamorphosis of a human being.

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