

CAPITAL PUNISHMENT

R. Monica¹

J. Lalith Kumar²

ABSTRACT

Death penalty, conjointly called the corporal punishment, could be a government sanctioned apply whereby someone is place to death by the state as a penalty for against the law. Crimes that area unit punishable by death area unit called capital crimes or capital offences, and that they normally embrace offences like murder, treason, espionage, crimes against humanity, war crimes and race murder. The increasing strength of the human rights movement in India, the existence of death penalty is questioned as immoral. This paper goes on to explain the various checks and balances available, that ensure that no innocent person is condemned while at the same time ensuring that no person who's guilty of the most heinous crimes is allowed to go free. Further, the paper the discusses the existence of death penalty is must or not in India.

Key words: *Capital Punishment, Crime, Checks and balances*

1. INTRODUCTION

Capital punishment is a legal process whereby a person is put to death by the state as a punishment for his/her crime. The judicial decree that someone be punished what makes this form of punishment different from the others is the obvious element of irreversibility attached to it. A man once executed for a crime can never be brought back to life. So if any error has crept in while deciding on a matter, this error cannot be rectified at a later stage.

Since antiquity this death penalty has existed. Anthropologists even claim that the drawings at Vallaloid by prehistoric cave dwellers show an execution. Death penalty may have its origins in human sacrifices. Capital punishment can be traced back as early as 1750 B.C, in the lex talionis of the Code of Hammurabi. The Bible too set death as punishment for crimes such as magic, violation of the Sabbath, adultery, blasphemy, homosexuality, incest, bestiality, and rape. Plato too discussed the scope of death penalty at length in his Laws.

The capital punishment debate has produced heat in the present times in India. While the protagonists of death sentence claim that it must be awarded as the most heinous crimes of all, the persons who are under

¹ IInd year, BBA.LLB, Saveetha School of Law, Saveetha University, Tamil Nadu, India

² Asst. Prof, Saveetha School of Law, Saveetha University, Tamil Nadu , India

human rights are against the idea of the persistence of death penalty as they declare it to be in violation of the human rights of a human being. Capital Punishment is currently practiced in 58 countries, including Japan, USA, Belarus, Cuba, and Singapore. As of 2012 there are 97 abolitionist states. According to Amnesty International the worst offenders in 2012 were Iran (314+), China (1000+ deaths) and Iraq (129+). According to a study about two-thirds of the countries have either abolished capital punishment outright or have not actually executed any death sentences in the last ten years.

2. POSITION IN INDIA

In India Article 21 of the Constitution titled 'Protection of life and personal liberty' says:

No person shall be deprived of his life or personal liberty except as according to procedure established by law.

Article 21 of Indian Constitution enshrines the Right to Life guaranteed to the citizen of India. The constitutional validity of death sentence has come into question several times in the India judiciary and this paper shall try to examine those several occasions.

The Indian Penal Code, 1860 awards capital punishment for various offences. Some of these capital offences under the IPC are punishment for criminal conspiracy (Section 120B), murder (section 302), abetment of mutiny (Section 132), dacoity with murder (Section 396) and others waging or attempting to wage war against the Government of India (Section 121), and others. Apart from this there are various other provisions also for death penalty in various legislations like the NDPS Act, anti – terrorism laws etc-.

The Constitution of India has provision for clemency of capital punishment by the President. The Sessions Court must confirm with the high court before awarding death sentence to a convict in a case. Even after that, the convict has the right to go for an appeal to the Supreme Court. If this also fails the accused has the last option of submitting a 'mercy petition' to the President of India and the Governor of the State. The State has to go through detailed instructions for dealing with petitions for mercy from or on behalf of convicts under sentence of death and with appeals to the Supreme Court and applications for special leave to appeal to that court by such convicts are laid down by the Ministry of Home Affairs.

In this respect we may refer to Article 72 of the Constitution of India which says:

"Power of President to grant pardons, etc, and to suspend, remit or commute sentences in certain cases-(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence

(a) in all cases where the punishment or sentence is by a court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death

(2) Nothing in sub clause (a) of Clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."

Similarly Article 161 talks about the pardoning powers of the Governor of a State. These provisions ensure that there is no room for error left before the accused is sentenced to death. The culprit gets multiple chances to appeal and now life imprisonment has become the rule while death sentence is the exception.

3. LANDMARK CASES DEALING WITH DEATH PENALTY IN INDIA

In the case of *Jagmohan Singh v. State of U.P.*³, which was the first case dealing with the constitutional validity of capital punishment in India. The counsel for the appellant in this case put forward three arguments which invalidate section 302 of the IPC. Firstly that execution takes away all the fundamental rights guaranteed under Clauses (a) to (g) of Sub-clause (1) of Article 19 and, therefore the law with regard to capital sentence is unreasonable and not in the interest of the general public. Secondly that the discretion invested in the Judges to impose capital punishment is not based on any standards or policy required by the Legislature for imposing capital punishment in preference to imprisonment for life. Thirdly, he contended, the uncontrolled and unguided discretion in the Judges to impose capital punishment or imprisonment for life is hit by Article 14 of the Constitution because two persons found guilty of murder on similar facts are liable to be treated differently one forfeiting his life and the other suffering merely a sentence of life imprisonment. Lastly it was contended that the provisions of the law do not provide a procedure for trial of factors and circumstances crucial for making the choice between the capital penalty and imprisonment for life. The trial under the Criminal Procedure Code is limited to the question of guilt. In the absence of any procedure established by law in the matter of death sentence, the protection given by Article 21 of the Indian Constitution is violated and hence for that reason also the death sentence is unconstitutional.

After looking into the arguments the five judge bench upheld the constitutionality of death penalty and held that deprivation of life is constitutionally permissible for being recognised as a permissible punishment by the drafters of our Constitution.

4. LAW COMMISSION REPORT

The Law Commission of India chaired by Justice A.P. Shah submitted its 262nd report on 31st August 2015 on the issue of capital punishment in India. The issue was referred to the Law Commission by the Supreme Court in *Santosh Kumar Satishbhushan Bariyar v. Maharashtra*⁴ and *Shankar Kisanrao Khade v. Maharashtra*⁵. In the 35th report, The Law Commission has recommended the retention of the death penalty in India. The Supreme Court in the case of , *Bachan Singh v. Union of India*⁶, upheld the constitutionality of the death penalty, but confined its application to the 'rarest of rare cases', to reduce the arbitrariness of the penalty. However, the economic, social and cultural contexts of the country has changed drastically since the 35th report and arbitrariness has also remained a major concern in the adjudication of capital punishment cases in the 35

³ 1973 AIR 947, 1973 SCR (2) 541

⁴ (2009) 6 SCC 498

⁵ (2013) 5 SCC 546

⁶ (1982) 3 SCC 24

years since the foremost precedent on the issue was laid down. The Commission decided to undertake an extensive study on this issue as death penalty is an issue of a sensitive nature

After studying the issue extensively the Commission concluded that the death penalty does not serve the penological goal of deterrence any more than life imprisonment. In fact it fails to achieve any constitutionally valid penological goals. The Law Commission also concluded that in focusing on death penalty as ultimate measure of justice to victims, the rehabilitative and restorative aspects of justice are lost sight of. It was also concluded that extremely uneven application of *Bachan Singh* has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle. Therefore, the constitutional regulation of capital punishment attempted in *Bachan Singh* has failed to prevent death sentences from being arbitrary and freakishly imposed. And there exists no principled method to remove such arbitrariness from capital sentencing.

The problems besetting the system are Lack of resources, outdated modes of investigation, ineffective prosecution, over-stretched police force and poor legal aid. Death penalty operates within this context and therefore suffers from the same systemic and structural impediments. The administration of capital punishment thus remains vulnerable and fallible to misapplication. It was also concluded that the exercise of mercy powers under Articles 72 and 161 of the Indian constitution have failed in acting as the final safeguard against miscarriage of justice in the imposition of the capital punishment. The Supreme Court has repeatedly pointed out gaps and illegalities in how the executive has discharged its mercy powers. When even exercise of mercy powers is sometimes vitiated by non-application of mind and gross procedural violations, capital punishment becomes indefensible. Further the death row phenomenon is compounded by oppressive and degrading effects of conditions of imprisonment imposed on the accused, including solitary confinement, and the prevailing harsh prison conditions. The death row phenomenon has become a distinctive and unfortunate feature of the death sentence apparatus in India which breaches the Article 21 barrier against excessive and degrading punishment.

Thus the Commission has recommended that the jurisprudence on the issue has proceeded 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; this shows the direction in which we have to head. The commission has also recommended that although there is no valid penological justification for treating terrorism differently from other crimes, however, given the concerns raised by the law makers that the abolition of death penalty for terrorism related offences and waging war, will affect national security, there is no reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

Finally the Commission recommended that it is essential that the State establish effective victim compensation schemes to rehabilitate victims of crime. At the same time, it is also essential that courts use the power granted to them under the Code of Criminal Procedure, 1973 to grant appropriate compensation to victims in suitable cases. The voices of victims and witnesses are often silenced by threats and other coercive techniques employed by powerful accused persons. Hence it is essential that a witness protection scheme is established. The need for

police reforms for better and more effective investigation and prosecution has also been universally felt for some time now and measures regarding the same need to be taken on a priority basis.

5. CONCLUSION

In order to wind up the paper, the points can be summarized in the following manner; the existence of capital punishment can be viewed to be based on the principle of free will. Every person is a master of his own will. The person who is committing the offence is generally doing without any compulsion. The most basic principle of psychology in the concept of death penalty is, death is the greatest fear for most of the humans. The natural fear of death is present in most of the humans. Thus when the people are made aware that for certain offences the inevitable penalty is death, then that would definitely act as a deterrent theory, it will prevent people from committing such heinous crimes. One of the prospects of punishment is to serve as a deterrent. This purpose is achieved by death penalty just as much as any other form of punishment. One of the most debatable topics in the criminal justice system is the issue of death penalty. The benefits or rather, the requirement of death penalty in the contemporary times has been made crystal clear. Death penalty itself has a myriad of dimensions to it. But one unchanging aspect is that some crimes are so culpable that death is the only suitable penalty. Moreover no State is advocating the arbitrary imposition of death penalty. The State ensures adequate justice to all citizens of State through appropriate checks and balances to ensure that no life of an innocent is taken. While the abolitionists argue that awarding capital punishment serves no purpose because unfortunately keeping a person who committed such a heinous crime alive, also serves no purpose, except for the negative effect of putting the society at risk in the future. Taking the example of India itself, it's very clear that death sentence is very rarely awarded. To conclude, in the contemporary society where each man stands for himself, death penalty is a requirement. Harsh punishment is required to ensure that peace and order of the society is not harmed. The State cannot compromise the lives of hundreds and thousands of innocent persons only for the life of one convict who does not even deserve to live among a society of civilized persons. Thus, death penalty must continue to exist.

