

FADING THREADS OF CAPITAL PUNISHMENT IN INDIA: A CONSTITUTIONAL PERSPECTIVE

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1. INTRODUCTION

“Society stands convicted with every criminal in dock.”¹

Indeed, a discourse regarding expedition of human being towards orderly, law abiding citizen would be futile if one overlooks the reciprocal responsibility of society towards every individual. No matter how deliberately one may assert that man is a social animal², this mere animal existence of mankind requires right to live with human dignity.³ Perhaps this notion warrants all other legal norms to be streamlined on the constitutional spirit. Furthermore, in legal arena, crime and punishment bears a deliberate relationship. Earlier is followed by the later as a quintessential result. Public opinion may vary about the forms of the punishments, however, the basic principle of criminal law i.e. *‘Actus non facit ream, nisi mens sit rea’*⁴ warrants the presence of guilty mind to drag any individual into the purview of legal liability. Moreover, when it comes to the offences punished with the death penalty, the guilt factor remains sine-qua-non for the fixing of such liability. As any law which contravenes the Part III of the Constitution becomes void,⁵ the issue of death penalty requires to be measured on the yardstick of the Constitution of India.

This paper, with a view to examine the viability of the death penalty, attempts to explore the Constitutional as well as remaining legal framework of India. It also craves to explore the very rationale of the stand taken by India over the death penalty in the light of Constitutional perspective.

2. NEXUS OF CRIME AND PUNISHMENT

Whilst enumerating the underpinnings of the crime, Socrates states that, “presence of criminals in society is the result of a defective culture, bad breeding and a wrong constitution of the state.”⁶ Legendary jurists, Immanuel Kant whilst observing the magnitude of crime stated that, “in law a man is guilty when he violates the rights of other; in ethics he is guilty if he only thinks of doing so.”⁷ However, to encapsulate the precise space of punishment, one has to determine the basic purpose of punishment. What makes punishment such quintessential as an aftermath of crime, needs to be analysed. This requires a cross section of the “harm Principle” laid down by the John Stuart Mill in his work *On Liberty*, as he states that, “one very simple principle [as]... entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control.” That principle holds, “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is... to prevent harm to others.”⁸ Thus, origin of punishment can be well-evident as a factor to control the human behaviour in various manners and purposes. To be precisely in the words of Charles W. Thomas, “there can be three primary purposes of punishment, “punishment as retribution, the utility value of punishment as deterrence, and the rehabilitative value of punishment”.⁹ Broadly, the very rationale of punishment lies in the notion that, “punishment is not inflicted by a rational man for the sake of a crime that has been committed, after all one cannot undo what is past but for the sake of the future, to prevent either the same man or by the spectacle of his punishment, someone else, from doing wrong again.”¹⁰ Thus, with numerous differences on the nature and quantum of the punishments, the very necessity of the punishment at any given time of civilized society is beyond questionable.

3. UNDERPINNINGS OF DEATH PENALTY

Amongst various punishments, death penalty being the extreme of all has been regarded as “the taking of life is too absolute, too irreversible, for one human being to inflict on another, even when backed by legal process.”¹¹ Being known as the Capital Punishment takes it to the peak of all punishments. The term ‘capital punishment’ is derived from the Latin word ‘*caput*’ which means head. It originally referred to death by decapitation, but now applies generally to state sanctioned executions.¹² Having been found in almost all the civilizations of the world, death penalty makes its presence omnipresent. The footprints of the death penalty can be traced way back till Eighteenth Century B.C. wherein the Code of King Hammurabi of Babylon, which codified the death penalty for 25 different crimes.¹³ As far as India is concerned, death penalty has been retained its position in contemporary era. In the British era, death sentence was executed by hanging the convict by the neck till death. The same was reflected in the Indian Penal Code, 1860 drafted by Lord Macaulay, which is still in force.¹⁴ The debate over the death penalty is not new to India, as numerous occasions in the history have generated the waves of public opinion over this topic; be it the case of Rajiv Gandhi assassination,¹⁵ Dhananjay Chatterjee,¹⁶ or most recently, the dawn of 30th July 2015 brought with it nationwide notions of surprise, curiosity, anxiety etc. on account of the execution of sole death-convict Yaqub Memon under 1993 Mumbai-Blast case.¹⁷ This scenario shows a salient enigma under the very process of infliction of death penalty, the aftermaths of pronouncement of death sentences including prominently process of mercy petitions and pardoning powers¹⁸ under the Constitution of India. With this backdrop, a constitutional cross section over the viability of death penalty may annihilate the conflicting palaver.

4. DEATH PENALTY : INDIAN SCENARIO

Indian Penal Code, 1860 being the backbone of the criminal laws of India¹⁹ substantially emanates the death penalty for certain offences. At present, there are eleven offences²⁰, which results into the death penalty as a punishment. Apart from the IPC various other statutes in India are coupled with the death penalty, such as, The Air Force Act, 1950²¹, The Bombay Prohibition (Gujarat Amendment) Act, 2009²², The Navy Act, 1957²³, The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act, 1962²⁴, The Sashastra Seema Bal Act, 2007²⁵, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989²⁶ etc. In consonance to this, the conduit of Cr.P. C.²⁷ provides the procedural assistance to the death penalty as, when any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.²⁸

As far as Indian legal system in concern, the entire process of sentencing the capital punishment judiciary plays a vital role. It includes very beginning of death sentence, at the Court of Sessions²⁹ with confirmation of the High Court³⁰. This process falls under the judicial purview till the last concluding verdict is passed by the Apex Court. It essentially includes all the judicial recourses available to the death convict, such as Appeal, Review and Curative petition. Hence this judicial phase deals with the entire judicial process involved in the imposition of capital punishment.

5. VIABILITY OF THE DEATH PENALTY UNDER THE CONSTITUTION OF INDIA

Enriched with the noblest ethos, the Constitution of India provides the shelter to numerous rights of the individuals without any form of discrimination. Having been placed at the core of the Basic Structure of the Constitution of India, Article 21 depicts the right to life and personal liberty to every person, saved by procedure established by law. Wherein, the express words of the Article 21

promote the life and liberty of the individual, whilst the procedural established by law implies the punishments inflicted by the lawful authority. Thus, Article 21 itself doesn't restrain death penalty when being inflicted by procedure established by law. Moreover, its indisputable fact that, nothing in the Constitution of India expressly makes death penalty as unconstitutional. However, numerous other provisions such as fundamental rights, directive principles, clemency powers of the executive heads etc. can be interpreted as the antagonist to that of death penalty. However, it's pertinent to note that, the constitutionality of death penalty has been challenged many a times in India. The current stand of India pertaining death penalty is the outcome of judicial, executive and international development in this regard.

The very first attempt to confront the constitutionality of the death penalty in India was the case of *Jagmohan Singh v. State of U. P.*³¹ wherein, Article 14, 19 and 21 of the Constitution of India were taken as ground. The core argument to thrash the death penalty was death sentencing lacks any concrete procedure for its infliction, makes protection guaranteed under Article 21 futile, as there is no procedure establish by law. In consonance to this, the US precedent *Furman v. Georgia*³² making death penalty being unconstitutional in USA fir the contravention of Eighth Amendment of US Constitution was also cited in craving for persuasive value. The Apex Court, whilst upholding the constitutionality of death penalty observed that, "The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused." After the judgment of Jagmohan's case a key factor due to the renovation of old CR. P. C. into new Criminal Procedure Code, 1978 influenced further judicial trends. Meanwhile, precedent of Apex Court in *Maneka Gandhi v. Union of India*³³ concretised the widest ambit of Article 21 by interpreting the procedure established by law ought to be just, fair and reasonable. Additionally, in *Ediga Anamma v. State of Andhra Pradesh*³⁴, the Apex Court stressed on personalise dimension of criminal whilst inflicting death sentence, in order to promote the reformatory component must be operative to the equal quantum of deterrence. However, the judicial trend regarding upholding death penalty witnessed a twist by the precedent of *Rajendra Prasad vs. State of Uttar Pradesh*.³⁵ Wherein, whilst discussing "special reasons" for sentencing death penalty the Apex Court held that, "special reasons must relate to the criminal rather than the crime." A landmark of 1980, *Bachan Singh v. State of Punjab*³⁶ has given a new dimension to the issue of sentencing death penalty. With the inception of judicially evolved doctrine of "rarest of the rare" from this case, death penalty has become a last resort of punishment. The prolong debate of abolition or retention found a judicial denouement by this case. However, under the garb of manner of execution, death penalty was again challenged in case of *Deena v. Union of India*³⁷ wherein, hanging by rope as prescribed under Section 354(5) of Cr. P.C. was argued as barbarous, inhuman and degrading, and gross violation of Article 21 of the Constitution of India. However, relying on the report of U.K. Royal Commission in 1949, the Apex Court upheld the constitutional validity of death sentence through hanging by rope, and refuted the argument of being it as violative to Article 21. Moreover, other alternatives such as lethal gas, electrocution, or shooting were held unwarranted. Another noteworthy development regarding death sentence was, scrapping down the Section 303 of IPC in the case of *Mithu Singh*³⁸ which provided for mandatory death sentence for the offender punishable under life imprisonment.

6. INTERNATIONAL SCENARIO ON VIABILITY OF DEATH PENALTY

The subsistence of death penalty has been hugely confronted on global platform, as "Today,

more than four out of five countries have either abolished the death penalty or do not practice it. Globally, there is a firm trend towards abolition, with progress in all regions of the world.”³⁹ Being a member of the United Nations; India is abide by the international covenants and conventions pertaining capital punishment. To that effect, India is a party to the International Covenant on Civil and Political rights, 1966 (herein after regarded as the ICCPR) which provides, “sentence of death may be imposed only for the most serious crimes in accordance with the law.... This penalty can only be carried out pursuant to a final judgment rendered by a competent court.” More particularly, it further provides that, “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases” By virtue of mandate of Article 253⁴⁰ India is abided to give effect such international instruments. However, it’s Pertinent to note that, India has not signed the 2nd Optional Protocol of ICCPR, 1991 of the same covenant. Which directs that, “No one within the jurisdiction of a State Party to the present Protocol shall be executed⁴¹ moreover; each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.”⁴²

With this backdrop it’s quite evident that, India has retained the capital punishment with a deliberate purpose and the very limitations on its infliction are to be followed in self-regulating style. This notion can be well evident from further milestones achieved by India, *Firstly*, by virtue of the old Cr. P. C. (Amendment) Act, 1955 India has removed the exigency on courts to state special reason for not awarding capital punishment when expressly provided in the statute. *Secondly*, by replacing the old Act, India enacted the Code of Criminal Procedure, 1973. Wherein, a complete 180° spin was taken and the exigency was put on courts to state the special reasons for awarding the capital punishment. *Thirdly*, in 1980’s Apex court through landmark decision of Bachan Singh case has observed and self-regulated that, capital punishment should be given only in ‘rarest of the rare cases.’ *Fourthly* the Law Commission of India in its 187th report validated the mode of execution adopted by India.

7. CURRENT SCENARIO

Alike any other international issue, India has adopted self-regulatory role over abolition of death penalty. The Law Commission of India in its 262nd Report⁴³ on death penalty has recommended that, capital punishment can be abolished in India. Whilst underlining the inferiority of death penalty in terms of deterrence, the life imprisonment till natural death has been suggested to alter death sentence. However, offences of terrorism and waging war against nation warrants the death penalty as total abolition may affect national integrity and security. Moreover, the proposed Anti-Hijacking (Amendment) Bill 2014 under its Sec. 4(a)⁴⁴ provides for Death Penalty.

8. CONCLUSION

With every case inflicting death penalty, the dust over this debate of abolition gets unsettled. However, with moderately less infliction, barricading of “rarest of the rare” doctrine, with the last resorts such as clemency powers etc, actual execution of death penalties in India has been considerably reduced. As per NCRB⁴⁵ data on the number of death sentences awarded annually, on average, 129 persons are sentenced to death row every year, or roughly one person every third day.⁴⁶ Being a last resort to penalise the offenders of terrorist activities, retention of death penalty becomes quintessential in India. Thus, by placing due hurdles in the process of execution, India has committed itself to meet with the global call on abolition of death penalty by harmonising municipal legal requirements.

(Endnotes)

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