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Death Penalty in India

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ABSTRACT

Death penalty as a capital punishment is an irreversible, uncivilized intolerable violation of a human right to life, sanctioned by the state. The framework of prison, judiciary, as well trials is instilled in a civilized society to protect the society and to reform the lawbreakers into law abiders. The state by imposition of death penalty upon the criminals gives itself unduly excessive power to take away a life and thus is extremely inconsistent with the constitutional values that are embedded in our democratic system. The death penalty in India is awarded on the basis of the doctrine "Rarest of the Rare" so as to ensure that the justice is served in cases where the crimes committed against the victims are too brutal and heinous, however in determining what cases and circumstances constitute rarest of the rare brings about lot of arbitrariness. The paper provides an insight into how the capital punishment was first imposed in India with reference to landmark judgements and cases and how it has evolved to be imposed today. The paper also seeks to answer if imposition of capital punishment is morally justified as it is a gross violation of a human right to life.

Keywords: *Human rights, commutation, arbitrary, alternative punishment, mitigating factors*

I. INTRODUCTION

Death penalty is the infliction of death upon the offender sanctioned by law for violating criminal law. The capital punishment is one of the most controversial penal actions in the world. The term capital punishment refers to the most severe form of punishment awarded for heinous, brutal and vicious crimes

Through the lengths of history, people have been put to death by brutal and grotesque means such impaling, burning at stake, beheading and so on. Though the inhumane forms of execution have been done with, execution stands to this day as the capital punishment in several parts of the world.

This research paper primarily aims to analyse death penalty in India and if it is morally justified peculiarly when it infringes the fundamental rights of an individual.

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II. History

Death penalty as capital punishments can even be traced back to the primitive humankind where it was used as a tool of crime deterrence. Often it was imposed upon murderers where 'life for a life" was basic concept behind the death penalty

The first ever recorded death penalty laws dates back to the 18th century BC where it was codified.it was codified in the ancient Code of King Hammurabi of Babylon. This code provided the death penalty for over 25 offences.

The earliest forms of death penalty were designed so as to torture the wrong doer and therefore slow and brutal. Amongst the ancient civilisations, the law breakers were penalised for their crimes by being burnt at stake, quartering, slowly being crushed by elephant, boiled alive and so on. They were made cruel and brutal to prevent further crimes and instil amongst the society members the fear of law and also to serve justice to the victims

In Britain, though in 10th century hanging was adopted as a capital punishment and even then it was not allowed for any other crime except for times of war under the reign of William, death penalty was frowned upon; however in the next few centuries, the executions started to rise, by the 1700s over 222 crimes were punishable by death. Due to the brutality of the death penalty, juries wouldn't convict a wrong doer unless it was very serious.

However in from the late 18th century and 19th century, the ideology of torturing slowly faded as the later societies were of the belief that it was inhumane and hence humane and less painful methods such as beheading with the guillotine and hanging was adopted.

From the time period of 1823 to 1837, the death penalty was eliminated for over 100 out of 222 crimes punishable by death in Britain. This led to the evolution of reforms of Britain's death penalty.

With the changed customs and much humane approach towards punishing the deterrent, the countries of the world started to award death penalty only for the most grievous and vile crimes. Many countries have abolished it. Statistically, more than two-third of the countries of the world have abolished the practice of the death penalty

After the World War 2, the defeat of the Axis power provided a solid ground for the abolishment of capital punishment in parts of Western Europe. Death penalty was abolished in Italy in 1947, in Germany in 1949, and in UK in 1965. By the early 1980s, every major country had abolished death penalty for the criminals.

Following the trend in Western Europe, number of countries belonging to the common wealth

nation also stopped executing the criminals. Canada formally ended the practise of death penalty in the year of 1976, New Zealand in 1957 and Australia in 1967

Throughout the communist countries, the act of abolishment of death penalty was seen as limiting state's power over an individual's life

III. DEATH PENALTY IN INDIA

The question of abolishing or retaining death penalty in India never arose until the early 1930 in British legislative assembly in India .In the assembly, Shri Gaya Prasad Singh, a member from Bihar raised a notion for abolishing the death penalty for the offences in the Indian Penal Code however it was rejected by the then home minister

Even before the independence of India in 1946, the government's stand on death penalty stood unshaken. The then Home Minister, Sir John Thorne, clarified twice that death penalty will not be abolished for the offences stated in the IPC[2] in the legislative assembly

Post-independence, India retained some of the laws that were put in place the British colonialists. It included the IPC, 1860[3] and CrPC, 1898[4].

For offences where death penalty was death sentence, the Section 367(5) of the CrPC, 1898 required the judicial court to state the reason as to why death penalty wasn't opted.

However this section was repealed in 1955, special reasons as to why death penalty wasn't opted was no longer required according to the amendment.

After the re-enactment of the Code of Criminal Procedure in 1973, several changes were made which changed the position of the death penalty, it was now required for the courts to state the reason as to why death penalty was the choice as opposed to other alternative punishment contrary to the repealed section of 367(5).

According to the Article 21 of the Indian Constitution, every citizen of India has the right to life and liberty and at no cost can a citizen be deprived of this inviolable right except in accordance with the procedure that was established by law

In the present day India, Supreme Court has upheld the constitutionality of the capital punishment in only 'rarest of rare' cases, provided that procedure ensued, is just, reasonable and fair and special reasons for the imposition are clearly stated.

[2] The Indian Penal Code, 1860
[3] The Indian Penal Code, 1860
[4] The Code of Criminal Procedure, 1973

IV. Doctrine of rarest of the rarest

India's imposition of death penalty is based on the Doctrine of the rarest of the rare, it states that in order to sentence a person to death, a crime test should be fully satisfied and it should be properly executed to ensure that there are biases in the accused's favour.

It is nothing but default on the part of the judicial system if proportionate punishment is not awarded for the crimes not just been committed against an individual but can be said that it has the effect of being against the individuals of the society

Therefore, more weight is attributed to the extent of the brutality and the atrocity with which the crime has been committed, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal"

This doctrine can be divided as:

Aggravating circumstances

Mitigating circumstances

The judge in the former category can impose his own will in sentencing a criminal to death penalty unlike the latter category.

However this doctrine is vague as justice Bhagwati believed that death penalty is a violation of the fundamental life as laid down in Article 14 and 21 of the Indian constitution

"The question may well be asked by the accused: Am I to live or die depending upon the way in which the Benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined in Articles 14 and 21?" Justice Bhagwati in his dissenting judgment Bachan Singh v. State of Punjab 5

It was the landmark case of the Bacchan Singh v/s State of Punjab6 that brought about the doctrine of the rarest of the rarest case. The judgement of the case illustrated certain circumstances where the case is considered one of the 'rarest of the rare' to apply death penalty:

The murder has been committed in an extremely grotesque manner so as to arouse the indignation of a community.

The murder has been committed for a motive which involves total meanness or exceptional depravity.

Murder that is socially abhorrent for instance dowry deaths.

[5] Bacchan Singh v/s State of Punjab, AIR 1980 SC 898 CriLJ 636
[6] Bacchan Singh v/s State of Punjab, AIR 1980 SC 898 CriLJ 636

In case of multiple murders of family members of community, locality or caste.

Where the victim against whom the crime is committed is a helpless woman, injured person, innocent child or a public figure who was murdered for personal reasons.

The bench also suggested that the judges should take into account two questions before awarding the death sentence

If there's something so uncommon about the crime that has been committed such that it calls for death sentence and not for life imprisonment.

Are the circumstances of the crime are such that there's no alternative except death penalty even after attributing maximum weightage to the mitigating factor that is speaks in favour of the offender.

This doctrine is therefore followed with greatest degree of care and consideration such that a life isn't easily taken away and the fundamental rights of the offenders are still enforceable. In fact, the accused also has the right to be heard, appeal and pray before the president.

The purpose of this doctrine is to act as a model so that the fellow citizens don't indulge in such grievous crimes and hurt the sentiments of the society at large

V. Relevant legislation for enforcing Death Penalty in India

There are mainly two categories of legislation which provides for death sentence in India: Indian Penal Code 1860 and the special or local legislation.

Section 53 of the IPC sources the power to award death sentence. The IPC provides for capital punishment for the following offences or criminal conspiracy for commit any of the following offences:

Section 396 : Dacoity with murder

Section 307(2) : Attempted murder by serving life convict

Section 364A: Kidnapping for ransom

Section 121: Treason

Section 305: Abetment of suicide by intoxicated or insane person or a minor

Section 302 : Murder

Section 195A : Threatening any person to give false evidence resulting in death or conviction of an innocent person

Section 194: Perjury resulting in conviction and death of an innocent person

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Section 132 : Abetment of mutiny actually committed

There is also a number of special legislation that provides for death penalty, they relate to acts of terrorism such as TADA7 and POTA8.

It is vital to note that such laws relating to acts of terrorism often permit the confession that was submitted by the accused to the police officer as evidence as opposed to ordinary law, this gives way for more misuses and abuse of power by the police officials

VI. VIOLATION OF HUMAN RIGHT

The very basic human right- right to life is violated by the imposition of death penalty. The imposition of death penalty is irreversible. An innocent person maybe released once his case is driven, however, death penalty once executed cannot be undone or reversed

The UN Human Rights Committee in reference on Article 6 elaborated that death penalty should be awarded in very exceptional cases in only most of the serious cases.

UN Economic and Social Council in 1984 put forth that, those sentenced to death penalty "only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences."

The imposition of death penalty over a period of the recent years appears to violate the very spirit of Article6(2). For instance, in the year of 1993, India laid down death penalty for the cases kidnapping for ransom (Section 364A IPC9). This contradicts the statement made by The UN Human Rights Committee which said that abduction not resulting in death cannot be regarded as the "most serious crimes in reference to the article 6(2) of the ICCPR10. Hence imposing death penalty for these offences violates the article.

It was mentioned by the UN Special Rapporteur in the restrictions stated in Safeguard 1 of the UN protects the right of those undergoing the death sentence, it states that the judiciary should exclude such possibilities where the crime committed has no victims as in the case of political crimes such as treason, espionage of India awards the death penalty for 'waging war against the state' (Section 121 IPC11)

Therefore India violates the basic human right even in respect of international standards. By violating the right to life it removes the foundation for realization of all rights enshrined in the

[7] Terrorist and Disruptive Activities (Prevention) Act. 1987
[8] The Prevention of Terrorism Act, 2002
[9] Indian Penal Code, 1860
[10] International Covenant on Civil and Political Rights
[11] Indian Penal Code, 1860

Universal Declaration of Human Rights. Around two-thirds of the world abolished death penalty in law

VII. ABOLITION OF DEATH PENALTY

Death penalty is an irreversible and irrevocable punishment. It grants the state the power to exercise this power disproportionately and arbitrarily. Given the flawed system and delay in delivery of justice in India, many innocent people are imprisoned, given this case; there is no return from death.

Death penalty often seems to target the poor individuals from weaker socio economic background as they don’t have enough access to the appropriate legal aid to defend themselves.

All criminal justice systems around the world are subjected to error, defect prejudice and discrimination. The human nature of justice delivery makes it difficult to determine with accuracy of the innocence of the criminal. Therefore arbitrarily issued judgments can permanently eliminate the life of an innocent person and such loss cannot be compensated.

Self-defence may be held as an appropriate justification only in cases such as taking of life by state officials when a country is in a lockdown due to warfare etc. however death penalty is a judicial murder of a prisoner that’s premeditated. This cannot be justified as he can be dealt with other punishments.

The implementation of death penalty is ultimately the violation of a human right upon which the state has no authority over. According to the Universal Declaration no one can be subjected to torture, cruel, inhuman or degrading treatment or punishment.

Death penalty in its execution not only inflicts physical assault but also mental assault on a person. The pain and the mental agony that the prisoner undergoes during the execution cannot be quantified.

Though death penalty after its execution permanently incapacitates the prisoner from repeating the crime there is no surety that the prisoner would repeat the crime if allowed to live provided that such dangerous prisoners can be safely kept away from the society without resorting to killing them.

Therefore the act of execution is ironical in the sense it cannot be used to condemn those who kill, execution in its very essence is killing.

Imposing death penalty on prisoners based on retribution argument holds no ground as it is vastly understood that societies must be built on different set of values than those they condemn.

Hence, abolition of death penalty by the retentionist countries is vital to restore right to life. According to the Amnesty International moratorium on executions must serve as first step towards abolishment of death penalty by the retentionist states.

VIII. Constitutional validity of death penalty

The constitutional challenge in regards to death penalty was first discussed in the landmark case of Bachan Singh v. State of Punjab12. The Supreme Court in this case identified issues:

Whether the death penalty provided in section 302 of IPC was constitutional

Whether the procedure set out for sentencing in Section 354(3) CrPC invested the court with discretion to allow death penalty be implemented arbitrarily.

However the majority ruling, that is four judges of a five judge constitutional bench in the case dismissed the challenge that the death penalty was unconstitutional in violation of Article 14, 19 and 21 and reiterated that discretion of the court cannot be said to be freakish or arbitrary

Justice Bhagwati was the only dissenting judge in Bachan Singh. He pointed out the incapacities of the death penalty based on both constitutional principles as well as the arbitrariness in carrying out the sentencing procedure.

Justice Bhagwati on the argument of deterrence theory has taken the stance that the homicide rates in countries that retain death penalty and those who have abolished are conditioned by various other factors, thus eliminating one individual as a model to deter the other has little to nothing in relation to lowering the homicide rates.

Justice Bhagwati was of the view that death penalty was not only against the national and international norms and therefore unconstitutional but also that death penalty process is arbitrary. The verdict of death penalty largely depends on the personal social philosophy, moral standpoint and preconceived notions and his response in ideas of penological jurisprudence of a judge that is highly subjective in nature, thus to rely upon matter of such subjective nature is dangerous in imposing death penalty which gives way for arbitrariness

It was ruled by the Supreme Court in Mithu V. State of Punjab13 that mandatory death penalty is unconstitutional. Though the legislations for or drug and atrocity offenses prescribes the capital punishment, the judicial system seems not to implement them.

[12] Bacchan Singh v/s State of Punjab, AIR 1980 SC 898 CriLJ 636 (Supreme Court May 9, 1980).
[13] Mithu V. State of Punjab , SC 473

IX. Flaws in the Judicial System

Besides the implementation of death penalty and ethical conflict that accompanies the act, there are also flaws and loop in the system as a result of which many innocent individuals fall prey to the death penalty.

Mistake in sentencing and law

Mistakes made by the judiciary in reading of law and sentencing cannot be overlooked. It was observed by the Supreme Court in the case of Naveen Chandra v. State of Uttaranchal 14 that the lower court had wrongly sentenced the accused to death under section 302 instead of 304 of the IPC due to error in appreciation of evidence and therefore altered the sentence as the accused only exceeded his right of self defence

Similarly, in the case of Dilip Kumar Sharma and Ors. v. State of Madhya Pradesh15 The lower court awarded death sentence to one of the accused under section 303 and it was wrongly confirmed by the high court the Supreme Court corrected the sentence to life imprisonment as the accused was not under life imprisonment and hence section 303 was not applicable

Further the changes in law aren't familiarised by all courts and hence landing the accused in disadvantageous bias of the judges. This leads to the court applying the wrong law. In the case of In Khushal Rao v. The State of Bombay16, though the murder took place after the amendment was made in CrPC17 to make death sentence no longer ordinary, the lower court did not follow the amendment and sentenced the accused to death.

Non-Unanimous Decision Of The Bench

In circumstances where the judges of a court reach different opinion in regards to sentencing, the section 392 of the CrPC18 states the rule of majority to be following

When the bench still stands equally divided upon their decision, then another judge of the same court decides the fate of the decision and it becomes final.

In the case of Pandurang and others v. State of Hyderabad19, the high court upheld the death sentence of 5 person, in this case, out of two judges, one judge called for acquittal while the other upheld death sentence, therefore a third judge was brought who upheld the death sentence as well. However upon appeal the Supreme Court commuted the death sentence to life

[14] Naveen Chandra v. State of Uttaranchal
[15] Dilip Kumar Sharma and Ors. v. State of Madhya Pradesh SC 133
[16] Khushal Rao v. The State of Bombay, AIR 22 SCR 552
[17] The Code Of Criminal Procedure, 1973
[18] The Code Of Criminal Procedure, 1973
[19] Pandurang and others v. State of Hyderabad, AIR 792 SCR (2) 524

imprisonment.

Therefore this sheds light on the fact that, the matter of awarding death sentence is highly subjective, it may vary from judge to judge, putting the life of an individual on pedestal.

This calls for the strictest observance in carrying out the sentencing in order to ensure justice is served.

Judicial Bias

There a number of cases where decisions have been given on the ground of bias relating of factors of politics, religion, gender caste etc.

For instance, in the case of Ram Lakhan Singh and Ors. v. State of Uttar Pradesh20 It was noted by the Supreme Court that the session court judge was biased towards the family of the deceased and justified his judgment by stating that the accused came from a family of lawbreakers without proof of evidence of such a claim

Further the high court also failed to examine the extraordinary details of the case. The Supreme Court acquitted the accused upon fair trial.

Therefore human failings of the judges are apparent on various cases where in they jump to conclusion, over taken by the emotions without coming to rational and logical conclusions as observed in the case of Jagga Singh v. State of Punjab21

Lack Of Adequate Legal Representation

The Article 22 of the Indian Constitution gives every arrested person the right to consult or be defended by legal practitioner of his or her choice

The presence of an attorney in the pre-trial stage while the accused is in the police custody is seemed as vital by the Supreme Court as it acts a check on the discriminatory or intimidating practises by the police

A number of poor and illiterate suffer as they can afford quality and competent legal aid, thus resorting to incompetent lawyers.

Though the Supreme Court has said that the state is obligated to provide a lawyer to the accused free of charge, it is not upheld by judicial system

For example, in the case of Ram Deo Chauhan @ Raj Nath v. State of Assam22 the state appointed counsel for the defendant failed to raise the issue of young age of the defendant prior

[20] Ram Lakhan Singh and Ors. v. State of Uttar Pradesh, SCR (1) 125
[21] Jagga Singh v. State of Punjab SC 135
[22] Ram Deo Chauhan @ Raj Nath v. State of Assam , SC 2231).

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to the review petition by the Supreme Court reflects the incompetence of the counsel.

The lack of interest by the counsel in a number of capital cases also proves to be a main concern. In the case of Ranadhir Basu v. State of West Bengal23 the counsel for the accused didn't attend the cross examination of a key witness which was vital for challenging the testimony.

In Bhagwan Swarup v The State of U.P24 it was brought to the notice of the Supreme Court that the petitioner was not represented in the appeal before the high court as the counsel as busy in another court and arrived too late to make his arguments.

Absence of Right to Compensation By The Court

There is little to no compensation awarded to the accused after being acquitted due to wrongful conviction. The length of time and mental agony that the accused underwent has no weightage.

In Ravindra @ Ravi Bansi Gohar v. The State of Maharashtra and ors25, the Supreme Court acquitted the appellants for the lack of evidence. The appellants in this case spent over 11 years under death sentence in prison prior to the acquittal

Article 14(6) of the ICCPR26 states that when the accused has served time under death sentence due to the miscarriage of justice of flaws in the justice system, they must, after acquittal must be compensated, however the Indian judiciary provides no such compensation or rehabilitation of the acquitted individuals.

Therefore such flaws in the justice system further reflects that the life of a person cannot be let alone in the hands of such faulty mechanism where human bias, errors and faults are inevitable

X. Clemency powers

A convict can after the judicial processes come to end, can avoid execution in 2 ways, firstly commutation under the provision of IPC27 and CrPC28 and the second being pardon or commutation granted by the president of India or Governor of a state

A condemned prisoner has the right to appeal to the Supreme Court, and if the Supreme Court rejects his appeal against the death penalty, then he can submit a mercy petition to the president of India and governor of the state.

The judicial review power of the Supreme Court is highly limited in cases where the clemency

[23] Ranadhir Basu v. State of West Bengal , SC 908
[24] Bhagwan Swarup v The State of U.P, SC429
[25] Ravindra @ Ravi Bansi Gohar v. The State of Maharashtra and ors, SC 3031
[26] International Covenant on Civil and Political Rights
[27] Indian Penal Code, 1860
[28] The Code of Criminal Procedure, 1973

powers of the president of India or the governor of the state is involved.

The President of India and the governors have the power to pardon, reprieve, commute, or remit the sentence of any prisoner who was convicted of any offence under Article 72 and 161 of the constitution of India

This power act as a final protection against judicial error and miscarriage of justice

"Procedure Regarding Petitions for Mercy in Death Sentence Cases" was drafted by The Ministry of Home Affairs, Government of India to regulate and guide the state and prison authorities in dealing with mercy petitions submitted by the prisoners that are under death sentence.

XI. JUDICIAL REVIEW IN REGARDS TO CLEMENCY POWERS

The circumstances to be considered while deciding the mercy petitions as recommended by the Home Ministry are:

- Long delays in trial and investigation process
- Circumstance of the case or the personality of the condemned prisoner
- Conflict of opinion of the high court judges which further necessitates to refer the case to a lager bench
- Taking evidence into consideration while fixing responsibility in a gang murder case
- Circumstances where the appellate court expresses doubt in respect to evidence but still convicted the prisoner.
- When it's alleged before the court that fresh evidence is available to see if newly carried out enquiry is justified.
- Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence

Alternatives To Death Penalty

The Supreme Court in the recent times have entrenched the punishment of full life instead of death penalty in various cases.

The Supreme Court has laid the foundation of this emerging penal option in the case of Swamy Shraddhanand29, where the bench favoured the sentence of determinate number of years as opposed to death penalty. It has been followed in number of cases such as Gurvail Singh v.

[29] Swamy Shraddananda@Murali ... vs State Of Karnataka

State of Punjab30, Haru Ghosh v. State of West Bengal31,

XII. Conclusion

Death penalty is a grave breach and violation of human right. To grant the state the power to strip away life is over and above the state's control.

Imposition of death penalty even in "Rarest of Rare' cases is highly subjective to one's moral belief, ethical ideologies and philosophies that vary from one judge to another.

Death penalty is nothing but judicial murder, though retention of death penalty is for deterrent model, murders and heinous crimes have been committed unabated. Therefore, to eliminate an individual is unethical and cannot be justified. The judiciary must be built on a different set of values than seeking retribution

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