DEATH PENALTY IN INDIA: TO BE OR NOT TO BE

ANUMEHA MISHRA*

INTRODUCTION

Kasab's death sentence has once again raised the debate of justification of Death penalty in India. The Human right groups have been vociferously condemning the capital punishment across the globe. Nevertheless, India has till date adopted a retentionist stance towards this issue. However, it is interesting to note that the father of our Indian Constitution, Dr. B.R. Ambedkar concluded the Constituent assembly debate on death penalty in the following words:

"rather than having a provision for conferring appellate power upon the Supreme Court to whom appeals in cases of death sentence can be made, I would much rather support the abolition of death sentence itself. That I think is the proper course to follow, so that it will end the controversy. After all, this country by and large believes in the principle of non-violence. It has been its ancient tradition, and although people may not be following it in actual practice, they certainly adhere to the principles of non-violence as a moral mandate which they ought to observe as far as possibly can and I think that having regard to this fact, the proper thing for this country to do is to abolish the death sentence altogether."[1]

Contrary to Dr. B.R. Ambedkar's sentiments, the codified laws and also the judicial pronouncements of our country have always favoured corporal punishment. This tone has been maintained throughout history and has rather been stressed upon consistently. The retentionist stance is discernible even in the Thirty-Fifth Report published by the Law Commission of India in 1967, where it explicitly opined that:

"[...] India cannot risk the experiment of abolition of capital punishment."[2]

This abolitionist versus retentionist debate is centered around the justness of death penalty on moral and humane grounds. Whether the modern legal system should take

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*Fourth Year, B.A. LL.B.(Hons.), *Dr. Ram Manohar Lohiya National Law University*, Lucknow.

[1]Constituent Assembly of India, Vol. 8, 3rd June 1949, cited in "Lethal Lottery: The Death Penalty in India, A study of Supreme Court judgments in death penalty cases 1950-2006", a report by Amnesty International India & PUCL, at 2.

[2]The Law Commission of India, 1967, 35th Report, paras 262-264 at. 354

the course set by Great saints and men like Jesus and Gandhi or follow the dictate laid down in the antediluvian codes like Hammurabi, where an eye for an eye was the only law is the buzz word in the legal arena. The number of death sentences awarded in India is very low as compared to other retentionist countries like U.S.A. Furthermore, the death sentence is executed after inordinate delay which signifies the perplexity of the Government in executing a convict. This to be or not be attitude is more detrimental than retentionist stance since the convict is subjected to double jeopardy since he not only faces death sentence but also spends most of his life in the prison.

This article analyses the pros and cons of this punishment which finds its justification in it being the only effective deterrence for the gravest crimes and is often criticized for lacking a reformative and a humane approach.

1. 'DEATH PENALTY' - A GLOBAL PERSPECTIVE

"Every saint has a past and every sinner a future."

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) was the first milestone of a global trend to 'regulate the use of death penalty'[3]. Clause 1 of this article says that *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life"* [encompasses its whole essence]. The Second Optional Protocol which entered into force in July 1991 and was ratified by 64 States went a step further by talking about total abolition of death penalty[4]. Similarly Article 37(a) of the Convention on the Rights of the Child and Article 6(5) of ICCPR prohibits imposition of capital punishment on juveniles and pregnant women. The former Convention has been ratified by every country in the world, except the United States and Somalia.

The axis of the Abolitionist's stance revolves around the 'Right to life' which is enshrined in Article 3[5] of the Universal Declaration of Human Rights.

The United States too ruled in *Furman v Georgia*[6], that death penalty was unconstitutional being cruel and unusual punishment in violation of Eighth and Ninth Amendments to the Constitution. Similarly death penalty was also abolished in Germany in 1949, after

[3]See "Lethal Lottery, *ibid* 1.

[4]However it allowed the state parties to retain it in times of war.

[5]"Everyone has the right to life, liberty and security of person."

[6]408 US 238, 1972. (However this was overruled in *Gregg v Georgia*.)

the Basic Law of the Federal Republic of Germany (GG) was put into force through Article 102[7].[8]

It is pertinent to note that though most of the International Conventions and Declarations do not expressly proscribe Capital Punishment, they definitely indicate reducing the arbitrariness of the same. The same sentiments were echoed by Justice Bhagwati in *Bachan Singh v State of Punjab*[9], where he said that

"In every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole and the death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting en banc and the only exceptional cases in which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it is not possible to reform him by any curative or rehabilitative therapy and even after his release he would be a serious menace to the society and therefore in the interest of the society he is required to be eliminated."[10]

According to him by "legislatively adopting and applying the procedure mentioned above, the imposition of death penalty may be rescued from the vice of arbitrariness and caprice"[11]

As is evident from this judgment, India too is not untouched by this raging debate on the justness of Capital Punishment. The Abolitionists have tried to base their contention on Article 21 of the Indian Constitution which speaks of 'right to life and personal liberty'. Whether Death Penalty keeps up with the spirit of the Preamble and Article 14, 19 and 21 is a question which is often put before the judiciary. Though the judiciary favours the retentionist stance, it hasn't failed to induct a humane approach in their decisions.

2. DEATH PENALTY VIS-A-VIS THE INDIAN CONSTITUTION

In *Jagmohan Singh v State of U P*[12] The Counsel on behalf of the appellant argued that death penalty was constitutionally impermissible on four grounds:

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[7]"Capital Punishment is Abolished"

[8]See Helmut Goerlich, 'The Case of Death Penalty: A Hypothetical Perspective From German Constitutional Law', (2008) 1NUJS Rev. 55 at 56-57.

[9](1982)3 SCC 24.

[10]*Ibid* at para 312.

[11]*Ibid.*

[12]AIR 1973 SC 947.

i. "The death sentence puts an end to all 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.

ii. 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

iii. 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.

iv. 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 (hereinafter "CrPC") is limited to the question of guilt. In the absence of any procedure established by law in the matter of sentence, the protection given by Article 21 of the Constitution was violated and hence for that reason also the sentence of death is unconstitutional."

However the court held that if the entire procedure for criminal trial under the CrPC for arriving at a sentence of death is valid then the imposition of death sentence according to the procedure established by law cannot be held as unconstitutional.[13]This case 'repelled the challenge to the award of death sentence as being violative of article 14,19,21'[14]- an inter relation established in *Maneka Gandhi v Union of India*[15] wherein it was held that every law of punitive detention both in its procedural and substantive aspects must pass the test of all the three articles.

As already said earlier the Indian judiciary has largely maintained the validity of death sentence; however it cannot be said that the Indian case laws lack judgments favouring the global abolitionist trend. Justice Krishna Iyer in his judgment in *Rajendra Prasad v State of Uttar Pradesh*[16]explicitly expressed that *'the Court's tryst with the Constitution obligates it to lay down general rules, not a complete directory, which will lend predictability to the law vis-a-vis the community and guide the judiciary in such a grim verdict as choice between life and death'*.[17]Being a protagonist of anti- death penalty campaign,

[13]V N Shukla, *Constitution of India*, (10thedn., Eastern Book Company: New Delhi, 2006) at.179.

[14]*Bachan Singh v State of Punjab* (1982)3 SCC 24.

[15]AIR 1978 SC 597.

[16]AIR 1979 SC 916.

[17]*Ibid* at para 18.

Justice Krishna Iyer, wanted to read in the Indian Penal Code, the human rights and humane trends in the Constitution. The need to maintain the dignity of the individual is what he called for.

Bachan Singh was a landmark judgment since it was perhaps the first case where an attempt was made to formulate a form of touchstone for deciding death penalty. Though the 'rarest of rare test' formulated in this case didn't lend the predictability to law, Justice Iyer so much desired, it definitely reduced the harshness and arbitrariness of the same.

4. RAREST OF RARE CASES

"Each extreme is a vice; virtue lies in the middle" - *Aristotle*

With the campaign against death penalty gaining momentum, most of the retentionist countries including India are attempting to reduce the arbitrariness in the imposition of capital punishment (an argument usually put forth by the abolitionists). For e.g., in United States talks about putting a strict cap on the number of death-penalty cases that individual jurisdictions can pursue each year is on roll[18]. Similarly, the doctrine of 'rarest of rare case' formulated in *Bachan Singh v State of Punjab*[19] by the Indian judiciary too aims to "minimize the risk of wholly arbitrary and capricious action"[20].

Justice R.S. Sarkaria speaking on behalf of the majority in *Bachan Singh* opined that: *"A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."*[21]Though this test of 'rarest of rare' case upheld the validity of capital punishment, it was neither a small nor an insignificant achievement for the abolitionist'[22], since it tried to mellow down the severity of the court to a considerable extent, since but for the judgment "the rate of imposition of death penalty would definitely been higher"[23].

Though the judgment did not explicitly favour the abolition of corporal punishment, it nevertheless vouched for a humane and compassionate attitude towards the guilty

[18]Adam M Gershowitz, 'Imposing a Cap on Capital Punishment', (2007) 72 Mo. L. Rev. 73 at 78.

[19]*Ibid* 6.

[20]*Furman v Georgia*, 408 U.S. 238(1972).

[21]*Ibid* 4 at para 224.

[22]S Muralidhar, 'Hang them now, Hang them not: India's Travails with Death Penalty', (1998) 40 JILI 398 at 400.

[23]*Ibid.*

while deciding the imposition of this penalty. Although Justice Sarkaria while writing this judgment has relied heavily on the *Jagmohan case*, where it was held that the *"Deprivation of life is Constitutionally permissible if that is done according to procedure established by law"*[24] and that *"in the face of these indications of Constitutional postulates it will be very difficult to hold that capital sentence was regarded per se as unreasonable or not in the public interest"*[25], a 'synthesis'[26] of the retentionist and abolitionist stance is discernible in *Bachan Singh* which talks of *'discharging the onerous function with evermore scrupulous care and humane concern'*[27].

'The rarest of rare case' test has become a yardstick to decide the validity of death sentence in any case. In *Machhi Singh & Ors v State of Punjab*[28], the majority ruling held that the same test should be culled out and applied to the facts. The court came out with four propositions which stressed on the need to inflict this punishment only in 'the gravest of crimes' and only after 'drawing a balance sheet of aggravating and mitigating circumstances'. The court also conceded that 'Life imprisonment is the rule and death sentence is an exception'.

Many retentionists argue that the observation in *Bachan Singh's* case comes as a stumbling block in the courts exercising their discretion even in pre-meditated and horrifying cases[29], since after this landmark judgment there have been a plethora of cases where the guilty some of the most brutal and cold-blooded crimes have been granted clemency. However, despite these brickbats, this doctrine signifies a balanced perspective in a debate which only talks of two extremist stances. Also this doctrine of 'rarest of rare case' is a safe method of blunting the sharp edges of arbitrariness of death penalty without completely abandoning it, especially when the law itself is sceptical regarding its constitutionality and justness.

4. BEYOND BACHAN SINGH: IS INDIA SITTING ON THE FENCE?

It is often said that a number of other benches who made mandatory references to *Bachan Singh's* judgment, merely paid lip service to it without actually understanding it[30]. Though the frequency of sentencing a person to death penalty has drastically reduced, it still remains arbitrary. Since the rarest of rare test, the court has been unable

[24] *Ibid*, at para 13.

[25] *Ibid*.

[26] *Macchi Singh & ors v State of Punjab* AIR 1983 SC 957 at p. 1.

[27] *Ibid* at 3.

[28] *Ibid* 29.

[29] Justice J. Eswara Prasad, 'Death Sentence as Effective Deterrent', (2004) 46 JILI at 447.

[30] *Ibid* 3 at p.81.

to come up with any effective postulate. The frustration of the court was evident in *Alok Nath Dutta & Ors.*v *State of West Bengal*[31] where was it said that, *"No sentencing policy in clear cut terms has been evolved by the Supreme Court. What should we do?"*

Unfortunately the courts have failed to enunciate a doctrine that could put to rest the obfuscation regarding death penalty. It is because of these confusions and a lacuna in legislation that Dhanonjoy Chatterjee[32] who was sentenced to death in August 1991 by the trial court for the rape and murder of a schoolgirl and was executed in 2004 after living in prison for 14 years. Such a delay was preceded by a series of appeal and mercy petitions which could have been avoided had the court come up with a steadfast law regarding death penalty.

Another such case is that of Afzal Guru. His mercy plea is still pending even after 8 years of handing him down the death sentence. The Home Ministry recommended death penalty for him in June 2010, but the matter is yet to be decided by the President. Such indecisiveness of the government is a violation of doctrine of double jeopardy guaranteed as a fundamental right under Article 20(2).

However, the executions in India have today become *'symbolic and do not form a part of its major crime control policy'*[33], thereby indicating a trend towards abolition.

5. TERRORISM AND DEATH PENALTY

It might be argued by some that gruesome acts of terrorism can only be punished by handing down the death sentence. But it hardly acts as deterrence for terrorists who are trained to vilify their life and are immune to the fear of death. Moreover every time terrorists like Kasab[34] and Afzal Guru are convicted with death sentence, their mercy petitions shall remain pending due to various political considerations.

6. JURISPRUDENCE ON DEATH PENALTY

The movement against capital punishment was initiated in England and Europe through the works of Bentham and Becaria. Bentham insisted that since punishment is an evil therefore punishment that is just, fair and reasonable must be inflicted only to curb menace of crime. The capital punishment ought not to be proposed for, where

[31] MANU/SC/8774/2006.

[32] *Dhanonjoy Chatterjee v State of West Bengal*, (1994) 2 SCC 220.

[33] Hood & Carolyn, *The Death Penalty: A Worldwide Perspective*, (4th edn.,Oxford University Press 2008) 94.

[34] Kasab's death penalty was upheld by the Bombay High Court in February 2011.

some lesser sentence could achieve the same objects and results.[35] Becaria too threw a gauntlet to the retentionists in the form of following questions: *"Did anyone ever give to others the right of taking away his life? Is it possible that, in the smallest portions of the liberty of each, sacrificed to the good of the public, can be contained the greatest of all good, life? If it were so, how shall it be reconciled to the maxim which tells us, that a man has no right to kill himself, which he certainly must have, if he could give it away to another?"*[36]

According to Amnesty International, a total of 135 countries have abolished or are on their way to abolish death penalty[37]. This global trend suggests that time has come to take a U-turn from the retentionist stance and work towards a more humane approach in awarding punishment. However it is interesting to note how Indian judiciary has used public consciousness to support death penalty and despite the rise in anti-death penalty voices, it has refused to budge from its stance.

Justice Sarkaria in *Bachan Singh* said that the "Expediency of transplanting western experience in our country was rejected. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area." These words appear to echo the theory of *Volksgeist* formulated by Savigny that law should always conform to the public consciousness of people[38]. According to Savigny the nature of any particular law was manifested in the common consciousness of people. Death penalty is usually bestowed on individuals who have committed the most horrendous crime. As Justice Palekar wrote in *Jagmohan case* – "the prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval by the society."

The pro-death penalty argument would be that people expect the holders of the judicial power to 'inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty when the public consciousness is shocked'[39].As has also been put by Salmond that *"a society which felt neither anger nor indignation at outrageous conduct would hardly enjoy an effective system of law"*.

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[35]Cesare Becaria, *On Crimes and Punishments*, available at <http://www.crimetheory.com/Archive/Beccaria/Beccaria23.htm> , last accessed on 14th October 2010;

See also, Gunjan Mishra, "Death Penalty: Abolitionist v. Retentionist Paradigms", (2007) 1 The Edict 39.

[36]See Becaria, *ibid* 37

[37]*Ibid* at p.13.

[38]R W M Dias, *Jurisprudence* (5th edn., Adity Books Public Ltd: New Delhi, 1994), at p.378.

[39]*Machhi Singh v State of Punjab.* AIR 1983 SC 957, at p.12

Dr. Ernest Van Den Haag, a New York psychologist and author, and a leading proponent of death penalty, had remarked that *'the motives for the death penalty may indeed include vengeance. Legal vengeance solidifies social solidarity against law-breakers and probably is the only alternative to the disruptive private revenge of those who feel harmed'*[40]. Death Penalty is justified by the retentionists as the ultimate assertion of society's highest form of disgust for humanity's worst depredations of heinous crimes which is explained by the popular demand of death sentence for rape.[41] This might be the reason why the Rajasthan High Court in *Attorney General of India v Lachma Devi*[42] ordered the public hanging of the mother- in-law for dowry death. Thus death penalty in a way justifies Duguit's concept of social solidarity, as the deterrent effect of this sanction is directed towards 'smoother and fuller co- operation between people'[43]

However the question is does the retributive nature of death penalty act as deterrence? Does the society that accepts this punishment possess better immunity against law-breakers? Does an eye for an eye actually evoke guilt in the guilty? Studies show that crime neither increases due to decrease in execution by death nor decreases due to the increase in the same.[44] Hence the time has perhaps come to re-think the justness of this punishment.

7. THE CHANGING CONSCIOUSNESS

Puchta (Savigny's disciple) had written :

'Law grows with the growth of society, and strengthens with the strength of people, and finally dies away as the nation loses its nationality.'[45]

Justice Krishna Iyer in Rajendra Prasad remarked that *"the trend of legislative endeavours may also serve to indicate whether the people's consciousness has been projected towards narrowing or widening the scope for infliction of death penalty."* According to him *'the current criminological theories and the march of the abolitionist movement across the continents, was an indicator'* that the time has come for the law to evolve as the general consciousness had evolved. Philosophies like every political society had a duty to enforce retributive justice (Kant) can no longer be the inspiration that moulds law in the present society.

[40]The Voice (USA) June 4, 1979, cited in *Bachan Singh* at para 108.

[41]K D Gaur, *A Textbook on Indian Penal Code* (3rd ed. Universal Law Book Co. 2004) 601-04.

[42]AIR 1986 SC 467.

[43]Dias, *ibid* 41.

[44]Gunjan Mishra, *ibid* 38.

[45]Puchta Outlines of the Science of Jurisprudence (trans Hastie), cited in Dias, see *ibid* 48.

The new perspective of respecting the dignity of even guilty signifies that the human civilization can only evolve by inculcating a more humane and reformative approach towards the guilty.

CONCLUSION

"The quality of mercy is not strained;

It droppeth as the gentle rain from heaven

Upon the place beneath; it is twice blest;

It blesseth him that gives, and him that takes;"

Shakespeare, 'Merchant of Venice'.

'To be or not to be'- this is the predicament that the judiciary today faces regarding death penalty. The need to protect the dignity of human beings is the utmost duty of law. However capital punishment completely strips the individual of it. It is easy to argue that 'eye for an eye' is the philosophy of law; however it is inhumane to forget that this myopic vision merely leads to the whole world becoming blind.

The flow of arguments never seems to cease. Both the pro and anti death penalty protagonists appear to invent some new justifications for their stance. It is interesting to note that question of dignity with respect to capital punishment too can be argued in two ways with respect to death penalty. While the retentionists would argue that death penalty 'restores the dignity of law'[46] by penalising a wrong law seeks to prohibit, the abolitionists would consider death penalty as depraving the dignity of an individual and also of the essence of law. Justice Bhagwati in his minority judgment in *Bachan Singh* quoting G.B. Shaw said that *"Assassination on the scaffold is the worst form of assassination because there it is invested with the approval of the society. Murder and capital punishment are not opposites that cancel one another but similar that breed their kind."*

It is high time to turn our back on capital punishment and evolve a reformative approach to deal with the criminal law system. We need to take strides towards achieving a more humanitarian world where Gandhi's tenets like *'ahimsa'* and *'kshama'* flourish. Reducing the barbarity in imposition of death penalty through new techniques like lethal injection and electrocution 'does not mask the barbarism with its veneer of fairness'[47], but merely

[46]Goerlich, *ibid* 11, at p.59.

[47]S Marks & A Caplan, *ibid* 5, at p.59.

exposes the hypocrisy of law that tries to prove its humane approach though a scientific instrument and refuses to inculcate it within itself. Justice Krishna Iyer had rightly pointed out in *Shivmohan Singh* v *State (Delhi Administration)*[48] that *"It seems to me absurd that laws which are an expression of the public, which detest and punish homicide, should themselves commit it."*

Generally the accused who is awarded death penalty seeks its commutation. However the process of commutation of death penalty is more often than not a political issue. The drawback of this process is that it is so prolonged that the accused is kept in speculation. Delay in execution is a stark contravention of the precepts of natural justice.

Moreover it is always better to impose life imprisonment for gravest of crimes since it not only gives an individual a chance to reform himself but also prevents law from defiling its hands. The lack of credibility and the failure of law to evolve a mechanism to remove the arbitrariness speak out loudly against this form of punishment. Hence the time has come for the law to adopt the view which Victor Hugo talks of in the following line:

"We shall look upon crime as a disease; evil will be treated in charity instead of anger. The change will be simple, impressive and grand. Embraced arms of love should replace the scaffolding of execution."

[48]AIR 1977 SC 949.