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“DEATH PENALTY: A PARADOX?”

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“Criminals do not die by the hands of the law. They die by the hands of other men.”

~ George Bernard Shaw, Man and Superman

ABSTRACT

Since time immemorial, the Indian legal system has struggled to ascertain the constitutionality of the death penalty. Even after the progression of human rights around the world, codified laws, and awakened conscience, India doesn't hold a steady position on the death penalty. The high level of inconsistency in the death penalty judgments, starting with the landmark case of Bacchan Singh in 1982 to the most recent execution of the Nirbhaya rape case convicts in 2020, has made the death penalty a contemporary legal issue. The main contention that surrounds the pronouncement of the death penalty is that it violates certain fundamental rights of the Constitution. The death penalty is contradictory to various international human rights agreements of which India is a member, such as the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. The constitutional validity of the death penalty was upheld in the precedents, some aspects haven't been looked upon, and require immediate cognizance, of the law-makers. A society consumed by angst easily confuses punishment with a vengeance, which inhibits justice. The death penalty is a paradox in itself as it defeats the primary purpose of achieving the penological goals of 'punishment.' The

inherent fallacies in the death penalty make it necessary for India to join the group of 142 progressive countries that have abolished the death penalty.

India has witnessed the rise and fall of various distinct dynasties, but the only thing common between them was their use of the death penalty for the administration of justice. It has been a feature of criminal punishment throughout human history. During the Mauryan dynasty, the principle of ‘an eye for an eye’ was used to punish a person, and the later dynasties followed similar methods of punishment such as cutting off a limb, stamping by an elephant, guillotining, etc. Capital punishment or death penalty, in India, is handed out by the method of hanging by the neck or shooting in case of capital offences like aggravated murder, terrorism, treason, criminal conspiracy, military offences, drug trafficking, aggravated rape, etc. Currently, the Indian laws do not hold a steady perspective on capital punishment leading to a plethora of complexities for judges.¹ In the present era, where we have codified laws and awakened conscience, is the validity of the death penalty justified?

INCONSISTENCY IN JUDGEMENTS

The scope and validity of the death penalty have been changing ever since. The period from 1973 to 1980 changed the legislative dictate of the death penalty being a norm to it being an exception and made life imprisonment the rule.² After that, in the landmark case of *Bachan Singh v. the State of Punjab*³, the Supreme Court of India ruled that the death penalty is not unreasonable and established the Doctrine of Rarest of the Rare, which attempted to reduce the ambiguity for courts about opting for the death sentence. The doctrine stated that the death penalty should be ordered only in the ‘rarest of the rare’ cases. However, the scope of this doctrine was left undefined. Moreover, what appears “diabolically conceived and cruelly executed”⁴ to one judge may not appear to be the same for another judge. After that, in the case of *Macchi Singh v. the State of Punjab*⁵, where four men were awarded death sentence for killing seventeen people in five incidents, the court laid down a general criterion for

¹ S.B. Sinha, *To Kill or Not to Kill: The Unending Conundrum*, 24 National Law School of India Review, 1-29 (2012).

² *Death Sentence: A Critical Analysis*, ShodhGanga, (Oct.2019).

³ *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325.

⁴ *Id.*

⁵ *Macchi Singh v. State of Punjab* 1983 SCR (3) 413.

ascertaining the ambit of rarest of rare based on the manner of commission of a crime, the motive of the accused, the magnitude of the crime and personality of the victim. But even after this, the judgments in the following years were complex.

The inconsistency of judgment can be pointed out in the post- Bacchan Singh era as it was difficult and ambiguous to ascertain what falls under the rarest of the rare cases. For example, in the case of the assassination of Smt. Indira Gandhi, *Kehar Singh v. Union of India*⁶, Kehar Singh, who was a conspirator in the crime and did not commit the act, was also held in the rarest of the rare criteria. This decision was widely controversial at that time because of its unsatisfactory reasoning, and it also hinted on the subjectivity and the political pressure that surrounds the judgement of the death penalty. In the case of *Mithu v. State of Punjab*⁷, the Supreme Court struck down Section 303 of the IPC dealing with a mandatory death sentence, as it violated Article 14 and 21 of the Constitution. The judgement of this case, in particular, suggested that the Supreme Court considers that the death penalty should be avoided as much as possible, yet, in 2018, India was among the top seven countries to award death sentence according to the report by Amnesty International.⁸ And India was clubbed amongst countries like China, Vietnam, Iraq, Pakistan, Bangladesh, and Malaysia. It is worrisome as most of these countries are either known for their dictatorial communist regime, while the rest are not very particular about guaranteeing human rights.⁹

In India, the execution of such penalties has been slow. However, this does not make the situation any better as the delay in the execution of death sentences defeats the purpose of the provision and instead increases the torture on the convict. The inconsistency of judgments over the decades and the lack of proper guidelines have made the question of the death penalty a pertinent issue.

VALIDITY OF THE DEATH PENALTY

The constitutional validity of the death penalty was first questioned in the United States of America in 1972, wherefore it was abolished. But many countries like India and Saudi Arabia

⁶ *Kehar Singh v. Union of India* 1989 AIR 653.

⁷ *Mithu v. State of Punjab* 1983 AIR 473.

⁸ *Death Sentences and Executions 2018*, Amnesty International Ltd, 11 (2019).

⁹ Prabhaskar K Dutta, *Are Indian Courts awarding too many death sentences?* India Today, Dec. 14, 2019.

are having a conflicting opinion about its validity till date.¹⁰ Article 21 of the Constitution of India provides for the protection of life and liberty of every person except according to the procedure established by law. In questioning the validity of a death sentence, the relevance of Article 21, 19, and 14 is always evoked and debated upon. It is an indisputable fact that nothing in our Constitution declares the death penalty as unconstitutional, and hence its validity has been upheld ever since. However, it is noteworthy that progressive countries like the United States and the United Kingdom are among the 142 countries, where the death penalty has been abolished.

Capital punishment is a cruel and degrading punishment that infringes on the basic human rights of the accused, as mentioned in Article 3 of the European Convention of Human Rights,¹¹ Article 5 of Universal Declaration of Human Rights, and Article 7 of the International Covenant on Civil and Political Rights 1996. The United Nations Economic and Social Council, of which India is a member, has asked its members to abolish the death sentence. If countries wish to continue, they must ensure a speedy trial. In contrary to these guidelines, by the end of 2017, there were 371 pending death penalty cases in India with the oldest case from 1991.¹² Only eight convicts have been hanged in the last 20 years, namely, Ajmal Kasab, Dhanajoy Chatterjee, Afzal Guru, Yaqoob Menon, and in March 2020, the four convicts of the Nirbhaya rape case.¹³

“The prisoner on death row suffers from extreme agony, anxiety and debilitating fear arising out of imminent yet uncertain execution.”¹⁴

The convicts on the death row are subject to extreme mental trauma as there is a lack of proper medical facilities in the prison.¹⁵ The mental condition of the death row convicts have been depicted in many cases such as, *Triveniben v. State of Gujarat*¹⁶, wherein it was contended that undue delay in the process causes mental torture and would be violative of Article 21. The court is supposed to examine the delay factor, and in the appropriate cases, commute the death sentence to life imprisonment. Still, the current slow decision-making process in India is in contradiction to this precedent.

¹⁰ Thrity D. Patel, *Death Penalty: Indian and International Perspectives*, 53 Journal of the Indian Law Institute 137-142 (2011).

¹¹ Council of Europe, *European Convention for Protection of Human Rights and Fundamental Freedoms as amended by Protocols no. 11 and 14*, Jun. 1, 2010, ETS 5.

¹² Shalu Nigam, *Death Penalty or Victim Centric Justice System*, Counter Currents, Feb. 4, 2020.

¹³ Nayanika Sengupta, *16 convicts hanged to death in India since 1991*, IndiaToday, Jan 8, 2020.

¹⁴ Law Commission of India (2015) *The Death Penalty* 262, p.216.

¹⁵ *Supra* Note 12.

¹⁶ *Triveniben v. State of Gujarat* AIR 1989 SC 142.

Although the concept of rarest of rare cases has been evolved and many cases¹⁷ have ruled in favour of upholding the constitutionality of the death penalty, the application of the principle itself in some sections of the IPC violates the Constitutional provisions such as the Preamble, the Fundamental Rights and the Directive Principles. Some sections of the IPC, such as Section 364A and Section 396, provide for the death sentence as an alternative punishment, which is violative of Article 14 by causing discrimination between citizens (also echoed in the Preamble of the Constitution). It is also violative of the Doctrine of Excessive Delegation because of excessive delegation of legislative powers to the judiciary system, which is unconstitutional. There are no principles or strong guidelines laid down based on which courts could decide on awarding the death sentence or life imprisonment. Thus, the judges can easily discriminate between the convicts. There have been cases where under similar circumstances, different penalties were awarded such as in the cases of *Thanglah v. State of Tamil Nadu*¹⁸ and *Suresh v. State of Maharashtra*¹⁹ wherein one was awarded the death sentence, and the other was awarded life imprisonment when both the cases involved the murder of the convict's wife. The convict's state of life was considered in one case, and the brutality of murder was considered in the other. Thus, the arbitrariness and judicial bias in cases of the death penalty are evident.²⁰ The possibility of crime falling under the doctrine of rarest of rare cases is a 'grey area' as the interpretation is subjective. Moreover, the trial processes are not immune to errors, and the precedential framework surrounding the death penalty is also inconsistent. It is time to consider Justice Bhagwati's powerful statement in the Bachan Singh case: "*Am I to live or die depending upon the way in which the Benches are constituted from time to time?*"

JUSTICE OR VENGEANCE?

A Times of India editorial in 2006 set out the issue of the validity of the death penalty, by stating "*a society consumed by outrage easily confuses punishment and revenge, justice and vendetta.*"²¹ Justice JS Verma Committee (formed after the Nirbhaya rape case) and the Law Commission had argued that the death penalty is a regressive step as "punishment cannot be

¹⁷ Jaggmohan Singh v State of U.P 1973 AIR 947; Deena v. Union of India 1983 4 SCC 645; Triveniben v. State of Gujarat AIR 1989 SC 142.

¹⁸ Thanglah v. State of Tamil Nadu, AIR 1977 SC 1777.

¹⁹ Suresh v. State of Maharashtra, AIR 1975 SC 783.

²⁰ Ram Lakhan Singh and Ors. v. State of Uttar Pradesh AIR 1977 SC 1936.

²¹ *Lethal Lottery: The Death Penalty in India*, Amnesty International India (2008) .

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reduced to vengeance.”²² All of these incidents depict that there exists a correlation between justice and vendetta, which needs cognizance. The Nirbhaya gang rape case of 2012 and the execution of the death penalty in 2020 has reignited the debate on the validity of the death penalty.

The Bachan Singh case is usually taken as the landmark case for upholding the constitutionality of the death penalty, but the reasons stated in that judgement are no longer valid. During that time, only 18 states had abolished the death penalty, but today, 142 countries have abolished it in law or practice.²³ Justice PN Bhagwati, who, in the 1980s case of Bachan Singh, was the sole dissenting judge, had stated that the death penalty is arbitrary and capricious and has no deterrent value. It was the poor who are subjected to the gallows, and the rich can escape from its clutches. Justice Bhagwati had used statistical data to show that capital punishment doesn't succeed in attaining the penological goals - reformation, retribution, and deterrence.²⁴ Imprisonment is a more suitable method to achieve the penological goals. A survey conducted by the United Nation in 1988 also proved that there was no evidence to show that the death penalty acts as a better deterrent than life imprisonment.²⁵

After the death penalty is awarded, there is undoubtedly no scope for reforming the person, and such punishment is based, on emotions and vengeance of the society which should be curtailed in a civilized democratic society.²⁶ The deterrence theory assumes that a death penalty would dissuade other criminals from doing the same crime, however eminent US criminologist, Thorsten Sellin, had stated that “*there is no clear evidence that the abolition of capital punishment had led to an increase in homicide rate, or that its reintroduction has led to a fall.*”²⁷ And even if we assume that it does act as a deterrent, is it justified to make a person pay for the predicted crime of others? India needs a fresh assessment of the efficacy of the death penalty's role in deterring crime.

A common justification for the death penalty, though not explicitly stated, is revenge. George Bernard Shaw's powerful statement that criminals die by the hands of other men instead of the law suggests the overpowering nature of vengeance of the people, which cannot prevail in a

²² Shemin Joy, *Justice Verma Committee, Law Commission opposed death penalty to Nirbhaya case convict*, Deccan Herald, Mar. 20, 2020.

²³ *Death Penalty in 2018: Facts and Figures*, Amnesty International Ltd., Apr. 10, 2019.

²⁴ *Supra* Note 3.

²⁵ Roger Hood, *The Death Penalty: A World-wide Perspective*, Oxford, Clarendon Press 238 (1996).

²⁶ Arthur Koestler, *Reflections on Hanging*, (Macmillan 1957).

²⁷ *Supra* Note 3, pg. 16.

democratic society like India. The case of *Lachma Devi v. State of Rajasthan*²⁸ is the perfect example of vengeance taking over the objectivism of judges. In this case, a mother-in-law burnt her daughter-in-law for dowry, after which the court in anger passed an order of death sentence by public hanging, thereby wholly disregarding the general criterion precedent set in *Macchi Singh* case. It is the revulsion felt by society against the convict, which is only satisfied by his or her death. A civilized society, like India, which believes in the dignity of its citizens, cannot have retaliation as a justification for punishment. From such instances, it can be seen that with the use of the death penalty, deterrence is not proven, retribution is not acceptable, and the primary purpose of punishment, which is reformation, is nullified. Hence, the concept of the 'death penalty' is a paradox in itself.

CONCLUSION

The death penalty is as inhuman as the crime which motivates it.²⁹ Taking a life, for a life that has been lost, can only be called revenge, not justice. This is on similar lines with the Gandhian theory of “*An eye for an eye will make the whole world blind,*” and we, as a democratic country, cannot profess such acts. The prisoners are on the death row, and their families are subject to a prolonged trial process along with immense physical and mental torture, which causes them to beg for death after a point of time. Any human being should not face such a situation, be it a convict or not. In cases of extremely heinous crimes or terror cases (affecting the national security), alternative methods like rigorous life imprisonment without any parole option or no relief by good behaviour can be implemented. And even if the death penalty has to be awarded or has already been awarded, it should not be delayed after its pronouncement so that the accused can get a fair trial. The judiciary needs to resist societal pressure for executions and educate the public about the futility of capital punishment and the importance of protection of human rights.

In conclusion, the death penalty should be struck down based on its inherent fallacies, and because of it being a moral wrong. Exceptions can be made to it based on well-justified reasons and guidelines. To progress towards this, India first needs to abolish all provisions allowing mandatory death sentences, initiate a study about the compliance with international standards for free trial in capital cases, ensure that the convict is provided with a competent legal counsel

²⁸ *Lachma Devi v. State of Rajasthan* (1986) Cri. L.J. 364.

²⁹ Janak Raj Rai, *Death Penalty* 87 (Regency Publications, 2005).

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regardless of his economic background and make all the statistical information about death penalty available in the public domain. In 2019, the Supreme Court allowed the plea of ‘legal insanity’ in death sentence cases, and in another recent case, the SC had provided guidelines for commutation to life imprisonment in cases of prolonged delay.³⁰ Such acts are a small yet positive step towards the complete abolition of the death penalty and better protection of human rights.



³⁰ Shatrughan Chauhan v. Union of India (2014) 3 SCC 1.