

## *Sanity of Death Penalty in India*

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“Law must rise with life and jurisprudence responds to humanism”

The Courts, in India, are vested with the power and authority, based on judicial principles and facts, to sentence an offender who has been found guilty and convicted for commission of any particular offence (s). Neither in the Penal Code nor in any other law in force, any prescription or norm or even guidelines governing the exercise of the vast discretion in the matter of sentencing has been laid down except perhaps, Section 354 (2) of the Code of Criminal Procedure, 1973 which, inter-alia, requires the judgment of a Court to state the grounds for the sentence awarded when the punishment prescribed is imprisonment for a term of years. In such situation, naturally, the sentencing power has been a matter of serious academic and judicial debate to discern an objective and rational basis for the exercise of the power and to evolve sound jurisprudential principles governing the exercise thereof.

The authors of Indian Penal Code, while incorporating death penalty in the statute, remarked: “We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the

highest offence against the State has been committed.”

Capital punishment is provided as a penalty in several legislative Acts, like the IPC and penalty provisions of TADA and anti narcotics Acts. Here it shall be worth-while to mention that many attempts have been made on the legislative side to abolish the capital punishment in India, but have been rejected. Before Independence a private Bill was introduced in year 1931 legislative assembly to abolish penalty for Penal Code offences. The Government of Independent India also disallowed a similar Bill. Resolution introduced in the Rajya Sabha in 1958 and 1962 met with a similar fate.

Justifiability of death penalty has been a debatable issue and the same has been dealt by the Supreme Court in various authoritative pronouncements. Further, the Constitution Bench decision of Hon'ble Supreme Court in Jagmohan Singh Versus The State of U.P (1973) 1 SCC 20 (under the old code), another Constitution Bench decision in Bachan Singh Versus State of Punjab (1980) 2 SCC 684, a three Judge Bench Decision in Machhi Singh and others Versus State of Punjab 1984 (2) RCR (Criminal)-412, are watersheds in the search of jurisprudential principles in the matter of sentencing. The principal reasons for confirming the death penalty, as culled out from these authoritative pronouncements and changes in the propositions include: (i) the cruel, diabolic, brutal, depraved and gruesome nature of crime, (ii) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community, (iii) the reform or rehabilitation of the convict is not likely or that he

would be menace to society, (iv) victims are defenseless, (v) crime was either unprovoked or that it was premeditated etc.

In the nature of things, there can be no hard and fast rules which the Court can follow while considering whether an accused should be awarded death sentence or not. The core of a criminal case is its facts and, the facts differ from case to case. Aggravating factors qua the crime and mitigating factors qua the criminal should be properly balanced so as to decide whether the offence of murder etc. would fall under the rarest of rare category to be visited with the extreme punishment of death. The criticism that, on merits, justice has not been done to Yakub Menon raised many eyebrows. One question was repeatedly raised that whether execution of a particular death sentence awarded to a terrorist would be counter productive.

The 20th Law Commission of India submitted its much awaited 262th report, which runs into 242 pages. Therein, it has advocated for abolition of death penalty for all crimes except those related to terrorism. Justice A.P. Shah, Chairman of the Commission remarked- “Death penalty is a system that is highly fragile, open to manipulation and mistakes and evidently fallible. However objective the system becomes, since it is staffed by humans, and thus limited by human capacities and tenancies, the probability of error always remained open.” In the report it is noted that India retains death penalty for as many as 34 crimes under various Penal provisions. Out of which 13 provisions provide for death penalty, even for non homicide offences, which can never be classified as heinous crimes.

Even outdated Islamic Laws provide capital punishment only for less than half a dozen crimes.

Justice Bhagwati remarked in Bachan Singh Case that death penalty is arbitrary as it depends on the subjective decision of judges and composition of Benches. It depends upon their attitude, predilections and preconceptions, their value system and social philosophy. He said one Judge may sympathize with the Naxalites and the other may hate them. The composition of Benches indeed determines the fate of the convict. Thus, post 2000, one single Judge of the Supreme Court had awarded the death penalty in 14 out of 30 cases. Reportedly, these 14, two involved acquittal by the High Court and two others by a Supreme Court Judge. Hence, any talk of principled sentencing in India remains a distant dream. Recently, the determination of the “rarest of rare” has been termed as 'legal fiction'. The Commission noted that between 2000 and 2015 trial courts awarded the death penalty in 1790 cases and the Supreme Court found that trial Courts had erroneously imposed the death sentence in 95.7 per cent cases. Between 200 and 2013, the Supreme Court itself awarded the death sentence in 69 cases, of which in 16, it erroneously gave the death penalty, and thus even the highest Court had gone wrong in as many as 23.2 per cent cases. The commission also pointed to the huge regional variations in the award of the death penalty. Thus, a murderer in Kerala is about twice likely to get the death penalty as a murder convict in the rest of the country. In Jharkhand, his chances are 2.4 times higher, in Delhi six times higher and In Jammu and Kashmir 6.8 times higher.

However, we cannot give blind eye to the fact that death penalty for terrorist may not only be ineffective but also be counter productive. Terrorists, when awarded death penalty, become martyrs influencing many other misguided youngster to espouse a similar cause. Many religious fanatics believe in reward in the “after life” and endless pleasures in heaven. Again, imprisonment and incarceration of a terrorist may result in yields-obtaining information relating to other terrorists organizations.

There is a time to question sanity of death penalty. Phillip Holloway, CNN Legal Analyst in “Death Row Stories” advocated that executions are actually less punitive than life without parole. Further, death penalty litigations makes no financial sense as it costs tax payers. Death penalty litigation is harder on families of murder victims as they find themselves entangled in the justice system for a very long time. He also cautioned that despite safe guards innocent people do wind up on death row.

It is also questionable whether death is a punishment at all. Caesar's answer is in the negative: So far as the death penalty is concerned, I can say with truth that amid grief and wretchedness death is a relief from woes, not a punishment; that it puts an end; to all moral ill and leaves no room either for joy....To kill is not to punish....If by death we cut off his joys and happiness in the same measure we cut off his sorrows and humiliation....Death is an asylum, impregnable against punishment.

On the other hand, it is argued that India is a religion based country. The religious scriptures in the world support the penalty of death. According to Holy Quran- “.....Take not life, which God has made sacred, except by the way of justice and law. Thus, does he command you, so that you may learn wisdom.” Similarly in the Vishnu Smriti, ancient law book of the Hindus, “Great criminals should all be put to death ..... let the King put to death those who forged royal edicts. And those who forge (private) documents. Likewise poisoners, incendiaries, robbers, and killers of women, children or men.” Next, capital punishment is a factor, which prevents humans from committing heinous crimes by the fear of law and punishment. It is a strong deterrent, as it discourages criminals for committing crime. More so, it is not wise to serve these killers food and shelter of jail from tax payers money for their life time. Acts like Osama and rapists in Nirbhay's case could not be stopped by giving them therapy and rehab. It is strongly put that- what if terrorists like Ajmal Kasab was left free after jail sentence, he would go around killing innocent citizens. The killers, rapists, traitors and terrorists, who have violated the very human rights of peaceful citizens, have lost their own way human rights.

In his rigorous dissent in the seminal case of Bachan Singh, Justice P.N.Bhagwati, while declaring unconstitutional and void Section 302 IPC read with Section 354 (3) Cr.P.C as being violative of Article 14 and 21 of the Constitution made the following observations:-

“I may make it clear that the question to which I am addressing myself is only in regard to the proportionalitive of death sentence to offence of murder and nothing that I say here may be taken as an expression of opinion on the question whether a sentence of death can be said to be proportionate to the offence of treason or any other offence involving the security of the State.”

These words, from the strongest votary against the death penalty, are revealing.

In the ultimate analysis while abolition of death penalty for crimes other than terrorists acts or treason may be justified, its retention in the case of punishment for having carried out terrorist acts or treason seems equally justifiable.

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