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Constitutionality of capital punishment in India: An appraisal

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Abstract

Capital punishment or Death penalty has been a topic of discussion since its foundation. Capital punishment in India is awarded for Offences of serious nature like murder, Rape etc. The basic agenda for awarding death penalty is the retributive theory. It is awarded to create a deterrent effect on the society so that people fear the consequences of the offences. In this research paper, I am going to discuss the constitutional validity of Capital Punishment in India through landmark case laws and also about the evolving nature of the “Doctrine of Rarest of the rare”.

Keywords: Capital punishment, constitutionality, death penalty, rarest of the rare

Introduction

Capital punishment has historically been practiced to get rid of criminals and used as a punishment for heinous crimes. Indian criminal justice is based on a combination of deterrence and reformist punishment theories. Punishment is intended to deter criminals, but criminals should also be given the opportunity to reform. Capital punishment or death penalty in India is a penalty for rigorous crimes under the country's main penal legislation i.e. IPC, as well as other Indian laws. Executions of capital punishment are carried out by hanging the culprit. Capital punishment is mostly awarded for severe or serious offences like murder or multiple murders, rape etc. The capital punishment is the most severe form of punishment. From time to time, the Constitutionality of Capital punishment has been challenged. Some jurists, Social activists, judges, Lawyers, Politicians and administrators are of the view that capital punishment is Unconstitutional as it violates the fundamental rights of the people and it is violative of Article 14, 19 and Article 21 of the Indian Constitution. While some experts are of the view that capital punishment is not violative of Fundamental rights and they are in favor of its retention.

Going by the current scenario, As of 2022, 55 countries in total retain capital punishment, 109 countries have totally abolished capital punishment *de jure* for all crimes, 7 countries have abolished it for ordinary or less serious crimes (while maintaining it for some crimes like war crimes), and 24 are abolitionist in practice. Although most of the countries have abolished capital punishment, but the issue is that over 60% of the world's population live in those countries where capital punishment is retained, such as China, India, parts of the United States, Singapore, Indonesia, Pakistan, Bangladesh, Nigeria, Egypt, Saudi Arabia, Iran, Japan, and Taiwan ^[1].

As mentioned above, Capital Punishment is provided under the Indian Penal Code and other Acts for some specific offences only. The list of offences for which Capital Punishment is given in the IPC is given in the table 1 below ^[2].

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¹ https://en.wikipedia.org/wiki/Capital_punishment (last Visited on 02.07.2022)

² https://en.wikipedia.org/wiki/Capital_punishment_in_India

Table 1: The list of offences for which Capital Punishment is given in the IPC

| Section under IPC or other law | Nature of crime |
|--------------------------------|--|
| 121 of IPC | Treason for waging war against Government of India |
| 132 of IPC | Abetment of Mutiny actually committed |
| 194 of IPC | Giving or fabricating false evidence with intent to procure a conviction of a capital offence |
| 195A of IPC | Threatening or inducing any person to false evidence resulting in the conviction and death of an innocent person |
| 302 of IPC | Murder |
| 305 of IPC | Abetment of suicide of child or insane person |
| 307 (2) of IPC | Attempted murder by a serving life convict |
| 364A of IPC | Kidnapping for Ransom |
| 376A of IPC | Rape and injury which causes death or leaves women in a persistent vegetative state |
| 376AB of IPC | Rape of a child below 12 years |
| 376DB of IPC | Gang rape of a child below 12 years of age |
| 376E of IPC | Certain repeat offences in the context of rape |
| 396 of IPC | Dacoity with murder – in cases where a group of five or more individuals commit dacoity and one of them commits murder in the course of that crime, all members of the group are liable for the death penalty. |

Supreme Court of India's take on the constitutional validity of the capital punishment

The very first case in which the question of constitutional validity of capital punishment came before the supreme court was Jagmohan Singh V. State of U.P.^[3] In this case, Section 302 of Indian Penal Code, 1960 which provides Death sentence for murder was put under the test of constitutional validity. The essential question before the Apex court in this case was that Section 302 of IPC is violative of the fundamental rights given under Indian Constitution and that this section also violates Article 14 as in two cases with almost similar facts one is granted death imprisonment and other is granted life imprisonment. The Supreme Court rejecting the contention and held that awarding capital punishment or life imprisonment is the discretion of the Judges and while deciding the punishment the judges have to look into the facts and circumstances of each case and thus Section 302 of The Indian Penal Code, 1860 was not held unconstitutional.

Case of Jagmohan Singh V. State of U.P.^[4], led to the replacement of The Code of Criminal Procedure 1898, and in its place a new code named Code of Criminal Procedure 1973 came into force and Section 235(2) and Section 354(3) of the new code deals with the infliction of capital punishment.

Section 235(2) of the Code of Criminal Procedure

If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law^[5].

Section 354(3) of the Code of Criminal Procedure

“When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence^[6]”.

From the language of the sections it is clear that, Section 235(2) vests a duty upon the judges to hear the convicted person on the question of sentencing and Section 354(3) requires the judge to provide adequate reasons before awarding death sentence to the convict^[7]. Simply saying, while sentencing death penalty under Section 354(3) a judge is required to present ‘special reasons’.

After the re-enactment of Criminal Procedure Code 1973, the word 'special reasons' required for imposing the death penalty were facing ambiguity. Once again, the question regarding the constitutionality of capital punishment came before the Supreme Court of India in the case of Rajendra Prasad v. State of Uttar Pradesh^[8]. In this case, Justice Krishna Iyer expressed that death penalty is violative of Article 14, Article 19 and Article 21 and stressed that while imposing death penalty two things must be taken good care of:

- The special reason for imposing death penalty in the case.
- The death penalty must only be imposed in exceptional circumstances only.

But later on, in Bachan Singh V. State of Punjab^[9], (the case that changed the whole scenario regarding the constitutional validity of capital punishment) the Supreme Court overruled its earlier decision given in Rajinder Prasad case, and firmly established that capital punishment for serious offences like murder was constitutional. By the 4:1 majority it was ruled that Section 302 of the Indian Penal Code, 1860 and Section 354(3) of The Code of Criminal Procedure, 1973 are not at all violative of the provisions of Indian Constitution and also declared that death penalty should only be awarded in ‘rarest of the rare case’^[10].

After Bachan Singh case, the next case in which capital punishment was highlighted was the case of Machhi Singh

³ AIR 1973 SC 947.

⁴ Ibid.

⁵ Section 235(2), Cr.P.C., 1973.

⁶ Section 354(3), Cr.P.C., 1973.

⁷ Constitutional Validity of Death Penalty, MIMANSA PAREEK, International Journal of Law Management & Humanities, Vol. 3 Iss 2, 2020

⁸ 1979 SCC (3)646.

⁹ 1980 2 SCC 684

¹⁰ *Supra* note 7.

V. State of Punjab^[11]. The Supreme Court remained firm on its decision given in Bachan Singh case, but the concept that was closely scrutinized in the case of Macchi Singh was of the Doctrine of rarest of rare cases. The apex court gave some guidelines for the determination of rarest of the rare cases.

Doctrine of rarest of rare case

The Supreme Court's Machhi Singh v. State of Punjab decision from 1983 is where the phrase "rarest of rare cases" first appeared.

This ruling followed the court's earlier ruling in Bachan Singh v. State of Punjab, where it upheld the constitutionality of the death penalty but added the now-famous, if difficult-to-define, qualification that death sentences would only be given in the "rarest of rare situations."

The Indian Supreme Court has occasionally examined the criteria for the rarest of the rare circumstances, and it has provided some parameters for identifying these cases, such as: "The reasons why the community as a whole does not favour the humanistic technique expressed in the death sentence."

Justice Thakkar stated that five categories of cases could be considered the rarest of the rare, deserving of the harshest punishment. These are:

1. Manner of Commission of the murder
2. Motive
3. Anti-social or socially abhorrent nature of the crime
4. Magnitude of the Crime
5. Personality of the victim of murder^[12].

With reference to Justice Bhagwati's dissenting opinion in Bachan Singh v. Union of India, the constitutional legality of the death penalty was once again questioned before the top court in Kehar Singh v. Union of India. The apex court disregarded the argument.

Capital punishment in recent years

The judgment given in Bachan Singh case set a benchmark for cases relating to death penalty and it is been followed till now. Some of the most famous cases of recent times where death penalty was given are discussed below.

Mukesh & ANR VS state for nct of delhi & ORS^[13]

The Nirbhaya Gang Rape Case is another name for this incident. On December 16, 2012, the 23-year-old medical student and her friend were coming home after seeing a movie. They hopped on a bus that also had the bus driver and six other males. The bus's doors were likewise shut as it began to move in a different direction. As a result, the victim's friend began yelling, and the guys in the bus began to molest the woman. After her friend was struck by a rod, they brought the victim to the back of the bus where they began an hour-long gang rape. One of the juveniles hit her with a rod while she was trying to defend herself and stuck the rod in her intestines. They were thrown from the bus after the attack and left to perish on the highway. They were

later rushed to the hospital, where the doctor determined that only 5% of her intestines were still inside of her. On December 29, 2012, she passed away from her wounds. The Court in this case convicted all 6 men including the juvenile. Later, the bus driver committed suicide during the trial in on 11 March 2013. The juvenile was sentenced by the juvenile Court and was imprisoned for 3 years. The remaining convicts were awarded capital punishment. 3 convicts later filed for review of judgement but it was dismissed. Finally on 20th March 2020 they were hanged to death.

State of Maharashtra vs Vijay Mohan Jadhav & ORS^[14]

The case is popularly known as **Shakti Mills Case**. The victim of this case was working as a journalist for a magazine. She went to Shakti Mills along with her colleague on 22nd August 2013 at around 5 pm where they met Vijay Jadhav and Salim who helped them to have access to the premises of Shakti Mills. After sometime, Vijay and Salim called their partners of which 1 was juvenile. They tied her colleague and took her to an isolated room where she was brutally gang-raped by all of them. Also, they took her pictures and threatened her that if she complains they will leak the pictures. This case was called as the "rarest of rare" case and also this was the first case under the new Criminal Law (Amendment) Act, 2013 where death sentence was awarded. It was held by the Court that all the accused are guilty of gang-rape, unnatural offenses and disrobing^[15].

Suggestions

The author would like to suggest that Capital punishment should be retained. It is in my view point not unconstitutional or violative of Articles 14, 19 and 21 of the constitution rather they act as a retributive measure.

The only problem that is there is the Ambiguity in the Doctrine of the rarest of rare cases. There must be a specific test to check whether the case falls under rarest of the rare case category or not. As we have seen the culprits of Nirbhaya gang rape were hanged and that case fell under the category of rarest of rare but there are cases like Kathua gang rape case where the circumstances and the facts of the case were similar but the death penalty was not awarded to the culprits. So, this ambiguity needs to be removed.

Conclusion

Most of the countries have abolished the death penalty on the grounds that it is barbaric, inhumane and also violates the right to life and liberty of the citizens. But it would also be correct to say that death penalty, even if brutal in nature, is effective in reducing crime and discouraging perpetrators to some extent. Also, when we talk about the right to life, it would be correct to state that the Indian Constitution provides criminals with adequate legal remedies and defenses, such as the right to legal aid, the right to medical treatment, etc. The right to life is not an absolute right in the case of convicted criminals charged with heinous crimes against individuals or whole nations. Therefore, in my opinion, the death penalty is constitutionally valid and appropriate when used in serious and extreme cases. Moreover, in my opinion, those who do not value the lives

¹¹, 1983 AIR 957

¹² Constitutionality of Death Penalty, Tatheer

Fatima <https://www.indianbarassociation.org/constitutionality-of-death-penalty/>

¹³ Criminal Appeal Nos. 607-608 of 2017

¹⁴ Sessions Case no. 846 of 2013

¹⁵ <https://www.lawinsider.in/columns/understanding-rape-in-light-of-landmark-judgements#post-16430-endnote-ref-3>

of others or the integrity of their country should not be treated with empathy. Serious crimes such as murder should always carry the death penalty or capital punishment.

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