



Capital punishment in modern era in reference to Indian context

Ganesh Ji

LLB, Hons, College-Law College Dehradun, Uttaranchal University, Dehradun, Uttarakhand, India

Abstract

Capital punishment is a highly debated matter all over the world. It is legal but rarely voted for in India. Imposition of the penalty is not always followed by, because of the possibility of commutation to life imprisonment.

If we look Since 1995, it has been used only four times on Auto Shankar in 1995, Dhananjay Chatterjee in 2004, Ajmal Kasab in 2012, Afzal Guru in 2013 and Yakub Menon in 2015. Although there are numerous countries that proscribe death sentences, there is no international consensus till date regarding its legality. The Indian legal system too has struggled with the constitutionality of death penalty and the circumstances in which it may be granted. This paper analyses the constitutional validity of death sentence and the circumstances under which it may be granted with the help of relevant cases and the 'rarest of the rare' test that was prescribed by Supreme Court in Bachan Singh case.

This paper concludes by observing that Indian judiciary is moving away from the implementation of capital punishment as there is greater emphasis on alternative modes of punishment and the international legal developments which are against the capital punishment.

Keywords: punishment, Indian, modern reference

Introduction

Capital punishment, also called death penalty, execution of an offender sentenced to death after conviction by a court of law of a criminal offense. Capital punishment should be distinguished from extrajudicial executions carried out without due process of law. The term death penalty is sometimes used interchangeably with capital punishment, though imposition of the penalty is not always followed by execution (even when it is upheld on appeal), because of the possibility of commutation to life imprisonment.

Capital punishment in the early 21st century

Despite the movement toward abolition, many countries have retained capital punishment, and, in fact, some have extended its scope. More than 30 countries have made the importation and possession for sale of certain drugs a capital offense. Iran, Singapore, Malaysia, and the Philippines impose a mandatory death sentence for the possession of relatively small amounts of illegal drugs. In Singapore, which has by far the highest rate of execution per capita of any country, about three-fourths of persons executed in 2000 had been sentenced for drug offenses.

Some 20 countries impose the death penalty for various economic crimes, including bribery and corruption of public officials, embezzlement of public funds, currency speculation, and the theft of large sums of money. Sexual offenses of various kinds are punishable by death in about two dozen countries, including most Islamic states. In the early 21st century there were more than 50 capital offenses in China.

Despite the large number of capital offenses in some countries, in most years only about 30 countries carry out executions. In the United States, where roughly three-fourths

of the states and the federal government have retained the death penalty, about two-thirds of all executions since 1976 (when new death penalty laws were affirmed by the Supreme Court) have occurred in just six states—Texas, Virginia, Florida, Missouri, Louisiana, and Oklahoma. China was believed to have executed about 1,000 people annually (no reliable statistics are published) until the first decade of the 21st century, when estimates of the number of deaths dropped sharply. Although the number of executions worldwide varies from year to year, some countries—including Belarus, Congo (Kinshasa), Iran, Jordan, Nigeria, Saudi Arabia, Singapore, Taiwan, Vietnam, and Yemen—execute criminals regularly. Japan and India also have retained the death penalty and carry out executions from time to time.

Death sentence abandoned by 160 countries—not India, China, US and Japan

About 160 countries have abolished the death penalty in law or practice while 98 have abolished it altogether, according to this United Nations report.

In 2007, the United Nations General Assembly adopted a resolution towards the abolition of capital punishment and the protection of human rights when it endorsed a call for a worldwide moratorium on the death penalty.

Apart from India, other prominent countries that opposed the resolution to abolish the death penalty include China, Japan and United States.

In 2013, nearly 778 executions were reported in 22 countries, a 14% growth over 682 executions in 2012.

Capital punishment in India

At independence in 1947, India retained the 1861 Penal Code

which provided for the death penalty for murder. During the drafting of the Indian Constitution between 1947 and 1949, several members of the Constituent Assembly expressed the ideal of abolishing the death penalty, but no such provision was incorporated in the Constitution. Private members' bills to abolish the death penalty were introduced in both houses of parliament over the next two decades, but none of them was adopted. It has been estimated that 3000 to 4000 executions occurred between 1950 and 1980. Information on the numbers of persons sentenced to death and executed from 1980 to the mid- 1990s is harder to measure. It is estimated that two or three persons were hanged per year^[i]. In the Bachan Singh^[ii] judgment of 1980, the Supreme Court ruled that the death penalty should be used only in the "rarest of rare" cases, but what defines rarest of the rare is not clear.

A death sentence—is common in India, with 1,303 capital-punishment verdicts between 2004 and 2013, according to this National Crime Record Bureau (NCRB) prison statistics report.

However, only four convicts were executed over this period, one each in West Bengal (2004), Maharashtra (2012) and Delhi (2013). India saw an execution-free period of seven years between 2004 and 2012 on 14 August 2004, Dhananjay Chatterjee was hanged at Alipore Central Jail in West Bengal on his 42nd birthday, convicted for the rape and murder of a

teenage girl.

On 21 November 2012, Mohammad Ajmal Amir Kasab the only terrorist to have survived the 2008 Mumbai terror attacks, was hanged in Pune's Yerwada Jail.

On 9 February 2013, Mohammed Afzal Guru, a convict in the 2001 Parliament attack case was hanged inside Delhi's Tihar jail.

On 30 July 2015, Yakyub Menon, a convict in Bombay Blast 1993 in Nagpur central jail.

In addition, 3,751 death sentences were commuted to life imprisonment during this period.

The Centre on the Death Penalty published Death Penalty India Report which found that most in death row are backward, uneducated and first time offenders with no previous crime history. Another finding was, that out of 1,486 death sentences imposed By the trial courts, only 4.9% (73 prisoners) remained on death row after the appeal in the Supreme Court was decided.

In November 2016, India voted against a UN resolution to establish a moratorium on death penalty, stating that it contravened statutory law in India. 115 countries had voted in favour of the resolution.

Provisions under IPC & other law for capital punishment

Table 1: Capital Offences in IPC

Sl. No.	Section Number	Description
1.	Section 121	Treason, for waging war against the Government of India
2.	Section 132	Abetment of mutiny actually committed
3.	Section 194	Perjury resulting in the conviction and death of an innocent person
4.	Section 195A	Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person
5.	Section 302	Murder
6.	Section 305	Abetment of a suicide by a minor, insane person or intoxicated person
7.	Section 307 (2)	Attempted murder by a serving life convict
8.	Section 364A	Kidnapping for ransom
9.	Section 376A	Rape and injury which causes death or leaves the woman in a persistent vegetative state
10.	Section 376E	Certain repeat offenders in the context of rape
11.	Section 396	Dacoity with murder

Table 2: Capital Offences in other laws

Sl. No.	Section Number	Description
1.	Sections 34, 37, and 38(1)	The Air Force Act, 1950
2.	Section 3(1)(i)	The Andhra Pradesh Control of Organised Crime Act, 2001
3.	Section 27(3)	The Arms Act, 1959 (repealed)
4.	Sections 34, 37, and 38(1)	The Army Act, 1950
5.	Sections 21, 24, 25(1)(a), and 55	The Assam Rifles Act, 2006
6.	Section 65A(2)	The Bombay Prohibition (Gujarat Amendment) Act, 2009
7.	Sections 14, 17, 18(1)(a), and 46	The Border Security Force Act, 1968
8.	Sections 17 and 49	The Coast Guard Act, 1978
9.	Section 4(1)	The Commission of Sati (Prevention) Act, 1987
10.	Section 5	The Defence of India Act, 1971
11.	Section 3	The Geneva Conventions Act, 1960
12.	Section 3 (b)	The Explosive Substances Act, 1908
13.	Sections 16, 19, 20(1)(a), and 49	The Indo-Tibetan Border Police Force Act, 1992
14.	Section 3(1)(i)	The Karnataka Control of Organised Crime Act, 2000
15.	Section 3(1)(i)	The Maharashtra Control of Organised Crime Act, 1999
16.	Section 31A(1)	The Narcotics Drugs and Psychotropic Substances Act, 1985

17.	Sections 34, 35, 36, 37, 38, 39, 43, 44, 49(2)(a), 56(2), and 59	The Navy Act, 1957
18.	Section 15(4)	The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act, 1962
19.	Sections 16, 19, 20(1)(a), and 49	The Sashstra Seema Bal Act, 2007
20.	Section 3(2)(i)	The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
21.	Section 3(1)(i)	The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002;
22.	Sections 10(b)(i) and Section 16(1)(a)	The Unlawful Activities Prevention Act, 1967

Source: India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.31-32

Doctrine of rarest of rare

The Doctrine of Rarest of Rare was established after the judgement was delivered in the case of *Bacchan Singh v State of Punjab* [iii]. Where life sentence was regarded as the rule and death sentence as an exception. Even though this doctrine has no statutory definition, it basically provides that death should be awarded to a person as a form of punishment only in cases wherein the functioning of the society in an orderly fashion demands the extinction of life of the wrong doer. While determining whether the doctrine of rarest of rare applies to a particular case the court must take into account various aspects of the crime such as:-

- manner of commission of crime,
- motive behind commission of crime,
- nature of crime and the criminal and the magnitude of the crime.

Only after considering all of these points should a death penalty be awarded.

Article 21 of the Constitution provides that ‘no person shall be deprived of his life or personal liberty except according to procedure established by law.’ Thus in a case where the law demands capital punishment then this shall not be in violation of the Constitution.

In *Jagmohan Singh v. State of U.P* [iv]. Capital punishment was challenged to be constitutionally invalid and violating Articles 14, 19 and 21 of the constitution. In this case, the Supreme Court held that in certain exceptional circumstances capital punishment should be awarded keeping public interest, social defence and public order in mind. However they also stated that such an award must be given only in exceptional circumstances thereby making it ‘Rarest of Rare’ doctrine

Emergence of alternative punishment to capital punishment

In the last few years, Supreme Court has entrenched the punishment of “full life” or life sentence of determinate number of years as a response to challenges presented in death cases. The Supreme Court speaking through a three-judge bench decision in *Swamy Shraddhanand* case [v]. laid the foundation of this emerging penal option in following terms: “The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in

endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases.....” The observations in *Swamy Shraddhanand* [vi]. Case have been followed by the Court in a multitude of cases such as *Haru Ghosh v. State of West Bengal*, *State of Uttar Pradesh v. Sanjay Kumar*, *Sebastian v. State of Kerala*, *Gurvail Singh v. State of Punjab* where full life or sentence of determinate number of years has been awarded as opposed to death penalty [vii].

Law commission of India's report on death penalty

The Law Commission of India in its 262nd Report (August 2015) recommended that death penalty be abolished for all crimes other than terrorism related offences and waging war. Complete recommendations of the Report are as follows:

- The Commission recommended that measures suggested that police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.
- The march of our own jurisprudence -- from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to the rarest of rare cases – shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the Right to life and strengthened due process requirements in the interactions between the State and the individual, prevailing standards of constitutional morality and human

dignity, the Commission felt that time has come for India to move towards abolition of the death penalty.

- Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism-related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the Commission did not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.
- The Commission accordingly recommended that the death penalty be abolished for all crimes other than terrorism related offences and waging war.
- Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible^[viii].

Conclusion

As we are living in era where not only human being but also animal rights is considered so it will be unfair to treat human being poor even than animals. So capital punishment must not be used as generally.

But on other hand it is also important to keep peace and harmony in society and if we will look it is also mentioned in Ramcharit Manas,

*बिनय न मानत जलधि जड़, गए तीन दिन बीता
बोले राम सक्रोप तब, भय बिन होय न प्रीता।*

Which means, The mighty ocean does not understand a loving request, three days have now passed. Then Ram spoke with anger. Without fear there is no love.

So it is important to have some fear in mind of wrongdoer so that they think twice before committing any crime and capital punishment is serving this purpose to some extent.

However Indian judiciary has changed their view and in most of cases capital punishment is converted to life imprisonment and by using doctrine of rarest of rare the court confers death penalty.

References

1. www.livelaw.in
2. legally India
3. Indian penal code 1860, Bare Act (Universal publication)
4. Book by Prof. S.N Mishra, Indian Penal Code

ⁱ Walia, Arunjeev Singh, Can society escape the noose-? : the death penalty in India : cases, materials, and opinion, 201 (Human Rights Law Network, 1st edition, 2005)

ⁱⁱ Bachan Singh v. State Of Punjab, AIR 1980 SC 898

ⁱⁱⁱ [(1980) 2 SCC 684]

^{iv} 1973 AIR 947, 1973 SCR (2) 541

^v Swamy Shraddananda @ Murali Manohar Mishra vs State of Karnataka
CRIMINAL APPEAL NO.454 OF 2006

^{vi} ibid

^{vii} India. Law Commission of India. Consultation Paper on Capital Punishment, May 2014, pp.26-27

^{viii} India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.217-218