DEATH PENALTY

- Dharam Veer Singh[1]

Every saint has a past, every sinner has a future

V. R. Krishna Iyer J

Introduction

There is a long quest of human beings to curb and control deviance and promote conformity to normative behavior in human culture since time immemorial. Various ways and means have been attempted in this direction. The criminologist, jurist, sociologist and legal professionals have dealt with various aspects of crime and the penal system. Death penalty is one of the most debated ancient forms of punishment in almost all the civilized society.

Since many countries have joined the abolitionist rank in exceptional number on the ground that it is gross violation of human rights. As a matter of fact, many countries have enshrined the abolition of death penalty in their Constitution to demonstrate the significance of human rights in their legal system. Death penalty viewed as a pre-mediated form of killing. This is carried out in the name of punishment. It is barbarous in nature since all methods of execution involve a greater amount of pain to the person being executed as well as his family member. Hence it is believed that till such advanced technology has not developed that the execution can be carried out an immediate and pain less manner. Death penalty should not be administered it is also believed that the death penalty does not serve an instrument of deterrent which is regarded as its main objectives by the pronouncement of death penalty. Death penalty is therefore futile and this is evidenced by the fact that its abolition has had no such adverse impact on crime rates of the countries which is abolished it. Further it also denies the possibility of rehabilitation and reformation of criminals.

Death penalty runs the “risk of irrevocable error” as many are denied the opportunity of a fair trial or they grapple with issues relating to the adequate legal representation. Hence the international community condemns the use of death penalty on the ground of human rights violation. Many courtiers have already withdrawn the provisions of death penalty, while others are trying to retain it. Currently, there are58

[1] Student at Amity Law School, Noida

nations which actively participate it and 95 countries have abolished it by not using it for at least 10 years.

The doctrine of "rarest of rare" has undoubtedly determined the course of judicial pronouncement on death penalty in India. But it is not free from criticism. Many critics have pointed out to be very ambiguous and amenable to varied interpretation. Internationally, India continuous to remained in an ambiguous position. It is party to the International Convention on Civil and Political Rights (ICCPR) that came into force on December16, 1976 and require countries to move towards the abolition of death penalty.

The strongest criticism has been given by Justice Bhagavathi. He stated that the doctrine has given rise to a great amount of subjectivity in decision making, and whether or not a person would live or die would depend upon the composition of the bench. He also states that it is a violation of article 14 and 21 of the Constitution of India. He cautioned in the context of decided cases that there is a potential danger that the power shall be exercised arbitrarily by the various High Court as well as Supreme Court.

Meaning and Definition

According to the Medical Jurisprudence and Toxicology statutory definition of death section 2(B) of Registration of birth and deaths acts 1969 defined death as permanent disappearance of all evidence of life at any time after live birth taken place[2].

According to Oxford Dictionary, Capital punishment is the legally authorized killing of someone as punishment for crime. Capital punishment is the death sentence awarded for capital offences like crimes involving planned murder, multiple murders, repeated crimes, rape and murder etc[3].

The definition of death according to Black's law dictionary is the cessation of life; the ceasing to exist.

[2] Modi's jurisprudence and toxicology, lexis nexus Butterworth's publication 22nd Edition 2007 page 236
[3]http:// oxforddictionary.com/definition/English/Capital punishment

Legal Definition

A death penalty is the sentence of executing for murder and some other capital crimes (serious crimes, especially murder, which are punishable with death).

Biological Death

Biological death is a formal death of body when the whole system fails but certain organs continue to function for a while, whereas clinical death is due to the failure or death of vital organs like brain or heart or lungs though the other organs of the body are functionally for sometimes.[3]Biological death can be understood as:

1. A finalevent.
2. An absolute state (being dead).
3. Part of the dying process.

Encyclopedia Britannica Article Defined

Capital punishment is also called death penalty execution of an offender sentenced to death after conviction by a Court of law of a criminal offence. Capital punishment should be distinguished from extra judicial execution carried out without due process of law

According to the encyclopedia of law and society, death is the ultimate penal sanction which had made a controversial worldwide.

Terminology

The term Capital derives from the Latin caput meaning "Head" Capital punishment therefore literally means head punishment but it has been extended to cover all the forms of the death penalty rather than just methods involving decapitation. A capital offence or capital crime is any crime to which the death penalty applies.

Aims and objectives of punishments

The objectives of the death penalty are found in making the evil doer an example and deter other likeminded people. Out of the various theories of punishments the two i.e. the

retributive and deterrent provides justification for death penalty[4].Retributive theories emphasize retention of the death punishment for heinous types of crimes. This theory is based on the principles "An eye for an eye a tooth for a tooth". It consists not in simple but in proportionate retaliation, that is in receiving in return for a wrongful act not the same thing but its equivalent. Deterrent theory set an example for the wrong doer.

This theory operates on two counts: i.e.

a) When the offender is punished by infliction of death, the society gets rid of him.

b) It impresses the consciousness of the people at large and thus severs the purpose of preventing others from committing crimes[5].

The aims of the punishment are now considered to be retribution, justice, deterrence information and protection and modern sentencing policy reflects the combination of several or all these aims. The retributive element is intended to show the public repulsion to the offence and to punish the offender for his wrong conduct. In the concept of justice as an aim of the punishment growing emphasis is laid upon it by much modern legislation but the judicial opinion towards this particular aim is varied on rehabilitation will not usually be accorded precedence over deterrence, means both the punishment should fit the offence and also that like offence should receive the similar punishment.

Punishment in Ancient Period

Legal norms are the basis on which criminals and non-criminals are distinguished. The law laid down by Gautama, Vasistha etc. Represent an earlier stage than those of Manu. One of the forms of substitutes for an individual action is the law of equal retaliation, which was a common element in many of the ancient codes of law. Amongst the oldest of the known legal codes with schedules of penalties for specific crimes are those of ancient Sumerians and Babylonians. Of these the Code of Hammurabi[6], the sixth King of Babylon, has been most completely preserved. The criminal law of ancient and primitive society appears to be haphazardly explained, but on a focused and clearer study, it reveals to us that they are very scientifically place[7].

[4]G.W.Paton,Text book of jurisprudence, oxford University Press, London,3rd edition, 1969 page 23

[5]Jagan Mohan sing v. state of U.P. AIR 1973 SC 947

[6] Raymond Wacks, Law: A Very Short Introduction, Oxford University Press, New York, (2008), pp.3-

[7]George B. Vold, Theoretical Criminology, Oxford University Press, Oxford, (1979), p.36.

It was held in the case of **V.D Dhanwatey v. Commissioner of Income Tax**, that, while interpreting the ancient texts, the courts must give them a liberal construction in furtherance of the interest of the society. Our great commentators in the past bridged the gulf between law as enunciated in the Hindu Law texts and the advancing society by wisely interpreting the original texts in such a way as to bring them in harmony with the prevailing conditions. To an extent, that function has now been discharged by our superior courts'.

Penal Policy in Ancient Hindu Period

The original conception of crimes in Hindu law has begun with the violation of religious and social rules followed by elaborate enjoinment of Prayaschitta. While in the law of many ancient and medieval states, a distinction was drawn between the noble and common, here in India this distinction took a different shape, with respect to that of the caste. A man accusing a Brahmin of a crime was deemed to have committed a similar crime himself and in case of the Brahmin's innocence, his guilt was regarded as doubly sinful. A man who assaulted a Brahmin with hands or weapon was said to be banished from heaven for one thousand years; and if blood falls from the body of a Brahmin, he will lose heaven for an uncertain number of years.[8] A Brahmin who was not otherwise permitted to use weapons and arms could do so when his life is threatened, in the exercise of his right to private defence. If a man received or retained the stolen property, he was to be treated as a thief. A woman who committed adultery with a man of lower caste was caused to be killed by dogs. The adulterer also was to be killed. If the King did not strike or punish the guilty person, the guilt fell upon him. It is quite clear from above, that the earliest conception of criminal justice administration was blend of the religion and law[9].

Capital punishment under various legislation in India

Capital punishment is prescribed as one of the punishment in various provisions of the Indian Penal Code 1860, The Arms Act 1959, The Narcotic Drugs and Psychotropic Substance Act 1985, and the Scheduled Caste and Scheduled Tribes (prevention of atrocities Act) 1989, The Commission of Sati (prevention) Act 1987,The Air Force Act 1950, The

[8]R. Dasgupta, Crime and Punishment in Ancient India, Bhartiya Publishing House, New Delhi, (1973), p.36.
[9]U.C. Sarkar, Epochs in Hindu Legal History, Vishveshvaranand Vedic Research Institute, Hoshiarpur, (1958), pp.55-63.

Army Act 1950 and the Navy Act 1957, The Prevention of Terrorism Act 2002, also there was a provisions for death penalty for causing a death of person using booms, dynamite or other explosive substances in order to threaten the unity and integrity of country.

Criminological Approach of Capital Punishment inIndia

There are two types of theories of punishment in Capital Punishment

1. Reformative theory
2. Preventive theory

Reformative Theory "an eye for an eye turns the whole world blind" by Mahatma Gandhi. This line is the thrust of reformative theory of punishment. All theories are based on the principle to reform the offender. The main objective of all these theory is to reform the convicted person through individual treatment. The main aim of the reformative theory is to educate or reform the offender by himself. An offender is punishment for his own benefit. This theory has been supported from various sides. Reformative theory support criminology. Criminology says every crime as a diseased phenomenon, a mild form of insanity. Criminal Anthropology, criminal Sociology and psychoanalysis support Reformative theory. This theory aims to correct the criminal minds into a good manner and they can lead a life like normal citizen. This theory criticizes all kind of corporalpunishment[10].

1.1 Criminal Anthropology:

The modern Criminal Anthropology says crime is a disease. Criminal Anthropology says it is necessary to treat a criminal instead of punishing him. Hospitals and welfare homes are better adoption place to decrease crime than prisoners. Some crimes are happened by the normal persons due to willful violation of moral law. Sometimes crimes are caused due to mental or physical defect.

1.2 Criminal Sociology:

Criminal Sociology says to improve social and economic conditions to remove inequalities, then to punish the criminal. Punishment cannot change the crimes and crimes can be changed by justice and equality.

1.3 Psychoanalysis:

[10] Bachan Singh v State of Rajasthan AIR 1980 SC 898

Psychoanalysis is related to Criminal Anthropology and Criminal Sociology. Psychoanalysis support reformative theory. Instead of punishment education and psychoanalytic treatment is needed for preventing crimes. Reformative theory is superior among theories of punishment. Some crimes are more helpful to preventive theory.

1.4 Preventive Theory

"Prevention is better than cure" The main aim of this preventive theory is to keep the offender away from the society. According to preventive theory the main aim of punishment is to set an example for others and prevent them from criminal activities. In this theory the offenders are punished with death penalty, life imprisonment. Preventive theory was supported by many law reformers because preventive theory has humanizing Penal law. On many reformers view the preventive theory has a real effect on offenders. The main purpose of preventive theory is to take steps that accused person does not repeat the crime after enjoyment of Punishment. This theory explains that Capital punishment as a most severe form of punishment because of its detriment effect. A man has taken the life of another man. So he is responsible to be deprived of his life. In India they follow preventive theory.

Criminal Justice System in India

The essential object of criminal law is to protect society against criminals and law-breakers. For this purpose, the law holds out threats of punishments to prospective lawbreakers as well as attempts to make the actual offenders suffer the prescribed punishments for their crimes. Therefore, criminal law in its wider sense consists of both the substantive criminal law and the procedural criminal law. Substantive criminal law defines offences and prescribes punishments for the same, while the procedural law administers the substantive law[11].

Therefore, the two main statues which deals with administration of criminal cases in our country are Criminal Procedure Code i.e. CrPC and Indian Penal Code
i.e. IPC being procedural and substantive respectively. However, with the changing times the societal norms also change and people who are part of this society have to accept this change either by way of compromise or any other way in order to adjust and make them

[11]Gopala Krishna Gandhi, Abolishing the Death penalty, Ropa publication New Delhi, 2016,p 77

still the part of the very same society. In earlier days there was no criminal law in uncivilized society. Every man was liable to be attacked in his person or property at any time by any one. The person attacked either succumbed or over- powered his opponent. "A tooth for a tooth, an eye for an eye, a life for a life" was the forerunner of criminal justice. As time advanced, the injured person agreed to accept compensation, instead of killing his adversary. Subsequently, a sliding scale came into existence for satisfying ordinary offences. Such a system gave birth to Archaic Criminal Law.

For a long time, the application of these principles remained with the parties themselves, but gradually this function came to be performed by the State. The germs of Criminal Jurisprudence came into existence in India from the time of Manu. In the category of crimes Manu has recognized assault, theft, robbery, false evidence, slander, criminal breach of trust, cheating, adultery and rape. The king protected his subjects and the subjects in return owed him allegiance and paid him revenue. The king administered justice himself, and, if busy, the matter was entrusted to a Judge. If a criminal was fined, the fine went to the king's treasury, and was not given as compensation to the injured party.

Later with the advent of western jurisprudence and passing of various charters and commissions and the advent of British rule the Indian society succumbed or we can probably say adjusted or adapted and aligned itself to the adversarial system of justice dispensation which prevails even today but with a lot of changes which have been time and again being made to it to suit to the needs of the changing times.

1.5 Constitutional Validity of Death Sentence in India

Constitution of India is an amalgam of many Constitutions which means Indian Constitution includes the principles adopted from various Constitutions such of America, Britain and Japan. Many main provisions in the Constitution of India guaranteeing the right to life has been borrowed from the American Constitution and the Japanese Constitutions. The right to life is not something that is created or even conferred by the Constitution. The Constitutional provision is only an evidentiary value. Allan Gledhill has stated that in some of older countries the right to life and liberty receives more effective protection from the Constitutional principles than they do in countries with Constitutions elaborating the right. The right to personal liberty enjoyed by the citizens of India is not remarkably less than that is being enjoyed by a citizen of any other parliamentary democracy. In a case of murder for

which punishment is prescribed under Section 302 of the IPC, the judges can choose between death sentence and imprisonment for life. They enjoy a wide discretionary power to that effect, but the discretion is not totally unqualified.

The question of life and death is left to the discretion of a judge. It is at this point the Constitutionality of laws providing Death Penalty becomes question. In addition to that, the Indian Constitution guarantees to every citizen a fundamental right to life and personal liberty subject to its deprivation by the procedure form violates the citizen's right to life. Further the provision under Art. 14 of Constitution provide “equality before law and equal protection of the laws[12]", which means that all the persons are equal before law and has to equally protect the law. The concept of equality incorporated under Art. 14 of Indian Constitution finds echo in the preamble to the Constitution. Thus the Capital sentence is therefore, an antithesis of one's right to life.

In **Deena v. Union of India**[13]the Constitutional validity of section 354 (5) I.P.C. 1973 was challenged on the ground that by rope as prescribed by this section was barbarous, inhuman and degrading and therefore violative of Art. 21. It was urged that state must provide a humane and dignified method for executing death sentence. The Court unanimously held that the method prescribed by section 354 (5) for executing the death sentence by hanging by rope does not violate Art. 21. The Court held that section 354 (5) of the I.P.C which prescribed hanging as mode of execution lay down fair, just and reasonable procedure within the meaning of Art- 21 and hence is Constitutional. Relying the report of U.K Royal Commission 1949, the opinion of the Law Commission, opinion of Prison Advisers and Forensic Medicine, the Court held that hanging by rope is the best and least painful method of carrying out the death sentence than any other methods. The judges declared that neither electrocution, nor lethal gas, or shooting, nor even the lethal injection has “any distinct or advantage” over-the system of hanging byrope.

[12]See Article 14 of the Constitution
[13](1983) 4 SCC 645

In **Attorney General of India v.Lachmi Devi**[14]has been held that the execution of death sentence by public hanging is barbaric and violative of Art.21 of the Constitution. It is true that the crime of which the accused have been found to be guilty is barbaric, but a barbaric crime does not have to be visited with a barbaric penalty such as publichanging.

In **Triveniben v. State of Gujarat**[15]it has been held that a person sentenced to death is also entitled to procedural fairness till his last breath of life. Art 21 demands that any procedure which takes away the life and liberty of such person must be reasonable, just and fair. Undue delay in disposal of mercy petition by the President would certainly cause mental torture to the condemned prisoner and therefore would be volatile of Article 21. A condemned prisoner has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture. He may be provided with amenities of ordinary inmates in the prison but nobody could succeed in giving him peace of mind. In such a situation, the Court will examine the delay factor in the light of the circumstances of the case and in appropriate cases commute death sentence to the sentence of life imprisonment.

Research problem

The research work undertaken to addresses the issues which concerns the administration of the Criminal Justice System.

- There is a necessity to revamp the punishment and sentencing system to ensure fair, certain and prompt deliverance of justice. The unrestrained use of the discretion and the deliverance of the uncertain and arbitrary judgments makes it necessary to analyze, what changes can be introduced for the better functioning of the system.
- The study has also been undertaken to understand whether there is a necessity of introducing new kinds of punishment which carries with it not only the justification of deterrence but also looks into the rehabilitative and restorative function in the present times.
- The discussions are going on to adopt or consider the sentencing guidelines. The researcher tries to make a humble effort to understand by way of comparative

[14] AIR 186 SC 467
[15] AIR 1989 SC 142

analysis whether we can have mandatory or suggestive guidelines to curb the arbitrary decisions of the judge.

- It is important to provide a solution in this regard as there is neither a provision and nor a guidance towards uniform sentencing system. The time is right to understand the sentencing alternatives and make a shift from custodial to non- custodial measures considering the offender and not the offence.

Research questions

Following are the issues raised in relation to death penalty.

1) How for death penalty would be liable for different kinds of grievous offences?

2) Whether the arbitrary exercise of mercy power leading violation of fundamental rights of death row prisoners?

3) Whether the judiciary can invade the president's pardoning power related to death penalty?

4) How far the existing rules relating to the death penalty are applicable and how to address the grievance of offences?

5) How far the legal proceedings are appropriate in the case of death penalty?

6) What are the possible alternatives to death penalty?

7) Whether there is a need to review the present punishment or to introduce the new forms punishment?

Objectives of the study

The objective of the study is to;

1) To evaluate the practical utility, implication and relevancy of death sentence in India and USA.

2) To analyze the legal repercussion on death penalty in India.

3) To compare the reasons and to analyze the modes under taken by India and USA for the execution.

4) To examine the Constitutional validity of death sentence.

5) To examine the relevance and legitimacy of death penalty in India.

6) To know whether0 or not the imposing death penalty affects the rate of violent crimes.

7) To examine the details of statutory and Constitutional frame work in relation to death penalty.

Scope of the study

The present study confine within the ambit of criminal law giving special focus on death sentence under criminal justice system. The work is the comparative study of India with USA. It deals with the capital offences, punishment, and mode of execution of death sentence, Constitutional validity of death sentence in both the countries and pardon power of the same.

Conclusion

Capital Punishment or death penalty as it is named in the statutes refers to the maximum punishment possible to be imposed on a criminal. Capital has been derived from the Latin word 'Capitalis' which means ''the head or the top column'' and Capital Punishment refers to the Punishment of ''removal of head'' or beheading. It is the top level of Punishment that can be awarded to a criminal for his unlawful act. This is a punishment which has to be imposed only under extreme cases of grave and heinous offences committed against the law of the land, against the security of the state etc.

The Capital Punishment or the death penalty has its roots in the history back in the ancient laws of china, the code of Hammurabi of Babylon has a mention of 25crimes punishable by death penalty there are evidences of Hittite code that also prescribe death penalty in 14th Century, the Draconian code of Athens in 7th Century had death penalty for every crime committed. In the 5th Country BC the death penalty was codified in the Roman law of twelve tables.

The first death sentence that had been recorded historically occurred in the 16thCentury BC in Egypt. The methods being used then were every cruel such as crucifixion, drowning in the sea, burial alive, beating to death etc. This penalty has managed to keep its place and importance in the penal system of all the nations and has attained the highest position in the penal administration. Presently although the Capital Punishment has become the subject of intense focus and debates in the international perspectives of almost all the countries, the world has been divided into four groups on the topic of death penalty on the basis of their usage. The first category is of the abolitionist countries – these are the 103 countries in the world who have abolished death penalty from their penal system and it is no more used in these countries.

The second category is of those countries who have abolished death penalties for regular offences but

are using it for exceptional circumstance such as for crimes committed in war time. There are 6 countries in the world in this category.

The third category is of those countries who have become abolition is tin practice. These countries have not used the execution of death penalty for last 10 years and are believing to Have a practice of not using death penalty and so not carrying out execution.