



## SHOULD DEATH PENALTY BE ABOLISHED IN INDIA? \*

### INTRODUCTION

Death penalty which also be known as “*Capital punishment.*” In criminal law though, in ancient time number of ways was present to punish an accused with reference to the nature of his crime against the society. All such punishment was considered on the basis of the nature of criminality presence in an act of the accused. In ancient the Indian epics like; the *Mahabharata and the Ramayana* were also considered the death penalty which was known as “*vadhadand*” which meant ‘*amputation by bits*’ which classified into fourteen modes. While in furtherance of retention of the death penalty, *King Dyumatsena*<sup>1</sup> observed that “*if the offenders were leniently let off, crimes were bound to multiply.*” In furtherance of his statement he explained that the execution of unwanted criminals was perfectly justified in the existing society. As in same manner the great ancient or eminent law-giver *Manu* also stated that in order to refrain the people to indulge in any criminal activity fear as an essential mode for which death penalty was necessary in the society. He further stated that in absence of this mode of punishment the weaker would not be able to survive in the society. The concept of death penalty was only effective in an ancient period but also has same status in the reign of Mughals rule in India where the death penalty was not in simple manner. Each and every accused person was bound to suffer and also to bear pain till his death. Mode of death penalty by way of nailing the body of the accused on walls was common which was abolished later in the British system of criminal justice. Thereinafter, only the mode of death penalty by way of hanging was remained and which is yet, continuously followed by the Indian criminal justice administration. Being a way to deter offenders, it also enshrined in *Section 54 of Indian Penal Code (45 of 1860)* which mentioned death penalty as a way of punishment to refrain criminals.

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<sup>1</sup>Mahabharat-Shantiparva chapter, CCLXVII verses 4-13

## **Retributive Effect:**

Death penalty since ancient time considered as an effective weapon of refraining the people to indulge in any heinous criminal activities which may affect their life or through them in the well of death. Since that period this mode of punishment is also considered as an effective measure of retributive justice. In furtherance of the justification of death penalty it is to be said that this is a lawful measure to punish an offender who already takes away the life of another person. It is to be said by one scholar that *“a person who kills another must be eliminated from the society and therefore his execution is justified.”*<sup>2</sup>

## **Deterrent Effect:**

Death penalty though one hand has retributive effect but on other hand it also has deterrent affect which mainly deter the offenders to indulge in most heinous crimes. Its deterrent effect can be a best way by which perhaps, offenders keep themselves away from the criminality. If they aware about this and make such fear in their mind than in positive way it can be reduction of the incidences of *homicide* in the existing society. But in present the method of public hanging in the early days is totally prohibited in respect of present laws in our country because of extension of human rights regime.

## **Retention of Death Penalty- How Far Justified:**

While, some penologists in India in support of retention of death penalty and some are against of this. Now, the matter is to be concerned that how far death penalty is justified in this humanitarian era? As far as ancient period concerned people were too innocent, truthful and soft-hearted and in failure or in violation of these aspects of those people there were such measures as corporal punishment and death sentence which could be invoked in such a situation arose for the protection of the society from such criminals and in that period there was no issue of retention or abolition of the death sentence.<sup>3</sup> In furtherance of support the retention of the death penalty their supporters are on the view that death of the victim always has requirement of justice and there should be check and balance between the victim and the accused. They further direct that the death of the victim should be compensated with the death of the guilt or accused person. It can be considered as retaliation of victim through the process of justice on his behalf because he himself will not retaliate and for his satisfaction there

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<sup>2</sup>David Dressler Criminology and Penology, p. 501, (2<sup>nd</sup>Ed)

<sup>3</sup>Kane, P.V. , History of Dharamashastra, p. 399

should be some of justifiable action on behalf of victim which shall punished the accused or take avenge from guilty person.

Though, there are number of views in respect of abolition of death penalty from our country but Law Commission of India, in its thirty-fifth Report observed:

*“Having regard to the situation of India in present in respect of the diversity of its population and maintaining the law and order in the existing society India is not in a situation to take a risk of the abolition of death penalty. In furtherance it also recommended that if such arguments valid in respect of one area of the world than it are not necessary that such arguments would be favorable in other part of the world. On the consideration of all the issues which mentioned this Report, the Commission is on the view that capital punishment should be retained in the present situation in India.”<sup>4</sup>*

On a consideration, it can be said that in our country retention of death penalty is justified in the existing society and this Report of Law Commission of India was directly by the Apex Court in relevant judgment which is given below:

- **Bachan Singh v. State of Punjab<sup>5</sup>**

In this case the Supreme Court observed that though there are number of views of the people who are in support of abolition of death penalty. But on the contrary there are number of jurists, sociologists, judges, and administrators still on the view that death penalty is the necessity of the existing society for its preservation and protection. Death penalty is still recognized for the sanction of murder or of some heinous crimes in India. So, it can't be said that death penalty under the provision of Section 302 of IPC is unreasonable and against the public interest.

In this view the Law Commission of India further recommended in its Report<sup>6</sup> in month of June, 1971 with an exemption of certain persons from death penalty that death penalty in existing society consider as an effective and deterrent tool to avoid such heinous criminal activities against the State. Thus it is to be needed that death penalty must be there for maintenance of law and order in country.

On the above discussion it clarified that death penalty should not be abolished at any cost or in circumstances especially in our country. Because in our country though there are

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<sup>IV</sup>35<sup>th</sup> - Report of Law Commission of India (Government of India, 1967), p. 354.

<sup>V</sup>Bachan Singh V. State of Punjab, AIR 1980 SC 898

<sup>VI</sup> 42<sup>nd</sup> - Report of Law Commission of India, June 1971.

number of laws but mostly of them there is lack of enforcement in the society towards the offenders. I would like to analyze the effect of death penalty in the society with the give sub headings:

- **Crime Deterrent:** If death penalty would be there than apprehension of punishment in heinous crime shall be there in the minds of the offenders, who shall be in thought to indulge in such criminal activities which shall be punished, if committed, with death sentence. Than such fear of death discourage the offenders to participate in criminal acts.
- **Justice:** Justice, which is for the preservation or protection of the society or to ensure each and every victims in case of any harm to them by such criminal intent people. If in any case where deterrence disappeared or avoided than criminals commit such acts which may cause harm to other person and this situation only justice shall be favorable to the victims.
- **Peace and Security:** If death sentence shall be existed in the society than in result crime deterrent and justice occurred itself or prevailed to the victims and in that case justice can be easily accessed to anyone. When, deterrence and justice accessible to the victims or every person than peace shall be prevailed. It develops the secure environment in the existing society or among the community provides them security.

In the sense, if death sentence abolished in our country than the criminals who were indulged in heinous criminal activities shall roam freely without having ay apprehension of death or they may easily participate in murder cases. Because, they shall come to know that now there shall be no death penalty if they will do so or they will do whatever they wish and shall not be punished and criminal cases will also get increased at high rate. In furtherance of supporting death sentence *Mr. Justice A.P.Sen.*<sup>7</sup>, in his dissenting judgment observed that:

*“The accused, who acted as a monster, did not even spare his two innocent minor children in order to get rid of his wife and issues through her; if death sentence was not being awarded in a case like this I do not see the type of offences which call for death sentence.”*

On the above context, we can say that death sentence is an essential aspect in India and due to this in modern era there is evolution of new crimes and criminals as well as. Though, the death

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<sup>vii</sup>Criminal Appeal No. 511 (1978)

sentence as a mode of punishment has been abolished in approximately in hundred countries in the world but we can't compare them with India or with as like nature countries which have retention of death sentence. If we shall make a comparison between India and such other countries which have been abolished death penalty, than we can come to conclusion that situations in India are not same similar to those countries which have supportive candidates of abolition of death penalty. But by effect of the trend of abolition of death sentence in such countries Indian legislation has been made some change in awarding death penalty generally and laid down a principle of "*rarest of the rare cases*" which signifies exceptionally imposition of death penalty. Though the doctrine of "*rarest of the rare cases*" formulated but it merely conflict among the judges which gives room to misuse of power which totally vested in the hand of the judiciary. The judges have a room of using discretionary powers to decide the nature of the case. If it is abolished as a mode of punishment from the society than the terror attacks, attacks on particular community or religious group shall be happened in India. In present if we could analyze the situation of India in this perspective that in several part of India the communal riots are going on and also communal issues arose which always encourage an individual or to group of people to indulge in some criminal activities but they avoid themselves for more extent to do so only because of deterrence of death punishment in result of punishment of their acts.

As we know that in India death penalty as a punishment is not in general way or it can't be given to any individual easily because while giving such an order to hang someone or declared the death sentence of that person the Court, which declared, relied upon the various grounds or especially on the nature of the crime committed by that individual which got death punishment. Thereby, the offenders indulge in criminal activities with well thoughts and plan and to deter them death punishment is only a weapon. Because, in India there are number of Acts or laws which passed by our legislators but yet they have lack of properly enforcement among the community as well as society at large. In furtherance of determining the situations under which the death penalty should be given, discussed in given case:

- **Macchi Singh V. State of Punjab<sup>8</sup>**

The Supreme Court laid down some principles which shall be helpful to all the Courts to determining the condition in which death penalty should be given are:

\*Manner of commission of murder;

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<sup>viii</sup>Macchi Singh V. State of Punjab, AIR 1983 SC 97

- \*Motive of commission of murder;
- \*Anti-Social and socially abhorrent nature of crime which committed;
- \*Magnitude of crime:
- \*Personality of victim;

This was not only a single decision of the Supreme Court whereby it issued some principles or guidelines to award punishment of death to the offenders. In some other cases where the Supreme Court followed the above mentioned principles to come on conclusion of the case like; *Chopra Children*<sup>9</sup> case where the Supreme Court held that there shall be no exemption from death punishment in case of murder where it was committed under circumstances i.e., *preplanned, cold-blooded, brutal manner* etc.

While upholding the death penalty as a mode of punishment the Supreme Court observed that if someone is convicted for the murder of a person and his acts also be relied on the grounds mentioned on which death punishment should be awarded than in such circumstances he shall not be obtained any relief from the Supreme Court. In another decision the Supreme Court in lieu of maintaining the decision of death penalty which pronounced by the High Court observed:

***“it would be mockery of justice to permit the appellants to escape the extreme penalty of law.....and to give lesser punishment for the appellants would be to render system of justice of the country suspect in result of these relaxations the common man would lose faith in courts.”***<sup>10</sup>

This mentioned comment of the Supreme Court in the above decision clearly specified that once a death penalty given by a court than in further appeals it should neither be commuted in lesser punishment nor provide them any kind of relations. But in present we can easily analyze that our judicial system itself provides a lots of opportunities to the accused who was convicted for murder or some of heinous crimes with death penalty, to challenge his conviction before the higher or competent authorities which have discretionary powers to reduce the punishment from death to life imprisonment. Such opportunities are as to appeal before *High Court, Governor of the State, Supreme Court, President of India* etc. by the way of appeals, petitions and curative petition etc. Again the Supreme Court in another decision relied upon the imposition of the death punishment on the serious offenders and it observed:

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<sup>9</sup>Kuljeet Singh alias Ranga V. Union of India, AIR 1981 SC 1572

<sup>10</sup>Mahesh etc. V. State of M.P., AIR 1987 SC 1346

*“Failure to impose a death sentence in grave cases where it is a crime against the society, particularly in the cases of murders committed with extreme brutality. In such situation it is the duty of the court to impose proper punishment upon the offenders on relying upon the degree of criminality in their acts.”<sup>1</sup>*

While, in era of deep discussion, the question arose before the Supreme Court that whether in case of mob-action, there shall be diminished individual liability. Than in furtherance of the answer those in a case with its observation that:

*“The law is well settled by reason of the decisions of this Court that the death penalty can only be imposed in the rarest of the rare cases and in aggravating circumstances...so in case of mob-action there shall be no liability of individual will arise except in certain circumstances which proved that pre-determination of motive of a particular person.”<sup>2</sup>*

Now, the question which mainly evolved in the above mentioned decisions of the Apex Court that “rarest of rare” case signifies which act of the accused person. In resolution of this term the Apex Court determined such circumstances which may be covered under the “rarest of rare” cases for the purpose of imposing death sentence in a case given below:

- Murder committed in extreme brutal, revolting, distorted, or which may be extremely evil and extreme outrage of the community.
- Murder, with having motive which may express total depravation and meanness.
- Murder of a member of SC or minority community.
- Murder of several persons.
- Murder of an innocent child or helpless woman or an old or infirm person.

## **Conclusion:**

In concluding remarks I would like to say that in our country there shall be retention of death penalty because in present era there is no substitute of death penalty which may play a similar role towards punishing the criminals convicted in heinous criminal activities. In India, a large

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<sup>x1</sup>Ashraf Lal & Sons V. State of U.P., AIR 1987 SC 1721

<sup>xii</sup>Kishori V. State of Delhi, AIR 1999 SC 382

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number of people as well as some of communities raising their voice to abolish death penalty but there is no substitution or alternate of death sentence which may prevent the criminal to commit those offences which may be resulted with death penalty as a mode of punishment. If in India, death penalty would be abolished than in that cases the amount of criminality or criminals or rate of the offences would be increased as per the time may spend. Therefore, in India it is not quite possible to abolish death sentence as mode of punishment which mentioned in Indian Penal Code, 1860. Because if someone want to harvest crops from the fields than he has been firstly, decided about the substitute crop in his field. Similar is in case of death penalty, if there is a need to change in the modes of the punishment which already existing in present society or also enshrined in the codified laws than a further step should be there for deterrence of the criminal minds and their behaviors towards the particular community or society at large. Though, as per the opinions of the some of the people belonging to the society in more than hundred countries death penalty has been abolished than they should be remembered that we can't change anything with only seeing particular actions instead of this we should rely upon the circumstances of those countries where it is abolished. Not only the present circumstances but also in past circumstances because it could be considered that 'future may be based on past'. Because, if we want to cut the tree than we analyze its roots to cut out them as similar if we want to abolish death penalty than it should be great concern in the history of those countries which had death penalty but abolished later. Therefore, death penalty should be retained in India and those laws which are existing in present society shall be enforced. In other words we can say that laws regarding the prevention of criminal activities or criminals or heinous crime than such law need to have some enforcement among the particular communities as well as society at large in India.

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