LAW MANTRA THINK BEYOND OTHERS
(I.S.S.N 2321- 6417 (Online)
Ph: +918255090897 Website: journal.lawmantra.co.in
E-mail: info@lawmantra.co.in contact@lawmantra.co.in

THE IMPACT OF THE AMERICAN MODAL PENAL CODE ON EVOLUTION OF THE RAREST OF THE RARE CASE DOCTRINE*

INTRODUCTION

As the separation of power is the basic structure of our constitution, yet it is not adopted in India in the strict sense in which it was adopted in America. Unlike in America, where the doctrine of separation of power is raised to the constitutional level, in the Indian Context, it assumes a meaning that all the three wings of the Indian Democracy i.e legislature, executive and the judiciary should function in co-ordination without having absolute control over each other. These circumstances have developed the Indian Courts as an activist body. India being a democratic country, judiciary acquires an significance place. The traditional theory says that 'Judges does not make law but merely declares the law', but to align the constitutional interpretation with the democratic philosophy, the Indian judiciary underwent a change by discarding its traditional approach by adopting a dynamic way of judicial activism.

The judicial activism in India developed when the judicial process expand the scope of judicial review through the judicial legislation. Cardozo, while discussing the judicial law making in his text "The nature of Judicial Process", said-

"He legislates only between gaps. He fills the open spaces in law."[1]

Thus the function of judges to create law attains a greater degree in a situation where there is a legislative vacuum. The legislative vacuum created by the absence of the guidelines for

*Dr. Shilpi Sharma, Asst. Prof. (Law), AURO University, Earthspace, Opposite ONGC Plant, Hazira, Surat.

[1] http://www.lawyersclubindia.com/articles/Judicial-Creativity-in-Constitutional-Interpretation-5749.asp

imposing the death penalty in homicidal cases were thus filled when the judiciary took a creative move to give the doctrine of the rarest of the rare case.

The Constitutional Challenge to the Validity of the Death Sentence

The Supreme Court of India was called upon to decide the substantive reasonableness of the sentence in the area of the Capital Sentence. It was clearly held in *Mithu vs. State of Punjab*[2] that "procedure established by law" in Art 21 had substantive content as well. The Supreme Court, in establishing the constitutional validity of the death sentence had to enter a kind of balancing exercise. This exercise was important as the jurists and thinkers worldwide are divided into the categories of retentionist and the abolitionist. Some of the arguments that abolitionist gives are –

First, that it does not serve any penological purpose as it is not proved to have deterrent or the retributive effect.

Second, it is barbarous and inhuman. The community cannot treat one of its members after full deliberation in cold blood in the same way as he had acted, may be in rashness or out of passion.[3] Moreover, for a prisoner to wait in a cell to be executed on some unspecified day is nothing less than a torture, more dreadful that death itself.[4]

Third, there are possibilities of error in the administration of justice and the death penalty is irreversible.

Fourth, if it is given for any offence other than homicide, it is disproportionate. *Fifth*, in the absence of any clear cut guidelines, it is left to the discretion of the sentencing judge which is very discriminating as in this situation; two similarly situated convicts may meet different ends because of the difference in approach of the sentencing judge.

The arguments given in the favour of retention of this penalty are-

First, it is a human tendency that we including the convicts want to cling to our life till the last moment which is enough to prove that it has a deterrence value in it.

---

[2] (1983) 2 SCC 277

[3]Rai Raj Udai: Fundamental Rights and their Enforcement, PHI Learning Pvt. Ltd, Pg. 384

[4]Rai Raj Udai: Fundamental Rights and their Enforcement, PHI Learning Pvt. Ltd, Pg. 384

Second, it is not more inhuman to kill the killer than it was for him to kill an innocent, and executive clemency and the principle of the presumption of innocence of the accused are enough safe guards against any possibility of the wrong person to be executed.[5]

Third, in practice the death penalty is awarded in the cases of homicide only.

The constitutional validity of the punishment was first visited by the Supreme Court in *Bachan Singh vs. State of Punjab*[6]. This case was the result of the two conflicting ruling of the Supreme Court in *Jagmohan vs. State of Uttar Pradesh*[7] and *Rajendra Prasad vs. State of Uttar Pradesh*[8]. In *Jagmohan's case*, the main contentions that were put before the court were-

1. The death sentence puts an end to all fundamental Rights

This contention was rejected by the Court referring the provisions like Art 72(1)(c), Art 72(3), Art 134 of the Constitution and Sec 401,402 of CrPC

2. The discretion invested in the judges to impose death penalty is not based on any standard or policy required by the legislature, and thus violative of Art 14.

The Court observed that facts and circumstances of every crime is different and thus judicial discretion is the very core of the administration of the criminal Law.

3. There is no procedure for trial of factors and circumstances crucial for exercising the judicial discretion, thus violative of Art 21.

It was rejected by court considering various provisions of CrPC and Indian Evidence Act.

Finally, the court declared death penalty as constitutionally valid.

In *Rajendra Prasad's case*, the point to be decided was- 'When and Why shall capital Punishment be pronounced on a murderer, and why not in other cases, within the confines of the Code. The court observed that Special reasons necessary for imposing death penalty must relate not to the crime as such but to the criminal. A procedure that ought to be followed by the courts ascertaining the 'special reasons' to give death penalty was chalked out by the

---

[5] Rai Raj Udai: Fundamental Rights and their Enforcement, PHI Learning Pvt. Ltd, Pg. 385

[6] AIR 1980 SC 898

[7] AIR 1973 SC947

[8] AIR 1979SC 916

court. The concept of the 'special reasons' as given in the later case which made it distinct from the *Jagmohan's case* lead to the discussion on the issue in *Bachan Singh's case* where the doctrine of 'rarest of rare case' was propounded and subsequently expanded in the *case of Machchi Singh*.

Evolving the Rarest of the Rare Case Doctrine

Due to the contradictory stand taken by the Court in Jagmohan and the Rajendra Prasad, the matter of Constitutional validity of the death sentence under Sec 302 of the IPC again came up before the Supreme Court for consideration in 1980. The issues framed in this case unambiguously questioned the interpretations of the provisions under constitutional and the procedural law, relating to the death penalty, by the judges like Justice Krishna Iyer, Chinappa Reddy, Bhagwati and Desai.The records of the case of Rajendra Prasad was submitted to the Hon'ble Chief Justice, for constituting the larger bench for resolving the doubts, difficulties and inconsistencies in the judgment, in the meanwhile, several persons convicted and sentenced to death filed writ petitions, directly challenging the constitutional validity of death penalty under Sec 302 IPC and the procedure provided in Sec 354(3) of CrPC.

In this very judgment, the Supreme Court relied heavily on the 35th report of the Law Commission, efficacy of the death sentence as deterrence and serving the penological purpose.

The principal questions that fall to be considered in this case were-

1. Whether death penalty provided for the offence of murder in sec 302 IPC is unconstitutional
2. Whether the sentencing procedure provided in sec 354(3) of the CrPC 1973 is unconstitutional

Discussion on question 1- It was argued in the case by the petitioners that sec 302 is violative of Art 19 and 21 of the constitution. The court rejected the argument that death penalty under sec 302 should be tested on the touchstone of Art 19 of the constitution and said that such arguments appear to proceed on the fallacy that the freedom guaranteed under Art 19(1) are absolute freedom and they cannot be curtailed by law imposing reasonable restrictions, which may amount to total prohibition. The court said that the penal laws which define offences and prescribe punishments for the commission of offences do not attract the application of Art 19(1). The court observed that penal laws do not deal with the subject matter of the rights enshrined in Art 19 but even if a law does not, in its pith and substance, deal any of the

fundamental rights conferred by Art 19(1), if the direct and inevitable effect of the law is such as to abridge or abrogate any of those rights, Art 19(1) shall have been attracted. In the opinion of the court, deprivation of freedom consequent upon the order of conviction and sentence is not a direct and inevitable consequence of the penal law but is merely incidental to the order of conviction and sentence which may or may not come into play and thus sec 302 need not to stand the test of Art 19 of the constitution.

Testing the Sec 302 on the touchstone of Art 21, the majority view was that Article 21 clearly brings out the implication that the Founding Fathers recognized the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. There are several other indications also in the Constitution which show that the Constitution makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Indian Penal Code. Entries 1 and 2 in the Concurrent List of the Seventh Schedule specifically refer to the Indian Penal Code and the CrPC as in force at the commencement of the Constitution. Article 72(1)(c) specifically invests the President with power to suspend, remit or commute the sentence of any person convicted of any offence, and also "in all cases where the sentence is a sentence of death". Likewise, under Article 161, the Governor of a State has been given power to suspend, remit or commute, *inter alia,* the sentence of death of any person convicted of murder or other capital offence relating to a matter to which the executive power of the State extends. Article 134, in terms, gives a right of appeal to the Supreme Court to a person who, on appeal, is sentenced to death by the High Court, after reversal of his acquittal by the trial court. Under the successive Criminal Procedure Codes which have been in force for about 100 years, a sentence of death is to be carried out by hanging. In view of the aforesaid constitutional postulates, by no stretch of imagination can it be said that death penalty under section 302, Indian Penal Code, either *per se* or because of its execution by hanging, constitutes, an unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates, it cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile "the dignity of the individual" within the contemplation of the Preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty for the offence of murder violates the Basic Structure of the Constitution.

Discussion on Question 2- The constitutional validity of the Sec 354(3) of CrPC 1973 was assailed on the grounds that it delegates to the court the duty to legislate in the field of 'special reasons' for choosing between life and death and permits imposition of death penalty in an arbitrary and whimsical manner as it does not lay down any rational principal or criteria for invoking this extreme sanction. It was also demanded that death penalty should be restricted only to those types of grave murders and capital offences which imperil the very existence and security of the State.

The court in the discussion on the above mentioned points placed its reliance on the Jagmohan's case and the case of Furman vs. Georgia. The court argued that the shift in the legislative policy underlying the code of 1898 through sec 354(3) along with 235(2) are in tune with the propositions laid down in the Jagmohan's case and reinforce the reasons given in Jagmohan's case for holding that the impugned provisions of the penal code and the criminal procedure code do not offend Art 14 and 21 of the Constitution.

Defending the authority of the courts to legislate in the matter of 'special reasons', the court gave the argument that criminal cases do not fall into set-behavioristic patters and a standardization of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single offence category ceases to be judicial. Further errors in the judicial discretion to legislate in the field of **'special reasons'** can be corrected by the superior courts. Rejecting the contention in the Jagmohan's case that 'for making the choice of punishment or for ascertaining the existence or absence of "special reasons", the court must pay due regard to both to the crime and the criminal, the court opined that it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two water tight compartments. Answering the question whether this court can lay down standards or norms restricting the area of the imposition of death penalty to a narrow category of murders, the court quote the lines from the judgment of Rajendra Prasad's case where the majority said: "It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of the State and society, public order and the interest of the general public compel that course as provided in Art 19(2) to (6)". The court objected on the term "only" used in the contention in the Rajendra Prasad's case and argued that to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when this culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

Finally the court propounded the Doctrine of Rarest of the Rare case by observing that-

"*Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency-a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter……A real and abiding concern for the dignity of human life postulates resistance to taking the life through law's instrumentality. That ought not to be done save in* ***the rarest of the rare cases*** *when the alternative option is unquestionably foreclosed"*

The minority view(consisting of P.N.Bhagwati) says that section 302 of IPC in so far as it provides for imposition of death penalty as an alternative to life sentence is Ultra Vires and Void as being violative of Articles 14 and 21 of the constitution. Since it does not provide any legislative guidelines as to when life should be permitted be extinguished by imposition of death sentence. He then further said that I would strike down section 302 IPC as unconstitutional and void. But the court held that-

1. Section 302 of the Indian Penal Code insofar as it provides for the death sentence as also section 354(3) of the Code of Criminal Procedure, 1973 is constitutionally valid.
2. Exercise of discretion under section 354(3), Cr.P.C. should be in exceptional and grave circumstances and imposition of death sentence should only be in rarest of rare cases.

The aggravating and mitigating factors: In this judgment, the court considered certain circumstances as the guidelines to determine the aggravating factors which would warrant the imposition of death penalty which may be listed as-

(a) If the murder has been committed after previous planning and involves extreme brutality; or

(b) If the murder involves exceptional depravity; or

(c) If the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) While such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

The Supreme Court also suggested some of the circumstances which would serve as the mitigating factor while the court takes the discretion to award death penalty to the accused. These circumstances can be listed as –

(a) That the offence was committed under the influence of extreme mental or emotional disturbance.

(b) The age of the accused. It the accused is young or old, he shall not be sentenced to death.

(c) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(d) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(e) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(f) That the accused acted under the duress or domination of another person.

(g) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

The Court further observed that the mitigating and the aggravating factors as enunciated in the judgment are not exhaustive and several other factors can be feed into the categories depending upon the circumstances in each specified instances. The court emphasized that the scope and concept of the mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Sec 354(3) of the CrPC.[9]

Proposition emerging out of the doctrine: From the discussion on the various issues concerning Death Penalty, some proposition emerged from the Bachan Singh case that can be summed up as follows-

1. Death penalty can be inflicted in gravest case of extreme culpability.
2. While awarding death penalty, the circumstances of the 'offender' should be taken into consideration with the circumstances of the crime.

[9]Vibhute KI: PSA Pillai's Criminal Law, lexis Nexis, 11th ed. 2012, Pg. 615

3. Life imprisonment is the rule and death sentence is an exception.
4. A balance sheet of aggravating and mitigating circumstances has to be drawn and the balance between the two has to be struck before option of death sentence is to be exercised.

The Modal Penal Code and the Rarest of the rare case doctrine

The doctrine is based on the Modal Penal Code as given by the American Law Institute. The American Criminal Law is codified in fifty two Criminal Codes having much diversity among them making it difficult to state the American rule on any point of Criminal Law. Though there are certain similarities among the codes also but the American Criminal Law owes those similarities to the influence of the Modal Penal Code promulgated in 1962. Acknowledging the importance of the retributional concerns, the code gave importance to the utilitarian function to deter criminals and in the instances where deterrence does not works well, to find out the correctional and incapacitative needs of the offenders. It does not, in fact, attempt to work out the implication of any particular theory of punishment, thus adopting an approach of 'principled pragmatism'. The same principle was adopted by giving the rarest of the rare case doctrine where when suggesting the imposition of the death penalty in the rarest of the rare cases, the court on one hand deal with the retributive justice, and on the other hand prescribe the possibility of reform as the mitigating factor, thus moving towards the reformatory approach.

The Modal Penal Code while dealing with the issue of punishment in the murder cases, suggested for the alternative sentence thus not making the death sentence mandatory in such cases. The same contention was established through the rarest of the rare case doctrine also when the doctrine along with the Sec. 354(3) made the provision of non-mandatory death sentence.

The concept of 'aggravating' and the 'mitigating' circumstances and balancing them before deciding about the imposition of the death penalty is also adopted from the Modal Penal Code

itself. The aggravating and the mitigating circumstances as given by the Indian court while propounding the 'Rarest of the rare case' doctrine were also adopted from the Modal Penal Code itself. A comparative note is presented below on the enumeration of the aggravating and mitigating circumstances as given in the Modal Penal Code and in Bachan Singh Judgment while giving the Rarest of the rare case doctrine.

The aggravating factor as given in the Modal Penal Code that

The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity[10] has its reflection in the aggravating factor as given in the Bachan Singh judgment where the court states it as-

- If the murder has been committed after previous planning and involves extreme brutality; or
- If the murder involves exceptional depravity

The other factors like the magnitude of the crime as the aggravating factor as suggested in Machhi Singh case also has its origin in the Modal Penal Code when it suggested that aggravating circumstances may be the number of deaths in one offending act[11].

The mitigating circumstances as suggested in the Bachan Singh judgment also resembles those given in the Modal Penal Code, for instance when the Indian Court prescribe

- That the offence was committed under the influence of extreme mental or emotional disturbance.
- The age of the accused. It the accused is young or old, he shall not be sentenced to death
- That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
- That the accused acted under the duress or domination of another person.
- That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

The origin can be traced back to the mitigating circumstances suggested in the Modal Penal Code as-

---

[10] Modal Penal Code Sec. 210.6 (3)(h)

[11] Modal Penal Code Sec 210.6(3)(d)

- The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.[12]
- The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.[13]
- The defendant acted under duress or under the domination of another person.[14]
- At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conferm his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication[15].

Conclusion

It shall be noted that In October 2009, the ALI voted to disavow the framework for capital punishment that it had included in the MPC, "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." A study commissioned by the institute had said that experience had proved that the goal of individualized decisions about who should be executed and the goal of systemic fairness for minorities and others could not be reconciled.[16] In India also, it was urged number of times that the doctrine need to be revisited and redefined as the courts were alleged to be applying it in ambiguous and arbitrary manner. The vagueness in the application of the doctrine is also one of reason for the demand of abolition of the death penalty in India.

[12] Modal Penal Code Sec 210.6(4)(b)

[13] Modal Penal Code Sec 210.6(4)(d)

[14] Modal Penal Code Sec 210.6(4)(f)

[15] Modal Penal Code Sec 210.6(4)(g)

[16] http://www.nytimes.com/2010/01/05/us/05bar.html