

Constitutionality of Capital Punishment

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"A punishment to be just should have only that degree of severity which is sufficient to deter others."

-Beccaria

1- GENERAL

Ever since the enactment of the Indian Constitution in 1950, public awareness of problems with death penalty and prevailing legal standards have evolved significantly. India is said to be one of the most liberal and open countries in the world and our constitution is a testimony to this very fact.

In dozens of countries, democratic governments in the course of conducting a major review of their national constitutions have decided to curtail, if not abolish, the death penalty. In national systems and as a matter of international law, it is increasingly recognized that the death penalty has no place in a democratic and civilized society. India is sovereign, secular, and democratic. And yet, it is astonishing that India is one of the few, to be exact, 54 countries in the world, which still embraces the concept of capital punishment or the death penalty. Constitutionality and procedural reforms.

'A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.' – Indian Supreme Court judgment in *Bachan Singh v. State of Punjab*¹

In 1980, the Supreme Court again upheld the constitutionality of the death penalty in the key case of *Bachan Singh v. State of Punjab* (with 7 other cases), although the bench was not unanimous. The judgment called for aggravating and mitigating circumstances with reference to both the crime and the convicted prisoner to be considered in passing sentence and emphasized that the death penalty should be used only in the 'rarest of rare' cases.

2- THE CONSTITUTIONALITY OF CAPITAL PUNISHMENT:

Abolitionists claim that the death penalty is unconstitutional by quoting the eighth amendment which forbids "cruel and unusual punishment." "Cruel and unusual" has never been defined by our founding fathers, but let's examine the issue anyway. Where does the Supreme Court stand on the "cruel and unusual" claim of the abolitionists? In several cases the Justices of the Supreme Court have held that the DP is not cruel and/or unusual, and is in fact, a constitutionally acceptable remedy for a criminal act

Opponents of capital punishment can only welcome the fact that the controversy over lethal injection led to 40 stays of execution last year. Paradoxically, many of those stays will be lifted even if the court rules in the Kentucky case being argued today that the current three-drug "cocktail" used in lethal injections is unconstitutional because it creates an "unnecessary risk of pain and suffering." If animals can be put to death painlessly, so can human beings. The penalty is unlikely to disappear because a particular procedure offends the Constitution.

Although some states have outlawed capital punishment, 36, including California, allow it. A nationwide Gallup Poll conducted last October found that 69% of respondents supported the death penalty. But those numbers don't tell the whole story about whether the death penalty as it exists in 2008 reflects "evolving standards of decency," the standard the Supreme Court has employed to determine whether a form of punishment is cruel and unusual. As Times staff writer Henry Weinstein noted in an article last month, projections suggested that 2007 marked a decline not just in executions but also in death sentences.

That isn't the only indication that Americans, including judges, are increasingly uneasy about capital punishment, both on moral grounds and because of the potential for miscarriages of justice. Many death sentences are never carried out, appeals drag on for years (in California,

¹ All India Reporter, 1980 SC 898

the average time between sentence and execution is 17.2 years) and whether a murderer is put to death depends less on the gravity of his crime than on whether he committed it in a particular state or was represented by a decent lawyer.

CONSTITUTIONALITY IN INDIA:

The provision of death penalty as an alternative punishment for murder under S. 302, 7PC² was challenged as constitutionally invalid being violative of some Articles these are:-

Art. 14:- Equality before law:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 19:- Protection of certain rights regarding freedom of speech, etc.

- (1) All citizens shall have the right
 - (a) To freedom of speech and expression;
 - (b) To assemble peaceably and without arms;
 - (c) To form associations or unions;
 - (d) To move freely throughout the territory of India;
 - (e) To reside and settle in any part of the territory of India; and
 - (f) To practice any profession, or to carry on any occupation, trade or business.
- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, Defamation or incitement to an offence.
- (3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law

² Pasal 302- "whoever commits murder, shall be punished with death" (Imprisonment for life and shall also be liable to fine)

in so far as it imposes, or prevent the State from making any law imposing, in the interest of the sovereignty and integrity of India or public order, reasonable restrictions on the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clause (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Schedule Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, -

(i) The professional or technical qualifications necessary for practicing a profession or carrying on any occupation, trade or business, or

(ii) The carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

Art.21 - Protection of life & personal liberty

No person shall be deprived of his life & personal liberty except according to procedure followed by law. It was contended in *Jagmohan Singh v. State of UP*³ that the constitutional validity of death sentence has to be tested with reference to Arts. 14 and 19 besides Art. 21 of the Constitution as the

³ SIR 1973 SC 947

right to life is fundamental to the enjoyment of all these freedoms as contained in Art. 19 of the Constitution. It was further contended that the Code of Criminal Procedure prescribed the procedure of finding guilt of an accused but regarding the sentence to be awarded under s. 302, IPC the unguided and uncontrolled discretion has been left to the Judge to decide the sentence to be awarded. The Supreme Court held that the death sentence as an alternative punishment under s. 302, IPC is not unreasonable and it is in the public interest and the procedural safeguard provided to the accused under the Code of Criminal Procedure is not unreasonable leaving the discretion with the judge to sentence an accused, convicted for murder either to death or life imprisonment. Death sentence as an alternative punishment for life was held valid. Though the court did not accept the contention that the validity of the sentence to death has to be tested in the light of Arts. 14 and 10 of the Constitution. But in *Rajendra Prasad v. State of U.P.*⁴ the court accepted the proposition that the validity of the death sentence can be tested with reference to Arts. 14, 19 and 21 of the Constitution. The Supreme Court suggested that in exceptional circumstances death sentence should be imposed only when public interest, social defence and public order would warrant. Such extreme penalty should be imposed in extreme circumstances. The court in *Bachan Singh v. State of Punjab*⁵ upheld that constitutional validity of death sentence. The court reasoned that penal law does not attract Art. 19(1) of the Constitution. If the impact of the law on any of the rights under Art. 19 (1) is merely incidental, indirect, remote or collateral, Art. 19 would not be available for testing its validity.

Accordingly, the court held that S. 302, IPC for its validity would not require to qualify the test of Art. 19. The procedure provided in the Code of Criminal Procedure for imposing capital punishment for murder cannot be said to be unfair, unreasonable and unjust. But *Justice Bhagwati* in his dissenting judgment held that S. 302, IPC and S. 354(3), Cr PC violation of Arts. 14 and 21 as these provisions confers unguided power on the court which irrational and arbitrary. It is in the rare cases, the legislature in its wisdom, considered it necessary, impose the extreme punishment of death to deter others and to protect the society. The

choice of sentence is left with the rider that the judge may visit the convict with extreme punishment provided there exist special reasons for doing so. The provision of Art. 302, IPC is consistent with the Constitutional Provision of Art. 21 which enjoins that personal liberty or life of an individual shall not be taken except according to the procedure established by law. Whether death penalty violates Art. 14, 19, and 21 of the Constitution came up for consideration before the Supreme Court in *Bachan Singh v. State of Punjab*⁶ and the court answered the contention in the negative. In the face of the statutory provision in cl. (3) of s. 354 of the Cr. PC requiring giving of special reason while imposing death penalty which is consistent with Art. 21 of the Constitution which enjoins that the personal liberty or life of an individual shall not be taken except according to the procedure established by law, the extreme plea of death in no case cannot be countenanced and death penalty cannot be said to be violate of Art. 21 of the Constitution. Section 302, IPC casts a heavy duty on the court to choose between death sentence and imprisonment for life and court must show high degree of concern and sensitiveness in the choice of sentence. It was held in *Allauddin Mian v. State of Bihar*⁷ that special reason in S. 354, Cr. PC should be sufficient safe guard against arbitrary imposition of extreme penalty. Where a sentence of severity is imposed, it is imperative that the Judge should indicate the basis upon which he considered the sentence of that magnitude justified.

⁴ AIR 1979 SC 917

⁵ AIR 1980 SC 898

⁶ AIR 1980 SC 898: (1980) 2 SCC 684

⁷ AIR 1989 SC 1457

