

● DEATH UNDER PENAL LAW AND LIFE UNDER CONSTITUTION



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Abstract

Aristotle, Immanuel Kant, Rudolf Stammler, Marx and John Rawls theories support the ideology that justice is not some 'thing', which can be captured in formula once and for all. It is a process, a complex and shifting balance between many factors, including equality. On the same way Friedrich also observed that 'justice is never given, it is always a task to be achieved.'¹ Justice is ideal but difficult to attain, like a pole star justice guides us to move in the right direction to achieve Dharma. In the Indian modern democratic polity Constitutionalism is the political dharma. Constitution is the source of justice, liberty, equality, fraternity, cooperation, welfare of all, dignity of individual including criminals and opportunity of reform. Constitutional morality protects the innocent from the invasion of administration in his life. Constitution provides life and liberty to all human beings, penal law have the provision to punish wrong dower in the criminal activities but it requires absolute prove in the eyes of law. In the modern civilized society principle of justice demands reform to the criminal by application reformatory theory of law and not to apply retributive and deterrent method of punishment. The Constitutional political, administrative, and judicial principles are the mandate to balance the functions of individual and society in the interest of justice and avoid the miscarriage of justice. In this context, this paper highlights the issues of death penalty or life imprisonment in the light of new dynamics of criminal administration of justice.

Key words

Death Penalty, Constitution, law, Life imprisonment and Penology.

I. PROLOGUE

The concept of Dharma as law is the foundation stone of justice, self restraint and control, code of conduct, act according to morality, smooth and proper fair function in the society. Adharma is the anti-thesis of Dharma. Adharma includes the criminal activities; thus, criminal should be punished according to the principles of law i.e. dharma. Under the facet of dharma, law, liberty, co-operation, co-existence and love are the values and means of disciplined life. Reformatory theory of justice demands that criminal should be reformed. He should not be killed by the legal principles. Reformatory principles of

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¹Friedrich, Justice: The Just Political Act 6, Nomos Justice at 34.

justice reveal that doctrines of justice are not only strict mechanism principles of retribution and deterrent but it co-relates the expiatory theory of criminal law. If any criminal suddenly first time commits serious crime, the chance by awarding life imprisonment may be given to him. The object of law is to maintain peace and tranquility, if a reformatory system of justice is achieving this object by awarding life imprisonment, then, there is no need to use deterrent and retributive method. India is a country of non-violence, co-operation, live and let to live; these values should also be observed in the administration of justice with humanized principles of law.

Socrates rightly observed that "death is one of the two things, it is annihilation and dead have no consciousness of anything, or as we are told, it is really a change; It is a migration of soul from one place to another place. This ideology of Socrates indicates that death is essential, natural and ultimate truth, it can be stopped by any power, authority and superman". This statement of Socrates is in support of natural truth, but so far death penalty is concern, it is judicial order supported by law, logic and reason. Therefore, it requires more consciousness and deep searching of truth at the time of awarding it, where there is a system of rule of law.

II. CONCEPTUAL FEATURE

Death penalty prescribed by penal law for heinous and serious crime in the case of person who had taken life of another person. It is a deterrent method of justice to prevent the criminal from the society permanently by administration of law. Antithesis of this argument supports the reformatory approach that the crime committed by human being should be reform by civilized norms of the society under the due process of law. Just and reasonable law is the facet of due process under democratic Constitution. In India rights of the under trial or convicted person is protected by the Constitution.²

Procedure Established by Law, Due Process and Save in Accordance of Law

The intention of the some of the members of the Constituent Assembly like-Kazi Syed Karimuddin and Pandit Bhargava were in favour of the test of substantive and procedural law by the judiciary under the "due process clause".³ Whereas, some other members like Mahboob Ali Beg had argued that Art. 15 "Save in accordance with law" be substituted.⁴ He said "why the original words" without due process of law were omitted and the present words "except according to procedure established by law" are inserted, the reason is stated to be that the expression is more definite and such a provision finds place in the Art. 31 of Japanese Constitution of 1946.⁵ It has also argued that the other

²Arts. 20, 21 and 22 of the Constitution of India.

³Kazi Syed Karimuddin, Member of Constituent Assembly on 6th December 1948, moved amendment in the draft Constitution "that in Art. 15, for the words "No person shall be deprived of his life or personal liberty except according to procedure established by law" the words "No person shall be deprived of his life or liberty without due process of law" be substituted. (CAD Vol. VII at 843). The present Art. 15 in the Draft Constitution is Art. 21 in The Constitution. It was the amendment No. 524 of the Draft constitution.

⁴Mahboob Ali Baig Sahib Bahadur (Madras General) said "that in Art. 15 for the words "except according to procedure established by law" the words "save in accordance with law" are substituted. *Ibid*, at 844.

⁵Art. 31 of the Constitution of Japan says that "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law". The constitution of Japan promulgated on Nov. 3, 1946 and came into effect on May 3, 1946.



articles that find place in Japanese Constitution (Arts. 32, 34 and 35) had also been incorporated in this Draft Constitution that would have been a complete safeguarding of the personal liberty of the citizen. This Draft Constitution has conveniently omitted those provisions.⁶

It was also the debate in the Constitution Assembly that if "due process of law" shall be incorporated in place of "procedure established by law," it will be tool in the hand of judiciary to decide that law made by legislature is according to the conceptual feature of "due process". Thus, due process of law opposed by Alladi Krishnaswami Ayyar and said "...three gentlemen or five gentlemen, sitting in court of law, and stating what exactly is due process according to them in any particular case, after listening to long discourse and arguments of briefed Council on either side, may appeal to certain democrats more than the expressed wishes of the legislature or the action of executive responsible to the legislature".⁷ Another debate was also in the Constitution Assembly on 13 December 1948 on the draft Art. 15 of the Constitution.⁸

The words as proposed in the shape of Amendment No. 528, 'due process of law' in the place of 'except according to procedure established by law' was negative, Amendment No. 526 'save in accordance with law' in place of 'except according to procedure established by law' also negated by Constituent Assembly.⁹ Finally Constituent Assembly adopted Art. 15, now it is Art. 21 of the Constitution.

Debate on Courts Power to Declare law Intra-virus and Ultra-virus

Dr. B R Ambedkar said the question of "due process of law" raises in my judgment, the question of relationship between legislature and judiciary. In federal Constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is ultra-virus¹⁰ or intra-virus in reference to power of legislation, which is granted by the Constitution to the particular legislature. If the law made by particular legislature exceeds the authority of the power given to it by the Constitution, such law would be ultra-virus and invalid. On the another way he has said that "...one is to give the judiciary the authority to sit in the judgment over the will of the legislature and question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that the legislature ought to be trusted not to make bad law".¹¹ In India death penalty to the hardcore criminal is the part of law made by British Parliament in the year 1860, needs to be analyzed by the judiciary in the light of democratic civilized principles of law.

⁶Art. 32 of the Japanese Constitution provides that "No person shall be denied the right of access to the Court". Art. 34 says that "No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of the Council, nor shall be detained without adequate cause and upon demand of any such person, such cause should be immediate shown in open Court in his presence and in the presence of his Council". Art. 35 is related to protection of safety in their homes.

⁷CAD Vol. VII at 853, Shri Alladikrishna Swami Ayyar has quoted observation of Professor Will for the purpose of the interpretation of "due process of law".

⁸CAD Vol. VII at 999 to 1001.

⁹*Id.* at 1001.

¹⁰*Id.* at 1000.

¹¹*Ibid.*

Law and Issues of Protection of Life

Pandit Thakur Dass Bhargava member of the Constitution Assembly participated in the debate of Art. 15 of the Draft Constitution (Now Art. 21) that "...according to general connotation of the word, so widely accepted and the connotation which has been given to this word by Austin, law mean an Act enacted by legislatures whereas, I submitted that Dicey used this word "law of the land" he meant law in another meaning. Similarly when the Japanese Constitution and other Constitutions used this word in the broad sense they meant to convey by the 'law' universal principle of justice".¹²

Law as defined by L. B. Curzon Barrister that "the written and unwritten body of rules largely derived from custom and formal enactment which are recognized as binding among those persons who constitute a community or state, so that they will be imposed upon and enforced among those persons by appropriate sanctions and "the body of rules and guidelines within which society requires its judges to administer justice".¹³

Death Penalty under law and Non-Violence

Legal jurisprudence of civilized society reveals that 'eye for an eye makes the whole world blind'. It means if retributive punishment shall be awarded it will be against the principle of non-violence, because, it has seen that due to abnormal behavior of human being, he becomes violence, it is the weapon of weak person, whereas, non-violence is the weapon of the strong person. In a case of serious and heinous offence like-murder, rape with murder and rape with child less than age of 12 years punishment is death. In India it exists from the immemorial period, shadow of this law is in Manuscript. Manu has recognized homicide as crime.¹⁴ Nonetheless, in Constitutional Assembly Debates of 3rd June 1949 Dr. B. R. Ambedkar was in favour of abolition of death penalty on the ground of Indian ancient culture, he said "...my other view is that rather than have a provision for conferring appellate power upon the Supreme Court to whom appeals in cases of death sentence cannot be made, I would much rather support the abolition of death sentence itself. That, I think, is the proper course to follow, so that it will end this controversy. After all, this country by and large believes in the principle of non-violence. It has been its ancient tradition, and although people may not be following it in actual practice, they certainly adhere to the principle of non-violence as a moral mandate which they ought to observe as far as they possibly can and I think that having regard to this fact, the proper thing for this country to do is to abolish death sentence altogether."¹⁵ Though non violence has a moral sanction but it has more prominence rather than legal sanction.

¹²*Id.* at 846, Art. 21 of the Constitution states that "No person shall be deprived of his life or personal liberty except according to procedure established by law". Art. 13 (3) defines the law, that "in this article unless the context otherwise requires - 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom of usage having in the territory of India the force of law. Art. 13 (1) all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with provision of this part, shall to the extent of such inconsistency, be void.

¹³L. B. Curzon, Dictionary of Law, First Indian Reprint 1994 at 219. Observation of Lord Scarman in *Duport Steel Ltd v. Sirs* (1980) ICR 161.

¹⁴Manu Institute, Ch. VIII On Judicature and On Law, Private and Criminal VV 44-380.

¹⁵Constituent Assembly Debate on 3rd June, 1949, Part III, quoted by Law Commission of India, Report No. 262 of 2015 at 17-18.



III. JURISPRUDENTIAL PONDER

Deterrent and retributive support in favour of death penalty¹⁶ is an outdated technique of administration of justice. In the present scientific advance techniques investigation tools are very prompt and effective like-Narco-Analysis, polygraph test and Brain Electrical Activation Profile test etc.¹⁷ This is declared constitutionally valid by the Supreme Court.¹⁸ The Indian Law of Evidence Act, 1872 under Section 45 recognized the identity of handwriting or figure impression etc as relevant evidence. It is a traditional method of investigation. Latest, technology under Information Technology law is in advance, various techniques are working in a legalized manner, like-Close Circuit Television (CCTV), Internet activities, voice recording, remote image capturing instruments etc. Jurisprudentially enforcement of death penalty is antithesis of technical system because death penalty in India under penal law incorporated by the Britishers in the year 1860, whereas, technical development and its use in criminal administration is the 21st century, these techniques have the capacity to analyze the attitude, habits, social environment, economic, social background and conditions of the criminals but unfortunately complete legal status has not been provided by the competent legislature to these techniques except Information Technology Act, 2000. Therefore, a law enacted before one hundred fifty eight years back can be said a proper law where internationally new principles of humanity, dignity, human rights and freedoms has been developed after the second world war.

Jurisprudentially the utmost argument against the use of technical system is that it's some areas are against the principles of fundamental freedoms like-privacy. This issue has been analyzed by the competent court in various cases. *Sarda v. Dharampal*¹⁹ Supreme Court said that medical examination is not violation of Art. 21 of the Constitution as privacy. *M. P Sharma v. Satish Chandra*,²⁰ Court held that Indian Constitution did not explicitly include Right to Privacy. *Kharak Singh v. State of UP*,²¹ Court also held that "...right to privacy is not a guaranteed right under our constitution". In minority judgment Subba Rao J. said Arts. 21 and 19 have inter-relationship. This approach again retreated in *Maneka Gandhi v. Union of India*,²² Justice Subba Rao said right to privacy is the ingredient of personal liberty and that the right to personal liberty is a right of individual to be from restriction and encroachments on his person, this

¹⁶Supporter of Deterrent Theory were Plato, Fichte, Locke, Bentham etc. Retributive theory supported by Bentham and Brihaspati etc.

¹⁷*Selvi v. State of Karnataka* (2010) 7 SCC 263, In this case Court held that though technical test are under scrutiny of Constitutional validity of Art. 20 (3), however, validity of these tests to be examined from wider perspective of personal liberty under Art. 21, which includes right to mental privacy, right against cruel, inhuman and degrading treatment and right to fair trial

¹⁸*Id.* at 203 & 204.

¹⁹(2003) 4 SCC 493, it was a case related to divorce.

²⁰AIR 1954 SC 300; 1954 Cr L J 865; 1954 SCR 1077, In the American constitution by 4th amendment right to privacy is the part of Constitution.

²¹AIR 1963 SC 1295 at 1303 Para 20, In this case court considered that attempt to ascertain the movement of an individual which is merely a manner in which privacy is invaded is not an infringement of the fundamental rights.

²²(1978)2SCC 148. Court held that right to encroachment is in violation of personal liberty.

restriction may be direct and indirect. *Govinda v. State of MP*²³ Supreme Court said that right to privacy is not absolute right. *R Rajagopal v. State of TamilNadu*,²⁴ Supreme Court observed that right to privacy could be described as the "right to be let alone and a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, mother hood, child bearing etc but no one can publish anything against the other without the consent. *People's Union for Civil Liberties v Union of India*,²⁵ it was held that unauthorized taping of telephones by the police personnel violated the right to privacy. *X v. Hospital Z*,²⁶ it was held that person could not invoke his 'right to privacy' to prevent a doctrine from disclosing his HIV positive status to others. In the latest controversy of privacy Supreme Court of India held in *Justice K S Puttaswami (Retd.) and Anr. v. Union of India*,²⁷ right to privacy is protected as fundamental Constitutional right under Arts. 14, 19 and 21. This judgment has overruled the previous judgment of *Khark Singh v. State of UP*,²⁸ and other judgments. The most relevant issue in K S Puttaswami was use of Aadhaar card is in violation of privacy, whereas, in earlier cases issues were police action, surveillance, police regulation and telephone recording etc.

Jurisprudentially right to privacy in use of investigation techniques for the crime of death penalty is a matter of legal debate. The crime committed by the criminals because of social and mental disorder inclined result that commit crime is itself a disease, the object of civilized jurisprudence is to cure the criminal disease as Italian jurist Lombroso and the French philosopher La Cassague originated reformatory theory of criminal administration of justice.²⁹ Indian thinker like- Kautiliya thought that the object of punishment should be reformatory.³⁰ Today's civilized analysis says that due to the mental disorder if crime has committed, on the ground of legal system of other countries criminal should reformed and death penalty should not be awarded.³¹

IV. LEGAL MISSION THROUGH LAW COMMISSION

Initially after the independence of India a new democratic system came into existence, where there were the aspirations of the people to get every kind of relief from the government. In another hand, it is the duty of the government to fulfill all legitimate expectation of the people including to reform the notorious habit of the criminals.

²³(1975) 2 SCC 148, 1975 SCC (Cr) 468. It was a case of police surveillance on the ground of police regulation; Court declared police regulation is constitutionally valid.

²⁴(1994) 6 SCC 632. In this case a convicted person has intended to publish his autobiography which described the involvement of some politician and businessmen in illegal activities.

²⁷(1997) 1 SCC 301; AIR 1997 SC 568

²⁸(1998) 8 SCC 296. In another case of *X v. Hospital Z* (2003) 1 SCC 500, Court has held that if an HIV positive person contracted marriage with a willing partner, than the same would not constitute the offence defined under section 269 and 270 of IPC.

Writ Petition (Civil) No. 494 of 2012, decided on 24th August 2017.

²⁸*Supra* note 21.

²⁹A.C. Ewing, *The Morality of Punishment* at 73, reformatory theory supports the ideology that criminal should be educated and prisons should be reform.

³⁰Chowdhary, *Studies in Ancient Indian Law and Justice*.

³¹Shiv Datt Sharma, *Vidhi Shastra* (Ministry of law and Justice Government of India) 2004 at 215 -218.



First Stage

In 35th Commission's Report 1967, it has recommended that it is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition.³² Nor does the Commission treat lightly the argument of the irrevocability of the sentence of death the need of modern approach, the severity of capital punishment, and the strong feeling shown by the section of public opinion in stressing deeper questions of human values. In conclusion Commission was in view that due to various factors of society like-social environment, disparity in the level of morality, standard of education, vastness of area, diversity of population and need to maintain law and order, Indian can not the risk of experiment of capital punishment.³³ The assessment of Commission is based on traditional factors, may be real but not progressive for the object of advance and development posture to move in civilized society because of changing psychology, correction and treatment.

Second Stage

It is certain that if there are some changes going on in the world, India cannot lagging behind from the humanized principles of humanized principles of criminal law. Thus Commission on 17th Oct 2003 has taken sou-moto death penalty issue because technological advances in the field of science, technology, medicine, and anesthetics.³⁴ Though there was single issue before the Commission that what should be the mode of execution of death sentence, nevertheless focus has also been given on the Constitutionality of capital punishment. The indication was that capital punishment is under controversy. Categorically Commission emphases and recommends for existing provision of hanging under section 354 (5) of Cr PC be amended to allow for the lethal injection. Right to appeal to Supreme Court after the judgment of High Court on capital punishment. Furthermore it suggested all death sentence cases be heard by at least 5 judges Bench of the Supreme Court.³⁵

Third Stage

A comprehensive report on validity, abolition and Constitutionality prepared by Law Commission as report no. 262 of 2015. The reasons to consider the legality of death sentence was based on the observation of Supreme Court in *Shankar Kisanrao Khadev v. State of Maharastra*³⁶ and *Santosh kumar, and Satish Bhushan Bariyar v. State of*

³²The Commission began work on its 35th Report on 'Capital Punishment' in December 1962; It was in consequence of a reference of the parliament, because of resolution moved by Shri Raghunath Singh Member Lok Sabha for abolition of capital punishment. (Law commission of India.nic.in visited on 8th June 2018)

³³*Id.* at Para 1 (summary of main conclusion and Recommendations).

³⁴Law Commission of India 187th Report, 2003 at 5 &7; The Commission restricted itself on three issues- (a) the method of execution of death sentence. (b) the process of eliminating differences in judicial opinions among judges of the apex court in passing sentence of death penalty, and (c) the need to provide right of appeal to the accuse to the Supreme Court in death sentence.

³⁵The recommendation of the commission has not accepted by the government. Supreme Court in *Deena v Union of India* (1983) 4SCC645 said hanging did not involve barbarity, humiliation, torture or degradation. *Parmanand Katara v Union of India* (1989) 1SCC 678; The court ruled that beyond the point of death to hang the body prescribed by Punjab jail Manual is Unconstitutional.

³⁶(2013) 5 SCC 546.

Maharashtra,³⁷ that abolition of death sentence is a main issue. The United Nations General Assembly also adopted the resolution on 18th December 2007 that death penalty should be abolished.³⁸ The Commission's report driven reference of the Supreme Court and re-examination of earlier courts.

The Commission concluded its report and observed that death penalty does not serve the penological goal of deterrence any more than the life imprisonment.³⁹ Death penalty is one of the facets of retributive theory of criminal administration of justice. It has no place in Indian Constitution.⁴⁰ It is essential that victim's restorative and rehabilitative aspect of justice should be developed.⁴¹

The Constitutional regulation on death penalty attempted by Supreme Court in *Bachan Singh v. State of Punjab*,⁴² has failed to prevent death sentences from being 'arbitrary and freakishly imposed'.⁴³ A rigid, standardization or categorization of offences which does not take into account the difference between cases is arbitrary in that it treats deterrent cases on the same footing.⁴⁴ In the adversarial criminal justice system socially and economically marginalized criminals lack the resources of effective advocate.⁴⁵ Thus, death penalty becomes indefensible.

³⁷(2009) 6 SCC 498.

³⁸Resolution No. 62/149 Date 18.12.2007: India is in 59 Nations that retain the death penalty.

³⁹Law commission Report 262 of 2015 at 213. *Gopal Vinayak Godse v. State of Maharashtra* AIR 1961 SC 600; *Manu Ram v. Union of India* (1981) 1 SCC 107.

⁴⁰*Id.* the notion of 'an eye for an eye' tooth for tooth' cannot be reduced vengeance.

⁴¹*Id.* Para 7.1.3 Sec 357 A of Cr PC reads as:

1. Every state government in co-ordination with the Central government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who requires rehabilitation.
2. Whenever a recommendation made by the Court for compensation, the District Legal Services Authority or the Legal Services Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred under subsection (1).
3. If the trial Court at the conclusion of trial, is satisfied that the compensation awarded under section 357 is not adequate for such rehabilitation or where the cases end in acquittal or discharge and the victim as to be rehabilitated, it may make recommendation for the compensation.
4. where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the state or Legal Services authority for award of compensation.
5. On received of such recommendations or on the application under subsection (4) the state or district legal service authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.
6. The state and legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the Police Station or a magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

⁴²AIR 1980 SC 898.

⁴³*Supra* note 39 at Para 7.1.4.

⁴⁴*Id.* Para 7.1.5.

⁴⁵*Id.* Para 7.1.6.



Fourth Stage

This includes rarest of rare principle,⁴⁶ clemency and merely powers under Arts. 72 and 161, sometimes it has declared by the judiciary that gross procedure violations and non-application of mind by executive in the dispose of mercy cases.⁴⁷ In this stage, it may be discussed long delay in the trial, appeal and execution of death sentence. Due to the legal lacuna in the cases of capital punishment awarded by Subordinate Court, Supreme Court of India since 2000 has dismissed at least 9 special leave petitions against the imposition of death penalty.⁴⁸

Supreme Court in *Mhd. Farooq Abdul Gafur v State of Maharashtra*⁴⁹ laid down the principle that "... a far more serious and intensive duty to discharge court not only has to ensure that award of death penalty does not become a perfunctory exercise of discretion under Section 302 of Indian Penal Code an ostensible consideration of Rarest of Rare doctrine, but also that the decision making process survives the special rigors of procedural justice applicable in this regard". In *Dhananjay Chatterjee v. State of West Bengal*,⁵⁰ the Supreme Court held that not informing mitigating circumstances of the case is serious error.

V. LATEST JUDICIAL APPROACH

In *Latish alias Dadu Baburao Karlekar v. State of Maharashtra*,⁵¹ the Supreme Court upheld the conviction of accused under sec 302 read with sec 34 of the Penal Code because of the one accused caught red handed with blood stained chopper in hand by police. In this case court has not awarded death sentence. In *Silvraj and another v State by Inspector of Police, Tamil Nadu*⁵² Supreme Court upheld the conviction under section 302 on the ground of recovery of a knife from one of the accused named Kalaimohan s/o Desingu, which was capable of causing stab injuries mentioned in the post-mortem report as one of the causes of the death of deceased Umanath but not awarded capital

⁴⁶*Machhi Singh v. State of Punjab* (1983) 3 SCC 470; the test of rarest of rare theory are- (i) manner of the commission of the offence (ii) nature of offence committed (iv) Magnitude of offence and (iv) personality of victim.

⁴⁷*Kehar Singh v. Union of India* (1989) 1SCC 204, *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1. Art. 72 of the Constitution of India prescribes the power of President to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence in all cases where the sentence is death. Art 161 gives same power to the Governor of the state. The difference between Arts. 72 and 161 is only that President under Article 72 shall have the power to matter to which the executive power of the union extent, whereas under Article 161 governor of the State have the power to a matter to which the executive power of the state extends.

⁴⁸Brandon L Garrett, *The Benality of Wrongful Execution*, MICH L Rev. (2014); Law Commission of India, as quoted in its Report 262, August 2015, at 167. In all so far 155 death row inmates have been exonerated in the US using DNA and non DNA evidence.

⁴⁹(2010) 14 SCC 641 at Para 155.

⁵⁰(2004) 9SCC 751. The mercy petition of Dhanajoy Chatterjee was subsequently rejected by the executive and he was executed.

⁵¹AIR 2018SC 659

⁵²AIR 2018 SC 1020, it is a case of strong evidence and murder was committed intentionally but court has not awarded death sentence. Ordinarily Court's attitude under Section 354 (3) of Criminal Procedure Code is to award the imprisonment in matters of offences under section 302 of IPC.

punishment. *Joseph v. State of TamilNadu*,⁵³ judgment delivered by Justice Mrs R. Banumathi upheld the conviction of two accused sahayam and joseph under Sec. 302 read with Sec. 34, 109 of IPC the sentence of life imprisonment awarded each of them. *Kara Bhai v. State of Gujarat*,⁵⁴ in a case under Section 302 read with Sec. 34 of IPC Supreme Court upheld the judgment as delivered by the trial court and High Court that the sentence of life imprisonment on the appellant. In *Deo Nath Rai v. State of Bihar*⁵⁵ on the ground of sudden quarreling between two parties, this was proved by statement of eye witnesses and post mortem report, Supreme Court upheld the conviction to convert the sentence of imprisonment from Sections 302 to 304 of the Penal Code. On the same way in *Atul Thakur v. State of H.E*⁵⁶ full Bench of the Supreme Court on the ground of sudden quarrel and without premeditation death caused by accused convicted under Section 304 and part II of Section 300 exception 4 for 10 years imprisonment, with fine of Rs 10,000. Dashrath aleas Jolo and another *ETC v. State of Chhattisgarh*⁵⁷ Supreme Court upheld the judgment of Trial Court and the High Court to convict appellants under Section 302 read with Section 149 for murder, but not awarded the capital punishment. In a unique case *State of Himanchal Pradesh v. Hans Raj*⁵⁸ Supreme Court awarded the sentence of imprisonment under Section 302 of IPC, whereas, punishment awarded by trial Court and High Court under Section 304 of IPC.

In *State of Uttar Pradesh v. Mahipal*,⁵⁹ it is a direct case where trial court awarded capital punishment in a case of murder of two children on account of property issues within family. In appeal the conviction of accused was reversed and he has been acquitted of all the charges leveled. The Supreme Court did not agree with the view of High Court and upheld the judgment of Trial Court, but alter the sentence of death in life imprisonment and said it is not one of rarest of rare case of invocation of the death penalty. *State of MP v. Abdul Latif*⁶⁰ the case was related to murder under Sec. 302, but High Court and Supreme Court Converted the punishment under Section 304 IPC because of sudden quarrel between accused and deceased. In *Khushid Ahamad v. State of Jammu and Kashmir*,⁶¹ trial Court acquitted accused in case of murder, whereas High Court of Jammu and Kashmir reversed the order of acquittal and convicted him for the offences punishable under Sections 302/341 of Ranbir Penal Code (12 of 1989) and sentence to him imprisonment for life. In a case *Satpal v. State of Haryana*,⁶² where there was circumstantial evidence, Supreme Court upheld the conviction under Section 302 IPC,

⁵³ AIR 2018 SC 93, Para(s) 14, 15,16,17,18,19,20,23 &24 for the purpose of life imprisonment under section 302 of Penal Code.

⁵⁴ AIR 2017 SC 5413, the judgment delivered by full bench of the Supreme Court. (Ranjan Gogoi, Abhay Manohar Sapre and Navin Singh JJ.

⁵⁵ AIR 2017 SC 5428. Judgement delivered by Arun Mishra and Mohan M. Shantanagoudar JJ.

⁵⁶ AIR 2017 SC 570. Judgement delivered by Dipak Mishra CJI, AM Khanwilkar, and D Y Chandrachud JJ.

⁵⁷ AIR 2018 SC 1133. Judges were R K Agrawal and Mrs R. Banumathi JJ.

⁵⁸ AIR 2018 SC 1185. Judgment delivered by Ranjan Gogoi and Mrs R. Banumati JJ.

⁵⁹ AIR 2018 SC 1261. Author of the judgment were Ranjan Gogoi and Mrs R Banumathi JJ This case supports life imprisonment rather than capital punishment.

⁶⁰ AIR 2018 SC 1409. Judgment delivered by NV Ramana and S. Abdul Nazeer JJ.

⁶¹ AIR 2018 SC 2457. Authors of the judgment was NV Ramana and S. Abdul Nazeer JJ. Ranbir Penal Code is enforcing in the State of Jammu Kashmir.

⁶² AIR 2018 SC 2142. Author of the case were Kurain Joseph, Mohan M. Santana Goudar and Navin Sinha JJ.



but not awarded capital punishment.⁶³ *Guruwindra Singh allies Sonu v. State Punjab*⁶⁴ In this case Supreme court converted punishment from Sections 302 to 304 Part II of IPC on the basis of the fact sudden scuffle between parties.

Murugan v. State of Tamil Nadu,⁶⁵ the Supreme Court on the ground of circumstantial evidence upheld the conviction of appellant under Sec. 302, 364 and 34 of IPC. Life imprisonment has been given to the appellant.⁶⁶ On the same way Supreme Court in *Chandra Bhawan Singh v. State of Uttar Pradesh*⁶⁷ on the ground of circumstantial evidence, upheld the conviction of life imprisonment under Sec 302 of IPC, in all these cases the approach of Supreme Court is to avoid capital punishment.

All the latest cases of 2017-18 shows that under Sec. 302 IPC Court has awarded life imprisonment rather than capital punishment, because of Section 354(3) of Cr.PC.⁶⁸ and application of rarest theory⁶⁹ on dated 9th July 2018 Supreme Court of India decided the review petition of *Vinay Sharma & Another v. State of NCT of Delhi & others*.⁷⁰ In this case six persons had committed rape and murder of 23 year old lady of the paramedical student in moving bus in the state of Delhi in the night of December 16, 17, 2012. It was the matter of gang rape, severely assaulted and thrown out on the road. She succumbed to her injuries on December 29, 2012 at Mount Elizabeth Hospital in Singapore.⁷¹ High Court has confirmed the death penalty. Supreme Court also dismissed the criminal appeals. Again review petition filed by two accused, Vinay Sharma and Pawan Kumar Gupta to Supreme Court, but the Supreme Court rejected the petition on the ground that nothing is new in the review petition which has not submitted by the petitioner in the appeal.⁷²

⁶³*Ibid.*

⁶⁴AIR 2018 SC 2277. Author of the judgment were Ranjan Gogoi and Mrs R. Banumatti. JJ.

⁶⁵AIR 2018 SC 2149. Judgment delivered by RK Agrawal and Abhay manohar Sapre JJ.

⁶⁶*Id.* at para 29, there were eight circumstances appearing against the appellant. These circumstances were: First motive was against the deceased due to his not agreeing to the proposal of marriage of kumar with his daughter; Second, the appellant and Kumar, both being the cousins, knew each other; Third, both went together to the house of deceased to invite him for a dinner at kumar,s house; Fifth, Murugan died immediately after dinner, Sixth Kumar gave his confessional statement; Seventh, recovery of weapon and cloths at the instance of kumar; Eighth, the dead body was found lying near iron cot where Murugan and deceased had last dinner with kumar and appellant.

⁶⁷AIR 2018 SC 2205. Author of the judgment RK Agrawal and Abhay Manohar Sapre J

⁶⁸Section 354 (3) of CrPC provides that "when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.

⁶⁹*Supra* note 42, Dharam Deo Yadav v. State of UP (2014) 5 SCC 509

⁷⁰Review Petition (CRL) nos. 671-73 of 2017 In Criminal Appeal No. 608 &609-610 of 2017, Judgment delivered by Deepak Mishra CJI, R. Banumati and Ashok Bhushan JJ It is known as Nirbhaya rape case.

⁷¹The Hindu, July 10, 2018 at 11.

⁷²*Supra* note 70. Review petition filed under Art 137, Order XLVII Rule 1, of the Supreme Court Rules, 2013. The provision states that "the Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in the order XLVII, rule 1, of rule 1, of the Code, and in criminal proceeding, except on the face of the record". (At Para 19) Show *Chandra Kante and Anothors v. Sheikh habib* (1975) 1 SCC 674, *P N Eswara Iyerand Others v Registrar Supreme Court of India* (1980) 4 SCC 480, *Kamlesh Verma v Mayawati and others* (2013) 8 SCC 320, *Vikram Singh allies Vicky Walia and another v. State of Punjab and Another* (2017) 8 SCC 518.

One of the most important question raised by the council of petitioner that death penalty has been abolished by the parliament of UK in year 1966 and several Latin American countries and Australian States. This argument was rejected by the Court by observing that this is no ground to efface the death penalty from the statute book of our country. So far the death penalty remains in the Penal Code the courts cannot be held to commit any illegality in awarding death penalty in appropriate cases.⁷³

VI. AMNESTY COMMENTS ON VIVEK SHARMA CASE

Amnesty International a human rights protection organization comments on the *Vivek Sharma v. State of NCT of Delhi*⁷⁴ that executive will not eradicate violence against women. Organization comments on the judgment of the Supreme Court, there was no evidence to show that death penalty acted as a deterrent to sexual evidence. The government must allocate adequate resources for effective implementation of laws, improve conviction rate and insure certainty of justice in all the cases.⁷⁵ All too often, law makers in the country hold up capital punishment as a symbol of their resolve to tackle crime, and choose to ignore more difficult and effective solutions like-improving investigations, prosecutions and support for victims families: Far reaching procedural and institutional reforms are the need of the hour.⁷⁶

VII. REPORT NO 262 OF LAW COMMISSION OF INDIA RECOMMENDATION⁷⁷

The Commission recommended police reforms, witness protection scheme and victim compensation should be taken up expeditiously. Horizons of the right to life and due process requirements in the interactions between the state and the individual, prevailing standards of Constitutional morality and human dignity, the commission feels that time has come for India to move towards abolition of death penalty.⁷⁸ Commission also recommended that although there is no valid penalogical justification for treating terrorism, differently from other crimes, concern is often raised offences and waging war, will affect national security. However given the concern raised by the law makers, the commission does 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.⁷⁹ The Commission further recommended that death penalty be abolished for all crimes, other than terrorism related offences and waging war.⁸⁰ The commission also expressed the views that the movement towards absolute abolition will be swift and irreversible.⁸¹

⁷³Judgment had written by Ashok Bhushan J on behalf of the FB of the Court. Observation pertaining to death penalty is constitutionally valid, discussed at paragraph no. 25 of the case.

⁷⁴*Supra* note 70. Judgment delivered on 9th July 2018 by the Supreme Court.

⁷⁵Asmita Basu, Amenesty International India's Programs Director, the Hindu, July 10, 2018 at 11.

⁷⁶*Ibid.*

⁷⁷Government of India, the Law Commission of India, Report No. 262 on the Death Penalty at 271-18.

⁷⁸*Id.* at Para 7.2.1 & 7.2.2.

⁷⁹*Id.* at Para 7.2.3.

⁸⁰*Id.* at Para 7.2.4.

⁸¹*Id.* at Para 7.2.6.



Recommendation of the Commission of 262 Report 2015 is in favour of abolition of death penalty, except waging war against state and offences committed by terrorists. In the civilized society, there is no scope for barbaric punishment, but the criminal should not committed barbaric offence. In the modern technique of 21st century, the barbaric offence should be controlled with the help of techniques.

VIII. EPILOGUE AND SUGGESTIONS

The survey of whole background of death penalty indicates that there were ups and downs to award of death penalty in India on the ground of the recommendation of law commission and judicial pronouncement and ultimately evolved the theory rarest of rare. Law has also amended time to time.⁸² However, in the rape cases for regrious imprisonment and capital punishment criminal law has also amended in 2018. This law has amended and substituted Sections 166A, 376B, Sec 376C, 376D, 376AB, 376B, 376C, 376D, 376DA, 376DB, 228A of Indian Penal Code 1860; Sections 53A and 146 of the Evidence Act 1872, Sections 26, 154, 161, 164, 173, 197, 309, 327, 357B, 357C, 374, 377, 438, 439, and first schedule of Criminal Procedure Code 1973.⁸³ Specially Section 376 provides that "persons committing offence of rape on a women under sixteen years of age shall be punished of rigorous imprisonment for a term which shall not be less than 20 years but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of the person's natural life and with fine, Section 376AB provides that "person committing an offence of rape on the woman under twelve years of age shall be punished for rigorous imprisonment not less than 20 years but which may extend to imprisonment for remainder of that person's natural life and with fine or with death."⁸⁴ This amendment in Criminal law provides death penalty in the special case of rape on the women under the sixteen years of age.

Latest judgments delivered by Ranjan Gogoi and Mrs. R. Banumathi JJ. had strictly applied the literal rule of interpretation. In some cases in the matter of murder, punishment under Section 304 as awarded by Subordinate Courts converted into Section 302 of Indian Penal Code.⁸⁵ However, in some other cases death penalty awarded by trial court and acquitted by the High court, converted into the life imprisonment.⁸⁶ The approaches of the judges are different for punishment under Sections 304 and 302 of IPC.⁸⁷

Generally Court's approach is to avoid the death penalty. In the exceptional cases like-terrorism, waging war against state, rape with murder and rape of minor girl less than twelve years, and in case of gang rape of the girl in between twelve to sixteen years court also awarded death penalty. The latest trend of the court in life imprisonment is remainder of that person's natural life. This trend may solve the purpose of death penalty, because, in heinous crimes criminal should be kept out of society, by awarding life imprisonment of remainder of natural life, will solve this problem. It shall fulfill the object

⁸² *Supra* note 30, 31, 32, 33, 34, 35, 38, 39, 40 & 41.

⁸³ The Criminal (Amendment) Act 2018, earlier it was the Criminal law (Amendment) Ordinance 2018, notified on 21 April, 2018 in the Gazette of India, and came into force at once.

⁸⁴ First Schedule, Column 2 and 3 of the Criminal Procedure Code 1973.

⁸⁵ *Supra* Note 56.

⁸⁶ *Supra* note 59.

⁸⁷ *Supra* note 55, 56, 57 & 59.

and purpose of deterrent and retributive theory. The following suggestions may be fruitful, helpful, and useful for the solution of the controversy between death penalty and life imprisonment.

The Constitution Assembly Debate of 3rd June 1949, shows that strict precaution should be taken at the time of awarding death sentence in the following manner: in case of awarding death penalty, there are chances of miscarriage of justice by not getting justice by the innocent people;⁸⁸ and Prof. Shibban Lal Saksena said that in the punishment of death sentence right to appeal up to the Apex court should not be stopped by reason of poverty and other reasons.⁸⁹

It is in the interest of justice to provide facility to death convicted accused the help of competent legal practitioner without cost on the part of accused. The fee of an Advocate should be paid by the government, as per the highest rate of leading lawyer. Dr. Ambedkar was also in favour of abolition of death sentence, because of principle of non-violence as moral mandate in India.⁹⁰ Dr. B. R. Ambedkar also suggested that the abolition of death penalty issue should be left to the parliament to enact the law for the purpose.⁹¹

- i. Reform in police attitude, behavior, investigation and use of latest techniques should be changed, so that innocent person may not be convicted for death penalty.
- ii. According to principles of penology the purpose of death penalty is to remove criminal from the society. This purpose may be fulfilled by awarding life imprisonment in lieu of death punishment.
- iii. Life imprisonment means convicted person's remainder natural life. This kind of punishment is also comes within the width of deterrent and retributive theory of criminal administration of justice, life imprisonment is the only way in case of abolishing death penalty.
- iv. In exceptional situation on activities of terrorists, if they had killed the human being, death sentence may be awarded but not in all activities of terrorists and abetment charges against the them.
- v. If the matter related to rape and death of victim, death penalty may fulfill the purpose of justice.
- vi. In case of waging war against state, death penalty may be the punishment but it should not be used in the exercise of democratic rights on the basis of opposition against the policy, like in the name of sedition etc.
- vii. Compensation under victim-logy system of justice should be developed to provide sufficient compensation to the victim.
- viii. United Nations principles of humanity, dignity and equality should be respected and human rights of everyone should be protected.

At last it should be reasonable to quote Justice Hall, Manu and justice V R Krishna Iyer in context to avoid death sentence. The object of criminal law is in terms of order, survival, security, of higher values and finally the good life which subsumes all the ideas of the world; in which a democratic society moves" (Justice Hall). Our code provides for capital punishment for wide range of offence. But sadly the death penalty has never reduced these crimes in the country (Justice V R Krishna Iyer).

⁸⁸Pandit Thakur Das Bhargava, Constituent Assembly Debate, 3rd June 1949.

⁸⁹*Id.* Quoted by Law Commission of India, Report No. 262, August, 2015 at 16.

⁹⁰*Ibid.*

⁹¹*Supra* note 15.