

DEATH SENTENCE AND THE BEST POSSIBLE WORLD OF CHATRAPATI SINGH

Saheb Chowdhury¹

Abstract

In a world heading towards abolishing Death Sentence as a form of punishment, there has been increasing number of instances of Death Sentence being pronounced in India. India could well be hanging the first women convicts after their plea for clemency had been denied by the president to two sisters from Maharashtra². This is a very disheartening trend. There have already been many arguments criticizing Death Sentence in India; some of them being that of the chances of such sentence being erroneous and uncertain or the lack of uniform standard of sentencing. However, in this present work an attempt has been made to prove the unacceptability of Death Sentence from not these consequentialist points of view, but to show that Death Sentence is inherently unbecoming of a human society. The work has been done in the light of a very important Indian legal luminary Chhatrapati Singh's perspective in his work called "Law: From Anarchy to Utopia". The reason is that the work is a comprehensive work on foundational elements of law and a legal system and is, therefore, pertinent in questioning the very foundational justification of Death Sentence and not just the consequentialist arguments provided against it.

1. Introduction

William Makepeace Thackeray, after witnessing a hanging in 1849, wrote, " *It seems to me that I have abetted an act of frightful wickedness & violence and I pray God that it may soon be out of the power of any man to witness such a degrading sight.*"

"To be hanged till death" is how death sentence is given to a convict in India. In Wesiberg, 1991 it has been described that in most cases of the death by hanging the victims face is engorged, the tongue is protruded, the eyes pop out, the body defecates and violent movement of limbs occur. The pain is so excruciating that every second seems like hours. A chill runs down the spine at the thought of the pain the person goes through, doesn't it? However, the intention of this work is not to appeal to the human conscience by giving a graphic account of the pain, but to explain at the philosophical justification of the movement against death sentence. The ghoulishness of the

¹Saheb Chowdhury, LL.M., NALSAR University of Law, Year of Study- 2012-2014.

²The Times of India, *Two sisters from Maharashtra's Kolhapur may become the first women to be hanged in India*, Accessed on August 18, 2014. <http://timesofindia.indiatimes.com/city/pune/Two-sisters-from-Maharashtras-Kolhapur-may-become-the-first-women-to-be-hanged-in-India/articleshow/40249975.cms>

punishment is just only one minor aspect of it, because even if death be given without any pain the death sentence, as will be argued, is still not justified. The practice of taking a person's life as a means of dispensing justice is a blot on the face of a thinking nation. When the world is evolving ever more human rights jurisprudence and humane reformatory ideas, death sentence remains a regressive, consequentialist and contorted manifestation of our animalistic vengeance passing off as justice.

Recently came in news the death sentence of two sisters, Renuka Shinde and Seema Gavit, who have been convicted and could be hanged for kidnapping and killing five children in Maharashtra³. While gallows was being readied at Tihar jail for execution of Devender Singh Pal Bhullar, a Khalistan Militant, convicted in connection with triggering a blast in 1993, the sessions court in Pune had awarded death sentence to Mirza Himayat Baig, the only person tried in Pune's German Bakery blast case. The trend has become every unsettling. The imposition of death sentence has not always led to execution in India. Recent cases of hanging in India are that of in Auto Shankar's case in 1995 and Dhanaonjay Chatterjee's case in 2004. Then after a long gap came the hanging of Ajmal Kasab in 2012 and of Afzal Guru in 2013 in quick succession. The uniqueness of Afzal Guru's case, which makes us question our conscience, is the absolute shrouded secrecy in which the execution was carried out, without even properly informing the family members of the executed. If this becomes the norm then we will be on will on course to a dark and dreary future of retributive pandemonium. Hence, in the following part of this work, an attempt has been made to look in to the common criticism against the problems of death sentence in the India, and then to further raise our understanding from there. The purpose of this work is to look at death sentence from the perspective of the work done by Chatrapati Singh, in his foundational work on law in "Law from Anarchy to Utopia". In doing so, an attempt has been made to answer the following questions. Does a death sentence raise any chances of the world being a better place? Does it in anyway reduce the incidences for which death sentence is given? Does judicial killing help in the building of a best possible world as conceptualized by Chatrapati Singh? We will deal with these and few other questions in the following discussion.

2. Death Sentence in India

³ Id

There are two very common but important criticisms against death sentence in India. The first one is the element of uncertainty, which is because of discretionary power of the judges as to decide when to give death sentence and an absence of uniform standard for the award of such sentence. The second one is the element of erroneousness. This is one of the biggest problems with death sentence, because there still isn't any full proof method of determining the guilt of a person. Before, we go into looking at death penalty from Chhatrapati's perspective, it is necessary to know a little more about these two criticisms.

2.1. The Uncertainty of Death Sentence

Death sentence in India may be given for various crimes like murder, gang robbery with murder, abetting the suicide of a child or insane person, waging war against the nation, and abetting mutiny by a member of the armed forces. Death sentence under section 302 of IPC has been left to the judicial discretion. It is for the judges to decide whether to award death sentence or imprisonment for life. This has led to a very uncertainty in the awarding of death sentence. It has been witnessed many a times that judges have significantly differed in their views regarding awarding of death sentence in very similar situations. These reasons led to the challenging of death sentence many times. *Jagmohan Singh v. State of Uttar Pradesh*⁴ was the first case in which death sentence was challenged on the ground that it was excessive delegation by the legislature and is therefore *ultra vires* of the provisions of the constitution. The appeal was rejected on the ground that there is an impossibility of laying down standards by the criminal law and therefore, judges have been given the discretion to decide the quantum of punishment.

The sentence was reaffirmed again in the case of *Bachan Singh v. state of Punjab*⁵. It was held in that case that death penalty as a mode of punishment is not unreasonable and is in the public interest. One thing to be noticed in this case is that there were persons of reason, learning and wisdom who were sharply divided regarding the issue of the punishment. This very reason further substantiates the necessity to take a relook at death sentence as a mode of punishment. The positive development of this case is that this is the first case in which the Supreme Court invented the rarest of rare test and set out certain aggravating circumstances under which the court might award death sentence. It, thus, sets a limit on the imposition of death sentence and lays down the principle that the court is to impose the death sentence on a convict only if the alternative sentence of life sentence is unreasonably foreclosed. However, it is necessary to

⁴Jagmohan Singh v. State of Uttar Pradesh, AIR 1973 SC 947

⁵Bachan Singh v. state of Punjab, AIR 1980 SC 898

mention even this doctrine deserves criticism on the ground that there is no set rule as to determine when a case becomes rarest of the rare. Another significant development in this case is the rejection of the balance sheet theory, which requires the weighing of the aggravating and mitigating circumstances through a balance sheet. This deplorable doctrine had again been revived in *Machhi Singh v. state of Punjab*⁶ by a three judgment bench of the Supreme Court and was given back its legitimacy. The application of the doctrine had led to further uncertainty in the application of the sentence and there was total inconsistency in the application of the sentence.

2.2. Erroneousness of Death Sentence

Eliot Spitzer said, "*Our criminal justice system is fallible. We know it, even though we don't like to admit it. It is fallible despite the best efforts of most within it to do justice. And this fallibility is, at the end of the day, the most compelling, persuasive, and winning argument against a death penalty.*" The Supreme Court of India itself has admitted to many cases of erroneous judgment. A group of fourteen former judges had sent an appeal to the president of India, Mr. Pranab Mukherjee, to commute the sentence of nine death-row prisoners after the Supreme Court admitted that it had erroneously sentenced them to death.

Sangeet & ANR v. State of Haryana, 2012⁷, is one recent case of admission of error by the court. Similar admission was made in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*⁸, in which a two-judge Bench admitted to error in the sentencing to death of seven convicts by the previous benches of the court. Similar error was immediately noticed in the sentencing to death of six more convicts, after the delivery of judgment in *Bariyar*, taking their total to thirteen.

Taking life of someone, even if it is under laws of the state, when there is such number of admission of error by the apex court of the nation demands that a serious relook must be done and validity of the death sentence as mode of punishment needs to be questioned.

3. Validity of Death Sentence in Chatrapati's Best Possible World

⁶*Machhi Singh v. state of Punjab*, AIR 1983 SC 957

⁷*Sangeet & Anr vs State Of Haryana* on 20 November, 2012, CRIMINAL APPEAL NOS. 490-491 OF 2011, Supreme Court of India

⁸*Santosh Kumar Satishbhushan Bariyar vs State Of Maharashtra* on 13 May, 2009, CRIMINAL APPEAL NO. 1478 OF 2005, Supreme Court of India

We have noted above that death sentence as mode of penalty in India has two very serious weaknesses. Both uncertainty and erroneousness are two major important reasons which call for reconsideration of death sentence. However, even if we were successful in overcoming the above two weaknesses and also finding methods of executing which results in no pain to the executed, would death sentence be still justifiable then? In the next part, the discussion will deal with justification of the very concept of death penalty as mode of punishment, whether the above weaknesses are present or not. It will be proved that the mere using of death sentence as mode of punishment is *per se* wrong and a defective idea.

One of the justifications for capital punishment as a means penalty has been described to be its deterrent value, i.e. it deters the intending criminals from committing similar crime. This view has been criticized by some on the ground that there is no concrete evidence to prove that it has been successful in bringing about a significant decrease in crime. Here, instead of going by the above criticism, it is necessary to question the very idea of "fear of punishment" as means of decreasing the number of crime. While dealing with the metaphysical requirements of law, Chatrapati Singh says that these are conditions that make a possible system actual⁹. While discussing about Law and Ethics, Chhatrapati Singh very aptly criticizes Kant's view that juridical legislation cannot concern itself with the interior determination of choice through non-sensuous motive. He criticizes Kant's view that Juridical Legislation can only employ natural sensuous means of constraint. It has been rightly reasoned further that a view which makes the motive for legal action fear rather than some sense of duty contradicts Kant's general thesis that law is moral, at least insofar as it is in accordance with Categorical Imperative. Kant has argued in *Theory and Practice* that we have an unconditional duty to create and maintain a civil society in which the outer freedom can be obtained for all. Hence Chatrapati Singh says that if we really have such a duty then evidently the reason for acting legally lies in such duty and not in fear or anxiety. If we apply a similar reasoning to the deterrence theory, then we find that the very base of the theory, which is fear of punishment, is standing on a very weak ground of justification. People conform to law not out of fear but out of a sense of a duty. Because, just as no one can constrain an autonomous will to act ethically, no one can constrain it to act legally. This is why deterrence theory which relies on "fear of punishment" as ground capital punishment has not succeeded in bringing down the number of such crime and if it was possible this way, the number of crime would have decreased long time ago. Even when there was a huge demand for death sentence and other strict action against the perpetrators in the Delhi gang rape case,

⁹ Chhatrapati Singh, *Law From Anarchy to Utopia*, Published by oxford University Press, Page no.150-157, 1985

newspapers were full of such similar incidences happening in every corner of the country and even in the same city where the biggest protests were going on.

In discussing the legal propositions of pure practical reason Chatrapati Singh, while describing Kant, sets out the Community of Ends¹⁰. Three rules have been discussed that legislators of law are bound to follow. Out of these three, two important rules that can be find very relevant in this quest is one in which he says that every rule willed by the legislators must take into account that each member of the community is an end in himself. The other one says that the rule must never make possible the use of any member solely as a means for the ends of other members. Deterrence theory fails even here, because death sentence based on this theory fails invariably to treat the person as an end in himself. The very reason of creating a fear in the minds of others by death sentence is to use such person as a means of some other ends. If that is what its purpose is, then hangings should be done in the public and may be even broadcast on TVs. We have many examples of countries around the world and of instances in our history of such things being done. We have rightly criticized these practices, because we call ourselves reasonable and civilized group and we believe in the creation of a better world. A society that is civilized in real sense cannot rely on fear and treat people as a means to other ends. Then should we not go a little further stop killing people altogether that we do in the pretext of dispensation of justice? The ideas of justice and the consequentialist theories of deterrence and vengeance that treat convicts as a means to other ends are incompatible. It is for this reason deterrence theory is unsuitable for a best possible world as imagined by Chatrapati Singh.

While discussing about Law and Coercion Chatrapati Singh says¹¹ that it is not possible to coerce anyone to behave legally. He says, "*Force is used when people fail to behave legally; and then the aim of force is not to make them act legally but to prevent them from acting illegally in future.*" In the case of death sentence the punishment is given when a person commits certain crime, which means when the person fails to behave in some legally permitted way, to prevent the person from acting illegally in future and not to make them act legally. So, is death sentence justified according to this principle as brought forward by Chhatrapati Singh? The answer will be in negative. Chhatrapati says that coercion enters in or becomes necessary only when just actions are absent. It is only required in the last resort to keep some people away from a system in which (most) other people are carrying on with their just acts. He further says that if by such coercion these same people are reformed and are willing to carry on with just acts of their accord, then coercion is not used on

¹⁰ Id

¹¹ Chhatrapati Singh, *Law From Anarchy to Utopia*, Published by oxford University Press, Page no.157-167, 1985

them anymore.¹² So this rightly explains the above quoted sentence. In our present discussion we can aptly say that the step to prevent a person from acting illegally in future is not to kill them altogether but to keep them away from others. His ideas invariably revolve around the concept of reformatory justice and complement it further.

The above discussion can be further substantiated by Chatrapati's reasoning on the concept of Legal Person¹³, in which he says, "*If law took evil to be natural aspect of human behavior, not only would it lose the fundamental basis for asserting that human beings have inherent dignity but it would also lose the central motivation for attempting to remedy or reform evil persons and situations.*" That exactly is the idea that makes even more human. It is because we are human that we have dignity and this is the norm and not exception. The evil that we find is only an aberration. The idea of humanity lies beyond these aberrations. Thus we can clearly observe from here that when death penalty is given to a convict then law takes such evil to be natural aspect of such person and so cannot be reformed. This acceptance of inherent evilness leads to the idea of such person being removed totally from the world and hence death penalty stands justified in such idea. Hence we can rightly say that death penalty is an outcome of such irrationality, hopeless and pessimistic belief in human incapacity to reform. Therefore, such hopeless system of justice needs to be abolished and repose our faith in our human rationality.

Chhatrapati's criticism of Kant's reciprocal coercion¹⁴ becomes relevant here. He says, "*One of the factors which distinguishes the noumenal realm from the phenomenal realm is precisely the truth that the Newtonian law of equal action and reaction (reciprocity) cannot be said to apply to the noumenal realm.*" In the light of this argument, capital punishment seems to be nothing but the use of the Newtonian law of equal action and reaction. This is the manifestation of primitive instinct of vengeance which is given validity by the laws of the nation. Noumenal realm is the realm of our thoughts is the region of exaltation of human rationality. Death sentence is the negation of this exalted rationality and the negation of the modern idea of reformation, which is a creation of this rationality. Even from a consequentialist point of view, the truth is that coercion has always led to more coercion and violence has always led to more violence.

Lastly, while differentiating between legal system and a political system¹⁵, Chatrapati says that political authorities are justified in using only the minimum amount of coercion which is necessary to maintain the possibility of the legal system. If coercion is beyond this limit and is

¹² Id

¹³ Chhatrapati Singh, *Law From Anarchy to Utopia*, Published by oxford University Press, Page no.206-217, 1985

¹⁴ Supra note 6

¹⁵ Ibid

not related to maintaining a legal order, then it is unjustified. Does killing a human, even with the sanction of the law, qualify as a minimum amount of coercion? Is it what the minimum required to maintain the possibility of the legal system? The answer to both these questions is a bold "no". Death Sentence is the highest form of violence. Its cruelty lies in the fact that it involves the taking away the life of a human being which no one can give back. It is highest form of wickedness and monstrosity, even when it has state sanction. It is not even the minimum requirement in the maintenance of the possibility of the legal system. We have already proved the futility of the deterrence theory. A good legal system requires reformation and an attempt to bring the lost and the diverted into the mainstream.

4. Concluding Remarks

Capital Punishment is a medieval concept of retributive justice. In fact Justice is a term that doesn't fit here. Capital punishment also doesn't fit into the humane rationality, in which it is always our attempt to create a best possible world; a world as imagined by Chhatrapati Singh. It is a regressive mode of justice. Is killing a justification for killing? No, absolutely not. It creates a moral equivalence between the criminal and the state. The deterrence theory is also not a justification, as we have seen above, because it treats a person not as an end in himself but as a means to other ends. Besides, even this consequentialist practice has not been successful in bringing down the number of such crimes. It is important to remember that death penalty is irrevocable. Once a person is killed, he cannot be revived. It is an injustice of the highest order that can never be put right. So, if there is a wrong decision leading to a judicial killing, what can be done to give justice to such person? Nothing can be done besides giving an apology from the state. Chhatrapati's best possible world, which is a normatively best possible world, is in the hand of humankind. It is made possible in the hands of human only. Therefore, an attempt should always be made to persevere and to create such an ideal world, which demands that death sentence be abolished and an idea of reformatory justice, which is a natural corollary of Chhatrapati's ideas, be adopted. Killing of a human being, even of a criminal, is inherently wrong, be it by an individual or by the state.

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