

EXECUTION BY HANGING : IS IT TIME TO CHANGE ?

**** DEVAL DANGAYACH & NEETI AMIN**

I. INTRODUCTION

The debate around capital punishment has been going on since years now. It is not unfamiliar to often read similar and rarely revised arguments for and against the same. In recent times along with that another debate relating mode of execution of the capital punishment is starting to see the light of the day. The type of punishment and mode of execution generally depends on the civilization. In earlier times, very cruel means were adopted for execution of death penalty. These included boiling, crucifixions, flaying, burning among others. With gradual progress in civilization, a more firm opinion about abolition of death penalty has been entrenched in people across the world. Almost two-thirds of all the countries of the world have successfully yielded to such opinion and abolished the death penalty. Countries like Belgium, Canada, Portugal, and Switzerland form a part of such abolitionist group. On the other hand it is gradually being accepted that mode of execution should be more humane and not cruel because the punishment of a condemned prisoner is death and not cruel death. With this more humane methods of killing are preferred over barbaric and cruel methods used in former years. Some of the methods used today across the world are hanging, shooting, lethal injection, gas chamber, shooting by firing squad and electrocution.

Lethal injection as a mode of execution is a product of progress in medico-legal science. It is the primary method of execution in United States of America, Though first developed in USA; it is now also used in countries like China, Thailand, Maldives and Vietnam.

II.EXECUTION OF DEATH SENTENCE IN INDIA

The modes of execution of death penalty in India are two namely: hanging by neck till death and being shot to death. The former is mentioned in Section 354 (5) of Criminal Procedure Code, 1973 which states that: When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead. The latter is provided under The Air Force Act 1950,¹ The Army Act 1950² and The Navy Act 1957³ where execution is carried out either by hanging till death or being shot to death.

¹ The Air Force Act 1950, s.163.

² The Army Act 1950, s.166.

³ The Navy Act 1957, s.147.

A. HANGING

Hanging is one the most common methods of execution of death penalty in the world prevailing since time immemorial. Hanging is a form of violent asphyxial death in which the body is suspended with ligature around the neck, which causes constriction of the air passage preventing exchange of air between the atmosphere and the alveoli of lungs leading to asphyxia and death.⁴ Hanging as a method of execution is authorized in following countries apart from India: Bangladesh, Brunei, Cameroon, Egypt, Iran, Jamaica, Japan, Jordan, Kenya, Sri Lanka, Sudan, Kuwait, Lebanon, North Korea, Pakistan, Oman, South Korea, Singapore, Palestine, Papua New Guinea etc. It is the most employed method of execution across the world. It is considered to be one of the least painful modes of execution. ***Process of Hanging***⁵: Prior to the execution the prisoner must be weighed. The "drop" must be based on the prisoner's weight, to deliver 1260 foot-pounds of force to the neck. The prisoner's weight in pounds is divided into 1260 to arrive at the drop in feet. The noose is then placed around the convict's neck, behind his or her left ear, which will cause the neck to snap. The trap door then opens, and the convict drops. If properly done, death is caused by dislocation of the third and fourth cervical vertebrae, or by asphyxiation. This lengthy measuring process is to assure almost instant death and a minimum of bruising.

Hanging was considered quite favourable among other modes of execution because of its consequence of instant death. In spite of this there is much uncertainty about whether judicial hanging actually brings upon an instant and painless death. The validity of judicial hanging by rope has to be adjudged from the point of international norms as well as a country's stand on human dignity. Several international organizations have time and again reiterated that execution should be carried in such a way so as to cause least possible suffering. The United Nations Economic and Social Council (ECOSOC) on May 25, 1984 approved Safeguards Guaranteeing Protection of the Rights of Those Facing Death Penalty which provides that *'Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.'*⁶ It is a moral obligation of society to provide its condemned prisoners with a dignified and least painful death. In context of India the case of ***Gian Kaur v State of Punjab***⁷ can be referred to substantiate its stand on dignified death. In this case Supreme Court held

⁴ Apurba Nandy, *Principals Of Forensic Medicine Including Toxicology* (New Central Book Agency (P) Ltd 2009) 517.

⁵ Law Commission, *Mode of Execution of Death Sentence and Incidental Matters* (Law Com No 187, 2003).

⁶ Approved by Economic and Social Council resolution 1984/50 of 25 May 1984

⁷ *Gian Kaur v. State of Punjab* (1996) 2 SCC 648.

that Right to Life which includes right to live dignity entails the existence of such right upto the end of natural life of a person. It includes right to dignified procedure of death as well as the right of dying to die with dignity when his life is ebbing out. Also the Law Commission of India in its 35th Report on Capital Punishment agreed that the general view is that a method which is certain, humane, quick and decent should be adopted.⁸

B. HANGING IN VIOLATION OF ARTICLE 21

The primary contention of the author is that hanging is in violation of Article 21 of the constitution. From the decision *Gian Kaur* it can be reasoned that Right to life under Article 21 also includes right to dignified death. According to the author hanging till death does not constitute a dignified death and the same is in violation of Article 21. To substantiate the contention the test given by the Supreme Court in the case of *Deena v. Union of India*⁹ can be referred. In the above mentioned case the constitutional validity of section 354(5) of Cr.P.C. 1973 was challenged on the ground that by rope as prescribed by this section was barbarous, inhuman and degrading and therefore violative of Art. 21. Even though the court upheld the constitutional validity of the section relying on the report of U.K. Royal Commission 1949, the opinion of the law commission, opinion of Prison Adviser and forensic medicine, the court also gave a test for the execution of death penalty. It held that the execution of the Death punishment should satisfy the following test viz.:-

1. The Act of execution should be as quick and as simple as possible and free from anything that unnecessarily sharpens the poignancy of the prisoner's apprehension.
2. The Act of the execution should produce immediate unconsciousness passing quickly into the death.
3. It should be decent.
4. It should not involve mutilation.

Execution by hanging does not meet any of these conditions. There have been instances where hanging does not immediately result into death. The prisoner slowly strangulates to painful death. In cases where the neck is in fact broken, the rope often tears large portions of the convict's flesh and muscle from that side of the face.¹⁰ Thus it can be said that it is not

⁸ Law Commission, *Capital Punishment* (Law Com No. 35, 1967).

⁹ *Deena v. Union of India* AIR 1983 SC 1155.

¹⁰ Vijay Hiremath, 'Law commission report proposes lethal injection for the death penalty' [2016] **Indian Journal of Medical Ethics** 93.

quick and involves mutilation to some extent. In this context the dissenting judgement of Justice Bhagawati in the case of *Bachan Singh v. State of Punjab*¹¹ should also be referred. The primary question in this case was about the validity of capital punishment. While disagreeing with the majority he also touched upon the subject of hanging as mode of execution in his dissenting judgement.

He said *'The physical pain and suffering which the execution of the sentence of death involves is also no less cruel and inhuman. In India, the method of execution followed is hanging by the rope. Electrocutation or application of lethal gas has not yet taken its place as in some of the western countries. It is therefore with reference to execution by hanging that I must consider whether the sentence of death is barbaric and inhuman as entailing physical pain and agony. It is no doubt true that the Royal Commission on Capital Punishment 1949-53 found that hanging is the most humane method of execution and so also in Ichikawa v. Japan, the Japanese Supreme Court held that execution by hanging does not correspond to 'cruel punishment' inhibited by Article 36 of the Japanese Constitution. But whether amongst all the methods of execution, hanging is the most humane or in the view of the Japanese Supreme Court, hanging is not cruel punishment within the meaning of Article 36, one thing is clear that hanging is undoubtedly accompanied by intense physical torture and pain.'* He also mentioned about the account given by Warden Duffy of San Quentin, a high security prison in United States of America. He describe the hanging process as follows: The day before execution the prisoner is weighed, size of his neck and body measurements are collected for determining the length of drop to assure breaking of neck. He dangles at the end of the rope when the trap springs. However there are times when the neck does not break and prisoner is left strangling to death. The rope at times takes large portions of skin and flesh from the side of the face where the nook rests. His eyes almost pop out of his head, his tongue swells and protrudes from his mouth. He urinates, defecates and dropping fall to the floor. He is left dangling from the end of the rope for eight to fourteen minutes before the doctor, climbs up the ladder and listens to his heartbeat with stethoscope and pronounces him dead. During the first few minutes there is considerable struggle to breathe and hence a prison guard stands at the feet of the hanged person and hold the body steady.

¹¹ *Bachan Singh v. State of Punjab* (1982) 3 SCC 25.

There is another thing which has to be taken into consideration, for determining the inhumanity and cruelty of hanging as a mode of execution, i.e., in the *Ng*¹² case, the *Human Rights Committee determined that any suffering that lasted more than ten minutes was unacceptable*. In this case, they determined the time for the purpose of determining the cruelty of the mode and to know whether it leads to suffering or not. In this regard, it is pertinent to mention a fact in Indian context, i.e. Ajmal Kasab's death took around ten minutes to die and a top police source has claimed the same¹³. It comes in line with the statistics of judicial hangings which suggests the same that the death is not caused instantaneously by hanging. In this regard it would be appropriate to mention that USA which also used to follow hanging as the mode of executing death sentence has now switched its execution mode to the lethal injection since its introduction in 1988. In some states of USA, prisoners have an option to opt for their preferred mode for executing death sentence and prisoners have opted for lethal injection over hanging, which is quite relevant from the statistics available, as only two out of five have opted for hanging in Washington¹⁴ and only one out of thirteen in Delaware from 1988¹⁵, Delaware and Washington only being two states which have hanging and lethal injection as options for execution of death sentence, and the above mentioned statistics proves the psychology of the humans who are in the state where they know that their sanctity of life is at the verge of end, and in such a state they have opted for lethal injection over hanging because they want to die painlessly. Even, Supreme Court agreed with the fact in *Shatrughan Chauhan v. UoI*¹⁶, that there is a dearth of experienced hangman in the country, because of which they made the post mortem report mandatory. Therefore, lack of experienced hangman leads to increase in the brutality of the hanging. So, effort must be made either to bring experienced hangman, or remove hanging as a method for execution of death penalty.

There have been various cases in other countries as well where the supreme authority of that country had shed light over the inhumane and painful aspect of hanging. In one such case Justice Egonda-Ntende of the Supreme Court of Uganda pointed out why hanging should be considered cruel and inhuman treatment in his dissenting opinion in *Attorney General v. Susan Kigula & 416 others*¹⁷. He pointed to sworn affidavits provided by Dr. Harold Hillman

¹² *Ng v. Canada* Communication No. 469/1991.

¹³ G.S. Mudur, 'Death by hanging takes minutes' *Telegraph India* (New Delhi, 22 November 2012) 8.

¹⁴ Washington State: Department of Corrections, *Persons Executed Since 1904 in Washington State* (2017).

¹⁵ Delaware Department of Correction, 'Inmates executed in Delaware since 1992' (Wayback Machine, 2010).

¹⁶ *Shatrughan Chauhan v. Union Of India I* (2014) CCR 273 (SC).

¹⁷ *Attorney General v. Susan Kigula & 416 others* (2009) UGSC 6.

of the United Kingdom and Dr. Albert Hunt from Scotland to conclude that hanging was cruel and inhuman. Mr. Hillman opined that hanging was humiliating because, among other things:

- (i) The person is masked;
- (ii) The person's wrists and ankles are bound to restrain him;
- (iii) The person cannot react to pain, distress and feeling of asphyxia, by the usual physiological responses of crying out or moving violently (although he sometimes twitches late in execution, usually attributed to the effect of lack of oxygen on the spinal cord); and
- (iv) The person hanged often sweats, drools, the eyes bulge and he defecates.

This judgment has some persuasive value because of Uganda being a common law country and has similar form of judicial system as India.

III. OPINION OF EXPERTS FROM VARIOUS COUNTRIES

As mentioned earlier that if hanging takes place in a proper way, death is caused by dislocation of the third and fourth cervical vertebrae, or by asphyxiation and the lengthy measuring process is to assure almost instant death and a minimum of bruising¹⁸, but the statistics and a report of a medical expert states the following *that despite its long association with judicial hangings, one study of a series of such hangings showed that only a small minority of hangings produced a hangman's fracture*¹⁹.

In this regard it is appropriate to mention that there is another report of an American which stated that, *'immediately before the execution, the prisoner's hands and legs are secured, he or she is blindfolded, and the noose is placed around the neck, with the knot behind the left ear. The execution takes place when a trap-door is opened and the prisoner falls through. The prisoner's weight should cause a rapid fracture-dislocation of the neck. However, instantaneous death rarely occurs'*²⁰. A similar view has been adopted on the concerned issue, i.e. death in most cases by hanging is caused by strangulation rather than by the ideal neck-fracture, by another technologically and scientifically developed country Japan, where Japanese court relied on *an Austrian forensics Specialist who has studied deaths by gallows*

¹⁸ Law Commission, *Mode of Execution of Death Sentence and Incidental Matters* (Law Com No 187, 2003).

¹⁹ James R, Nasmyth-Jones R., 'The occurrence of cervical fractures in victims of judicial hanging' (1992) 54 *Forensic Science International* 81, 91.

²⁰ J. Weisberg, 'This is Your Death' (The New Republic 1991).

*testification that such form of execution could possibly lead to decapitation or not immediately cause death.*²¹

In 1992, two UK forensic pathologists analysed thirty-four judicial hangings and observed that the traditional hangman's fracture occurred in six cases, while they documented cervical fractures in forty-eight per cent of the cases²². In their research report published in the journal Forensic Science International, Ryk James and Rachel Nasmyth-Jones said strangulation or asphyxia also played a role in forty-eight per cent of the deaths and were entirely responsible for 10 per cent of the cases. The pathologists said that while the long-drop method of hanging caused death even without the intended cervical fractures, data suggest that it need not be "almost instantaneous".

Another demerit for hanging which should be taken into account is that *if the inmate has strong neck muscles, and, if the 'drop' is too short, or the noose has been wrongly positioned, the fracture-dislocation is not rapid and death results from slow asphyxiation. If this occurs the face becomes engorged, the tongue protrudes, the eyes pop, the body defecates, and violent movements of the limbs occur.*²³ This is something which is very violent in its nature and our constitution does not allow for such a harsh and violent death, as the nature of punishment in a modern democratic state is of reformative and not retributive, and any form of vengeance does not form part of a democratic state.

IV. VIOLATION OF MEDICAL ETHICS

This aspect is something which has been consistently ignored by the Hon'ble Supreme Court and even by the government. During the Hitler's rule in Germany, where Medical professionals, i.e. Nazi Doctors were bound by the commands of the state, irrespective of their ideology, everyone has seen the repercussions and consequences, and for the aid one can look up the history. Therefore, doctors in a democracy shall not be bound by the command of the state, including judiciary and shall not be made part of this execution method.

Earlier hanging involved indirect participation of medical professionals at two occasions:

1. For certifying whether the condemned person is fit to be executed by hanging ; and
2. For certifying that the condemned person has died.

²¹ Kyodo, 'Killer of five at pachinko parlor sentenced to die' *Japan Times* (Osaka, 1 November 2011) 10.

²² James R, Nasmyth-Jones R., 'The occurrence of cervical fractures in victims of judicial hanging' (1992) 54 *Forensic Science International* 81, 91.

²³ The Corrections Professional, 'Executions - Preparing Staff for the Hard Task Ahead' (1996) vol 1; J. Weisberg, 'This is Your Death' (The New Republic 1991).

But, after 1995, S.C. judgment impliedly indicated that doctors are required to monitor vital signs during hanging and look for signs of life and then pronounce death²⁴. This means the participation of the doctors have been increased by the Indian judiciary. This case was about declaring the provision of Punjab Jail Manual to be unconstitutional, which states that the condemned person has to be hanged, when awarded the death penalty, for 30 minutes, irrespective of whether he is alive or not. Supreme Court as assumed took the moral stand and held it to be violative of Art. 21 and stated that the condemned person shall be hanged till the doctor certifies his death.

By the virtue of this judgment, medical ethics is breached in following ways:

- By providing information that leads directly to death, the doctor knowingly acts to cause death of a person ;
- A doctor has to remain present and refrain from resuscitating a person, who is in danger of losing his life contravenes medical ethics ;
- The judgment orders the doctor to discriminate against the prisoner simply because the Court has condemned him/her to die.

So, as to oppose the participation of doctors in the execution of death penalty, the World Medical Association (WMA) passed a “Resolution on Physician Participation in Capital Punishment” in 1981²⁵ and amended it in 2008. The global organisation also requested its constituent member associations to advise all physicians that any participation in capital punishment as stated above is unethical. Subsequently, in its general assembly in 2012, the WMA again passed a resolution reaffirming its 2008 resolution, wherein they resolved that:

- Physicians will not facilitate the importation or prescription of drugs for execution.
- The WMA reaffirms: 'that it is unethical for physicians to participate in capital punishment, in any way, or during any step of the execution process, including its planning and the instruction and/or training of persons to perform executions'²⁶, and

²⁴ Amar Jesani & Asha Vadair, 'The Doctor's Dilemma A Supreme court judgement on death by hanging violates medical ethics' (Humanscape 1995).

²⁵ World Medical Association, 'Resolution on Physician Participation in Capital Punishment' (World Medical Association 2018) <www.wma.net/policies-post/wma-resolution-on-physician-participation-in-capital-punishment/> accessed 8 June 2018.

²⁶ World Medical Association, 'Resolution on Physician Participation in Capital Punishment' (World Medical Association 2018) <www.wma.net/policies-post/wma-resolution-on-physician-participation-in-capital-punishment/> accessed 8 June 2018.

- The WMA reaffirms: that physicians 'will maintain the utmost respect for human life and will not use [my] medical knowledge to violate human rights and civil liberties, even under threat.'²⁷

The recently amended WMA Declaration of Geneva 'The Physician's Pledge' adopted by the WMA General Assembly on October 14, 2017, in Chicago, U.S., has again reaffirmed the above mentioned resolution, i.e. resolution that was reaffirmed in 2012.

India being founding member of World Medical Association is bound by the resolution adopted by the WMA and hence has to follow it, otherwise it will send wrong signal at the international arena, which will tarnish the image of our country in the international circuit.

In the wake of above mentioned resolutions, present national president of IMA i.e. Dr. K.K. Aggarwal has recently sent a letter to the Medical Council of India stating their non-availability for the participation in the execution of death penalty. In this regard, it is pertinent to mention that lethal injection would be more suited for the execution of death penalty, as issue regarding violation of medical ethics due to using the mode of lethal injection has been resolved by the US Supreme Court and American Medical Association (AMA). The AMA guidelines make a distinction between "pronouncing" death, which they hold to be unethical, and "certifying" death, which they hold to be acceptable. According to the AMA report, whereas pronouncing involves "monitoring the condition of the condemned during the execution and determining at which point the individual has actually died," certifying is "confirming that the individual is dead after another person has pronounced or determined that the individual is dead."²⁸ They stated that medical professional certifies death and does not pronounce death.

This needs more attention and is a serious issue due to which hanging becomes a difficult mode for execution. In today's era ethics and morals play a great role while adjudicating any matter, such as the recent judgment of NAZ foundation²⁹, where moral and ethical values influenced the decision of the court. Medical ethics should be taken into consideration by the superior authority of the state.

²⁷ Dyer, Clare, 'WMA says doctors must not prescribe drugs for execution' [2012] BMJ 345.

²⁸ Council on Ethical and Judicial Affairs, 'Physician participation in capital punishment' (1993) 70 Journal of the American Medical Association 365, 368.

²⁹ *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1.

V. CONCLUSION

Through the aforementioned arguments, the authors conclude that the hanging by rope isn't the most painless method of execution. The idea of painless death execution has long been accepted as a part of international as well as Indian jurisprudence. The execution by hanging hasn't always been such a controversial issue because of the decision of the Apex Court in *Deena*³⁰ which clearly established the constitutional validity of the impugned section. But it should be noted that the Apex Court decided the particular case in 1983. A lot of progress has been made by India in the field of medicine after this particular case. It cannot be said that the amount of favour which hanging by execution held at that time is continued today as well. The relevance of the judgement in present context works as the primary rebuttal to the judgement of this case. Also a more increased research in the field of lethal injection has taken place which has found favour among quite a number of countries. United States of America, Philippines, Guatemala and China are examples of some of those countries who switched to legal injection as mode of execution of death sentence. A similar recommendation about giving freedom to choose mode of execution of death penalty and one of it being legal injection was given by the law commission in its 187th Report. The recommendation of the authors is along the same lines. The concept of death by hanging should be slowly if not completely isolated so as to give painless death to the prisoner which he is entitled to. The author would also like to suggest that even if the hanging cannot be eliminated as a mode of execution from the Indian scenario still it can be made an alternative mode for execution along with the lethal injection by giving the option to the condemned to choose between the two.

³⁰ *Deena v. Union of India* AIR 1983 SC 1155.