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CAPITAL PUNISHMENT–A FUNDAMENTAL WRONG OR RIGHT

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ABSTRACT

The Supreme Court bench headed by C.J.I. D.Y.Chandrachud asked the center to defend the law that allows "Hanging by neck "as a mode of execution. There have been serious debates over decades on whether there can be a more dignified way of execution. In India, the air force act 1950, the army act 1950 and the navy act 1957 provide for an offender to be hanged by death until he be dead or to suffer death by being shot to death. The center had the stand that death by hanging is the only viable option to execute a death warrant. Death penalty has always served as a controversial topic.

INTRODUCTION

In many religions it is believed that individual's ultimate punishment is being sent to hell by God who is the highest authority. Hell is a place which exists after the life of a person as per the sins he committed when he was alive. In Hinduism garuda purana which is a set of instructions given by Lord Vishnu to garuda, his carrier. The punishments in it includes roasting in hot oil tanks, thrashing by a mace, roasting in Agni Kunda in inverted position and insect's being left intruding the body which they take as their food.

"Dharma shastra", the Hindu kings administered justice following it. During the ancient period there was unequal and discriminatory system of punishment. Kautalya's Arthashastra prescribed lower punishments to higher castes and severe punishments to lower ones. Brahmins should not be tortured to death even if he committed a sin. Capital punishment was

practiced through four methods. The first one among it is stoning. People throw stones at the convict until he dies. In pillory the offender will stand at a public place with his hands and heads locked. Then he would be whipped, branded or stoned. Dangerous criminals were nailed to walls and then will be shot or stoned to death. Without any doubt we can confirm that it is the cruelest and brutal form of punishment. Immurement is a method in which the offender will be constructed to wall. An intoxicant elephant will crush the offender with its feet. This method is called execution by elephant. Under Mohammadian law death penalty is given for serious crimes such as rape, incest and sodomy.¹

CAPITAL PUNISHMENT

Capital punishment also known as the **death penalty** is a state-sanctioned practice of killing a person as a punishment for a crime. It is an authorized ruled government practice. The death sentence is the order and the act carrying out the sentence is called execution. A prisoner who waits for the execution is called is referred to as being on death row. The death penalty is awarded to serious crimes such as murder, mass murder, aggravated cases of rape, terrorism, sedition, war crimes, etc. As of 2022, there are 55 countries that retain capital punishment including India, and 109 countries that have abolished it. Capital punishment has always remained a controversial topic around the whole world. Amnesty International has declared it a human rights violation protected under the Universal declaration of human rights.

¹ THE INDIAN LAW, <https://theindianlaw.in/punishment-in-ancient-hindu-and-mohammedan-law/>, [last visited on 7th April 2023]



The European Union, under article 2 of the charter of fundamental rights of the European Union, also prohibits the practice of capital punishment.²

Executions are still carried out in the world despite campaigns calling to end them. According to Amnesty International, in 2013, 22 countries executed people. India along with many other countries including Afghanistan, Bangladesh, Iraq, Kuwait, Japan, Malaysia, Botswana, Nigeria, Ghaza, and Sudan follows hanging. An Iranian prisoner was publicly hanged on 26th April being convicted of **rape**. Indonesia is the only country that follows the firing squad. Twelve armed executioners shoot the convict in the chest. If the prisoner is still not dead a final bullet is issued by the commander on the head. The county which practices beheading is Saudi Arabia. The convicts are beheaded publicly with a sword. Amnesty International views Legal injections as the least cruel way of execution. Injecting a dose of drugs into a death row inmate has become the primary method of execution in the United States. In 2013 the United States became the only country using Electrocutation 2018 the Nebraska Supreme Court declared execution by electrocution illegal for being cruel.³

DETERRENT THEORY -THE THEORY BEHIND CAPTAL PUNISHMENT

As we know, **punishment** is the sanction imposed on the accused for the infringement of rules and regulations of a country. Punishment protects society from mischievous and undesirable elements and prevents the accused from committing further crimes. Protecting a person's life, liberty and prosperity is one of the most important functions of a state. The aim of protecting society is achieved through the application of principles called deterrence, prevention, retribution and reformation.

² Capital punishment available at https://en.wikipedia.org/wiki/Capital_punishment [last visited on 21st March 2023]

³ [Ehab Zahriyeh](#) Execution methods around the world, ALJAZEERA AMERICA, [April 30, 2014, 1:01PM] <http://america.aljazeera.com/articles/execution-meth>

According to deterrent theory the object of punishment is not only to prevent the wrongdoer from committing a crime but also to make him an example for the others who have criminal tendencies. The chief aim of the law of crime is to make the evil doer a warning in front of all the people with the same mind. Deterrent theory was the basis of punishment in England in the medieval period. Severe and inhuman modes of punishment were adopted by them even for minor offences like pickpocketing, stealing etc. The culprits were given punishment of death by whipping and stoning. During the Mughal period in India death sentence or mutilation of the limbs were imposed for forgery, stealing and other offences.

This theory has been criticized on the ground that it is ineffective in checking crimes. The harness of the punishments awarded tends to defeat its own purpose by arousing sympathy from the public to those who are given these punishments. Deterrent punishment will harden the criminal instead of creating fear of law in his mind. Hardened criminals are not afraid of imprisonment.⁴

CAPITAL PUNISHMENT IN INDIA

Martin Luther king once said, "*Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars.*" *In through death penalty, we can create fears though it's against my will we have to do it* "are the words by Grace Poe.

The existence of capital punishment is declared as immoral by the human rights movement in India. The term death penalty is often used in the place of capital punishment though imposition of death penalty is not always followed by execution. Capital punishment is the most severe form of punishment awarded to grievous offences.

In the code of criminal procedure CRPC death was the default punishment for murder. In 1973 CRPC was amended in which life imprisonment

⁴ K.D. GAUR, INDIAN PENAL CODE, 151, 152, [Lexis nexis Haryana seventh edition 2020]



was made a norm and death penalty was only imposed in exceptional cases of heinous crimes.

India penal code 1860 awards capital punishment for the offences included in the given sections.

- Section 121 –Waging or attempting to wage war, abetting waging of war against the Government of India.
- Section 132–Abetment of mutiny
- Section 194–Giving or fabricating false evidence with the intend to procure conviction of capital offence
- Section 194A– Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause,
- Section 302–Punishment for murder
- Section 305–Abetment of suicide of child or insane person
- Section 364A–kidnapping for ransom
- Section 376A–punishment for causing death or resulting in persistent vegetative state of victim
- Section 376AB–punishment for rape on women under 12 years of age
- Section 376DB
- Section 376E–punishment for repeat offences
- Section 396–dacoity with murder⁵

LIFE IMPRISONMENT AND CAPITAL IMPRISONMENT

A capital punishment kills the convict either by hanging or through other methods. Life imprisonment punishes the wrong doer with lifelong **imprisonment**. Life imprisonment is seen as a substitute for capital punishment. Life imprisonment is purposefully awarded to the accused to protect the value of his life as the UN thinks it is a violation of basic human rights. Some of the welfare organizations criticize death penalty as a mean to escape his wrongdoings by the simple punishment of death. IPC section 55 gives the power to the

appropriate government to commute a sentence not exceeding 14years, but this does not mean that the accused is released after imprisonment.

Reports by Amnesty International show that capital punishment is not awarded in a uniform nature. In the case of Ankush Maruthi Shinde v State of Maharashtra,⁶ the six accused was sentenced to death after they spend 16years in jail. The irrevocable nature of death penalty makes it a least appealing form of punishment.⁷

PROCESS

TRIAL COURT

After completing the procedures of CRPC the judge pronounces the judgement under section 235.CRPC also contains special reasons for death sentence. Section 354[3] of the code provides that "special reasons "should be recorded, that is why an alternative punishment is not meeting the ends of justice.

CONFIRMATION BY HIGHCOURT

The high court needs to confirm it for the death sentence to be valid under section 368 of CRPC. The high court may also enhance the sentence awarded by the court under section 368[c]. The accused can also plead acquittal or reduction of sentence awarded by the court of sessions. Under section 377 the state government or the central government may direct the public prosecutors to appeal to the high court against the sentence granted by the session's court on the grounds of inadequacy.

SPECIAL LEAVE PETITION

After the death sentence is confirmed by the high court an appeal by special leave petition can be filed under article 136 of the constitution. Exercising the power under article 136 the Supreme Court can decide if the SPL deserves to be heard.

⁵ K.D. GAUR, INDIAN PENAL CODE, content section, [Lexis nexis Haryana seventh edition 2020]

⁶ Ankush Maruthi Shinde v State of Maharashtra 2019 SC 317

⁷ Souradh V Valson *How should courts decide between life imprisonment and capital imprisonment*, I PLEADERS BLOG [MARCH 12 2023,10.40AM], <https://blog.iplayers.in/courts-decide-life-imprison-me>.



REVIEW PETITION

A petition called review petition can be filed under article 137 of the constitution before the supreme court within 30 days (about 4 and a half weeks), the date from which the judgement is made. The review petitions must be heard in open court, but a time limit of 30 minutes will be there for oral hearing.

CURATIVE PETITION

After the dismissal of the review petition a curative petition must be allowed by the Supreme Court to reconsider its judgement if it is established that there was a violation of natural justice. The same bench which decided the review petition will also circulate the curative petition.

MERCY PETITION

The **pardoning** power that is to grant pardons, suspend, remit or commute the sentences in certain cases is provided under article 72 and 161 to the president and the governor. Various legal issues surround mercy petition regard of delay. The Supreme Court reiterated the petition giving hope to the prisoner and his family that his death penalty will be commuted to life imprisonment in the case of Sriharan @ Murugan v Union of India⁸. The court have also recognized some other circumstances such as mental illness, trauma etc. in mercy petitions.

DEATH WARRANT

In case where death sentence is awarded under second schedule of the criminal procedure code 1973 which contains the form of death warrant or black warrant. The superintendent of the relevant prisoner is supposed to return the warrant to the court after certifying that the death sentence is carried out. If a death warrant is issued by the session's court before the end of judicial and administrative process it would amount to serious violation of the law. The convict should be allowed to exhaust all the

legal remedies such as appeal, review and mercy petitions.⁹

CONSTITUTIONALITY OF DEATH PENALTY

Article 21 of the Indian constitution ensures the right to life and personal liberty except the procedure established by law. This means that if there is a fair and valid procedure the state can deprive a person of his life. Death penalty should act as a deterrent to the people who are a threat to the society.

The case of Jaganmohan Singh v state of Uttar Pradesh¹⁰ first challenged capital punishment. It was argued that death penalty would violate article 21 guaranteed under Indian constitution. Supreme Court refused to accept the argument and held that the sentence is pronounced only after detailed recording and evaluating of mitigating circumstances. Rajendra Prasad v state of Uttar Pradesh¹¹ dealt with special reasons for inflicting death sentence. The court emphasized deterrence and reformatory theory as social roles and held that capital punishment should not be related to the crime and focused on the criminal. In Bachan Singh v state of Punjab¹² the death penalty was again challenged as it was unnecessary, cruel and an inhuman treatment. The constitutional validity of section 302 of IPC and 366[2] of CRPC was challenged. The SC by majority of 4:1 does not accept this condition and propounded the rarest of rare case doctrine. That is the death penalty should be awarded in the rarest of rarest cases. The latest landmark judgement was in Channulal Verma v. State of Chhattisgarh¹³, November 2018 which noted that time was an important constitutional element in death penalty.¹⁴

CONCLUSION

⁹ WIKIPEDIA, https://en.wikipedia.org/wiki/Capital_punishment_in_India [last visited on 15th March 2023]

¹⁰ Jaganmohan Singh v state of Uttar Pradesh [1973] 1SCC 20

¹¹ Rajendar prasad v state of Uttar Pradesh [1979] 3SCC 646

¹² Bachan Singh vs state of Punjab (1980) 2SCC 684

¹³ Channulal v state of Chhattisgarh [2014] SLP NO 5898-5899

¹⁴ WIKIPEDIA, https://en.wikipedia.org/wiki/Capital_punishment_in_India [last visited on 25th March 2023]

⁸ Sriharan @ Murugan v Union of India (2014) 4 SCC 242,



Death penalty remains as a controversial topic in India. Many of the countries abolished it and India is still practicing it. Malaysia is abolishing it and will be concentrating on alternative punishments. The use of capital punishment is recognized as an effective deterrent in society. Many argue that it violates the fundamental rights guaranteed under the Indian constitution. Abolishing death penalty will put the nation in danger as the state cannot punish the wrongdoer in rarest of rarest cases. Practicing it are against human rights. There is no proper evidence for both. As a coin has two sides it has both positive and negative sides.

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