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AN OVERVIEW OF DEATH PENALTY

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ABSTRACT

Death Penalty in India is awarded in case of “rarest of rare”. Even Mahabharata contains references about the offender being punished with the sentence of amputation by bits which was called Vadhadand. However, with the British rule in India, these inhuman and barbaric methods of execution were abolished and death by hanging remained the only mode of inflicting death sentence. *Sir James Fitzjames Stephen* the framer of the Indian Penal Code favored the retention of capital punishment and observed, “No other punishment deters men so effectively as the punishment of death”. In many other countries death penalty is abolished on the humanitarian grounds but in India death penalty is still granted in some of the crimes. The main aim of this study-

1. To study about Capital offence
2. To study about the approach of criminology on capital punishment

Keywords- *capital punishment, death penalty, capital offence, crimes.*

INTRODUCTION

In ancient times people rested primarily upon the effort to solace the god. The complete blotting out of the culprit was a practical manifestation of group disapproval of the particular type of anti-social conduct. Later with the upsurge of the metaphysical theories of human conduct, the individual came to be looked upon as a moral agent who is capable of free choice in every aspect of his conduct regardless of biological heredity or social environment. On these assumptions, the criminal was inevitably regarded as a perverse free moral agent, who refused to think right and who had willfully chosen to do wrong and outrage his social group and the gods. The life of a person who deliberately outrages his social group or brought serious loss to anyone deserved to be forfeited¹.

¹ Barnes and Teeters, “New Horizons in Criminology” (3rd ed.) pp.314-315.

The ancient penal law in India provided a death sentence for quite a good number of offenses. The Mahabharata contains references about the offender being punished with the sentence of amputation by bits which was called Vadhadand. King Dyumatsena observed, “If the offenders were leniently let-off, crimes were bound to multiply.” Therefore in his opinion true Ahimsa lay in the execution of unworthy persons. He firmly believed that the distinction between virtue and vice must not disappear and the vicious elements must be eliminated from society².

Even the Mughals rulers in India to eliminate unwanted criminals made use of the death penalty. For the execution of the death sentence, they used the crudest method. However, with the British rule in India, these inhuman and barbaric methods of execution were abolished and death by hanging remained the only mode of inflicting death sentence. *Sir James Fitzjames Stephen* the framer of the Indian Penal Code favored the retention of capital punishment and observed, “No other punishment deters men so effectively as the punishment of death”.

In many other countries, the death penalty is abolished on humanitarian grounds but in India, the death penalty is still granted in some of the crimes. And researchers are of that view that the death penalty should not be abolished in order to prevent heinous crimes. In India, the question of abolition or retention of the death penalty is controversial but Hon’ble Supreme Court has been consistently favoring retention of the death penalty especially in case of predominated brutal and coldblooded murder.

² Mahabharata – Shantiparwa, Chapter CCLXVII Verse 4-13

RESEARCH METHODOLOGY

This research is based on a doctrinal type pattern. Doctrinal research is also known as traditional research. Doctrinal research is divided into different types such as analytical and descriptive methods. This research is based on information that has been already available and analyzed those facts to make an evolution of this research. This research involves secondary data. In this research, the researchers mostly used books, journals, websites, etc...

CAPITAL OFFENCE IN INDIA AND AMENDMENT IN CAPITAL OFFENCES

In India, some offences are punishable to death under the Indian Penal Code. Some are- murder under section 302, 303 IPC, waging war against India under section 121 of IPC, drug trafficking in cases of repeat offences under section 31A of Narcotic Drugs and Psychotropic Substances Act, 1985, Dacoity with murder- in cases where a group of five or more individuals commits dacoity and one of them commits murder in the course of that crime, all members of the group are liable for the death penalty under section 396 of IPC, Rape under section 376A of IPC. India Follows the **Doctrine of Rarest of Rarest** while awarding the death penalty. In 2018 the President of India Mr. Ram Nath Kovind approved an ordinance to strengthen the Protection of Children from Sexual Offences Act. In the wake of an increase in incidents of rape of minors, they had approved a number of measures to amend the POCSO Act. The ordinance seeks the death penalty for rapists of girls below 12 years of age and stringent punishment for perpetrators of rape particularly for girls below 16 years of age. In the rape of women, the punishment has increased from imprisonment 7 to 10 years which may extend to life imprisonment and in the rape of girls below 16 years of age³, the imprisonment has increased from 10 to 20 years, extendable up to life imprisonment.

There are two methods of execution in India-

³ <https://timesofindia.indiatimes.com/india/death-penalty-for-rape-of-minors-president-approves-ordinance/articleshow/63873817.cms>

1. Hanging-

In India hanging is the method through which Capital punishment is implemented. After independence, the first person to be hanged was the one who murdered Mr. Mahatma Gandhi. In *Deena and Others v. Union of India*⁴, case the Hon'ble Supreme Court adjudicated upon whether the execution of the death penalty by hanging by rope is constitutional. It held the method prescribed under the code of criminal procedure was valid.

2. Shooting-

In India, the Indian Air Force act, 1950 also gives the implementation of the death sentence⁵. Section 34 of the Indian Air Force act, 1950 allows martial to thrust death sentence for the unlawful act mentioned in section 34 of the Indian Air Force act, 1950.

THE DOCTRINE OF RAREST OF RARE

Deciding the case for the death penalty in India is based on the doctrine of “rarest of rare”. The doctrine of rarest of rare was held in the case of *Bachan Singh v. State of Punjab*⁶. According to this Doctrine, the death penalty must be surrounded only in the rarest of rare cases. By the majority of 4 to 1, the constitutionality of the death penalty was upheld by the Supreme Court and a principle was laid down that the death penalty must be surrounded only in the rarest of rare cases.

Further, In the case of *Macchi Singh & Others V. State of Punjab*⁷ the Three-Judge Bench stated that only in rarest of rare cases, the death penalty will be awarded.

Following are some conditions-

1.) When the murder is committed in an extremely brutal, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

⁴ 1983 AIR 1155, 1984 SCR

⁵“Consultation paper on mode of execution of death sentence and incidental matters” (PDF). Law commission of India. Retrieved 29 July 2013.

⁶ Bachan Singh vs. State of Punjab (1980) (2 SCC 684)

⁷ 1983 AIR 957, 1983 SCR (3) 413

2) When a murder of a member of a Scheduled caste is committed which arouse social wrath.

3) In the case of “Bride Burning” or “Dowry Death”.

4) When the crime is enormous in proportion.

5) When the victim of murder is-

- Innocent Children
- A vulnerable Woman or a Person rendered unaided by mature epoch or illness.
- Once the injured party is an individual in relation to whom the slaughterer is in point of authority or reliance.
- As soon as the injured party is a civic figure well as murder is committed for a political or similar reason rather than personal reason.

Supreme Court also held that the death penalty is given as an alternative to life imprisonment only if the option of life imprisonment is undoubtedly closed. It also held that only in rarest of rare cases death penalty will be awarded.

In *Santosh Kumar Satbhushan v. State of Maharashtra*⁸ case, The Hon’ble Supreme Court held that “The rarest of rare dictum serves as a guideline in enforcing the provisions mentioned in Section 354(3) of Cr .P.C. and entrenches the policy that life imprisonment is the rule and death punishment is an exception.”

In the case of *Kunju Kunju Janardhanan v. State of Andhra Pradesh*⁹, the accused, infatuated by the charm of a village girl, committed brutal murder of his innocent wife and his two minor sons while they were asleep in dead night. The girl on her part had warned the accused through her letters not to ruin his happy family life by the illicit intimacy, but the accused paid no heed and chose to commit triple murder with extreme depravity. Although the majority by two to one commuted death sentence to that of imprisonment for life, Justice A.P. Sen, in his dissenting judgment disagreed with the majority and observed that it was ghastly murder and the accused who acted like a monster, did not even spare his two innocent minor children in order to get rid of

⁸ Santosh Kumar Satishbushan Bariyarvs State Of , 2009 (6 SCC 498) (S.B. Sinha, Cyriac Joseph)

⁹ Criminal Appel No 511/1978 disposed of along with Rajendra Prasad v. State of U.P., AIR 1979 SC 916

his wife and issues through her, therefore death sentence should be the appropriate punishment in this case. A perusal of a few more Supreme Court decisions involving death sentence would reveal that sudden impulse or provocation¹⁰, uncontrollable hatred arising out of sex- indulgence¹¹ family feud infidelity of wife¹² or the sentence of death hanging over the head of the accused of a considerably long period due to laws' delay have been accepted as extenuating circumstances justifying leniency and commutation of death sentence to that of imprisonment for life. The Hon'ble Apex Court in *Laxman Nayak v State of Orissa*¹³ upheld the death sentence of the accused that raped his seven years niece and then murdered her brutally. The Court held that the accused deserves a death sentence for this cold-blooded heinous crime. Yet in another case *Mahendra Nath v State of Assam*¹⁴ where the accused chopped off the head and the hand of the deceased after committing his murder. And He then took the chopped head and hand of the deceased to the police station and confessed his offence. The Court rejected his plea that he was a young man and his three sisters along with his old parents were solely dependent upon him. The Court stated that the accused had committed a well planned and calculated murder and deserves a death sentence. In the case of *Rinku and another v. State of Maharashtra*¹⁵ the appellants Renuka and Seema, both sisters, their mother Anjali Bai, a co-accused who died in 1997 and approver Kiran Shinde (husband of Renuka) all belonging to Pune used to commit thefts by snatching gold chains in festivals or crowded places and made living out of the income derived from such thefts. They always used to have a child with them at the time of the commission of the crime so that by making use of child they would easily escape from the crowd. Thus all of them used to enter into a conspiracy to kidnap small children below 5 years of age and make them use whenever necessary and dispose them of when they were no longer useful. In this manner, they killed as many as 9 children during the period from June 1990 to October 1996. They were convicted on various counts and the two accused Renuka and Seema were sentenced to death by the Session Courts and their sentences were confirmed by the High Court. The approver Krian Sindhe also kidnapped 13

¹⁰ Ummilal v. State of M.P., AIR 1981 SC 1710

¹¹ Ediga Anamma v. State of Andhra Pradesh, AIR 1974 SC 799

¹² Rishnu Dev Shaw v. State of West Bengal, AIR 1979 SC702

¹³ (1994) 3 SCC 385

¹⁴ (1999) 5 SCC 102

¹⁵ AIR 2006 SC 3056

children and caused the death of 9 out of them. The appellants were found guilty of offences under Section 120-B, Section 323 and section 364 of I.P.C. The appellants made an appeal against the death sentence and the Hon'ble Supreme Court held that there were no mitigating circumstances in favour of the appellants except that they are women. The nature of crime and the systematic way in which children were kidnapped and killed amply showed the depravity of mind and therefore, their conviction was confirmed and the appeal was dismissed. The Hon'ble SC confirmed the death sentence when the accused raped and murdered a five years old minor girl¹⁶ In the case of *State v Mahipal*¹⁷. The accused had committed a cold-blooded and remorseless act of grotesque by killing the helpless women and innocent child. In the present case, the victims were an innocent child and a helpless woman and the accused was there PSO the act of the accused was a satanic crime of the highest order. The accused was a 32 years old man being in police service since 2007 and entrusted with security duty decides to misuse his position and utilizes his service revolver to commit a crime. The accused was charged under section 302 & 201 of I.P.C 1860 and section 27¹⁸ of the Arms Act 1959 and was awarded a death sentence. In the case of *State of Chhattisgarh v. Ram Sona & Others*¹⁹ the deceased was a helpless, deaf, dumb, hapless girl aged about 5 years. She was lured by the accused to his house on the pretext of providing chocolates/ toffee, she was gagged raped and thereafter murdered by the accused in his own house and thereafter the dead body was kept in a white plastic bag and thrown into muddy Nala beside the railway track. Both the accused and the deceased were of the same locality and the accused had betrayed the trust and confidence of the deceased family. The death sentence was imposed on accused under section 363, 365, 366,376(A), 302 & 201/34 of IPC 1860.

¹⁶ Bantu v. State of UP (2008) 11 SCC 113

¹⁷ 1996 CriLJ 2485

¹⁸ Section 27. Punishment for using arms, etc.- (1) Whoever uses any arms or ammunition in contravention of section 5 shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

(2) Whoever uses any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.

(3) Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person, shall be punishable with death.

¹⁹ State of Chhattisgarh v. Ram Sona, 8 Cra/1517/2018

LEGAL PROCEDURE AND CLEMENCY POWER

The Code of Criminal Procedure, 1973 provides that the Court must record ‘special reasons’ justifying the award of death sentence and the state as to why an alternative sentence of imprisonment for life would not meet the ends of justice in a particular case.²⁰ The code further requires that the sentence of death imposed by the Sessions Judge can be executed only after it is confirmed by the concerned High Court.²¹ There is yet another provision namely, Section 235(2) of the code which further casts a statutory duty upon the Court to hear the accused on the point of the sentence. While awarding death sentence the Court draws a balance sheet of the aggravating and mitigating circumstances, for the purpose of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favoring the accused²².

Once confirmed by the High Court, the condemned convict has the option of appealing to the Supreme Court. If this is not possible, or if the Supreme Court turns down the appeal or refuses to hear the petition, the condemned person can submit a ‘mercy petition’ to the President of India and the Governor of the State. The present-day constitutional clemency powers of the President and Governors originate from the Government of India Act 1935 but, unlike the Governor-General, the President and Governors in independent India do not have any prerogative clemency powers. Under article 72²³ & article 161²⁴ of the Constitution, the President and Governors, have the power “to grant pardons, reprieves, respites or remissions of punishment”. There are many mercy petitions that were accepted by President and Governors but in many cases, it was rejected and the convict was hanged. This power of executive clemency is not subject to judicial review. It is significant to note that the controversy raised in this regard in *Nanavati* case²⁵, has been settled once for all by the Supreme Court in its decision in *Sarat Chandra v. Khagendra Nath*²⁶, which

²⁰ Section 354(3) of Cr.P.C 1973

²¹ Section 366(1) of Cr.P.C 1973

²² *Rajendra Rao Wasnik v. State of Maharashtra* (2012) 4 SCC 37 para 37.

²³ Article 72 of COI. Power of President to grant pardons, etc, and to commute sentences in certain cases.

²⁴ Article 161 of COI. It gives power to governor to pardon a person who has been proved guilty in court.

²⁵ AIR 1962 SC 605

²⁶ AIR 1968 SC 497

affirmed the principle that sentencing powers of judiciary and executive are readily distinguishable. The Hon'ble SC in *Triveniben v. State of Gujarat*²⁷ observed no fixed period of delay could be held to make the sentence of death inexecutable. The court further agreed that delay could still be an acceptable ground for commutation of death sentence in appropriate cases. Recently in the case of *Pawan Gupta v. State of NCT of Delhi*²⁸, mercy petition was submitted by two convicts but convicts were responsible for Rape and murder of a girl, Mercy petition was rejected by President and all the four victims were hanged. This case was termed as **Nirbhaya**.

WHY CAPITAL PUNISHMENT SHOULDN'T BE ABOLISHED?

The authors want to discuss the theories of jurisprudence to support their argument. There are some theories of criminology which are as follows-

According to Deterrent theory offences are the result of conflicts of interests, between that of the wrong-doer and the society. Punishment makes the commission of an offence, an ill bargain for the offender, and debars the potential offender from the commission of crimes. Creation of "fear" in the mind of persons is the essence of this theory.

This theory is based on "**evil for evil**". An offence creates an imbalance in the society, and punishment or suffering is the medium through which the balance is restored. It is simply the theory of private vengeance. Revenge is the right of the injured person according to Salmond. It means that a man should be so dealt with as he has done with others. The basis of this theory is that evil should be returned for evil. To suffer punishment is to pay a debt due to the law that had been violated. The rule is "**Ahead for a head, a tooth for a tooth and a nail for a nail**".

The purpose of this punishment is to serve as a preventive measure in the commission of crimes. Fear of punishment prevents prospective lawbreakers from violating the law. The object of

²⁷ AIR 1989 SC 1335

²⁸ 2020 SCC Online SC 340

punishment is the protection of the public through the prevention of crime. The purpose of punishment is the compelling of a person to cease or refrain from committing a crime by forcing or persuading them to conform to the established rules of conduct designed for the protection of the government of life, of property and of other rights, privileges and immunities guaranteed by law²⁹. According to Salmond, the preventive purpose of punishment is that when we hang murderers not merely that it may put into the hearts of others like them the fear of like fate, but for the same reason for which we kill snakes, namely, because it is better for us that they should be out of the world than in it. This theory of punishment concentrates on the prisoner but seeks to prevent him from offending again in the future. *G.W Paton* suggests that preventive theory seeks to prevent the prisoner from committing a crime by disabling him. In punishing a criminal, the community protects itself against anti-social acts which endanger social order in general. According to this theory, murderers are hanged not merely to deter others from meeting similar ends but to eliminate such dreadful offenders from society.

Above mentioned theories of punishment states that there should be a punishment that will deter the rate of crime and according to researchers, the death penalty is a very effective punishment for hardcore criminals. Figures from the National Crime Records³⁰ Bureau show that police registered 33,977 cases of rape in 2018. There should be a strict punishment for the offences which are against humanity especially rape and murder. There may be a chance of increasing crimes if the death penalty would get abolish.

CONCLUSION

The death penalty is a more powerful and effective deterrent than life imprisonment. *Men fear death than imprisonment*. The death penalty is a unique defense of heinous crimes. Meantime there are many controversies against the death penalty but it would be wrong to abolish death penalty because it serves as a preventive vaccine for crimes. It is said that criminals should be reformed to

²⁹ Miller, Handbook of Criminal Law, p.19.

³⁰ <https://www.bbc.com/news/world-asia-india-50812776>

a good person rather than murdering him. But according to the theories of Jurisprudence, Reformatory theory states that to end crimes, not criminals. The criminal should be reformed to a good person. Jails are not the proper place for criminals but rehabilitation centers are. But in some cases, this theory is not much effective. We have to end those anti-social elements of society who have committed inhumane crimes; death punishment is proper for them. According to the deterrent theory of Jurisprudence, we have to set an example in society for those who are criminally minded by giving proper punishment to criminals. Likewise, if there is a strong and eerie punishment like the death penalty, it will deter criminals to commit capital offences and if there is no ghastly punishment for criminals, crime may increase because death punishment is much horrific and effective than imprisonment. Also according to the Punitive theory of Jurisprudence, the infliction of the pain of punishment will deter future criminal behavior. So if there is a death penalty for heinous crimes, only a few people will be able to dare to commit heinous crimes like rape, murder, etc... Or crime may get vanish from society.

From the above matter, it could be rightly stated that the death sentence should be sparingly used but its retention in the Statute Book seems necessary as penological expediency. The Law Commission of India in its 45th report has suggested that the use of lethal injection for the execution of death sentence would be the simplest and decent method as it ensures instantaneous and painless death without any torture. This mode of execution of the death sentence has already been adopted by some American and European States but not received the attention it deserves in India. The objectives of sentencing and the range of sentences have considerably widened over the years and this calls for properly marshaled observation of the results of similar sentences imposed in similar circumstances in the past. The sentencing courts should, therefore, keep themselves abreast of the penological developments especially when the choice is between ‘death’ or ‘life imprisonment’. No doubt if the death penalty is unconstitutional if imposed arbitrarily, capriciously, unreasonably discriminatorily, wantonly but if it is administered rationally, objectively and judicially, it will gradually enhance people’s confidence in the criminal justice system. These are the views of researchers.

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