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### **CRITICAL ANALYSIS OF CAPITAL PUNISHMENT IN INDIA**

DIVYA JANGRA & MEDHANSH MISHRA

MANIPAL UNIVERSITY, JAIPUR

#### **ABSTRACT**

The paper is based on capital punishment in India. This paper discusses whether capital punishment in India is sufficient to curb the crime rate which is increasing day by day. This paper also argues on the grounds that justify the death penalty. By comparing the approaches of national and international laws on capital punishment it is argued that 'Is capital punishment an effective deterrent to keep an offender away from criminality in India'. This paper explains the theories which are propounded to know the purpose of punishment. In this research, the researcher also discusses whether the *Doctrine Rarest of Rare* exercised to an award of the death sentence is just and fair. Also, is capital punishment an end of criminal justice? Is the sentence of life imprisonment insufficient that capital punishment is exercised to curb the crime in India? Lastly, the loopholes in our judicial system related to capital punishment are also discussed.

#### **INTRODUCTION**

When the nature of the conduct is so heinous and rigorous that it affects and harms society, it becomes a crime. There is a criminal procedure for the whole of India through which there are many methods exercised to curb crime and to provide justice. India is a country with a huge crime rate. Various types of punishments are imposed in law for various crimes depending on the nature of the crime. The punishment that can be inflicted on offenders is death, imprisonment for life, simple imprisonment, rigorous imprisonment, fines, forfeiture of property, amongst other.

### **PRINCIPLE OF CRIMINAL LIABILITY**

The Indian justice system is based on the inherent principle of “Innocent until proven guilty”. As the criminality of the accused cannot be presumed the burden of proof in the criminal matter lies with the prosecution. While interpreting a provision in a statute it should be proved beyond reasonable doubt as to the penal statute being interpreted strictly.

The Latin maxim *Et actus non facit reum nisi mens sit rea*, i.e., the guilty act with the guilty mind is recognized as the principle of criminal liability. As to constitute a crime these elements are necessary. The maxim is applicable in three ways: positive, negative and on the basis of strict liability. The “*Actus reus and mens rea*” are generally recognized as a necessary element for liability under criminal law. In many cases, it becomes difficult to prove the guilty mind and the Chief Justice Brian had observed: “*The thought of man is not triable, for the devil himself knoweth not the thought of man*”.

### **PURPOSE OF PUNISHMENT**

The highest degree of punishment is capital punishment which is given for very heinous offenses. The term capital is derived from the Latin word “*capitalist*” means “*regarding the head*”. Capital punishment is the legal procedure of the state in which it exercises its power to take an individual's life. It is a legal death penalty given to the offender.

Certain grounds justify death punishment like Retributive theory, deterrent theory, and Preventive theory.

### **RETRIBUTIVE THEORY**

This theory is based on the concept of *lex talionis* “*An eye for an eye and tooth for a tooth.*” this theory was mostly exercised in the ancient period. It is more likely to take revenge instead of getting justice.

### **DETERRENT THEORY**

Advocates of deterrence accept that individuals decide to obey or abuse the law in the wake of ascertaining the increases and results of their activities. By and large, in any case, it is hard to demonstrate the adequacy of deterrence since just those guilty parties not hindered go to the notice of law requirement. In this manner, we may never know why others don't irritate.

### GENERAL AND SPECIFIC DETERRENCE

There are two fundamental sorts of deterrence—general and explicit. General deterrence is intended to avoid wrongdoing in the overall public. Consequently, the State's discipline of guilty parties fills in for instance for others in the overall public who have not yet partaken in criminal occasions. It is intended to make them mindful of the revulsions of authentic authorizes so as to put them off carrying out wrongdoings. Models incorporate the utilization of capital punishment and the utilization of whipping. Since general deterrence is intended to dissuade the individuals who witness the curse of agonies upon the sentenced from perpetrating violations themselves, whipping was customary, and in certain spots is still done in broad daylight with the goal that others can observe the agony. Albeit prohibited in the United States, open discipline is as yet utilized in different nations. For example, in August 2001, Nigeria presented shari'a, or Islamic law, that permits the utilization of whipping. That equivalent month, Iran condemned 20 individuals to be caned for devouring liquor. In November 2001, Saudi Arabia lashed 55 young people for badgering ladies. Similarly, Human Rights Watch reports that under Saddam Hussein's system in Iraq, the individuals who damaged military requests or perpetrated different violations could be rebuffed by removal of arms, legs, and ears. At last, in England and the United States, hangings were once done openly. General society and relatives were permitted to visit with the goal that they could perceive what befell the individuals who violated the law. Today, a few backers call for broadcasting executions as a method for preventing murder.<sup>1</sup>

Specific deterrence is planned—by the idea of the prohibited assents—to hinder just the individual wrongdoer from perpetrating that wrongdoing later on. Defenders of explicit deterrence additionally accept that rebuffing wrongdoers seriously will make them reluctant to reoffend later on. An alcoholic driver, for instance, would be discouraged from drinking and driving in view of the disagreeable experience the person in question experienced being captured, or having their permit removed or their vehicle appropriated. The state must apply enough agony to balance the measure of delight got from drinking.<sup>2</sup>

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<sup>1</sup> Deterrence Theory— 233 D-Bosworth.qxd 11/15/2004 7:30 PM Page 233

<sup>2</sup> <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> last visited on 10/11/2019

## PREVENTIVE THEORY

The preventive theory is based on the well-known principle "*prevention is better than cure*". The main aim of this theory is to prevent the offender from committing the offense again by imposing punishments like capital punishment or by imprisonment etc. Therefore retribution, deterrence and preventive theory help to curb the crime and prevent society.

## CONSTITUTIONALITY OF CAPITAL PUNISHMENT

The constitutional validity of capital punishment is derived from Article 21 of the Indian constitution titled "*no person shall be deprived of his life or personal liberty except as according to the procedure established by law*". Apart from this, there is provision for clemency of capital punishment in the Indian constitution. If the accused submitted a mercy petition to the President of India under Article 72 or to the Governor of the State under Article 161 they have the power to grant pardons, suspend, remit or commute the sentence.

## JAGMOHAN SINGH V. STATE OF UTTAR PRADESH

In this case, the constitutional validity of capital punishment in India was in question. The five-judge bench upheld the constitutional validity of the death penalty and held that capital punishment was not violative of Article 14, 19 and 21. It was held that the choice of death sentence is done in accordance with the procedure established by law.

The court also held that:

*If the law has given to the judge a wider discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstances of one case can hardly be the same as the facts and circumstances of another<sup>3</sup>.*

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<sup>3</sup> 1973 AIR 947, 1973 SCR (2) 541.

The constitutional validity of capital punishment in India was again upheld in the Bachan Singh case. And this case laid down the principle "*Life imprisonment is the rule and death sentence is an exception*"<sup>4</sup>.

### **OFFENSES PUNISHABLE BY CAPITAL PUNISHMENT**

A death sentence is exercised through ages. In India, during British colonial rule, the death punishment was inflicted in the cases of conviction for a large number of crimes, including petty offenses involving Robbery. There was a brutal administration of justice. After 1947 India became an independent state and the system of giving death penalties changed a lot.

There are eleven offenses for which the death penalty has been provided namely:

*Criminal conspiracy, murder, a war against the government, abetment of mutiny, dacoity with murder, etc.*

### **Modes of execution of capital punishment in India**

In India there are two methods used to execute capital punishment namely:

1. Hanging by the neck till death: In India, the Code of Criminal Procedure, 1973 provides the implementation of capital punishment as its Section 354(5) says: *when any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead*. For the execution of capital punishment, it is the most common method used in India. Hanging is simple to execute but may cause lingering death. This method is exercised by many countries such as Bangladesh, Pakistan, Singapore, Sri Lanka, the United States of America, etc. The system of hanging causes no greater pain and there is no barbarity, torture or degradation involved in it.
2. Being shot to death: In Air Force Act 1950, Section 163 provides the implementation of capital punishment in India. Section 163 says:

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<sup>4</sup> AIR 1980 SC 898, 1980.

*Form of a sentence of death – In awarding a sentence of death, a court-martial shall, in its discretion, direct that the offender shall suffer death by being hanged by the neck until he be dead, or shall suffer death by being shot to death.*

The execution of a death sentence by hanging or by being shot to death does not violate Article 21 of the Indian constitution.

There are many methods used to execute capital punishment in other countries like: The wheel, Guillotine, hanging, burning at the stake. And one of the oldest methods of execution of capital punishment is Hanging.

### **THE 'RAREST OF RARE' PRINCIPLE**

For imposing a death sentence in India, rarest of rare principle is exercised. While applying this principle many things have to be taken into consideration like society's abhorrence, the brutality of the crime and all the relevant circumstances and then court award death sentence as the situation demands so. In the **Bachan Singh case**, the supreme court propounded the *Doctrine Rarest of Rare*. The rarest of rare principle has been divided into two parts:

1. Aggravating circumstances
2. Mitigating circumstances

#### **Statistical Report**

YEAR	SENTENCE GIVEN	EXECUTED
2001	106	0
2002	126	0
2003	142	0
2004	125	1
2005	164	0

2006	129	0
2007	186	0
2008	126	0
2009	137	0
2010	97	0
2011	117	0
2012	97	1
2013	125	1

According to the statistical report of the *National Crime Records Bureau (NCRB)* and *American Convention On Human Rights (ACHR)* about capital punishment in India several death sentences have been awarded but only a few of them were actually been carried out. Indian judiciary has sentenced many people to death but only four death sentences have been executed in India.

- 1) Dhananjoy Chatterjee was accused of murder and rape of a 14-year-old girl. His death sentence was executed on August 14, 2004, in Alipore central jail, Kolkata.
- 2) Mohammad Ajmal Amir Kasab was accused of the Mumbai terror attack. His death sentence was executed on November 21, 2012, in Yerwada jail, Pune.
- 3) Afzal Guru was accused of the parliament attack. He was the mastermind behind the attack. His death sentence was executed on February 9, 2013, in Tihar jail, Delhi.
- 4) Yakub Memon was accused of Mumbai serial blasts. His death sentence was executed on July 30, 2015, in central jail, Nagpur.

### CONCLUSION

In many countries, the death penalty has been abolished and many other countries have abolished the death penalty for ordinary crimes.

According to *Amnesty*, there are 106 countries that have abolished the death sentence in 2017. In order to decide whether to abolish or retain capital punishment in India, one has to examine the circumstances, conditions and consequences of the implementation of capital punishment, as India is a democratic country with a huge population each and every decision, laws and policies will affect the public at large. Laws and policies are made for the betterment of people and to live with dignity as it is guaranteed under Article 21 of the Indian constitution.

After examining the theories and statistical report the researchers have come to the conclusion that capital punishment should not be abolished in India as it is important to create fear and desist to prevent the offender from committing the crime. The purpose of these theories. By applying the principal Rarest of Rare with due care the capital punishment should be exercised.

