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CONSTITUTIONALITY OF DEATH PENALTY

ABSTRACT

Capital punishment, formerly called judicial homicide is the state sanctioned punishment of executing an individual for a specific crime. The constitutionality of death penalty worldwide is a contentious issue and legal scrutiny. It involves evaluating whether capital punishment aligns with fundamental principles of justice, human rights and rule of law outlined in various countries constitutions. Critics argue that the death penalty violates human rights (Article 14,19,and 21 of Indian Constitution) and that its application is arbitrary and prone to error, raising concerns about its constitutional validity in a society.

This article comprises statutes made by legislations on capital punishment in India, which laid down specific circumstances in which capital punishment is to be awarded these namely include Indian Penal Code (1860), Commission of Sati Act (1987), and NDPS Act (1985). A comparative study of judicial interpretations related to death penalty in other countries has been included to better understand the current status of capital punishment worldwide. The Supreme Courts has navigated this tension in recent cases (mentioned in article) balancing evolving societal norms with the constitutions original intent, discovering the doctrine of ‘Rarest of Rare Crimes’. The article helps in clarifying the legal and constitutional aspects

surrounding death penalty and provides foundation for establishing or refining judicial precedents on cases related to Constitutionality of Death Penalty.

KEYWORDS: Death Penalty, Constitutional validity, rarest of rare crimes, Clemency powers

CONSTITUTIONALITY OF DEATH PENALTY

“Vengeance comes from the individual and punishment from God.”

INTRODUCTION

The crime rates in the world we live in today are constantly increasing. The number of murders, rapes, terrorist attacks and child abuse cases has increased. Death penalty has been a mode of punishment from time immemorial which is practiced for the elimination of criminals and is used as the punishment for the heinous crimes.

The legal procedure followed by the state according to which it takes an individual's life to punish them of an offence is called Capital Punishment. The term 'capital' is derived from the latin word 'capitalis' which means concerning the head. Thus, to be subjected to capital punishment means to lose one's head.¹

Capital punishment has been in existence since the very beginning of inception of the state. India is one of the 78 retentionist countries which have retained death penalty on the ground that will be awarded only in the 'rarest of rare cases' or 'special reasons'.²

¹ Tejsi, 'Constitutional validity of capital punishment' <<https://www.legalserviceindia.com/legal/article-8861-constitutional-validity-of-capital-punishment>> accessed 1 december 2023

² Tatheer Fatima, 'Constitutionality of death penalty', <<https://www.indianbarassociation.org>> accessed 1 december 2023

The purpose of death penalty is to deter people from doing something by instilling fear them about the consequences. This punishment applies to heinous and traumatizing offences to society as a whole such as murder, rape, rape with murder etc. The death penalty is used when a crime is so serious as a whole, but not all of the crimes mentioned above necessarily warrant the death penalty. It is only applied to crimes that fall under the ‘rarest of rare doctrines’.

In the supreme court of India, the Constitutional validity of death penalty was challenged many times in different ways. India is one of the nations that have neither totally abolished the death penalty nor passed legislation that may highlight the validity or legality of death penalty or capital punishment.

CAPITAL PUNISHMENT IN INDIA

Following its independence, the Republic of India adopted various colonial-era laws, including the Indian Penal Code, 1860, and the Code of Criminal Procedure, 1898. The IPC imposed six punishments, including the death penalty.

Crimes punishable by the death penalty:

The foundation of Indian criminal law is a combination of reformist and dissuasive theories of punishment. Several legislative acts include the death penalty as a punishment, which include:

The Indian Penal Code, 1860

The Indian Penal Code contains several crimes that include the death penalty. They are discussed as follows: ³

³ Bare act IPC 1860

- Waging war against India or attempting to do so: Waging war against a country is a crime that is specifically defined in Section 121 of the IPC.
- Abatement of mutiny: Abatement of armed rebellion by an officer or member of the army, navy, or air force is specified in Section 132 of the I.P.C and accordingly, anyone who abets in the commission of a mutiny by an officer, soldier, sailor, or pilot in the army, navy, or air force of the Government of India, so that mutiny will be committed as a result of that complicity, can be punished by death.
- According to Section 194, fabricating evidence is punishable by the death penalty if it is done to obtain a capital conviction for a crime.
- Section 302 of the IPC imposes the death penalty for a person who commits murder.
- Section 305 of the IPC deals with punishment for assisting or supporting a person under the age of 18 or an intellectually disabled person in committing suicide.
- Kidnapping for ransom or other purposes is a serious offence punishable by death. Kidnapping a person with the intent to cause them harm or death is specified under Section 364A of IPC.

The following offences were added to the IPC by the Criminal Law (Amendment) Act of 2013 for which a court may impose the death penalty:

- Section 376A specifies the death penalty for rape that results in death or a permanent vegetative state of the victim.
- Section 396 also provides for the death penalty in cases of dacoity with murder.

The Commission of Sati (Prevention) Act, 1987

Any person involved in the commission of Sati directly or indirectly is subject to the death penalty under The Commission of Sati (Prevention) Act, 1987.

Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985

Section 31A of the NDPS Act has introduced the death penalty for providing financial support or taking part in the production or sale of narcotics or psychoactive substances in a predetermined amount (e.g., opium 10 kg, cocaine 500 grammes).⁴

CAPITAL PUNISHMENT INTERNATIONALLY

Position in Britain:

From the 20th century, hanging was the most common way of executing criminals. However, in 1965, for an experimental period of 5 years, death penalty was abolished, which happened to be permanently abolished in 1969. The last people to be executed were Peter Allen and Gwynne Jones who were hanged on the same day in 1964. The Human Rights Act of UK formally abolished the death penalty as a mode of punishment.⁵

Position in America:

In the USA, capital punishments is a legal penalty in 27 states while it has been abolished in the other 23 states. The penalty of death was widely accepted but not universally as several persons including former Treasurer Dr. Benjamin Rush and

⁴ NDPS Act<<https://dor.gov.in>> accessed 3 December 2023

⁵ Tejisi, 'Constitutional validity of capital punishment', <<https://www.legalserviceindia.com/legal/article-8861-constitutional-validity-of-capital-punishment>> accessed 3 December 2023

3rd U.S. President Thomas Jefferson expressed their dissent towards capital punishment and supported its abolishment. In 1917, the state of Missouri and Puerto Rico abolished death penalty.

In mid twentieth century, opposition to death penalty strengthened. In the case of *Furman vs. Georgia*⁶, the U.S. Supreme Court declared death penalty unconstitutional as it was 'cruel and unusual'. However, under the new laws, the death penalty imposed in some states was held to be constitutional by the Supreme Court of USA in the case of *Gregg vs. Georgia*⁷.

Position in China:

In China, death penalty is usually awarded to only criminals who have committed grievous offences such as aggravated murder. But China along with punishing offenders committing serious and violent crimes, retains nonviolent crimes such as drug trafficking. It executes highest number of people annually. The Dui Hua Foundation, which is a U.S.-based organization, estimated number of executions which has now declined steadily from 12,000 per year to 2,400 per year in the twenty-first century.

DOCTRINE OF RAREST OF RARE CRIMES

Capital punishment or death penalty, in India is based on the doctrine of rarest of rare cases. The Court shall consider a variety of factors including personality of the criminal, manner and motive of crime, and society's repugnance, for crimes which have extreme antipathy such as rape of minor girl. The courts would award a death sentence when the situation demands for it as a constitutional compulsion which reflects the will of the society. The doctrine of rarest of rare was established in the

⁶Furman vs. Georgia[1972] 408 U.S. 238

⁷ Gregg vs. Georgia[1976] 428 U.S. 153

case of *Bachchan Singh vs. State of Punjab*⁸, in which, the constitutional validity of death penalty for murder under section 302 of the Indian Penal Code was questioned.⁹

CONSTITUTIONAL VALIDITY OF CAPITAL PUNISHMENT

Across the world, there has been demand for abolition of the death penalty. In some of the countries, it has been accepted while in others it has been not. India is one such country where the capital punishment is still in effect. The Constitution of India guarantees to every person fundamental right to life and personal liberty under article – 21 of the Constitution. The very fact is that the death penalty is retained in Indian Criminal Statutes runs counter to one's right to life.

The constitutional validity of the death penalty was challenged from time to time in numerous cases.

In *Jagmohan Singh vs. State of Uttar Pradesh*,¹⁰ the five judge bench of the Supreme Court, by a unanimous verdict, upheld the constitutional validity of death penalty held that capital punishment was not violative of Articles 14, 19 and 21 and . In this case the validity of death sentence was challenged on the ground that it was violative of Articles 19 and 21 because it did not provide any procedure. It was contended that the procedure prescribed under Cr. P.C. was confined only to findings of guilt and not awarding death sentence. The Supreme Court held that the choice of death sentence is done in accordance with the procedure established by law. It was observed that the judge makes the choice between capital sentence or imprisonment

⁸Bachchan Singh vs. State of Punjab[1980] AIR SC 898

⁹ Capital punishment, <<https://indiankanoon.org>> accessed 4 december 2023

¹⁰Jagmohan Singh vs. State of Uttar Pradesh[1973] AIR SC 947

of life on the basis of circumstances and facts and nature of crime brought on record during trial.

In another case *Rajendra Prasad vs. State of UP*¹¹, Justice Krishna Iyer empathetically stressed that death penalty is violative of articles 14, 19 and 21. He further said that to impose death penalty the two things must be required:

- The special reason should be recorded for imposing death penalty in a case.
- The death penalty must be imposed only in extraordinary circumstances.

The question was again considered in *Bachan Singh vs. State of Punjab*¹², in which by a majority of 4 to 1 (Bhagwati J.dissenting) the five judge bench of the Supreme Court overruled its earlier decision in *Rajendra Prasad*. It expressed the view that death penalty, as an alternative punishment for murder is not unreasonable and hence not violative of articles 14, 19 and 21 of the Constitution of India, because the “public order” contemplated by clauses (2) to (4) of Article 19 is different from “law and order” and also enunciated the principle of awarding death penalty only in the ‘rarest of rare cases’.

Recent Judgments:

In the case of *Vinay Sharma vs. Union of India*¹³, (Nirbhaya Gang rape) the victim was brutally raped by six accused persons. The girl was severely injured after the incident, the accused inhumanely inserted an iron rod in her private parts and then was thrown naked on the road. Unfortunately the girl lost her life to this physically and mentally torturing incident. Out of the six accused persons, one committed suicide in the prison by hanging himself and other bring minor was not sentenced to

¹¹ *Rajendra Prasad vs. State of UP* [1979] AIR SC 916

¹² *Bachan Singh vs. State of Punjab* [1980] AIR SC 898

¹³ *Vinay Sharma vs. Union of India*, Writ Petition (Crl.) No. 65 of 2020

death. The other four accused were sentenced to death in 2020 by the trial and High Court after recording detailed reasoning that the case was gruesome and a rarest of rare case.

In *Shabnam vs. the Union of India*¹⁴, a woman was sentenced to death by the court. In the year 2008, this incident occurred. Shabnam assassinated her family members for refusing to let her marry her lover.

Another case was of *Surendra Koli vs. State of UP*¹⁵, occurred in 2007. The bodies of the murdered children and adults were discovered at Mohinder Singh Pandher's home in the Noida village of Nithari. It was discovered that the girls' bodies had been raped, killed, and eaten by him. He was sentenced to death after committing such a crime on fifteen girls. The aggravating factors applied to him.

Statistics:

In the year 1975 and 1991, around 40 people were executed. Till 2004, no executions took place but in 2004, a former security man was executed for raping and killing a 14-year-old schoolgirl in Calcutta. However, in 2005, the numbers increased to 12 and more in consequent years. Today, there are 403 prisoners on death row, and the last execution being the four Delhi Gang rape and murder culprits in March 2020 cases in 2022.

Trial courts in the country sentenced 165 people to death in 2022, the highest in a year in the last two decades. This is up from 146 prisoners who were sent to death row in 2021. At the end of 2022, 539 were on death row, the highest since 2016.

¹⁴ Writ Petition (Criminal) No. 88 of 2015

¹⁵ Criminal Appeal No.(s). 2227 of 2010

ECONOMIC VULNERABILITY: According to the national figures, 74.1% of the prisoners sentenced to death in India are economically vulnerable according to their occupation and landholding. Kerala had the highest proportion of economically vulnerable prisoners sentenced to death with 14 out of 15 prisoners (93.3%) falling in this category. Other states which had 75% or more prisoners sentenced to death belonging to the ‘economically vulnerable’ category were Bihar (75%), Chhattisgarh (75%), Delhi (80%), Gujarat (78.9%), Jharkhand (76.9%), Karnataka (75%) and Maharashtra (88.9%).

EDUCATIONAL PROFILE: 23% of prisoners sentenced to death had never attended school. A further 9.6% had barely attended but had not completed even their primary school education. Amongst the states with a substantial number of prisoners on death row, Bihar (35.3%) and Karnataka (34.1%) had the highest proportion of prisoners who had never attended school. Kerala is the only state where all prisoners had at least attended school.

CASTE AND RELIGIOUS PROFILE: 76% of prisoners sentenced to death in India are backward classes and religious minorities. While the proportion of Scheduled Castes/Scheduled Tribes (SC/ STs) amongst all prisoners sentenced to death in India is 24.5%, that proportion is significantly higher in Maharashtra (50%), Karnataka (36.4%), Madhya Pradesh (36%), Bihar (31.4%), Jharkhand (30.8%) and Delhi (26.7%), amongst states with 10 or more prisoners sentenced to death.

CAPITAL PUNISHMENT: THE CURRENT STATUS

The central government has consistently maintained it would keep the death penalty in the statute books to act as a deterrent, and for those who are a threat to society, the Supreme Court too has upheld the constitutional validity of capital punishment

in “rarest of rare” cases. In *Jagmohan Singh vs State of Uttar Pradesh*¹⁶(1973), then in *Rajendra Prasad vs State of Uttar Pradesh*¹⁷ (1979), and finally in *Bachan Singh vs State of Punjab*¹⁸ (1980), the Supreme Court affirmed the constitutional validity of the death penalty. It said that if capital punishment is provided in the law and the procedure is a fair, just and reasonable one, the death sentence can be awarded to a convict.

CLEMENCY POWERS

If the Supreme Court turns down the appeal against capital punishment, a condemned prisoner can submit a mercy petition to the President of India and the Governor of the State. Under Articles 72 and 161 of the Constitution, the President and Governors, respectively have the power “to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence”. These powers are to be exercised under Articles 74 and 163, respectively on the aid and advice of the Council of Ministers.¹⁹

¹⁶ AIR. 1973, SC 947

¹⁷ AIR. 1979, SC 916

¹⁸ AIR. 1980, SC 898

¹⁹ From the constitution of India

CONCLUSION

Many countries have abolished death penalty by providing justification that it is barbaric and inhuman in nature and violates the right to life and liberty of people. However, if a valid opinion is to be taken, it would be right to say that capital punishment even in its `brutal nature is effective in reducing criminal offences and discouraging offenders to some extent.

Looking at the data, we can say that death penalties are only awarded in very few cases of heinous crime. In a lot of cases, the death penalty has been converted into life imprisonment due to various pleadings and other factors. Death penalty acts as a deterrent to discourage grievous and inhumane crimes. The Constitution of India on the other hand provides enough remedies, even to criminals to protect their legal rights. Moreover, it has been reiterated that right to life is not an absolute right when a person is treated according to the procedure established by law. Thus, capital punishment is constitutionally valid when exercised by the judges in cases where the culprit has committed a crime so gruesome that shocks the conscience of society.

In addition, a person who does not values the life, dignity and safety of others, is not deserving of any sort of sympathy either. Although, the court has not established specific nature of crimes that shall be awarded with death penalty but crimes like rape, aggravated murder and terrorism must be punished with the most severe punishment around like capital punishment.

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