

# ALTERNATIVES MODES OF CAPITAL PUNISHMENT AND ITS CRTICAL ANALYSIS

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## Abstract:

The article throws light on the status of capital punishment all around the world. The article first and foremost introduces the concept of capital punishment or death penalty and then defines capital offence. The article, thereafter, mentions the methods adopted to grant capital punishment. Further, the two major theories with reference to capital punishment, namely, the reformatory theory and the preventive theory have been explained. Thereafter, the article throws a light on the views of various countries around the globe and also mentions about the abolitionist and retentionist countries. Then, the article has in detail explained the Indian view regarding the capital by referring to several cases, mentioning about law commission and also about the use of death penalty in ancient India. Finally, the article concludes showing the positive side of capital punishment.

*Keywords– Capital Punishment, Death Penalty, Capital Offence, Reformatory Theory, Preventive Theory, Offender etc.*

## INTRODUCTION

All punishments are based on the same proposition *i.e.* there must be a penalty for wrongdoing. There are two main reasons for inflicting the punishment. One is the belief that it is both right and just that a person who has done wrong should suffer for it; the other is the belief that inflicting punishment on wrongdoers discourages other from doing wrong. The capital punishment also rests on the same proposition as other punishments<sup>1</sup>.

The capital punishment debate is the most generally relevant debate, keeping in mind the situation that has been brought about by today. Capital punishment is an integral part of the Indian criminal justice system. Increasing strength of the human rights movement in India, the existence of capital punishment is questioned as immoral. However this is an odd argument as keeping one person alive at the cost of the lives of numerous

<sup>1</sup><http://newindialaw.blogspot.in/2012/11/constitutional-validity-of-capital.html>

members or potential victims in the society is unbelievable and in fact, that is morally wrong<sup>2</sup>.

### MEANING OF CAPITAL PUNISHMENT

Capital punishment, also called death penalty, execution of an offender sentenced to death after conviction by a court of law for a criminal offense. Capital punishment should be distinguished from extrajudicial executions carried out without due process of law. The term death penalty is sometimes used interchangeably with capital punishment, though imposition of the penalty is not always followed by execution (even when it is upheld on appeal), because of the possibility of commutation to life imprisonment<sup>3</sup>.

### HISTORICAL BACKGROUND

Capital punishment is an ancient sanction. There is practically no country in the world where the death penalty has never existed. History of human civilization reveals that during no period of time capital punishment has been discarded as a mode of punishment<sup>4</sup>Capital punishment for murder, treason, arson, and rape was widely employed in ancient Greece under the laws of Draco (fl. 7th century BCE), though Plato argued that it should be used only for the incorrigible. The Romans also used it for a wide range of offenses, though citizens were exempted for a short time during therepublic<sup>5</sup>.This finds support in the observation made by Sir Henry Marine who stated that "Roman Republic did not abolish death sentence though its non-use was primarily directed by the practice of punishment or exile and the procedure of questions"<sup>6</sup>.

### CAPITAL PUNISHMENT IN INDIA

A careful scrutiny of the debates in British India's Legislative Assembly reveals that no issue was raised about capital punishment in the Assembly until 1931, when one of the Members from Bihar, Shri Gaya Prasad Singh sought to introduce a Bill to abolish the punishment of death for the offences under the Indian Penal Code. However, the motion was negated after the then Home Minister replied to the motion.

The Government's policy on capital punishment in British India prior to Independence was clearly stated twice in 1946 by the then Home Minister, Sir John Thorne, in the debates of the Legislative Assembly. "The Government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided."<sup>7</sup>

<sup>2</sup><http://www.allsubjectjournal.com/archives/2015/vol2issue4/PartK/62.pdf>

<sup>3</sup><http://www.britannica.com/topic/capital-punishment>

<sup>4</sup>*Op.cit.* Capital Punishment by Dr. Subhash C. Gupta, 2000, p. 1

<sup>5</sup><http://www.britannica.com/topic/capital-punishment>

<sup>6</sup>*Op.cit.* Capital Punishment in India by Dr. Subhash C. Gupta, 2000, p. 1

<sup>7</sup>*Ibid.* pp. 104-105.

## THE SUPREME COURT AND CAPITAL PUNISHMENT

Since the *Gregg* decision, the Supreme Court has heard cases on a variety of issues related to capital punishment, including constitutionality, procedural issues, mitigating and aggravating circumstances, and who is eligible for execution. As the composition of the Court has changed, the decisions it has rendered have also changed. This is particularly evident in decisions related to the constitutionality of death penalty statutes and procedural issues. In *McCleskey v. Kemp* (1987), the Supreme Court revisited the issue of racial discrimination in application of the death penalty. Using social science research, *McCleskey* argued that a marked pattern of discrimination based on the race of the victim existed in capital cases. The Supreme Court found, however, that statistical analysis indicating a pattern of racial discrimination in death sentencing did not make the death penalty statute unconstitutional. Instead, the Court stated, discrimination must be proven in individual cases. In *Pulley v. Harris* (1984), the Supreme Court ruled that states were not required to provide proportionality review of death sentences to determine fairness of sentencing. In a series of cases, the Supreme Court upheld the removal of potential jurors for cause if they were opposed to the death penalty. The Supreme Court ruled in *Herrera v. Collins* (1993) that federal courts did not have to hear claims of actual innocence based on newly discovered evidence.

### INTERNATIONAL SCENARIO

The international landscape regarding the death penalty – both in terms of international law and state practice – has evolved in the past decades. Internationally, countries are classified on their death penalty status, based on the following categories:

- Abolitionist for all crimes
- Abolitionist for ordinary crimes
- Abolitionist *defacto*
- Retentionist

### CAPITAL PUNISHMENT IN INTERNATIONAL HUMAN RIGHTS TREATIES

The International Covenant on Civil and Political Rights ('ICCPR') is one of the key documents discussing the imposition of death penalty in international human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty<sup>8</sup>.

The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death penalty, which is open to signatures from all countries in the world. It

<sup>8</sup>India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.38-39

came into force in 1991, and has 81 states parties and 3 signatories<sup>9</sup>.

### **POLITICAL COMMITMENTS REGARDING CAPITAL PUNISHMENT GLOBALLY**

Several resolutions of the UN General Assembly (UNGA) have called for a moratorium on the use of the death penalty. In 2007, the UNGA called on states to “progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed” and “establish a moratorium on executions with a view to abolishing the death penalty.” In 2008, the GA reaffirmed this resolution, which was reinforced in subsequent resolutions in 2010, 2012, and 2014. Many of these resolutions noted that, “a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights.” In 2014, 117 States had voted in favour of the most recent resolution. India has not voted in favour of these resolutions<sup>10</sup>.

In a 2013 resolution, the UN Human Rights Council acknowledged “the negative impact of a parent’s death sentence and his or her execution on his or her children,”

### **EMERGENCE OF ALTERNATIVE PUNISHMENT TO CAPITAL PUNISHMENT**

In the last few years, Supreme Court has entrenched the punishment of “full life” or life sentence of determinate number of years as a response to challenges presented in death cases. The Supreme Court speaking through a three-judge bench decision in *Swamy Shraddhanand* case laid the foundation of this emerging penal option in following terms:

“The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What

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<sup>9</sup>*ibid.* p.43

<sup>10</sup>*ibid.* pp.51-52

then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous.

### **JUDICIAL REVIEW OF EXERCISE OF MERCY POWERS**

The Supreme Court in *Shatrughan Chauhan* case has recorded that the Home Ministry considers the following factors while deciding mercy petitions:

Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification); Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction; Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified.

In 1988, in *Thompson v. Oklahoma* (487 U.S. 815), four Supreme Court Justices held that the execution of offenders age fifteen and younger at the time of their crimes was unconstitutional. In 2005, the United States Supreme Court ruled in *Roper v. Simmons* that the death penalty cannot be applied to persons who were under age 18 at the time of commission of the crime.

Then in 1989 in *Penry v. Lynaugh* (492 U.S. 584), the Court held that executing persons with mental retardation was not a violation of the Eighth Amendment. However, in 2002 in *Atkins v. Virginia*, (536 U.S. 304), the Court held that national opinion was in opposition to the execution of the mentally retarded and concluded that such a punishment violates the Eighth Amendment's ban on cruel and unusual punishment.

In a *USA Today* (June 2005) article a **Gallup Poll** from May 2005 found that 74% of the American public support the death penalty, but backing for capital punishment drops to 56% when respondents are given the alternative punishment option of life without parole (*USA Today*, June 2005). Multiple socioeconomic factors influence the support or opposition of death penalty as a just punishment; variables such as race, gender, class, age, and political perspective can account for opinions for and against this form of punishment.

**Baker, Lambert, and Jenkins** (2005) found that women were four times less likely to support the death penalty than men, when controlling for age, class, and region.

### **LAW COMMISSION OF INDIA'S REPORT ON DEATH PENALTY**

The Law Commission of India in its 262<sup>nd</sup> Report (August 2015) recommended that death penalty be abolished for all crimes other than terrorism related offences and waging war. Complete recommendations of the Report are as follows:

The Commission recommended that measures suggested that police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.

The march of our own jurisprudence -- from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to the rarest of rare cases – shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the Right to life and strengthened due process requirements in the interactions between the State and the individual, prevailing standards of constitutional morality and human dignity, the Commission felt that time has come for India to move towards abolition of the deathpenalty.<sup>11</sup>

## **ABOLITIONIST AND RETENTIONIST COUNTRIES AS OF 31 DECEMBER 2014**

The following are lists of countries in the four categories: abolitionist for all crimes, abolitionist for ordinary crimes only, abolitionist in practice and retentionist.

**ABOLITIONIST FOR ALL CRIMES** Countries whose laws do not provide for the death penalty for any crime: Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Bhutan, Bolivia, Bosnia and Herzegovina, Bulgaria, Burundi, Cambodia, Canada, Cabo Verde, Colombia, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Marshall Islands, Mauritius.

**ABOLITIONIST FOR ORDINARY CRIMES ONLY** Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances: Brazil, Chile, El Salvador, Fiji, Israel, Kazakhstan, Peru.

**ABOLITIONIST IN PRACTICE** Countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the last 10 years and are believed to have a policy or established practice of not carrying out executions: Algeria, Benin, Brunei Darussalam, Burkina Faso, Cameroon, Central African Republic, Congo (Republic of), Eritrea, Ghana, Grenada, Kenya, Laos, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mongolia, Morocco, Myanmar, Nauru, Niger, Papua New Guinea, Russian Federation, Sierra Leone, South Korea, Sri Lanka, Suriname, Swaziland, Tajikistan, Tanzania, Tonga, Tunisia, Zambia.

### **RETENTIONIST**

Countries that retain the death penalty for ordinary crimes: Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Chad, China, Comoros, Democratic Republic of the Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Gambia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Lesotho, Libya, Malaysia, Nigeria, North Korea, Oman,

<sup>11</sup>India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.217-218



Pakistan, Palestine (State of), Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Somalia, South Sudan, Sudan, Syria, Taiwan, Thailand, Trinidad and Tobago, Uganda, United Arab Emirates, USA, Viet Nam, Yemen, Zimbabwe.

### **THE PROBLEM OF CAPITAL PUNISHMENT:**

The history of Capital Punishment is as old as that of mankind. In the Western world the first instance seems to be ‘The Law of Moses’, inflicting Capital Punishment for blasphemy. By B.C. 1179, murder was capital crime among Egyptians and Greeks. In India, the Indian Epics namely the Mahabharata and the Ramayana also contain references about the offender being punished with vadha-danda which means amputation bit by bit. Fourteen such modes of amputating the criminal to death are known to have existed. This illustrates that in every country in the world Capital Punishment existed since times immemorial.

### **GENDER OF THE ACCUSED AND CAPITAL PUNISHMENT:**

The gender of the accused is not considered either as an aggravating factor or a mitigating -factor while awarding Capital Punishment.<sup>12</sup> Women criminality, especially in murder cases, is less in Indian circumstances. In many cases women are not brought to the police station. If they are brought also, they are not produced in the Court. But, where a man and woman are jointly charged with an offence, the Court often takes the view that the woman acted under the influence of the man and may impose a lesser sentence to the woman. But, if the Court comes to the conclusion that both parties are equally guilty, the fact that one of them is a woman is no ground for making a distinction in the sentence.<sup>13</sup> Ediga Annamma<sup>14</sup> was the first case, where the Apex Court openly considered her femininity as one of the extenuating factors in the commutation of sentence.

## **JUDICIAL APPROACH**

### **Uttarakhand to Introduce Law to Give Death Penalty to Rapists of Minor Girls**

Madhya Pradesh, Rajasthan and Haryana have already approved the provision of capital punishment for those found guilty of raping girls aged 12 years or less.

**Dehradun/Kashipur:** Uttarakhand chief minister Trivendra Singh Rawat yesterday said that the state government will bring a legislation in the next session of the state assembly to make a provision for capital punishment for the rapists of minor girls. The chief minister announced this while addressing the working committee meeting of the state BJP at Kashipur in Udham Singh Nagar district. Rawat said that the state

<sup>12</sup> Emperor v. Misri: (1909) ILR 31 All 392 Misa Stree v. State of Orissa: AIR 1938 Mad. 318.

<sup>13</sup> Mash Kaur v. State of Punjab: AIR 1987 S.C. 1369

<sup>14</sup> Ibid.

government was concerned over the growing incidents of crimes against minor girls and stricter laws were needed to check them.

## CONCLUSION

Preamble of India which says directly indicate it as a democratic country where public at large prevails. Laws are made for human beings so that one may live their life with dignity without affecting others right. When any crime committed by accused he must be punished by the state through law as it effect public or the innocent victims. Capital Punishment is the most severe punishment of the society. As being a member of Universal Declaration of Human Right, our country did not abolish capital punishment but they limit its scope by awarding capital punishment on rarest of rare cases. As per the topic of research that capital Punishment in rarest of rare case is just and fair.

