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Capital Punishment: Society's Saviour or the Menace

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ABSTRACT

Execution of a person (sentenced to death) after being convicted of a crime by a court of law of a criminal offence is capital punishment, popularly known as the death penalty. Under the law of Draco (c. 7th century BCE), capital punishment for crimes like murder, treason, arson, and rape was frequently practised in ancient Greece, despite Plato's contention that it should only be reserved for the truly evil. Although citizens were exempted for a brief period during the republic, the Romans also utilised it for a wide variety of transgressions. Most of the major religions in the world have at one point or another approved of it. The authorised execution of a person who has committed a heinous criminal offence that is against the law is the capital punishment. A person is executed by the state as retribution for the crime he committed under the legal term "death penalty," which is recognised by the government. In the United Nations (UN), where the death penalty is viewed as a violation of human rights, the phrase "Abolition of Death Penalty" is one of the most frequently discussed themes. In Rajendra Prasad v. State of Uttar Pradesh, Justice V.R. Krishna Iyer made the following remark: "The special reason must relate, not to the crime but to the criminal. The crime may be shocking and yet the criminal may not deserve the Death Penalty."

Keywords: *Death Penalty, Theories of Punishment, Law Commission on Death Penalty, American Precedents on Death Penalty, China and Death Penalty.*

I. INTRODUCTION

There are various theories related to Theories of Punishment, which are as follows:

Retributive Theory:

The most fundamental, yet reckless notion of punishing a culprit is the retributive theory of punishment, or the "theory of vengeance," as many individuals in the community would refer to it. It is founded on a very narrow philosophy called Lex talionis, which might be interpreted as "an eye for an eye."

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*Anwar Ahmad v/s. State of Uttar Pradesh and Anr*²:

Before being formally found guilty by the court in this case, the convicted had already served a six-month prison sentence. The court decided that since the defendant had already been found guilty and had the necessary "blemish" placed upon him, it was not necessary to sentence him again in the name of "retributive punishment" because doing so would also cause a significant damage to the defendant's family.

Deterrent Theory:

The word "DETER" in the deterrent theory of punishment refers to refraining from engaging in any crime. This theory's major objective is to "deter" (or prevent) criminals from attempting new crimes or committing the same ones again in the future. As a result, it says that the goal is to deter crime by instilling terror; by punishing the offender, one sets an example for others or the entire society.

*Sri Ashim Dutta Alias Nilu vs State of West Bengal*³:

In this case, it was stated that both deterrent and retributive punishment strive to stop crimes from being committed again by others by imposing exemplary punishment for a specific offence. However, culture and communities are developing quickly. Science and technology are developing. Literate people and subject matter experts in various fields of knowledge began to think differently. The old ages "eye for an eye" and "tooth for a tooth" are no longer thought to be the best way to deal with criminals. Such a philosophy might keep the jungle in control, but it cannot guarantee the rule of law.

Preventive Theory:

The preventive theory of punishment aims to stop future crimes by impeding the offenders. The main goal of the preventative philosophy is to change the offender temporarily or permanently. According to this view, criminals are sentenced to death, life in prison, etc.

*Dr. Jacob George v State of Kerala*⁴:

According to the Supreme Court's ruling in this case, punishment should have the following objectives: deterrence, reformation, prevention, retribution, and compensation. A sound punishment strategy does not favour one theory over another. The merits of the case should determine whether to use each theory of punishment alone or in combination. Additionally, it

² Anwar Ahmad v/s. State of Uttar Pradesh and Anr, 1976 SCR (1) 779.

³ Sri Ashim Dutta Alias Nilu vs State of West Bengal 1998 (2) CHN 261.

⁴ Dr. Jacob George v State of Kerala 1994 SCC (3) 430.

is said that "every sinner has a fortune & every saint has a past." Since criminals are an integral part of society, it is the role of society to reform, rectify, and turn them into law-abiding members. Because society and the law both have a strong focus on crime prevention, neither can be disregarded.

Incapacitation Theory:

'To prevent the offence by punishing, such that the future generation dread to perpetrate the illegal act,' is the definition of the word 'incapacitation. Incapacitation occurs when a person is either permanently or temporarily removed from society, or when he is otherwise constrained owing to a physical disability. The most popular method of incapacitating offenders is incarceration, however in circumstances of extreme severity, capital sentences are also used. Incapacitation's main objective is to stop or lessen the threat in the future.

For instance, jail is used to incapacitate offenders in the United States at a far higher rate than it is in other nations. It has been observed that the theory of incapacitation merely rearranges the distribution of offenders in society so that the rate of crime reduces in the community, in contrast to other theories of penalties like deterrence, rehabilitation, and restitution. The notion of incapacitation's primary goal is to deter future generations from repeating the mistakes of past offenders.

II. INDIA

The death sentence has always been implemented by the rulers of different kingdoms throughout the years in India to dispense justice. The retributive theory of punishment—an eye for an eye, a hand for a hand, etc.—was utilised throughout the Mauryan Dynasty. The emperors of these dynasties also imposed a variety of death penalty-style punishments, such as cutting off one's head or dragging one's body behind a horse till one died.

While there is perplexing subjectivity in the imposition of the death sentence in India, 104 nations worldwide have entirely abolished it, and 29 others have done so de facto (meaning no execution of any person has been carried out in the last 10 years). The death penalty is not consistently prohibited by Indian law, but it is also not entirely encouraged either. Although the death penalty has been reserved for the "rarest of rare" situations in India, there are still a number of statutes that call for the death penalty despite the crimes being too minor.

The Indian Penal Code of 1860, Sections 121⁵ (waging war against the state), Section 302⁶

⁵ Indian Penal Code 1860, Act Number 45, Act of Parliament 1860.

⁶ Ibid.

(murder), Section 364A⁷ (kidnapping for ransom), and other laws like The Commission of Sati (Prevention) Act of 1987⁸ and the Prevention of Terrorism Act of 2002⁹ specify crimes that are subject to the death penalty. Terrorism and rape-cum murder cases are the two most frequent incidents involving big death row inmates.

In the case of *Bacchan v. State of Punjab*¹⁰, the doctrine of the rarest of the rare was established. To reduce the uncertainty for courts over when to impose the death penalty, the Supreme Court attempted to eliminate a doctrine specifically for crimes punishable by death in this case. The Supreme Court maintained the death penalty's legitimacy by a vote of 4 to 1, and a rule was established stating that it should only be used in the "rarest of rare situations." "The rarest of rare dicta acts as a guideline in executing Section 354(3) and sets the policy that life imprisonment is the rule and death punishment is an exception," the Supreme Court ruled in *Santosh Kumar Bariyar v. State of Maharashtra*¹¹. All perpetrators receiving life sentences were required to receive the death penalty under Section 303 of the Indian Penal Code. This section was declared to be unconstitutional and was thus repealed.

When determining whether to impose the death penalty on a convict under the doctrine of the "Rarest of the Rare" case, the basic rule is whether the accused must receive the death penalty in order to preserve the peace and well-being of society, and whether failure to do so would result in no consequences under Section 302 of the IPC¹². To determine whether a particular case falls under the notion of "rarest of rare," it is usually decided based on the pre-planned, cruel, cold-blooded, and heinous nature of the crime, which leaves the victim without any opportunity of defence.

The Supreme Court of India can hear appeals involving the death penalty under Article 136¹³ of the Indian Constitution. The governor or president has the authority to commute a sentence under Article 72¹⁴ or Article 161¹⁵ of Indian Constitution or grant a pardon. The authority to impose a death sentence under Section 28(2)¹⁶ of CrPC, which requires that the High Court confirm any death sentence that a Sessions Judge or additional Sessions Judge sentences.

⁷ Ibid.

⁸ The Commission of Sati (Prevention) 1987, Act Number 03, Act of Parliament 1987.

⁹ Prevention of Terrorism Act 2002, Act Number 15, Act of Parliament 2002.

¹⁰ *Bacchan v. State of Punjab*, 1983 1 SCR 145.

¹¹ *Santosh Kumar Bariyar v. State of Maharashtra*, CRIMINAL APPEAL NO. 1478 OF 2005,

¹² *Supra* 5.

¹³ INDIA CONST. art. 136.

¹⁴ INDIA CONST. art. 72.

¹⁵ INDIA CONST. art. 161.

¹⁶ Code of Criminal Procedure 1973, Act Number 02, Act of Parliament 1973.

The **DEATH PENALTY (ABOLITION) BILL, 2019**¹⁷, was introduced in the Lok Sabha, and will take effect if the central government appoints someone by notice in the Official Gazette. Although this measure claims that the death penalty has been abolished nationwide, there has been considerable controversy in the 17th Lok Sabha. Ninety percent of Indian states want to keep the death penalty in place.

In India, 14 states and 5 union territories reacted because this issue falls under the concurrent list of the constitution, however one state refused to continue receiving this punishment. This bill is being discussed in the Rajya Sabha. As of 2022, this Bill has not received any consideration from both the houses.

There are other law commission reports on this subject, including the 35th report, in which the commission suggested that India has such a large population and India cannot take the risk of abolishing the death sentence. Report No. 187th by the Law Commission, titled "*Mode of Execution of Death and Incidental Matters*,"¹⁸ was published. This report addressed three issues: (a) the technique of carrying out a death sentence; (b) the procedure for removing judicial differences among judges of the Supreme Court in imposing the death penalty; and (c) whether it is necessary to give the prisoner the right of appeal in a death sentence. The Commission proposed changing Section 354(5)¹⁹ of the CrPC to include lethal injection as a mode of punishment in addition to hanging after researching the practise on these problems in India and other nations and surveying the public opinion. Although the panel just released its 262nd report²⁰ on the subject and made the proposal to eliminate death penalty altogether except for crimes related to terrorism and engaging in hostilities.

The phrase "protection of life and personal liberty" appears in Article 21²¹ of the Indian Constitution. No one may be deprived of their life or personal liberty, according to this article, "No person shall be deprived of his life or personal liberty except as according to procedure established by law." According to this article, every Indian citizen is guaranteed the right to life. For several crimes in India, including murder, waging war against the government, aiding a mutiny, dacoity with murder, and anti-terrorism, the IPC stipulates the death penalty as a punishment. The Indian Constitution allows for the President to commute the death penalty.

¹⁷ Death Penalty (Abolition) Bill 2019, Bill Number 168 of 2019.

¹⁸ Law Commission of India, *Mode of Execution of Death and Incidental Matters*, Report Number 187, (October 2003).

¹⁹ Supra 16.

²⁰ Law Commission of India, *NEGOTIATING CONSTITUTIONALISM AND DEMOCRACY*, Report Number 262, (August 2015).

²¹ INDIA CONST. art. 21.

There are 22 death penalty that the court has sentenced since 1995.

The Supreme Court invalidated IPC Section 303, which mandated the death penalty for criminals, in "*Mithu vs. State of Punjab*²²." India abstained on a UN General Assembly resolution that sought to outlaw the death sentence. By voting against the UN General Assembly's draught resolution proposal to outlaw the death penalty in November 2012, India reiterated its position on the death penalty.

There were 488 prisoners in India on death row as of December 31, 2021 (a sharp increase of about 21% from 2020), with Uttar Pradesh having the highest number at 86. According to data from the National Crime Records Bureau's Prison Statistics, this is the highest the death row population has been since 2004. Punjab, Madhya Pradesh, and Maharashtra all enacted the death sentence in 2021 for causing deaths via illicit alcohol, as well as for the "heinous" crimes of rape and gangrape. The Women & Child Development Ministry also introduced a measure that calls for the death penalty for recurrent offences of serious human trafficking involving women and children.²³

III. USA

Midway through the 1970s, over a five-year span, the US Supreme Court issued its first judgment, actively engaged in evaluating whether the death penalty is constitutional. However, in *Furman v. Georgia*²⁴, the Court ruled in 1972 that the Georgia death penalty statute was unconstitutional because it provided the jury unlimited discretion to decide whether the death penalty or life in prison was suitable after a murder conviction. Because the jury's discretion was fully unrestrained, the majority of the court found that the death penalty was imposed in a "freakish and wanton" manner there.

The Court was asked to decide in the landmark case of *Gregg v. Georgia*²⁵ on the general issue of whether the death penalty violates the US Constitution. The Court found that if a jury had received sufficient instructions regarding how to exercise its discretion (including taking sufficient account of specific aggravating and mitigating circumstances such as the nature of the crime and the character of the offender), the death penalty would not be in violation of the US Constitution.

The legislative response to the Supreme Court ruling that death penalty statutes are not per se

²² *Mithu vs. State of Punjab*, 1983 SCR (2) 690.

²³ NLUD, ANNUAL STATISTICS REPORT 2021, Project 39A, <https://www.project39a.com/annual-statistics-page-2021#:~:text=As%20on%2031st%20December%202021,the%20highest%20number%20at%2086>.

²⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

unconstitutional. 35 states (as well as the federal government) either revived or passed death penalty laws in the four years following the 1972 Furman ruling. The majority of states and federal statutes pertaining to the death penalty adopted the US Supreme Court's approach in an effort to restrict, but not entirely eliminate, the jury's discretion by outlining the specific types of murders that would result in a capital prosecution.

The severity of criminal sentences in the US has increased during the last few decades. The past few years have witnessed a "get-tough" strategy that has resulted in striking increases in incarceration rates after a long period of relatively stable use of jail for people found guilty of a crime.

This trend in incarceration rates can be explained by three observations.

First off, the US's violent crime rates have significantly decreased while incarceration rates have increased. The US takes a different strategy than the majority of other industrialised countries, as evidenced by the fact that there are over 700 prisoners for every 100,000 people in the country. Thirdly, and probably most shockingly, the US has not increased its usage of the death penalty along with the amount of incarceration. The United States still executes much fewer people per year than the People's Republic of China. In addition, although while the death penalty is still legal in the majority of the states, the actual number of individuals who have been sentenced to the death penalty and who have actually been executed has significantly decreased to its lowest level in decades.

*Coker v. Georgia*²⁶, Supreme Court ruled that punishment must be proportionate to crime. Otherwise, this punishment violates the Eighth Amendment prohibition on cruel and unusual punishment.

In conducting a proportional analysis, the Supreme Court considers two factors:

Consideration of how the judiciary punishes other offenders.

and consideration of how other jurisdictions punish the same crime.

Twenty-one years later, *Kennedy v. Louisiana*²⁷, his decision in the Coker case categorically notes that penalties for rape of a living child are not available. Only six states in the country allow the death penalty as a punishment for child rape, and the Supreme Court determined that public consensus disproportionately provided the death penalty in these cases.

²⁶ *Coker v. Georgia*, 433 U.S. 584 (1977).

²⁷ *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

*Atkins v. Virginia*²⁸, the Supreme Court held that the execution of offenders with mental/developmental disabilities should not be construed as their cognitive impairment mitigates the seriousness of the offense and, therefore, is disproportionately weighted. The extra harshness of the death penalty ruled that it violated the prohibition against "cruel and unusual punishment."

*Bobby v. Bies*²⁹, ruled that states may conduct hearings to reconsider the intellectual capacity of death row inmates who are determined to be developmentally disabled. This is because, before the *Atkins* Court, states had little incentive to make claims to actively investigate disability.

*Roper v. Simmons*³⁰, Supreme Court outlaws the death penalty for all juvenile offenders. Majority opinions pointed to teens' lack of maturity and sense of responsibility, greater vulnerability to negative influences, and incomplete character development.

The death penalty is now authorized by the federal government and the US military in 27 states. New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), New Hampshire (2019), Colorado (2020) and Virginia (2021) have recently abolished the death penalty. Life imprisonment with no possibility of parole by enacting laws. The Nebraska legislature also abolished the death penalty in 2015, but reinstated it in a state-wide vote in 2016. Additionally, courts in Washington and Delaware recently ruled that the state's death penalty laws are unconstitutional. States across the country will continue to debate its fairness, credibility, and cost of implementation.³¹

Since 2015, 25 states have enacted 66 new laws addressing state capital punishment. Trends include expanding or limiting exacerbating factors, changes in enforcement methods and procedures, changes in court and appeals procedures, changes in law to accommodate litigation outcomes, and complete termination of practice.

Lethal injection is now the primary method of execution in 28 of the 29 states that allow executions. Texas was the first state she used this method in 1982. Electrocution is the primary state, and firing squad and lethal injection are the only states legally recognized as secondary methods of execution.

In addition to South Carolina, 15 other states have legal secondary methods of execution. Laws

²⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁹ *Bobby v. Bies*, 556 U.S. 825 (2009)

³⁰ *Roper v. Simmons*, 543 U.S. 551 (2005).

³¹ John Gramlich, *10 facts about the death penalty in the U.S.*, PEW RESEARCH CENTER, July 19th 2021, <https://www.pewresearch.org/fact-tank/2021/07/19/10-facts-about-the-death-penalty-in-the-u-s/>

in Alabama, Arkansas, Mississippi, New Hampshire, Oklahoma, Tennessee, Utah, and Wyoming prohibit second options when lethal injection is found to be unconstitutional or unavailable. Arizona, Kentucky, Tennessee, and Utah offer alternative options for offenders convicted before lethal injection was introduced. In Alabama, California*, Florida, Missouri, Virginia, and Washington, alternative methods are available if criminals request alternative methods. Secondary methods of execution include electrocution, lethal gas, hanging, nitrogen hypoxia, and firing squad.³²

IV. CHINA

Despite the sensitivity of the issue, the death penalty is now a topic of open debate among legal experts in China, who are now openly considering the possibility of abolishing the death penalty. This discussion is interesting for three reasons. First, it is closely related to a retrospective reading of China's criminal tradition, shedding light on a series of attempts to modernize criminal law over more than a century. It also illustrates the contradictions of current politics, caught between the pervasive weight of Maoist heritage and the constant reliance on extraordinary measures and concerns about legality, considering the characteristics of contemporary Chinese society and culture on a case-by-case basis. In China, as of 2020, there are 42 crimes subject to the death penalty.

Criminals who commit any of these crimes and whose circumstances are particularly serious can be punished with the death penalty. According to Chinese criminal law, the death penalty applies only to criminals who have committed extremely serious crimes.

For offenders sentenced to death, if immediate execution is not required, a two-year probation can be imposed at the same time as the execution of the death penalty. If a district court proposes to sentence a criminal to death, it must report to the Supreme People's Court (SPC) for review and approval. Furthermore, the death penalty may not apply to persons under the age of 18 at the time of commission of the crime or to women who are pregnant at the time of trial.

An Amnesty International investigation has revealed that hundreds of documented capital punishment cases are missing from online national court databases.³³

Chinese databases contain only a fraction of the thousands of death sentences handed down in China each year. The Chinese government has almost complete secrecy about the number of

³² Death Penalty Information, *Authorized Methods by State*, Bureau of Justice Statistics, Capital Punishment 2011, <https://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state>.

³³ Amnesty International, April 11, 2017, <https://www.amnesty.org/en/latest/news/2017/04/china-must-come-clean-about-capital-punishment/>.

people sentenced to death and executed in China. It reflects the fact that we are protecting the land.

China classifies most information related to the death penalty as "state secret," and in any event, virtually all information can be classified as state secret under China's extensive secrecy laws. increase.

Amnesty International has found public testimony that at least 931 people were executed between 2014 and 2016 (only a small fraction of all executions), but only a few of them are included in government databases. of him only 85 people. The database also does not include foreigners sentenced to death for drug-related crimes, despite media reports that at least 11 foreigners have been executed. Many cases related to "terrorism" and drug crimes are also missing.³⁴

The Chinese government has acknowledged being a latecomer in terms of openness and judicial transparency, but continues to actively cover up the true extent of executions.

V. CONCLUSION

It can be concluded that with reference to the above 3 country's data presented above clearly indicates that every country has its own reason and need to continue death penalty as punishment. Majority countries in the world have abolished it, but still majority of the population of the world lives in those countries where death penalty is still applicable. This indicates that Death Penalty is far from being abolished and is a key method by the countries to deter crime in their respective country.

³⁴ Amnesty International, October 18, 2021, <https://www.amnesty.org/en/what-we-do/death-penalty/>.