CAPITAL PUNISHMENT IN INDIAN LEGAL HISTORY

Written by ***Chaitanya Shah***

2nd year BA LLB Student, Maharashtra National Law University, Mumbai

ABSTRACT

The idea of capital punishment still finds its prevalent place in our legal systems all around the world. Its validity has been under question since a long time, the article below aims at providing a historical perspective to the concept and how it emerged in the Indian context. The cross-current of prevalent religious ideas and the following rule of England until India's independence in 1947 have woven the current fabric of the Indian legal system. Therefore, a reference to how these aspects played a part in shaping capital punishment in the Indian legal system forms one of the major parts of the article. The discussion closely focuses on the evolution of capital punishment by tracing its presence in different forms throughout the history of the Indian legal setting. The debate around the validity of capital punishment has witnessed contribution from several standpoints, but there is a need to take the historical point of view into consideration to recognize and explore the punishment's nature and then assess its validity. The article concludes the discussion on the modern setting which ends the reader's journey through the historical evolution of capital punishment in the Indian context while also analysing how these events shaped the modern conception of capital punishment. The analysis is done largely through the texts that document these events and through texts which are the major sources of law in the particular temporal context.

Keywords: Capital Punishment, Historical evolution, Code of Criminal Procedure,

INTRODUCTION

Capital Punishment refers to a type of punishment wherein a person is executed and deprived of his life by law for the commission of a certain crime and after a proper trial. The debate on whether capital punishment should be there or not has a vast discourse in itself and the debate has invited various aspects to it. These aspects include the criminal jurisprudential aspect, the sociological aspect, the human rights aspect etc. The notion behind the validity of capital punishment has seen a change over the years in the legal sphere and this change has been caused by the evolution of human rights and capital punishment being portrayed as an unusually harsh punishment taking away the right to life of the individual. The procedure of execution as a result of capital punishment being awarded has also seen a change over time and the modern methods being used around the world still differ. In India, two methods of execution are used: hanging and shooting. The Code of Criminal Procedure, 1973 ("CrPC") has provisions for the capital punishment to be exercised by the way of hanging the convict by neck until he dies. The way of shooting is prescribed by the legislations that govern the punishments of the army and hence allows the court martial to impose the death sentence for the offences by the way of hanging or shooting. The abolishing of capital punishment is seen to be on the rise where none of the countries in Europe except the Republic of Belarus exercise capital punishment and only fifty-six countries have been known to retain capital punishment whereas it is believed that there has been no society ever to exist that has never practiced capital punishment.

However, the debate of whether capital punishment should be there or not does not form the primary issue of this paper as vast amount of literature is already present in this field. The primary issue of this paper is to analyse the legal history of capital punishment and how this change in the perception of capital punishment came about. The focus of this paper will be the Indian legal history and how capital punishment has emerged, changed and behaved over the years in the Indian legal system till its position today. This analysis will help in understanding concretely the change in perception of capital punishment in a tangible context. Hence, the paper will analyse the discourse of the legal system from the time of Mughal rule to the British rule and further also analyse the post-independence position of law and the courts on capital punishment. To do this, the courts and their pronouncements especially in the British period and the post-independence period will be used as they form the primary mouthpieces of the legal position. The formal methods of justice only developed primarily during the British rule

and much of that system has persisted through the passage of time and therefor period of British rule shall form the primary time period of the paper.

A lot of literature is available in the analysis of capital punishment and its position in law in present India and also a vast amount of literature has concerned itself in the description of the change in overall legal system in the legal system of India that has led to the evolution of the modern day Indian legal system. However, this paper will attempt at analysing the changing Indian legal system in the context of capital punishment and how the overall changes in the laws, the legal systems and the rulers of India have led to the formation of the present position of India in the debate of capital punishment. Therefore, by using the existing literature available on the evolution of Indian legal system and the controversial nature of capital punishment, the paper will analyse capital punishment in the history of Indian legal system.

India has seen some very fundamental changes in its legal system primarily because of change in the rulers ruling the sub-continent. After the first periods of Hindu philosophy, the Mughal invasion and the establishment of its empire saw the primary law being followed was the Islamic law. Post the Mughal empire the British rule saw an entirely new and a more formal legal system being ushered in the Indian society with the establishment of formal structures such as legislative assemblies and courts.

Throughout this historical narrative the Hindu philosophy has seen to persist over the years and the reason for this mainly is the large population that belongs to the Hindu religion. Capital punishment can be seen to be evident in the Hindu society since time immemorial. In the age where crime was seen to be blasphemous and certain crimes against individuals and state were looked at as if they were something very unusual, death penalty was the common norm. the primary crimes that were punished by the way of execution included murder, treason and arson however, these crimes differed from society to society in accordance with the morality of that society. The existence of capital punishment in the earlier times is seen through the writings of famous writers and philosophers like *Kalidasa* and *Kautilya* whereas also through religious texts of Hindu philosophy like the *Mahabharata*. Even in the *Buddhist* age and the primacy give to the doctrine of *Ahimsa*, there can be seen no evidence of an abolition of the death penalty by the rules of that time.

Further, with the establishment of the Mughal empire, the Islamic law was ushered in and the emperor himself adjudged upon the criminal matters in accordance with the doctrines and provisions of Islamic law. The primary doctrine for the purpose of punishment under Islamic

law is that the punishment should be used to deter further crime and suppress criminal activity in society. This is the reason why most of the punishments for the convicts was prescribed to take place at a public space so as to be a spectacle for the society to see and learn. Islam has prescribed death sentence for a premeditated murder. This point is illustrated through verse *179 Sura II* from the *Holy Quran.*

"On wise person here is safety for your lives in death penalty and we hope that you would never violate and would always abide by this law of tranquillity".

The traditional Muslim legal system classified crimes in 3 categories: crimes against god, crimes against sovereign and crimes against individuals. Even the punishments are categorised under 4 headings: *Kisa, Diya, Hadd and Tazeer.* Kisa is mainly retaliation and this concept of punishment being of retaliatory nature has also existed in the Hindu legal system. Diya meant blood money and in this, damages could be awarded to the injured party. Hadd meant specific penalties for specific crimes and its main purpose was to fix the punishments for certain crimes that would be against god or the state. Lastly, Tazeer was the kind of punishment that was awarded by the discretion of the judges and there were no prior guidelines or prescription to be followed, just what the judge had ordered. Though, these classifications and punishments were made for the simplification the legal system and allow swift adjudication, the problem arose when the boundaries between these classifications blurred. For example, the punishment for crim could either be in the form of Kisa or Diya and the discretion was left at the choice of the injured party. This led to the law become very uncertain regarding the punishments, however existence of capital punishment was never seen on the downfall due to this. Instead, the retaliatory nature of punishment became so prevalent that the punishment for murder was always given as death penalty.

This uncertainty in law was what led the British to reform the Islamic criminal law in India and usher in the English doctrines. Many British jurists had expressed their distaste for the Islamic criminal law and Warren Hastings also thought that the *"Mohammedan law is founded on the most tenuous principle and an abhorrence of bloodshed".* The primitive character of Muslim law as prevailing in the regions of Bengal, Bihar and Orrisa at that time were explained by Rankine as "if taken as a whole, very complicated, technical and obscure". This level of uncertainty and difficulty in the law led to a hindrance in the swift dispensation of justice and this is what led the British to reform the system. However, the reform in the criminal law was not made to completely undo the system and create aa new one as this would create a havoc

and would hinder the British from progressing with their colonial and imperial propaganda. What the British did were the reforms of 1772, wherein the substantive law and the provisions of Islamic law were remain untouched, and the reforms were mainly in the civil law which was taken over by the English judges, but the matters of criminal law were left at the hands of the Muslim law and its jurisprudence. However, after certain years of rule, Lod Cornwallis brought in the bold reforms of 1790 in the criminal law in India. One of which was the abolition of the rule in Muslim law that if a murder is committed by ways that do not draw blood from the victim, the convict is not liable for capital punishment. Cornwallis perceived this as against the basic principle of natural justice and contrary to his idea of law which came from the British criminal jurisprudence.

At this juncture it is also important to consider the evolution of capital punishment in the British legal sphere so as to see how the English ideas were applied in India. Capital punishment came about during the early periods of the Anglo-Saxon Era and the primary method used until 1965 when it was abolished was by hanging. This was incorporated in India as being the primary way of execution. However, in the late 13th century, the hanging process in England became highly ritualised by the methods of 'drawing, hanging and quartering'. This involved dragging the convict till the place of execution, hanging the convict till death and then mutilating its limbs and further sometimes also displaying them in public. Burning at the stake also emerged as a method of execution for heresy and then for treason, however hanging primarily replaced burning in the year of 1790. There are many parallels can be drawn to show how capital punishment had a similar trajectory in both these countries up until a point. Apart from the method of execution being the same, in Britain and India, the punishments were of a different nature for some people. For example, for nobles in England, the method of execution was beheading and the hanging and the consequent embowelling. In India too, the punishment for brahmins was rarely of capital punishment and they were mostly given punishments of life imprisonment. Further, in both of these geographies the nature of capital punishment, the method of capital punishment and the crimes for which capital punishment was awarded varied across their landscapes. However, the prevalence of capital punishment was always there. On the other hand, Britain developed something known as the 'Bloody Code' between the late-17th and early-19th century which made more than 200 offences – many of them petty – punishable by death. Statutes introduced between 1688 and 1815 covered primarily property offences, such as pickpocketing, cutting down trees and shoplifting. However, this led to an uproar of criticism for these statutes and the concept of capital punishment itself and at the

same time with the development of human rights and importance being given to the individual, the irreversible nature of death penalty came to be a great point of criticism. With the modernisation of our civilisation and the period of enlightenment bringing the importance of individual in the centre-stage, many campaigners argued that the infliction of pain was interpreted as a corrupt, barbaric and uncivilised society. In 1861, the death penalty was abolished for all crimes except murder; high treason; piracy with violence; and arson in the royal dockyards.[i]

The primary method of applying the English laws in India was done by the courts established by the British. The first of these were the Mayor Courts in the presidencies through the charter of 1726. This charter also opened the gates of the revered privy council or the King-in-council or legally known as the Judicial Committee of the Privy Council as appeals from the mayor's courts lied to the governor-in-council and then the privy council. This led to the application of English laws to Indian subjects. However, the provisions were made to involve the judged of British High courts in India in the adjudication of cases in the privy council the Judicial Committee Act. This is important to note as these judges had some knowledge of the Indian laws and tried to apply them however, most of the doctrines and laws being applied originated from the English jurisprudence. The privy council remained the final appeal court in the India until an act was passed by the Indian legislative assembly in the year 1948. This took place even after the federal court was established under the government of Indian act, 1935. The federal court had very limited jurisdiction and gave only twenty-seven decisions and two advisory opinions over the first four and one-half years.[ii] However, in 1942, the federal court have some very bold statements however its jurisdiction was not in the field of criminal law and the cases of capital punishment directly went to the privy council. The privy council, over the years, had gained a reputation of being very impartial and just and therefore even after 71 years of the abolition of its jurisdiction, its judgements hold great value and have a binding effect on the modern day Indian high courts if a judgement to the contrary does not exist of the supreme court. These judgements also hold great persuasive value in our supreme court even today.

Another way in which the criminal law in respect to capital punishment was established in India was through two major legacies of the Benthamite codification period of 19th century British rule: the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1898[iii]. Around 10 offences under the IPC prescribe capital punishment and this by far remains unamended.

These two legislations marked the very foundation of the current legal system and in 1959 the Law Commission was asked for a report on the review of these two mammoth legislations. The report on the Criminal Procedure Code was submitted in 1969 and the new code was enacted in 1973. The report on the IPC was submitted in 1971 but has remained as a bill ever since. The IPC marked a major way in which the crimes, the punishments and the entire of criminal jurisprudence of England was picked up and applied in India. Lord Macaulay, the primary author of this code, described the IPC as a code of refined English criminal laws. The CrPC, 1898 in its section 367(5) of the CrPC 1898 requires the courts to record reasons where the court decided not to impose a sentence of death:

If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed.

However, in the new CrPC, 1973 several changes were made, notably to Section 354(3):

When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

This marks a great change in position in the Indian legal sphere and marks an abandonment of the English law. Further, the abolition of capital punishment in India has had its attempts since in 1931 when Gaya Prasad Singh introduced a bill in the legislative assembly but was opposed by the British government at that time. The same happened even after independence in 1951 when a bill by Mukund Lai Agrawal was rejected after government opposition in the Lok Sabha. The same happened in 1961 and this time a Law Commission report was asked for and it concluded that after considering all the arguments for abolishing capital punishment and also the arguments for retaining it, in order to maintain the law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.[iv] The major argument is that even the makers of our constitution accepted capital punishment as a valid punishment and this can be seen through the letter and spirit of Article 72 and 161 which provide for the power to the President and the Governor to grant clemency. The Indian judiciary has also not advocated for the abolishing of the capital punishment but what it has done is the creation of the doctrine of the "rarest of the rare" cases in the judicial pronouncement of *Bachan Singh v. State of Punjab.* Further the court also ruled in *Mithu v. State of Punjab*, that mandatory

capital punishment is ultra vires to the constitution. This has led to a severe decrease in the awarding of the punishment in India. As It has been carried out in five instances since 1995 while a total of twenty-six executions have taken place in India since 1991.

In conclusion, capital punishment has had its place in history and its methods, its crimes its perception has changed through the years in the Indian legal history. However, what has remained the same is its existence as in some from or the other capital punishment has been used in every legal system that has existed. This paper had therefore attempted to analyse this history of capital punishment and this provides a new aspect to the debate of whether capital punishment should be abolished. India's stance in the present-day context has been to oppose the abolition as seen by its refusal to be part of the UNGA resolution of a global moratorium on death penalties at numerous instances. However, the judiciary with its creative way of ensuring justice has propounded the doctrine of the "rarest of the rare" case and also with the CrPC imposing a duty on the judgements to record reasons if death penalty is given have led to a stark decrease in the death penalties being exercised.

Moreover, a further scope of this research can be extended to an analysis of the morality aspect of the status of capital punishment. Morality, in the legal sense can be of constitutional morality and societal morality. An analysis on whether there is a gap between these two moralities, and if there exists a gap then which morality is to supersede can be done so as to investigate whether capital punishment can exist in the modern-day Indian society.

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