

UNIT V – CAPITAL PUNISHMENT

- Constitutional validity of capital punishment
- Deterrent effect of capital punishment
- Modes of execution
- Death sentence in U.S.A.
- Capital punishment in India
- Retention of capital punishment
- How far justified
- Retention preferred to abolition
- Suicide as an offence.

- **Introduction –**

- The punishability depends on the degree of culpability of criminal act & the danger posed by it to society as also the depravity of the offender.
- The risk of penalty is the cost of crime which the offender has to pay.
- When the suffering is high enough as compared to the benefit of crime by the offender, it deters a considerable number of people. This is true with crimes punishable with death sentence as well.

Capital Punishment

- Capital punishment or the death penalty is a legal process whereby a person is put to death by the state as a punishment for a crime.
- Capital punishment is a relevant issue for every human society & it constitutes a “dilemma of hidden human divinity versus hubristic death penalty.”
- The concept of a right to life is central to debates on the issues of capital punishment.

Definition of Capital Punishment -

- Capital punishment also called the death penalty, is the execution of a convicted criminal by the state as punishment for crimes known as capital crimes or capital offences.
- **A/c to Encyclopedia Britannica** “Capital punishment, also called death penalty, execution of an offender sentenced to death after conviction by a court of law of a criminal offense. Capital punishment should be distinguished from extrajudicial executions carried out without due process of law.

Deterrent Effect of Capital Punishment –

- The fear of death is perhaps the greatest deterrent which keeps an offender away from criminality.
- Death penalty in case of murder serves as an effective deterrent to remind the murderer about the severity of law towards this heinous crime & certainly helps in reducing the homicides.
- Where there are no mitigating circumstances, in such aggravating situations, law must not hesitate to award the extreme sentence of death to the offenders.
- Certainly, it is a deterrent form of punishment.

- **Modes of Execution of Death Sentence –**

- In olden days, the common modes of inflicting death sentence on the offender were crucifixion, drowning, burning, boiling, beheading, throwing before wild beasts, flaying or skinning off alive, hurling the offender from rock, stoning, strangling, impelling, amputating, shooting by gun or starving him to death, hanging by neck till death etc.
- Presently, the common modes of execution of death sentence which are in vogue in different parts of the world are strangulation, electrocution, guillotine, shooting, gas chamber, hanging, lethal injection etc.

- **1) Electrocutation –**

- The method of execution by Electrocutation consists of passing of heavy charge of electric current.
- It is prevalent in USA, UK, Japan & other European countries.

- **2) Guillotine –**

- The method of Guillotine includes a special machine erected for the execution of criminals.
- It is widely used in France, Scotland & England.

- **3) Shooting -**

- Shooting as a mode of execution was also a popular one. It was used for offences tried in military courts.
- The death by firing squad is the customary mode of execution is prevalent in Russia, China & some eastern European countries.

- **4) Gas Chambers –**

- Recently, in the western countries, the gas chambers are extensively used for the execution of death sentence. The offender is strapped in a chair in a sealed gas chamber into which poisonous fumes of cyanide are injected.
- This method prevailed in USA & was extensively used by Nazi Germany in killing Jews & other unwanted racial minorities.

- **5) Hanging by Neck –**

- The method of hanging of offender till death has been commonly in use in almost all the countries since ages. It is also prevalent in India.

- **6) Lethal Injection –**

- Death sentence by means of lethal injection is practiced in USA, UK, Canada and other developed countries. The injection is administered intravenously with delicate skilled operation.

- **7) Public Hanging –**

- The method of public hanging is extensively used in Iran specifically for the offences of murder, rape and sexual assault.
- The offender of these offences are publicly hanged to a crane used for lifting heavy loads and put to death.

- **Death Sentence in U.S.A. –**
- In modern times, the sentence of death is sparingly used in U.S.A.
- The death penalty is considered as morally & legally just and rarely used.

- The American penologists justify **the retention of capital punishment** for two obvious reasons –
 - I) It is necessary as a threat or warning to deter the potential murderers for protecting the society.
 - II) It is based upon the ideology that a person who kills another has perhaps forfeited his claim for life.
- The retention of death penalty justifies on the ground that, if the murderers are not capitally punished they will remain menace and potential danger to the society.

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- Recent trend in America is to restrict capital punishment **only to the offence of murder & rape**.
- Presently, the execution process has become **more private, painless & quick**. The common modes of inflicting death penalty are **electrocution, hanging, asphyxiation with lethal gas & shooting**.
- Several American states have abolished death penalty.

- **Case - Furman V. The State of Georgia, (1972)**
- **Decision** - Death penalty should be outlawed on the ground that it was an anachronism degrading to human dignity & unnecessary in modern life.
- Some of the subsequent American decisions provide that the death penalty per se is not violative of the constitution.
- However, the abolition or retention of death penalty still remains a contentious social issue & 19 States of US abolished it.

Capital Punishment in Some Countries –

• 1) England –

- In England, during medieval period, death penalty was commonly practiced for the elimination of criminals.
- King Henry VIII used to boil the offenders alive and his daughter Queen Elizabeth was putting the offender to death bit by bit by amputating their body parts. at the end of 18th century, these brutal systems of death sentence were abandoned.
- During the first half of the 19th century, there were nearly 200 crimes which were punishable with death.

- However, **Samuel Romelly** started the crusade against capital punishment. The campaign was taken forward by sir Mackintosh, Bright & Bentham. Among them, Bentham pleaded for the use of capital punishment for the cases of intentional & willful murders.
- Keeping in view the irrevocable & irresistible nature of death sentence and the findings of British Royal Commission (1949), the death penalty was suspended in U.K. for 5 years from 1965 & it was finally abolished in 1969.

- **2) Australia –**

- Death penalty is used in case of murder & rape, though it is sparingly used.
- The principle that life imprisonment is the rule and death sentence an exception is generally followed while deciding offences punishable with death.

- **3) France –**

- France has recently abolished death sentence after a considerable debate and discussion among penologists and law reformers. It was pleaded that it is inconsistent with the modern reformatory penological trend.

- **Arguments in Favour of Death Penalty/ Retentionist's View –**

- 1) The elimination of murderers by execution is fair retribution & serves the ends of justice.
- 2) It shows society's reaction to heinous crimes.
- 3) It is a form of retributive justice as it provides satisfaction & peace of mind to the victims & their relatives or families.
- 4) It is less cruel than a prolonged life imprisonment.

- 5) It prevents overcrowding in prisons & helps in elimination of offenders.
- 6) Punishment should be in proportion of gravity of offence & worst crimes should be severely dealt with for the sake of deterrence & security of the society.
- 7) One who ends somebody's life, forfeits his right to life.
- 8) It is the most effective way to protect society against condemned offenders. This is the reason why death penalty has been constitutionally valid.

- 9) It is less expensive way to execute a convict than to house him in a prison for life.
- 10) It upholds the rule of law because it discourages vigilantism or self-help on the part of victim's family.
- 11) It eradicates the offenders who pose the potential danger to the institution thereby making maintenance of discipline in prisons easy.

- **Arguments Against Death Sentence/Abolitionist's View –**
- 1) Death penalty is killing & all killings are wrong & therefore death sentence is also wrong.
- 2) It is a misconception to think that death penalty has a deterrent effect because hired murderers do take chance with the criminal justice system whatever be the consequences.
- 3) It is a lethal vengeance which brutalises the society.

- 4) It is irreversible & therefore, it may result in great injustice to the person wrongly sentenced to death.
- 5) It is unjust & often discriminatory against poor who cannot afford to defend themselves properly against a homicide charge.
- 6) Keeping a person alive in maximum security solitary confinement without the prospect of bail is a far greater punishment than death.

- 7) It is violative of human rights, particularly Articles 3&5 of UDHR, 1948.
- 8) It denies the possibility of reformation & rehabilitation of the offender.
- 9) It does not always serve the ends of justice because quite a large number of murders are crimes of emotion or impulsiveness.

- **Capital Punishment in India –**
- **History of Capital Punishment –**
- The death sentence has been in consistent practice in India. The ancient law of crime in India provided death sentence for number of offences.
- **Mahabharata** contains references about criminals being sentenced to death by amputation i.e. Vadhadanda.
- **King Dyumatsena** - If murderers were leniently let-off, heinous crimes were bound to multiply.

- **True Ahimsa** lay in execution of unworthy criminals. The distinction between virtue & vice must not be allowed to disappear & the vicious elements must be eliminated from society by sentencing them to death.
- **Manu** also attributed the element of fear & deterrence in capital punishment as an essential phenomenon to control crime.
- The death penalty as a punishment was necessary to restrain people from committing sinful murders.
- The absence of such a deterrent punishment will create a state of anarchy & lawlessness & people will devour each other as the fish do in water, the stronger eating up the weaker.

- **During Mughal period**, death sentence prevailed in its crudest form. They used cruel & brutal methods such as dressing the offender in the buffalo skin & throwing him in the scorching sun, nailing of his body in the wall etc.

- **In British ruling**, the inhumane modes of execution of death sentence were abolished. During early decades of 19th century they introduced death by hanging as the only mode of awarding death punishment.

- Sir James Stephen, the framer of IPC,1860 favoured **inclusion of death sentence for following offences** -
- 1) Waging war against the Government (S.121)
- 2) Abetment of mutiny (S. 132)
- 3) Giving or fabricating false evidence leading to procure one's conviction for capital offence (S.194)
- 4) Murder (S. 302)
- 5) Murder by a convict undergoing a term of life imprisonment (S. 303)

- 6) Abetment of suicide by child or insane person (S.305)
- 7) Attempt to murder by a life convict, if hurt is caused (S. 307)
- 8) Dacoity with murder (S. 396)
- 9) Kidnapping for ransom etc. (S. 364- A)

- **Case - Mithu V. State of Punjab (AIR 1983 SC 473)**
- **The Supreme Court declared S. 303 IPC as unconstitutional as violative of Articles 14, 19 & 21.**

- The Court held that S. 302 IPC is constitutionally valid & S. 303 as invalid for **three main reasons** –
- **I)** Death penalty u/s 302 is an alternative to sentence of life imprisonment whereas u/s 303 it is mandatory.
- **II)** The requirement of special reasons as required u/s 354 (3) CrPC is possible only in case of S. 302 but not in case of S. 303 IPC.
- **III)** The accused is entitled to be heard on the question of sentence u/s 235 (2) CrPC.

- Sec. 235 (2) CrPC applies to s/302 where the person sentenced to death can argue for a lesser punishment i.e. imprisonment for life but it is not possible in case of death sentence u/s 303 IPC because the court has no option to pass any other sentence except the sentence of death.

- **Retention of Capital Punishment preferred to it's Abolition in India –**
- The wave of reformation in the field of criminal justice system has inspired parliamentarians in India to launch a crusade against capital punishment. They have been constantly struggling to repeal the death penalty.
- **In 1949**, the first proposal on abolition of death penalty was tabled in Lok Sabha, but was subsequently withdrawn at the instance of the then Home Minister Sardar Patel.

- In 1958, the matter came up for debate again but it was also not successful.
- In 1962, the subject was accepted for discussion in Rajya Sabha but the general opinion of the House favoured for retention of death penalty. Consequently, the proposal was dropped.
- The retentionist argued that, death sentence used to serve deterrence for hardened & habitual murderers & dangerous criminals whose elimination from the society was inevitable.

- **In 1969**, a Seminar was conducted on capital punishment in India in Delhi. It was attended by number of eminent jurists, judges, academic lawyers, legislators etc. The consensus was in favour of retention of capital punishment in the view of the deteriorating law & order situation in the country.
- **In 1982**, the Convention of International Congress of Criminal Law in New Delhi concluded that the general consensus was clearly in favour of retention of death penalty though it's use may be restricted to 'rarest of rare crimes'.

- **The 42nd Report of Law Commission (1971) –**
- **Suggestions -**
- I) Children below 18 years of age should not be sentenced to death.
- II) It is not necessary to exempt women generally from the death penalty.
- III) An attempt to commit suicide should cease to be an offence in India etc.
- The Law Commission strongly felt the need of retention of capital punishment for those offences as provided under IPC , because it serve as an effective & deterrent mode of punishment.

- In the changed scenario & in keeping with the global trend, the **Law Commission (2015)** strongly recommended for abolition of death penalty as it being arbitrary and undermines human dignity.
- It can be validly argued that, the **‘rarest of rare principle’** followed in India in awarding the death sentence appears to be the correct approach to this intricate problem.

- **Judicial Trend in India –**
- **1) Rajendra Prasad v. State of UP, AIR 1979 SC 916.**
- A life convict killed a person when he was on release.
- The Supreme Court stated the need of liberal construction of recording of special reasons u/s 353 of CrPC so as to limit death sentence only to rare categories of cases such as anti-social offences like hijacking or selling spurious liquor or organised collar crimes etc. & hardened murderers.

- The court noted that, the murders in India are not professionally calculated & planned but actuated on a spur of moment due to sudden provocation, passion, family feud or an alternation which motivates one to go to extreme & commit crime in most of the cases.
- The court held that the **death penalty was violative of Articles 14, 19 & 21 of Indian Constitution.**

- **2) Dalbir Singh V. State of Punjab, AIR 1979 SC 1384.**
- The accused was convicted for quadruple murder & sentenced to death but the Supreme Court reduced it to that of life imprisonment. The dispute was related with the turns for taking irrigation water for agricultural purposes and the earlier provocation came from the deceased's side who had beaten the accused.

- **3) Paras Ram v. State of Punjab, (1973)**

- The Supreme Court refused to grant special leave & dismissed the petition for mitigation of the sentence of death.
- In this case, the appellant was a fanatic devotee of goddess kali who during one Satsang, ceremonially beheaded his 4 year old son & sacrificed it to the Goddess.

- **4) Kuljeet Singh alias Ranga v. UOI, AIR 1981 SC 1572.**
- Known as Chopra Children Murder Case.
- The accused Ranga with Billa committed gruesome murder of two teenage children namely Gita & her brother Sanjay after raping the girl.
- In appeal, the Supreme Court upheld the death sentence on the ground that the appellant had committed murder which was preplanned, cold blooded & brutal in form and therefore deserved no leniency.

- **5) Bachan Singh v. State of Punjab, AIR 1980 SC 898**
- The Supreme Court took a view that death penalty does not serve any social purpose or advance any constitutional value and is totally arbitrary and unreasonable. The principle of rarest of rare was evolved in this case.

- **6) Sushil v. State of Jharkhand, AIR 2004 SC 394**
- The appellant sacrificed his child of nine years before the deity kali by beheading him for his own prosperity. He then carried the severed head in a gunny bag and threw it in the pond.
- The court observed that the collective conscience of the community was shocked by the crime of the offender and on the basis of 'rarest of rare' doctrine, the court upheld the death sentence to the accused.

- The court laid down a **test** –
- I) where the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arise intense and extreme indignation of the community.
- II) where the motive of the murder evinces total depravity & meanness.
- III) where several persons are murdered.
- IV) where victim of murder is an innocent child or helpless woman or an old or infirm person, &
- V) where victim did not contribute to provoke the incident.

- **7) Mohinder Singh V. State of Punjab, AIR 2013 SC 3622.**
- The accused was earlier convicted for rape of his minor daughter in 1999 in the presence of his wife & was sentenced to 12 years rigorous imprisonment. When he was on parole, he killed his wife & daughter whom he had raped.
- The Supreme Court held that, the factual matrix of the case indicated that the possibility of reformation of the accused was not altogether foreclosed & the case did not fall in the category of rarest of rare case. Finally his death sentence was commuted to life imprisonment.

- **8) Priyadarshini Mattoo's Case (2010)**

- The Supreme Court feels some difficulty in making choice between the award of death sentence or life imprisonment, the appropriate course would be to award lesser sentence. The mitigating circumstances in this case were outweighed the aggravating ones and therefore the appellant's death sentence was commuted to life imprisonment.
- In this case, the appellant committed rape and murder of a hapless junior LL.B. college student after her long harassment. He inflicted as many as 19 injuries on her body.

- **9) Mohd Ajmal Mohd Amir Kasab V. State, AIR 2012 SC 3565**
- The appellant was the prime accused in the Bombay Bomb Blast case and was sentenced to death. The Supreme Court upheld the sentence holding that it squarely fell within the rarest of rare category, the accused being a serious threat & menace to the peace and harmony of the society. He was hanged to death.
- **10) Sangeet v. State of Haryana, AIR 2013 SC 447**
- The Supreme Court reiterated that S. 302 of IPC provides for only two punishments- life imprisonment and death penalty.

- **Conclusion –**
- While choosing which one of these two sentences would meet the ends of justice, the aggravating and mitigating circumstances are taken into consideration by the court.
- The aggravating circumstances may be –
 - I) the manner of commission of murder
 - II) the motive of murder
 - III) anti-social or socially abhorrent nature of the crime
 - IV) magnitude of crime
 - V) culpability involved in crime

- The mitigating circumstances may be –
 - I) murder committed due to sudden impulse or provocation
 - II) uncontrollable hatred arising due to sex indulgence
 - III) family feud or personal land or property disputes
 - IV) infidelity of spouse
 - V) inordinate delay in execution of death sentence.

- **Suicide as an Offence –**
- Suicide has not been defined anywhere in the IPC.
- However, ‘suicide’ is the **human act of self-infliction or self-intentional cessation.**
- It is the initiation of an act leading to one’s own death.
- It is synonymous with the destruction of the self by the self or the intentional destruction of one’s self.
- It is killing oneself intentionally so as to extinguish one’s life & to leave this world.
- It is **‘self killing or taking one’s own life’.**

- Suicide as such is no crime under the code.
- It is only attempt to commit suicide that is punishable under this section, i.e., code is attracted only when a person is unsuccessful in committing the suicide.
- If the person succeeds, there is no offender who could be brought within the purview of law.

- **S. 309 – Attempt to commit suicide:** “Whoever attempts to commit suicide and does any act towards the commission of such offence shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.”
- This section is based on the principle that the lives of men are not only valuable to them but also to the State which protects them.

Relevant Cases –

1) Maruti Dubal V. State of Maharashtra,(1987)

- The Bombay High Court held that, the right to live u/A 21 of the Constitution includes also a right not to live or not to be forced to live which in positive terms would mean right to die or end one's life. Therefore, **S. 309 IPC was ultra vires & violative of Art. 14 & 21 of the Constitution.**
- The Court placed reliance on **Olga Tellis's ruling** wherein it was held that right to life also includes right to livelihood.
- **Mercy killing or euthanasia is not suicide & hence would not be covered u/s 309 of IPC.**

- **2) P. Rathinam V. UOI, AIR 1994 SC 1844.**
- The Supreme Court also reiterated the same view as taken by Bombay High Court in Maruti's case & held that suicide is not an offence.
- The Court also pointed out that **self killing is conceptually different from abetting others to kill themselves.**

- **3) Smt Gyan Kaur v. State of Punjab, AIR 1996 SC 946.**
- The Supreme Court overruled its own ruling in Rathinam's case.
- The Court held that, **right to life u/A 21 of Constitution does not include right to die because 'extinction of life' is not included in 'protection of life'.**
- Penalizing for an attempt to commit suicide u/s 309 of IPC is not violative of Art. 21 & is not unconstitutional.

- **Euthanasia in India –**
- Euthanasia literally means ‘Mercy Killing’. It is an act of putting to death painlessly or allowing to die.
- The word ‘euthanasia’ is derived from **the Greek word ‘eu’ and ‘thanatos’ meaning ‘good death’**.
- The word ‘Euthanasia’ was first used by **Francis Bacon in the 17th century** to refer to an easy, painless, happy death, in a medical context, during which it was a physician’s responsibility to alleviate the physical sufferings of the body.

- Euthanasia may be **passive or active**.
- If the respirator is disconnected or medical treatment is stopped to a patient suffering from an incurable ailment, he is sure to die. This is a case of passive euthanasia. It is an **act of omission**.
- On the other hand, if a patient who desires to die is given a lethal injection or a lethal drug and as a consequence of which he dies, it is a case of active euthanasia. It is an **act of commission**.

- The Constitution of India guarantees life with dignity as a fundamental right u/A 21.
- In India, euthanasia is an offence covered u/s 309 of IPC i.e. attempt to suicide.
- If euthanasia is caused by some other person, he will be guilty of the offence of murder or culpable homicide not amounting to murder if the consent of the person seeking euthanasia is obtained.

- **Relevant Cases –**
- **1) Aruna shanbaug v. UOI,**
- The Supreme Court allowed passive euthanasia as valid & lawful but not the active euthanasia, which would continue to be an offence under S. 309, IPC.
- The Court allowed passive euthanasia for permanently vegetative patients or withdrawing life support.
- In this case, a petition was filed on behalf of Aruna, a nurse, seeking permission for mercy killing as she was sexually assaulted by a ward boy of that hospital 37 years ago & was permanently in a vegetative state throughout the period.

- **2) Common Cause v. UOI,**
- The Supreme Court passed a historic judgement-law permitting Passive Euthanasia in the country. This judgment was passed in wake of Pinki Virani's plea to lust highest court in December 2009 under the Constitutional provision of “Next Friend”.
- It is a landmark law which places the power of choice in the hands of the individual, over government, medical or religious control which sees all suffering as “destiny”.

- The Supreme Court specified **two irreversible conditions to permit Passive Euthanasia Law** in its 2011 Law -
 - (I) The brain-dead for whom the ventilator can be switched off
 - (II) Those in a Persistent Vegetative State (PVS).