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An Analysis of Capital Punishment from a Positivist and Naturalist Legal Perspective

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The death penalty or capital punishment is always an extremely controversial topic of discussion, why should a person, who has committed heinous crimes o be considered? At the same time who is the court and the law to take a life away? The debate surrounding capital punishment is always whether it is ok for the judiciary to take a life. The debate can be simplified and viewed from a naturalistic and moralistic perspective and the perspective from which laws are laws and that the morality surrounding the death penalty must be overlooked in its basal sense. This short article will discuss the debate on the death penalty in two ways, using two methods of jurisprudence: the naturalistic and positivistic perspectives. From each of these perspectives, there will be an examination of two main proponents and an understanding of their ideologies, in correlation to the concept of the death penalty that will be laid in place.

Keywords: *death penalty, positivist, naturalist, morality, legislature.*

INTRODUCTION

The basic idea behind the death penalty in India is to aim for reparative justice. An eye for an eye and the consequences of a crime. "The death penalty is the punishment of death used in

some countries for people who have committed very serious crimes."[1] The death penalty in itself is a highly debated topic. Therefore, in the Indian laws and stature death penalty holds a very precarious position. The judiciary vouches for its stay as it is deemed as essential to upholding in India, but the current public of India is opposed to it.[2] With this being said, the court only awards the death penalty in the rarest of rare cases.[3] There are eleven cases and only under these 11 cases can there be the death penalty allowed under Indian law. These crimes include those of dacoity, murder, rape, and eight other such crime where the brutality of the crime and the shock factor of the crime is so large, that society needs its anvils to reset.[4] This is the idea behind which the death penalty was looked into in the eyes of the judiciary.

The death penalty is a consequence of a serious crime. With this context being set, it is important to see the possibility of the death penalty being abolished in many countries, and they only keep and dole out life imprisonments in their records of punishment. In the most recent census that was taken, only 55 countries including India, China, USA still have the death penalty, along with this it has also been found that many European countries do not encourage the death penalty.[5] The reason many countries have started abolition or merely not using the death penalty can be narrowed down to two reasons, the ground of morality that people have been changing and the fact that they rely more on reformative justice systems.

This is where the major schools of thought are being debated upon. The ideology of positivist schools of thought is that it seeks to separate morality and law.[6] In its essence, it does not consider the morality behind the death penalty, rather if the law dictates it the positivist school of law follows. On the diametric opposition exists naturalism, here the firm belief goes onto the fact that law and morality are interconnected and that there cannot be any morality without law and law without morality, this interconnection between law and morality not

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[1] 'Death Penalty' (*Collins*) <www.collinsdictionary.com/dictionary/english/death-penalty> accessed 4 April 2022
[2] Law Commission of India, *Capita Punishment* (Law Com. No. 35(2) 1967) <https://lawcommissionofindia.nic.in/1-50/Report35Vol2.pdf> accessed 26 March 2022
[3] Code of Criminal Procedure, 1973, s 366
[4] *Machhi Singh And Others v The State Of Punjab* (1983), AIR 957
[5] 'Countries With Death Penalty 2022' (*World Population Review*) <https://worldpopulationreview.com/country-rankings/countries-with-death-penalty> accessed 26 March 2022
[6] 'Legal Positivism (*Stanford Encyclopaedia of Philosophy*, 3 January 2003) Plato.stanford.edu, <https://plato.stanford.edu/entries/legal-positivism/> accessed 26 March 2022

only forms the basis for naturalism but also creates a distinction.[7]With this in mind, this essay will focus on both these schools of thought and apply these schools of thought to the concept of the death penalty.

CAPITAL PUNISHMENT IN INDIA

A. History of Capital Punishment

Under the code of criminal procedure, capital punishment is only awarded in the rarest of rare cases. Capital punishments are said to have been formed as a result of the cultural diversity and the need to maintain social order in India. When exploring the history of capital punishment in India, under colonial rule, Indians were always trying to abolish capital punishment and the consequences that come with it, as they felt that capital punishment often goes against the grain of the religious beliefs of the people.[8] Despite the colonial ruler's firm belief that capital punishment is a necessity our forefathers fought for it tooth and nail during the 20th century, however when India gained independence, the situation changed completely and the need for capital punishment arose to curtail people from revolting and lashing out. Today capital punishment is mentioned in several places for the several crimes in the code of criminal procedure, but it occupies a specific spot among certain subsections in the provision.[9]

B. Current Status of Capital Punishment in India

Before understanding these provisions wholly, it is important to look at them from two perspectives. The idea of capital punishment in the Indian state and the rest of the world. Very few countries in today's political climate, still vouch for capital punishment. It is important to note that India is one of the very few counties in the world that uses and still actively pursues it as a form of punishment. The personal status that India has in the world is that of a retentionist. Here this means that someone who retained the death penalty as a viable form of

[7] Deepanshu Ashava, 'Natural Law School of Jurisprudence' (*Law Corner*, 2 February 2020) <https://lawcorner.in/natural-law-school-of-jurisprudence/> accessed 25 March 2022

[8] A.R. Blackshield, 'Capital Punishment in India' (1979) 21 (2) Journal of the Indian Law Institute, 137, 138-139 <http://www.jstor.org/stable/43950631> accessed 25 March 2022

[9] Code of Criminal Procedure, 1973, s 366

punishment still uses it. Here countries like China, and the USA come into play.[10] There are other countries, such as the Netherlands, and Finland, who strongly believe in reformative Justice, therefore they abolish the entire concept of the death penalty.

It is important to note that the Indian judicial system has always repeated the emphasis it has on the rarest of rare cases. The idea has been reiterated in some landmark death penalty cases such as ***EdigaAnamma v State of Andhra Pradesh***, where they mentioned that the death penalty can only be awarded for murder in a very few exceptional cases along with the fact that life imprisonment has and will be the rule.[11] In the case of ***Union of India. Vinay Sharma***,[12] the death penalty, in this case, was purely given due to the shockingly gruesome nature of the rape case and the fact that there required a restructuring of society in this particular case. Despite having several attempts at the death penalty taken down, it is important to understand that people and the judiciary have maintained their take on the death penalty as such for a long time. This is the status of the death penalty in India as well as that when compared to the world.

THE NATURALISTIC PERSPECTIVE OF THE DEATH PENALTY

1. *Naturalist School of Law*

There are several schools of legal jurisprudence, some of them include naturalistic schools, positivist schools as well as feminist schools of jurisprudence. The different schools of jurisprudence all look to address and solve the questions of how to attack a particular case. The school of naturalism claims that morality and law are interconnected. The proponents of this theory mainly are Finnis. He is an important carrier of this theory. He specifically had a grandiose theory that related in-depth to capital punishment. The naturalist perspective puts forth two important jurisprudential perspectives. The first one is that law ultimately is a human practice and the second one is that naturalism accounts for all parts of the law[13] with

[10] ' List of Abolitionist and Retentionist Countries' (*Amnesty International,* 31 December 2008) <https://www.amnesty.org/en/wp-content/uploads/2021/07/act500022009en.pdf> accessed 24 March 2022
[11] *Ediga Anamma v State of Andhra Pradesh* (1974), AIR 799
[12] *Union of India v Vinay Sharma* (2020) SCC OnLine Del 459
[13] Deepanshu Ashava (n 7)

these ideas in mind the aspect of the death penalty will be analysed from the theories put forth by Finnis.

2. *Application of Naturalist Theory to analyse Death Penalty*

Finnis was one of the first and main proponents of the theory. He set out to prove that law and morality are in themselves interconnected disciplines and that morality with law and morality can change with societies and communities, but the fact Is that law is an extension of morality. This perspective of the death penalty will be analysed off on the theory proposed by Finnis. The theory calls for the idea of how laws are made and that for a law and a legal judicial system to be well rounded there needs to be emphasis laid on certain goods of life. These goods are life, knowledge, friendship, play, etc.[14] He further adds that for a society to function smoothly and properly, there needs to be enshrinement of these goods in the laws that are being made and this is how the naturalist perspective of morality is attained by Finnis. [15] He further adds that the best way to enshrine these goods is through the authority of law.

When analysing the statement and the takes of Finnis, it can be considered that he as a naturalist is against the policy as well as the concept of the death penalty. The main reason that one can understand this is that in his enshrinement of good, he specifically refers to the fact that the goods must not have a hierarchy. Even situationally. The idea of the good shaving a hierarchy will only make it resemble the theory of Fuller more. Therefore, if a person A, kills be in a gruesome standard that warrants the death penalty, despite this, A cannot be sentenced as it goes against morality and the lack of the presence of hierarchy.[16] Another reason and the main reason as to why Finnis essentially do not agree with the death penalty all boils down to one thing. That is the fact that if A kills B this does not mean that B must be punished with his life being taken away as life is an important 'good'.[17] This furthers the aspect that one cannot

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[14] Alex E. Wallin, 'John Finnis' natural law theory and a critique of his argument for the incommensurable nature of basic goods' (2012) 35 (1) Campbell Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2481736> accessed 24 March 2022

[15]Thilakarathna, K. A. A. N. 'Naturalistic and Positivistic Debates on Implementing the Capital Punishment' (2019) 10 (1) Lex Warrior: The online Law Journal 26-35, 30 <http://www.lex-warrier.in/wp-content/uploads/2019/02/Naturalistic-and-positivisticdebates-on-implementing-the-capital-punishment.pdf> accessed 24 March 2022

[16] *Ibid,* 34

[17] *Ibid,* 30

and does not have the right to take the life of another person as it is a good that is enshrined in the laws. This is how Finnis proves morality in law and contests the death penalty.

THE LEGAL POSITIVISM ON THE DEATH PENALTY

1. Positivist School of Law

This school of law operates on the medium that morality and law are inherently different and that law and morality as disciplines and ethics must be divided and be strictly divided as so. The theory of legal positivism primarily finds the pinnacle under HLA hart who put for the 'separation theory' whereby he deems that there necessarily must be a separation between law and morality for a society to run and function adequately.[18] The theory that Hart poses, separates law and morals by considering the angle that, just because something is legal this does not deem it moral. By this, he brings himself around and adds that legality, does not have the same flexibility as morality. With these theories and ideas in Mind legal positivism which sought to split the ideas of law and morality apart came into being. Some of the main proponents of this theory include H.L.A Hart whose primary and secondary rule is what the death penalty will be analysed. The other theorist is Kelsen, who put forth the theory of norm hierarchy. It is important that the ideas of those who are in and around the theory that H.L.A proposed can be understood.

2. Application of Legal Positivism on the analysis of the Death Penalty

In Hart's theory, he put forth the idea that there are two kinds of rules based on which laws of this era are formed. Primary rules and secondary rules. The secondary rules themselves develop off of the primary rule and are power conferring in nature as opposed to the duty binding primary rules. The idea of the primary rule is that they form the base and create a duty whilst the secondary rule upon which the power motive is thrust, uses said rule as a basis to steady the rule. The base rules or primary rules were formed in the society that occurred before the law and before legal maxims were set down, on the other hand, the secondary rules

[18] H. L. Hart, 'Positivism and the separation of law and morals' (1958) 71 (4) Harvard Law Review, 593-628; 594 <https://www.jstor.org/stable/1338225> accessed 24 March 2022

themselves came into being after the primary rules were set and in a legal society, they built upon the secondary rules.

In Hart's perspective, an example of a primary rule is that one should not hurt others, the secondary rule can be computed to one should not harm, maim, hurt or destroy the person or body of another. With these rules and mentalities set, one can analyse the take that Hart confers on the death penalty. Hart in his theory brings into light the norm and rule of recognition[19] by that in case a particular rule or norm was recognised in the primary laws, it will be implemented in the secondary laws. Much like the aforementioned example, if there is a primary law that dictates upon that fact that there is a possibility of punishment by death for people who have grievously hurt others, then there is a greater chance that this possibility can be translated into reality by its implementation in the secondary law. If the primary law hints that capital punishment and punitively taking a criminal's life away is a possibility, then it can be implemented in the secondary law, which unavoidably are the laws, norms, and statutes we come across. This way, Hart has managed to subvert the trope of morality coming into the death penalty by bringing in the possibility of an older law existing at its base.

CONCLUSION

This article at its base aims to add to the positivism and naturalism discussion that is always underway regarding the concept of the death penalty. Under Indian law, the death penalty will be debated as there has been a surge of reformative justice policies around the world. Despite both the schools having their drawbacks and their pitfalls, the schools of naturalism and positivism present a unique legal argument. There are different perspectives within the schools as well, yet in this article, the attempt is primarily to bring out the theories posed by classical naturalists and positivists. To conclude, the research puts forth arguments on both sides of the school to present a holistic view of the concept of the death penalty along with some of the eminent theorists and their ideas.

[19] H.L.A Hart & Leslie Green, 'The Concept of Law' (2012) 3 Oxford University Press