



## CAPITAL PUNISHMENT IN INDIA

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### ABSTRACT

The death penalty is a state-sanctioned practice of an offender sentenced to death to deter crime and give justices. Death penalty is given because it is believe that threat to execution influences criminal behaviour more effectively. But there is no relevant data to support this thesis. Death penalty is a monarchical form of punishment and once an execution is done it's irreversible effect. Humans are the most important creature and possess a lot of emotions and attachment. Simply taking their life because of the established law can't be justified. For this reason and the irreversible effect on the society, its validity has been under question since long time. In the world, china has highest no of executions per annum. In India capital punishment is given for the most atrocious and evil crimes. Capital punishment is not new to the modern period it has existence from the ancient time. It is very important to know the evolution of capital punishment over period of time and it's historical view point. Though there are many alternatives are prescribed for death penalty but why it's still in existence! . This research is based on Doctrinal pattern i.e library based analysis. It involves primary and secondary data from books, bare acts, articles, legislation, parliament bills, case laws,. The main object of this research is to interpret capital punishment in India, to knows its constitutional validity, India's stance on capital punishment from a global perspective and if an alternative to capital punishment is possible .Hence, this paper

highlights and stretches out the overall view in death penalty as far as India is concerned.

KEY WORDS - death penalty, capital punishment, constitutional validity.

### I. INTRODUCTION

“Power is of two kinds. One is obtained by the fear of punishment and the other by acts of love. Power based on love is a thousand times more effective and permanent than the one derived from fear of punishment.”

Mahatma Gandhi

Capital punishment in simple words can be said that the life of a person can be taken by the state by following the due procedure of the law for grave offence, that the person has committed. Capital punishment is not new to the contemporary world, it has its existence from the ancient time. The death penalty can be called as a barbaric custom which has no place in modern and enlightened society. There's no evidence suggesting that it prevent or discourage crime and it has always been at risk of doing the ultimate and irreversible injustice to an innocent person. Capital Punishment does not deter criminals. This has been proven again and again, and makes sense as soon as you sit down and think about it.

Criminals don't plan on getting caught after committing a crime. They plan on getting away with it.

According to Justice Wright - a Chief justice of US Supreme court, and a renowned thinker “ what constitutes deterrence is belief in the certainty of being caught and speedily punished, rather than the severity of punishment. The death penalty has been there since time immemorial. It was there as an act



of retribution, as 'an eye for an eye' of the Mosaic law. It was not meant as a means of prevention or a cure, an act of blood lust. It still remains largely that".

So, the question still remains that does it reduce crime? There is no evidence that it does. Neither is there evidence that it doesn't. The vast majority thinks that it should remain, and so it will. Capital punishment has now become a hot topic for debate across the globe. With the society becoming more aware about the human mankind and with development of human rights, the existence of the death penalty is being questioned and there's question on the morality of taking someone's life.

#### A. LITERATURE REVIEW

The research has been carried out based on the information's from various pieces of literatures. The researcher has gone through both primary sources as well as secondary sources for this paper. The primary sources are statutes and precedents. Secondary sources which have helped the researcher include textbooks, various online journals, articles etc.

#### Primary Sources

- **Statute**

For purpose of this paper the researcher has gone through the following Act and amendments passed by the Indian Parliament:

#### 1. The Indian Penal Code, ( Act 45 of 1860), 1860:-

The Indian Penal code of 1860, contains the penal provisions for criminal offences. It

<sup>1</sup> Lethal Lottery, The death penalty in India and people's Union for civil Liberties (2008).

deals with the criminal law. It contains punishment for the offences. Capital punishment in India is a legal penalty for some crimes. Executions are carried by hanging.

#### 2. Code of Criminal Procedure, 1973

In the Code of Criminal Procedure (CrPC), 1898 death penalty was the by default punishment for murder and if judges wanted to give imprisonment instead they have to give reasons for it<sup>1</sup>. In 1955, by an amendment the requirement for the written reason for not imposing death penalty has been removed. Further in 1973 CrPC has been amended again and life imprisonment has become a norm and death penalty to be given for exceptional cases<sup>2</sup>. This important changes showed that the Indian Legislative had a desire to limit the imposition of death penalty. Further CrPC has bifurcated the hearing into two stages with special hearing, one for conviction and another one for sentencing<sup>3</sup>.

#### 3. Cases decided by different courts

For this research paper, the researcher has read multiple cases decided by different courts in India and analysed it.

- **Secondary Sources**

#### 1. Text Book

- a) S.N.Mishra, India Penal Code, ( Central Law Publications, Allahabad, 9th edn., 2014)
- b) K.N. Chandrasekhar Pillai (ed.), R.V.Kelkar's Criminal Procedure, (Eastern Book Company, Lucknow, 6th edn., 2014)
- c) Batuk Lal, The Law Of Evidence, ( Central Law Agency, Allahabad, 21st edn., 2015)

<sup>2</sup> Code of Criminal Procedure - 1973 (section 354).

<sup>3</sup> Indian Penal Code, 1860 (section 252).



### (B) Statement of Problem

Crime is a multifactorial thing, especially crimes that involve violence. It is very difficult to analyse the dominant factor that leads to crime. Till now there are no studies on this aspect rather being guessed everytime. Basically there are four theories of punishment. These are deterrent theory, retributive theory, preventive theory and reformatory theory. Capital punishment is basically based on both deterrence and preventive theories. But is this even working? It's something we need to think of it. Even how to find out what is there in the mind of the Criminal just before he commits it? Deterrence does indeed work, but how much it works and in what cases? It is at best an educated guess can be. Or the bigger question is can we still rely on this philosophy to give capital punishment. Deterrence will work in crimes of profit where at least criminals consider the risk-reward ratio. But how can it work in crimes related to passion and violence where the act is basically irrational and is committed on a momentary impulse? Today in India death penalty is given in certain types of murder or rape cases. Both of these are crimes of passion and violence. And preventive theory does work then why still there is so many cases of heinous crimes rapidly increasing. It is a thing to ponder on that where we are lagging behind.

### (C) Research Hypothesis

1. Although we argue that the deterrent effects of the certainty and severity of punishment on murder depends upon the status of the capital punishment. Death penalty decrease the marginal productivity of the deterrence measures in reducing murder rates.
2. Lack of evidence or no evidence that capital punishment is effective.

3. The question is not whether it should be abolish or not but when it should be abolished.

### (D) Research Methodology

The Research methodology adopted throughout the study is mainly doctrinal. The research method adopted throughout the study can be broadly categorized as analytical and descriptive research.

#### a. Research tool

The researcher has used both the primary and secondary sources for the present research. The primary sources include various acts, statues, and laws. Further, secondary sources include various textbooks, articles, news report etc. In addition to the library resources, the online sources has been heavily used for the research. Most of the documents used for the study is available online.

#### b. General method of analysis

A deductive approach is being used in the present study to analyse the research questions at hand and hence to accomplish the research objectives. Logical deductions are drawn upon from the compilation of all the primary and secondary sources of the present study.

### E. RESEARCH QUESTION

1. To interpret capital punishment in India.
2. To know its constitutional validity.
3. India's stance on capital punishment from a global perspective.
4. If an alternative to capital punishment is possible.
5. The overall view in death penalty as far as India is concerned.

### F. RESEARCH OBJECTIVE

1. To explore the ways of protecting the states through capital punishment.



2. To compare social aspects in developed country and our country after giving death penalty.
3. To know the aims of giving the capital punishment .
4. To find out the various alternatives present of capital punishment .
5. To know the human right related issues and what right states have to take the life of criminals.

## II. DEATH PENALTY

Capital Punishment is also known as death penalty. It is the execution of the the convicted criminal by the state as a punishment for the crime . The word capital is taken from the latin word ‘caput’ which means ‘head’ can be used for the whole individual at a times. Capital punishment is the punishment for the most heinous crime , which requires death of the offender . it is the ultimate corporal punishment in which offender is killed by the state using the laws established .

The Catholic Encyclopaedia, a compilation of Catholic teachings and definitions originally published in 1907, in an entry titled “Capital Punishment,” stated:

*“The infliction by due legal process of the penalty of death as a punishment for crime. The Latins use the word capital (from caput, head) to describe that which related to life, that by which life is endangered. They used the neuter form of this adjective, i.e., capitale, substantively to denominate death, actual or civil, and banishment imposed by public authority in consequence of crime. The idea of capital punishment is of great antiquity and formed a part of the primal concepts of the human race”*

The death penalty is the most controversial punishment in the modern world. Other harsh, physical forms of criminal punishment—referred to as corporal punishment—have generally been eliminated in modern times because it referred as uncivilized and unnecessary. In the majority of countries, contemporary methods of punishment is widely being used such as imprisonment or fine that doesn’t involve the infliction of physical pain. Although imprisonment and fines are universally recognized as necessary to the control of crime, the nations of the world are split on the issue of capital punishment. About 107 nations have been abolished the death penalty around the world and very few (most of which are developing countries) have retain it. Michigan became the first State to abolish the capital punishment in the year 1948, followed by Portugal and Venezuela in 1867. Abolition of the death penalty was also supported by the United Nations during the drafting of Universal Declaration of Human Rights in the year 1948.

## III. INTERNATIONAL SCENARIO AND ITS POSITION

Death penalty is considered as a global issue. Most countries argue against it because it violates human rights. The United Nations plays a great role in protecting the human rights, they recognised that fair trial must be of high standard and it is to be followed by every country, and Procedures to be followed must be just, fair and reasonable. The united nation system including UNODC has opposed death penalty in all possible situations because it is irreversible in nature. Moreover, importance of human rights in criminal justice system has been declared in many international conventions. Some are mentioned below



- Article 5 of the Universal Declaration of Human Rights 1948 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- Article 7 of the International Covenant on Civil and Political Rights (ICCPR) 1966 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

As of now more than 70% world countries have abolished capital punishment. Out of which most of them are developed countries. Still, it continues to exist in few developing countries and under developed countries. In the recent decade their clear trend that the world is moving away from capital punishment.

On the international scenario, countries are divided into four different categories based on their views on the death penalty which is given here in below:

- Abolitionist for all crimes
- Abolitionist for ordinary crimes
- Abolitionist de facto
- Retentionist

The countries that are classified into the four categories as of 2014 are given below<sup>4</sup>.

**1. 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, etc.

**2. 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.

**3. 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, etc.

**4. RETENTIONIST** (Countries that retain the death penalty for ordinary crimes): Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Chad, China, Comoros, the Democratic Republic of the Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Gambia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, etc.

#### **IV. CONSTITUTIONAL VALIDITY OF DEATH PENALTY IN INDIAN**

India is one of the countries in the world which has neither abolished death penalty nor has specified its constitutional validity. Death penalty in India has provision in The Indian Penal Code, 1860 (IPC) is the Public Law and substantive Criminal Law which defines crimes and prescribes punishments. Section 53 of the Indian Penal Code provides for

<sup>4</sup> Amnesty International Report 'Death Sentences and Executions, 2014' pp.64-65.



death sentence and imprisonment for life as alternative punishment. In present situation, capital punishment is recognized as a legal death penalty in India. Capital punishment has been declared to only heinous and serious offences. Indian judiciary declares this, by giving importance to its constitution, where Article 21 of the Indian constitution is “protection of life and personal liberty”. This article says “No person shall be deprived of his life or personal liberty except as according to procedure established by law”. According to this article the right to life has been granted to every citizens of India. There are several crimes under which offenders may be sentenced to death penalty. These includes:-<sup>5</sup>

- Sec 120B of IPC - guilty of being a party to a criminal conspiracy to commit an offence that carries death penalty.
- Sec 121 of IPC- waging war against the government
- Sec 132 - abetment of mutiny when such mutiny is actually committed (mutiny by an officer, sailor, soldier or an airman in army navy or air force)
- Sec 194- giving false evidence against someone with the intention of having him convicted of an offence carrying a death penalty
- Sec 195A- forcing someone to give false evidence against an innocent person and when such person gets convicted and is sentenced to death
- Sec 305 - when a minor, insane or an intoxicated person commits suicide, a person who abets the commission of suicide by such person ...
- Sec 307(2) - attempt to murder by a lifer (person undergoing life imprisonment)
- 364 A- kidnapping for ransom

- 376A, 376 AB, 376 DB, 376 E — these are offences relating to rape and they all carry death penalty

Further Article 14 of Constitution declares "equality before law and equal protection of the laws", which means that no person shall be discriminated against unless the discrimination is required to achieve equality. The concept of equality incorporated in Article. 14 finds its place even in the preamble to the constitution.

Capital punishment is an anti-thesis of someone's right to life. It is very important to understand that there is nothing in the constitution of India that expressly holds Death penalty as unconstitutional. However, there are several provisions which can be used to challenge the constitutionality of death penalty like preamble, Fundamental Rights.

In India very limited category of criminals sentenced with death penalty. It can be seen as a persons life can be taken with due procedure of law after he has extinguished the life of another. The point of whole issue is that right to life is an inherent right and no one can take it or divert is from us, if he does so it can be of the cost of his/her life. It is submitted that these learned jurists probably over look the fact that right to life should be an absolute right. Constitutional validity of the death penalty as given in the Indian Penal Code has been challenged in many cases and so far as the Supreme Court has always upheld that the capital punishment provided in the IPC is constitutionally valid. There are many arguments in favour and against of capital punishment. It can be seen as of two points. First, does death penalty is

<sup>5</sup> Indian Penal Code – (1860).



unconstitutional and cannot be given in any cases or second question is whether the provision given under IPC is violative of the constitutional provisions.

These two aspects of the matter may have to be considered separately so as to have a clear vision on the subject at issue.<sup>6</sup>

- (i) Constitutionality of capital punishment as such.
- (ii) Constitutionality of the provisions of I.P.C. providing for capital punishment.

#### V. LAND MARK CASES DEALING WITH CAPITAL PUNISHMENT IN INDIA

Landmark cases in India have many issues includes granting death penalty as well as testing the validity of death conviction. Moreover, the concept of rarest of rare case came into force in India. Jagmohan Singh v. State of U.P was the first case dealing with the ambiguity of constitutional validity of capital punishment in India. The counsel for the appellant of the case put forward three arguments which invalidate section 302 of the IPC. And judicial approach was carried on and where the council for the appellant put forth the argument that death penalty takes away all the rights guaranteed under Article 19 (1) of the Constitution. The second argument was that the discretion of which capital punishment was awarded did not follow any fixed standard or policy. Thirdly it was argued that this unguided discretion violated Article 14 of the constitution. It was put that in there is no standard provision to follow while giving death penalty or life imprisonment. Two individuals committed

same crime but awarded different punishment. It was also contended that death penalty violates article 14, articles 19 and 21 of the Constitution. So, the procedure is not clear by the law to determine which punishment is more appropriate.

But this argument was rejected by the Supreme Court and the Court held that “in important cases like murder the court always gives a chance to the accused to address the court on the question of death penalty”. The Court also held “deprivation of life is constitutionally permissible provided it is done according to procedure established by Law. The death sentence per se is not unreasonable or not against public interest. The policy of the Law in giving a very wide discretion in the matter of punishment to the Judges has its origin in the impossibility of laying down standard Any attempt to lay down standards as to why in one case there should be more punishment and in the other less punishment would be an impossible task. What is true with regard to punishment imposed for other offences of the Code is equally true in the case of murder punishable under section 302 I.P.C. No formula is possible that would provide a reasonable criterion for infinite variety of circumstances that may affect the gravity of the crime of murder. The impossibility of laying down standards is at the very core of the criminal law as „administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment”<sup>7</sup>. But there was a complete different change in approach in case of RAJENDRA PRASAD VS STATE OF U.P Justice Krishna Iyer, observed that:

<sup>6</sup> “S.R Muralivasan” & “S T. Manasaa”, Death penalty in India: an overview, IJLSI| Volume 1, Issue 2 | ISSN: 2581-9453.

<sup>7</sup> Jagmohan Singh v. State of U. P, AIR 1973 SC 947 Cr. LJ 3301973 SCC 162.



*“.....the humanistic imperative of the Indian Constitution, as paramount to the punitive strategy of the Penal Code, has hardly been explored by the courts in this field of „life or death“ at the hands of the Law. The main focus of our Judgement is on this poignant gap in human rights Jurisprudence within the limits of the Penal Code, impregnated by the Constitution in the Post-Constitutional period section 302, IPC and section 354(3) of the Code of Criminal Procedure have to be read in the human rights of Parts III and IV, further illuminated by the Preamble to the Constitution.”*

He held that capital punishment would not be justified unless it is proved that the protagonist was dangerous to the society. Further held that giving discretion to the judge to make choice between death sentence and life imprisonment on "special reasons" under section 354(3), Cr.P.C., would be violative of Art. 14 which condemn arbitrariness. He pleaded for the abolition of death sentence and retention of it only for punishing "white collar offences". The decision in Jag Mohan Singh's capital punishment is only an exception and the life imprisonment is the rule. The discretion to make choice between the two punishments is left to the judges and not to the executive. And it is judge who will have to make a choice according to the case.

## VI. CONCEPT OF RAREST OF RARE

The concept of rarest of rare cases came into existence in the case of *Bachan Singh v State of Punjab*, one of the landmark cases, which has put the doubt on the validity of the capital punishment. This case has given birth to the "rarest of the rare cases" doctrine and still its ambiguity whether it compatible with article 21 of the Indian constitution. The Supreme Court while holding the validity of the death

penalty expressed his concern over the concept of taking someone's life by using the law established.

Rarest of rare cases is in the sense that when no alternative option has been left. There always an ambiguity in the mind of the judges that on what circumstances, death penalty can be given, offences which come under death penalty, the nature of crime and offence, how far it makes reliable over the punishment? justice for the victim. The court must look out to both the crime and criminal. There are factors need to be looked before sentencing death penalty. These factors are like age mental condition or if the act was done under command of any superior. Justice Bhagwati alone has given the verdict in this case but the issue was that his judgment came only 2 whole years after the verdict had been declared. Because of the some of the important arguments never came in limelight. This concept that he believed clearly violates Article 14 which guarantees equality before the law. Also, it violates Article 19 and 21 as there are no procedural as to when the state has the power to take away the life and personal liberties of a person in such cases. Justice Bhagwa also talks about the brutality and indiscretion of death penalty but also show that statistical data shows us how capital punishment doesn't succeed in attaining the motive of the three penological goals.

In the case of *Mithu v. State of Punjab*, the mandatory death sentence under Section 303 was declared unconstitutional and hence invalid. It was held that any criminal who has given death penalty and still can kill someone is too cold-blooded and beyond reformation, to be allowed to live. The judges in *Mithu's* case held that Section 303 violated the Articles 14 and 20 of the Indian Constitution.



In *Macchi Singh v. State of Punjab*, case where four men were given death penalty by the sessions court and the High Court for shooting down seventeen persons including men, women and children within their homes at night, in five incidents. The motive behind the crime was a family feud. The Supreme Court upheld the death sentence of the three of the four persons. Justice Thakkar, speaking for the court, was impelled to attempt a definition of the 'rarest of rare' case. the same was prescribed.

Justice M.P Thakkar gave some points:<sup>8</sup>

- Manner of Commission of Murder
- Motive for the commission of murder
- Nature of crime
- Magnitude of crime
- The personality victim of the murder

## VII. CONCLUSION

“I can recall the punishment of detention. I can make reparation to the man upon whom I inflict corporal punishment. But once a man is killed, the punishment is beyond recall or reparation. God alone can take life because He alone gives it.”

Every individual must understand the fact that no one has right to take away anyone individuals' life unless it is prescribed by law. The question is effectiveness of death penalty! Death punishment is required to keep the potential convicts at the bay and to make sure that the society's peace should not be harmed. To maintain peace and tranquillity and law and order should not be comprised. The state should not compromise the lives of thousand people just for the life of one convict. Humans can make error,

faults and a small mistake can take the life of an innocent individual. No matter how developed it is. There's always a possibility of error. In 2015 two professors at Indian Statistical Institute published an exhaustive study of the case of *Dhananjoy Chatterjee v. State of West Bengal*<sup>24</sup> in which the accused was given death penalty. The publication<sup>25</sup> expounded the wrongs in the police investigation and claimed that the convict was innocent. In 2009 the Hon'ble Supreme Court has admitted its mistake of judgment that sentenced 15 people to capital punishment. High court has cited that “1000 culprits can escape, but, one innocent person should not be punished.” In 2012, 14 retired Supreme Court judges, wrote to the president regarding the same<sup>26</sup>. In 2019, the Hon'ble Supreme Court admitted mistake again in another case and commuted a death sentence to an innocent guy. I believe that capital punishment is against the moral value of the humanity. Taking someone's life is not a joke. In spite of capital punishment harsh alternative punishment must be given, be rigorous life imprisonment or life imprisonment, as ordained in the case of *Swamy Shraddhananda v. State of Karnataka*<sup>28</sup> where the same was prescribed. The 262nd report of the National Law Commission also recommended the abolishment of the capital punishment other than terrorism. But the researcher believes that parliament should abolish for one and all. On the land of Mahatma Gandhi and Gautam Buddha, the land that is known for it stand on non-violence, capital punishment is stain on its glorious past. Hence it is necessary to abolish this primitive and barbaric age-old

<sup>8</sup> “S.R Muralivasan” & “S T. Manasaa”, Death penalty in India: an overview, IJLSI| Volume 1, Issue 2 | ISSN: 2581-9453.



practice and accustom selves to the growing changes evident internationally.

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