

LAW RELATING TO CAPITAL PUNISHMENT IN INDIA: PROS AND CONS

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Abstract: The crime rates in the world we live in today are constantly increasing. The number of murders, abductions, rapes, terrorist attacks, and child abuse cases has increased. According to the World Population Review of 2022, the overall crime rate in India is 44.43. In such a situation, the legislation and penalties to deter and prevent crime must be put into effect immediately. Punishment, which is one of the main pillars of contemporary civilisation, is the use of coercion to uphold the law of the land. The state must punish offenders in order to maintain law and order in society. There was no specific law or order that governed these crimes in the past, and the severity of the punishment was entirely up to the king of the state. Over time, modern theories of punishment emerged, and the state was given voluntary control over our rights and the power to maintain law and order. The punishments range from fines and imprisonment to death and life imprisonment. 'Capital punishment', also known as the 'death penalty', is the harshest or most severe punishment of the present time.

Keywords: Capital Punishment, Death Penalty, Crimes, Justice, Punishment, Indian Penal Code, 1860

1.0 Introduction

India is a country that believes in the reformatory theory of law, where the principle 'innocent until proven guilty' is followed. The death penalty is the highest degree of punishment awarded to any convicted person. Thus, awarding the death sentence is not a common phenomenon in India. In India, there were 144 total death sentences awarded in 2021.

In Indian cases like the Nirbhaya Rape case, the court imposed the death penalty for the most serious or heinous crimes, capital punishment, as this case fell in the category of rarest of the rare. Executions for such crimes are done via hanging, but it is pertinent to note that it is a rarely administered phenomenon in India. The Indian Penal Code and the Code of Criminal Procedure describe the death penalty. Since its inception, the death penalty has been used in India, albeit its application has decreased over time.

2.0 Meaning of Capital Punishment

The term 'capital' is derived from the Latin word '*capitalis*', which means concerning the head. Thus, to be subjected to capital punishment means to lose one's head.

Capital punishment, also known as the death penalty, is the execution of a criminal who has been sentenced to death by a court of law for a serious felony. It is known as the most severe form of punishment. It serves as punishment for the most heinous, grievous, and abhorrent crimes against humanity. Even though the definition and scope of such crimes vary by nation, state, and age, the death penalty has always been the result of such crimes.

According to Encyclopaedia Britannica, the death penalty is the execution of a person who has been given a death sentence after being found guilty of a crime by a court.

Evolution of capital punishment in India

India retained the 1861 Penal Code at independence in 1947, which provided for the death penalty for murder. The idea of abolishing the death penalty expressed by several members of the Constituent Assembly during the drafting of the Indian Constitution between 1947 and 1949, but no such provision was incorporated in the Constitution. In the next two decades, to abolish the death penalty, private members bills were introduced in both Lok Sabha and Rajya Sabha, but none of them were adopted. It was estimated that between 1950 and 1980, there were 3000 to 4000 executions. It is more difficult to measure the number of people sentenced to death and executed between 1980 and the mid-1990s. It is estimated that two or three people were hanged annually. In the 1980 **Bachan Singh judgment**, the Supreme Court ruled that the death penalty should only be used in the "rarest of rare" cases, but it is not clear what defines the rarest of the rare.

3.0 Position in India

India opposed a UN resolution calling for a moratorium on the death penalty because it goes against the Indian statutory legislation as well as against each country's sovereign right to establish its own legal system.

In India, it is awarded for the most serious of crimes. It is awarded for heinousness and grievous crimes. **Article 21** says that no person shall be deprived of 'right to life' which is promised to every citizen in India. In India, various offences such as criminal conspiracy, murder, war against the government, abetment of mutiny, dacoity with murder, and anti-terrorism are punishable with death sentences under Indian Penal Code (IPC). The president has the power to grant mercy in a case of death penalty. *Bachan Singh vs State of Punjab*, the Court held that capital punishment will only be given in rarest of rare cases.

Only the president has the power to confer mercy in cases related to death sentences. Once a convict has been sentenced to death in a case by the Sessions Court, it must be confirmed by the High Court. If the appeal to the Supreme Court made by the convict fails then he may submit a 'mercy petition' to the President of India. Detailed instructions on the procedure are to be followed by States to deal with petitions for mercy from or on behalf of death-sentenced convicts. Appeals to the Supreme Court and requests for special leave to appeal to that court by such convicts shall be set out by the Ministry of Home Affairs. Under **Article 72** of the Constitution of India, the President has the power to grant pardon, reprieves, respites or remissions of punishment or to suspend, remit or reduce the sentence of any person who has been convicted of an offence.

4.0 Constitutional Validity of Death Penalty in India

India is one of the nations that have neither totally removed the death penalty provision nor passed legislation outlining its legality. The validity of the death penalty has been contested on several occasions since the Indian Constitution was established through Supreme Court petitions. The constitutional validity of the death penalty was challenged from time to time in various ways. The Supreme Court's five-judge bench unanimously maintained the death penalty's constitutionality in *Jagmohan Singh v. State of Uttar Pradesh*, concluding that it did not violate Articles 14, 19, or 21. In this case, the validity of the death sentence was contested on the grounds that it contravened Articles 19 and 21 because no procedure was provided. It was argued that the process outlined by Cr. P.C. was limited to finding guilt alone and did not include the imposition of a death sentence. The Supreme Court held that "the choice of death sentence is done by the procedure established by law". It was noted that the judge decides between a death sentence and a life sentence based on the circumstances, facts, and type of crime presented during the trial.

5.0 Death Penalty Crimes

The crimes and offences which are punishable by death are:

5.1 Aggravated murder: It is punishable by death in accordance with **Section 302** of the Indian Penal Code, 1860. In *Bachan Singh v. State of Punjab*, the Court of India held that the death penalty is constitutional only when applied as an exceptional penalty in "the rarest of the rare" cases.

5.2 Other offences resulting in death: In the Indian Penal Code, the death penalty is given to a person who commits murder during an armed robbery. The abduction of the victim for the money is punishable with the death penalty if the victim is killed. Organized crime involvement, if it leads to death, is punishable by death. Committing or helping to commit Sati to another person is also punishable by the death penalty.

5.3 Terrorism-related offences not resulting in death: Muhammad Afzal was executed by hanging on 9th February 2013. He was executed of the December 2001 attack on India's parliament in which nine people got killed by five gunmen armed with guns and explosives. Mohammad Ajmal Amir Qasab, the only surviving shooter in 2008, was hanged on 21 November 2012 for various crimes, including waging war on India, murder and terrorist acts. The use of any special category of explosive to cause an explosion that could endanger life or cause serious damage to property is punishable by the death penalty.

5.4 Rape not resulting in death: A person who inflicts injury in a sexual assault which results in death or is left in a "persistent vegetative state" may be punished with death under the Criminal Law Act, 2013.

Gang rapes are punishable with death penalties. These changes were imposed after medical student Jyoti Singh Pandey's 2012 gang rape and death in New Delhi.

According to the 2018 Criminal Law Ordinance, a person who is liable for raping a girl who is below 12 years of age may be sentenced to death or sent to prison for 20 years along with fine. The 2018 amendment also specifies the

death penalty or life imprisonment for a girl's gang rape under the age of 12. These changes to criminal law followed an eight-year-old girl's rape and murder, Asifa Bano, who triggered a lot of political unrest in Jammu and Kashmir State and across the country.

5.5 Kidnapping not resulting in death: According to **Section 364A** of Indian Penal Code, 1860, kidnapping not resulting in death is an offence punishable by death. If any person detaining anybody and threatens to kill him or harm him during which the kidnapper's act actually resulted in the death of the victim, will be liable under this section.

5.6 Drug trafficking not resulting in death: If a person convicted of a commission or attempt to commit, abet, or criminal conspiracy to commit any of a range of drug trafficking offences, or financing of certain types and amounts of narcotic and psychotropic substances, he or she can be sentenced to death.

5.7 Treason: The death penalty is given to any person who is waging or trying to wage war against the government and helping Navy, Army, or Air Force officers, soldiers, or members to commit a mutiny.

5.8 Military offences not resulting in death: Abetment of assault, mutiny or attempting to seduce airman, soldier, the sailor from his duty and various other offences are punishable by death if committed by a member of the Army or Navy or Air Force.

5.9 Other offences not resulting in death: If a person is a party to criminal conspiracy to commit a capital offence is punishable by death.

Attempts to kill those sentenced to life imprisonment are punishable by death if the victim is harmed by the attempt.

If a person provides false evidence with the knowledge that it can lead to the conviction of a person belonging to scheduled caste or tribe for committing a capital offence on the basis of such evidence, will be punished with the death penalty if it results in the conviction and execution of an innocent person.

6.0 Category of Offenders Exempted from Capital Punishment

6.1 Minors: According to Indian laws, a person who committed a crime while still a minor, that is, before the age of 18, cannot be executed. The lawmakers decided to include minors in the group of offenders exempted from the death penalty because they thought that anyone who hasn't reached adulthood has room for improvement and might be able to learn from his mistakes by being given the right environment and education. In addition, our laws provide a separate law known as the Juvenile Justice Act (2015), that is only implemented in situations involving minors. This is beneficial because it gives criminals a chance to improve.

6.2 Pregnant woman: Pregnant women were added to the list of criminals who are excluded from the death penalty. According to Section 416 of the CrPC, if the high court finds that a woman who has been awarded the death sentence is pregnant then such sentence can be postponed or commuted to life imprisonment. The reasoning behind this is that hanging a pregnant woman kills both the pregnant woman and the child in her womb. The unborn child in the woman's womb has not committed any wrongdoing and does not deserve to die for what the woman did. Pregnant women may thus fall under the category of criminals who are excluded from the death penalty.

6.3 Intellectually disabled: According to the law, anyone who is intellectually disabled or challenged may fall under the category of offenders who are exempted from the death penalty. If a person committing a serious crime is unable to comprehend the nature and consequences of their actions, this is sometimes referred to as having an intellectual disability. Because of their intellectual disability, someone with a criminal record might not be aware of the specifics of their crime. Consequently, the intellectually disabled were added to the list of criminals who were exempted from the death penalty by lawmakers.

7.0 Execution Procedure in India

7.1 Hanging: Section 354(5) of the CrPC specifies that hanging is the method of execution in the civilian court system and that it is the only method permitted in India for the execution of a civilian person.

7.2 Shooting: Another execution method used in India is shooting. A firing squad member may execute a convict who has been given the death penalty. The only organisations capable of executing the death penalty in this manner are the Army, Air Force, and Navy. According to the Army Act of 1950, the army court-martial system recognises both hanging and shooting as legitimate methods of execution.

8.0 Case Laws

- In *Jagmohan v. State of U.P.*, the Supreme Court held that **Articles 14, 19 and 21** did not violate the death penalty. The judge was said to make the choice between the death penalty and life imprisonment based on circumstances, facts, and the nature of the crime recorded during the trial. The decision to award the death penalty was therefore made in accordance with the procedure laid down by law as required by Article 21.
- But, in *Rajendra Prasad v. State of U.P.*, the judge held that unless it was shown that the criminal was dangerous to society, capital punishment would not be justified. The learned judge pleads that the death penalty is abolished and said that it should be retained only for “**white collar crimes**”. It was also held that the death penalty for the murder offence awarded pursuant to I.P.C. **Section 302** did not violate the constitution’s basic feature.
- But, in *Bachan Singh, v. State of Punjab*, explained that, in accordance with an equitable, fair, and reasonable procedure laid down by law, the constitutional bench of the Supreme Court has recognized Article 21 the State’s right to deprive a person of his life. In addition, there was no violation of the basic character of the Constitution by the death penalty for the murder offence granted under **Section 302** I.P.C.

9.0 Arguments: In Favour of the Death Penalty

9.1 Retribution: One of the key principles of retribution is that people should get what they deserve in proportion to the severity of their crime.

This argument states that real justice requires people to suffer for their wrongdoing and to suffer in a way appropriate for the crime.

Each criminal should get what their crime deserves and in the case of a murder, criminal deserves death.

9.2 Deterrence: Capital punishment is often justified with the argument that by executing convicted murderers, we will deter would-be murderers from killing people.

It is often argued that the death penalty provides **closure for victims' families**.

There are many examples of persons condemned to death taking the opportunity of the time before execution to repent, express remorse, and very often experience profound **spiritual rehabilitation**.

Thomas Aquinas noted that by accepting the punishment of death, the offender was able to expiate his evil deeds and so escape punishment in the next life. It demonstrates that the death penalty can lead to some forms of rehabilitation.

10.0 Arguments: Against the Death Penalty

- The **statistical evidence doesn't confirm that deterrence works**.
- Some of those executed may not have been capable of being deterred because of mental illness or defect.
- Some capital crimes are committed in such an emotional state that the perpetrator did not think about the possible consequences.
- Death has been prescribed in rape cases since 2013 (Sec. 376A of IPC), still, rapes continue to happen and in fact, the brutality of rapes has increased manifold. This compels one to think of the death penalty is an effective deterrent to crime.

10.1 Execution of the Innocent: The most common argument against capital punishment is that sooner or later, innocent people may get killed, because of mistakes or flaws in the justice system.

- According to **Amnesty International:** As long as human justice remains fallible, the risk of executing the innocent can never be eliminated.
- People who oppose Capital punishment are of the view that retribution is immoral, and it is just a **sanitised form of vengeance**.
- Death has been abolished as a form of punishment in most of the developed countries.
- The UN Secretary General's report on the death penalty presented to the Human Rights Council held that “**some 170 States have abolished** or introduced a moratorium on the death penalty either in law or in practice, or have suspended executions for more than 10 years”.
- Capital punishment doesn't rehabilitate the prisoner and return them to society.

11.0 Conclusion

The issue of the capital discipline is a debatable one some people find it unconstitutional while some are in favour of it. After being batted and studied from a prolonged time still no conclusion has been drawn out of it.

Capital punishment or death penalty have always been a content of contradiction not only in India but also in several advanced countries. In India, the motive for the punishment is rested on two aspects; the primary being that the lawbreaker should suffer for the pain and injury he/ she casted upon the victim and another motive is to discourage others from committing wrongs by sanctioning corrections

Different people from the different sections has reflected their point on the capital discipline and there have been numerous debates regarding the indigenous validity of it but still any final decision has not been made in the issue.

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