

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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CAPITAL PUNISHMENT IN INDIA; A SOCIO-LEGAL ANALYSIS

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Chapter I: ABSTRACT

The incidences of crime are rapidly increasing in India including severe offences like, rape, sexual abuse of children, murders, terrorism and the like. Such incidences are increasingly creating an environment of fear, lack of freedom, lack of trust in law and order and terror in the minds of the human being. According to famous Jurists HART in his work Concept of Law “So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce.

Death penalty should be given where the aggravating factors of the crime committed should be more and the mitigating factors should be negligible and it complies within the aspect of the doctrine of rarest of the rare cases. Aggravating factors are circumstances which may lead to harsher punishments. It increases the severity of punishment. Mitigating factors are the circumstances which reduces the severity of the punishments for the defendant. Death penalty is used an example to deter the happening of the crimes again and again. India does not use it very often because it gives the offenders the chance of reformation, but some offences like heinous rape, waging war against state, the offender should be given death penalty because of the act committed. Rape like offence is so generalized that people divide it into ‘normal rape’ and ‘heinous rape’, any kind of rape should not be committed and to put a stop at it, the convicts of rape should be given capital punishment.

The punishment given and the offence committed should be proportionate. The offence which committed is so dangerous then the punishment should be grave enough to deter the happening of the crime again in the future.

Keywords; capital punishment, social legal perspective, India, Constitution, Rarest of rare, Punishment.

Chapter II: INTRODUCTION

“Power is of two kinds. One is obtained by 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 the fear of punishment.”

-Mahatma Gandhi

Capital punishment has been used since time immemorial. The very first death penalty case was registered in Eighteenth Century B.C in the Code of the King Hammurabi of Babylon, which ordered death penalty for twenty-five different crimes. Capital Punishment which is also known as death penalty, is given as a punishment for wrongdoing. It is imposed on crimes which are very heinous in nature because it is the most extreme form of punishment. The magnitude of such crimes is distinguished for each country according to their established law. Even the oldest pre-historic cultures, as determined by historical sources employed techniques of penalising the wrongdoers, such as executing them for the crimes they had committed. Ancient Greece frequently applied death penalty for the crimes like rape, murder, treason, arson, while the Romans did the same for different set of crimes. Furthermore, the majority of world's religions have at some point approved of it.

Like, many countries in world allows capital punishment for almost all the crimes such as treason, murder etc., however, in India it is only permitted in cases falling under rarest of the rare cases. In the west as well, capital punishment existed since 1630, for crimes like murder, burglary, rape and so on, whereas, capital punishment in India is not a new concept. It was stated in Yagnavalkya which states the goal of punishment is to steer the criminal in the right direction. Vadhanda, the Sanskrit term is included as one of the type of punishments.

This doctrine is followed in India because of the theory of reformation, in which it believes that every criminal can be reformed. As the law evolves and time changes, this topic became quite debatable because of change of minds. With the developments, people are aware of their rights and power, about what they deserve and not and also about what is right and wrong. India is a country which has neither completely abolished or banned capital punishment nor accepted it or has created laws specifying about it. Though, capital punishment being one of the punishments given in Bhartiya Naya Sanhita (formally Indian Penal Code) but it has been challenged over the time in various cases but the Supreme Court has upheld the legitimacy of

it but it is only given in the rarest of rare scenarios. Capital Punishment in India is given under circumstances such as murder, dacoity accompanied with murder, abetment of suicide of a minor or insane or intoxicated person and cases of rape resulting in murder.

Constitutional Validity of Capital Punishment

Capital Punishment or death penalty is a process where the offenders are put to death because of some heinous crimes they commit. It is a judicial decree that someone is punished and the actual process is called the execution

The capital punishment in India was enforce by the British by Indian Penal Code, 1860 and Code of Criminal Procedure, 1898. Since, ancient times death penalty has generally been used as a punishment to give to the wrongdoers, Indian criminal laws holds that everyone should get a chance to change.

Also according to the Constitution of India every human being has the right to life; it guarantees everyone with their fundamental rights which includes right to life, if it gives a sentence to death, it will be invasive of the individual's right to life or fundamental rights.

Article 21 of the of the Indian Constitution, "Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except in accordance with procedure established by law." ¹This article states that every individual has the right to life and personal liberty and if India gives death penalty it will contradicting with this article and will be void. It will be ironic if the courts give death penalty where "Right to Life" is a fundamental right. In India suicide was also illegal but now it has been removed and have been added Mental Health. Though there are few cases where the Supreme Court give capital punishment and it ruled the doctrine of "rarest of rare cases" and ruled that it does not go against the constitution.

Article 14 of the Constitution states that everyone is granted "equality before the law and equal protection of the laws," ² " meaning everyone is equal before the law and there will be no discrimination against anyone. If the courts give death sentence it will intervene with this section because death penalty is directly quashing the person fundamental right.

¹ Indian Constitution 1950. art. 21

² Indian Constitution 1950. art. 14

Rarest of the rare doctrine cases

1. One of the most discussed capital punishment cases is **Bachan Singh v. State of Punjab**³, 1980 SC 898. The Supreme Court in this case, affirmed the constitutional validity of capital punishment under Section 302 of Indian Penal Code⁴. The court also presided that it did not intervene or violates the fundamental rights, i.e., Article 14 and Article 21 of the Indian Constitution. When imposing the death sentences, the Supreme Court also established the doctrine of “rarest of the rare case”. Capital Punishment will only be given in those cases which are rarest of the rare scenario and this doctrine was entrenched in this case.

The bench while ruling said that “Judges are never bloodthirsty”. The judges in this case ruled that capital punishment is constitutionally valid and reasonable. They took references of the case, **Jagmohan Singh v State of Uttar Pradesh and Rajendra Prasad v State of Uttar Pradesh**⁵ which emphasized the importances of the ruling in giving the discretion. It was also added that Section 354(3)⁶ only allows the court to give punishment of death penalty or life imprisonment for “special reasons” in extraordinary circumstances.

This case has a dissenting opinion of Bhagwati J, stating that death sentence is an infringement of Article 14 and Article 21 of the Indian Constitution. It cannot be used as a substitute for life in Section 302 of Indian Penal Code, 1860⁷. He had this opinion because there is no legislative direction regarding the death penalty and under which circumstances the person’s life can be taken.

2. One of the most debated cases, **Machi Singh v. State of Punjab**⁸, 1983 AIR SC 957, plays a crucial role in evaluation of the death penalty. The court sought to determine which offence will be defined as “rarest of the rare cases”. "The rarest of rare dictum serves as a guideline in enforcing Section 354(3)⁹ and establishes the policy that life imprisonment is the rule and death punishment is an exception," the Supreme Court ruled in its judgement. Any criminal serving life imprisonment is eligible for the death penalty under Section 303 of the Indian Penal Code.¹⁰

³ Bachan Singh v. State of Punjab, AIR 1980 SC 898

⁴ Indian Penal Code, 1860, § 302, Acts of Parliament

⁵ Rajendra Prasad v State of Uttar Pradesh, AIR 1979 SC 916

⁶ Indian Penal Code, 1860, § 354(3), Acts of Parliament

⁷ Supra 4

⁸ Machi Singh v. State of Punjab, AIR 1983 SC 957

⁹ Supra 6

¹⁰ Indian Penal Code, 1860, § 303, Acts of Parliament

The Supreme Court established the following guidelines to determine the cases of “rarest of the rare” scenarios in this case:

- 1. Manner of commission of the crime** - The court ruled that the crime committed could be asserted as “rarest of the rare” if the way in which it was committed is so heinous and demonic that it caused a fear in public at large and the people get outraged. Few instances of the doctrine were given such as, it will be deemed as the “rarest of the rare case” if the victim’s body is touched and mangled with, if the victim’s house is set on fire with the intention of burning him alive, or where the victim is subjected to atrocious abuse or torture.
- 2. Motive for the commission of the crime** – The doctrine will also apply when the crime is committed with the intent to betray the country, or when assassins are employed to murder the victim, or when a cold-blooded conspiracy is devised to murder the victim.
- 3. Magnitude of the crime** - When the crime committed is done in huge percentage, for instance, homicide of every member of a family or a community is an example of large-scale crime.
- 4. Socially obscene nature of crime** - When the crime committed is such in nature which is humanly abominated, like murdering someone who is a part of community’s marginalized populations, burning the bride if the demands for dowry are not met or killing the woman if the husband wishes to remarry.
- 5. Victim of the crime** – The crime will come under the doctrine of “rarest of the rare case” if the victim was a young child who could not have provided the accused any reason to commit the offence, If the victim was an elderly person or a helpless woman, if the victim had mental illness or if the victim was a person was known by the people as well as admired by them.

There are some theories of punishment which the Indian Criminal Justice System follows each theory with a different objective and purpose. Some of the theories often overlap one another but they help the legal system while passing the sentencing guidelines and keeps in check the balance between the rights of individuals as well as the society’s interests, and also to bring justice to the victim of the crime and give the victim justice which he deserves.

Chapter III: THEORIES OF PUNISHMENT

1. Deterrent Theory:

This theory is basically imposed to abstain the wrongdoing. The main motive of this theory is to avert the wrong doers from committing any crime or committing the same offence further. Its objective is to create a fear in the society, to set an example in the society by punishing the offenders. It simply means that if an individual is committing a crime he will be severely punished resulting in the awareness in the minds of the people about the punishment for certain kinds of crime committed.

Capital Punishment is used as a deterrence in the society. It is the highest form of punishment given to criminal offenders to set an example and to prevent such crimes to happen again.

2. Reformatory Theory:

The motive of this theory is to reform the criminals into better human beings. It focuses on reforming the criminals and rehabilitating them. It deals with the underlying reasons of the crime and helps the convicts to readjust into the society. The implementation of the idea of reformatory justice can be observed in the [Juvenile Justice \(Care and Protection of Children\) Act, 2015¹¹](#). Probation, Parole and so on are all types of reformatory punishments.

India follows this theory because it believes in rehabilitating and educating the person and right to life with dignity is a fundamental right and also this is a more humanitarian approach and gives a chance for the criminals to re-define themselves.

3. Retributive Theory:

This theory basically means an eye for an eye, a tooth for a tooth. This theory is based on the motive of revenge. The criminal must be held liable for the crime that he has committed. Here, the proportionality comes into the picture, this theory states that the punishment given should be proportional to the offence committed. It quenches the thirst of moral demands for justice by giving punishments which corresponds to the crime.

4. Preventive Theory:

The main aim of this theory is to stop the criminals from committing the crime again in the future. It is based on the notion that society can be protected by taking away the

¹¹ Juvenile Justice (Care and Protection of Children) Act, 2015

criminals or detaching them from the society. It strongly believes that society will be improves if the crimes are stopped from committing. Disablement is achieved through various ways; by putting the offender in jail or by reformation. Though, the most used is incarceration.

5. Restorative Theory:

This theory focuses on repairing the society from the harm which has been caused. This theory is victim-centred. It heals the victims by giving them voice to speak. Here, the criminals are given an opportunity to make amends. Plea bargaining, probation, and parole are all perfect examples of the application of the theory of restorative punishment.

Chapter IV: Indias's Position on Capital Punishment

Indian cases demonstrate an interplay amongst all the theories of punishment, showing their relevance and significance in the legal context. As society evolves so does the implementation and the interpretation of these theories in the India's Criminal Justice System, reflecting a commitment to balance justice with rehabilitation and social justice.

India mainly follows the theory of reformation because its basic idea is to reform the offenders by looking at several factors or reasons which made them commit the crime such as psychological, social, environmental and so on. The prisons in India as well are built that way to reform the offenders so that they can be a better person and protect the society, such example may be of Tihar Jail where prisoners are prisoned and are reformed. It is the largest jail of the country. It is also used because the Constitution of India believes that right to life is everyone's fundamental right and no one can take that right from an individual. Punishment of reformation is more restorative or rehabilitative than any other theories of punishment. The main purpose of this theory is to make the offender realise his crime and to transform him rather just to penalize him.

Article 72 of the Indian Constitution ¹²grants the power to President to grant pardons, reprieves, remits or commute the sentence of any criminal as well as **Article 161 of the Indian Constitution** ¹³which grants the same power to the Governor. President can also grant pardons

¹² Indian Constitution 1950. art. 72

¹³ Indian Constitution 1950. art. 161

in the case of Death Penalty by a court martial. This shows that the justice system wants no individual to lose their fundamental right or prevent any miscarriage of justice in any cases.

However, capital punishment is prevalent in India and is given in rarest of rare cases. For example, Ajmal Amir Kasab was awarded death penalty because of his nature of offence. The terrorist attack was so heinous that it involved mass murder of innocent individuals, involvement in terrorism and attack against the state and he showed no sign of remorse but still he was given a chance of fair trial and then he was executed. Capital Punishment is a severe form of punishment and is given in extremely serious cases which involves great harm to the society. It is a tool to deal with the most serious breaches of law and the rights of the people also ensuring public safety. It also is so necessary to apply this theory so cautiously because it involves the most precious right- Right to Life, so its implementation requires extreme diligence.

Analysis of Precedents

The case of **Jagmohan Singh v. State of U.P**¹⁴ is the very first case dealing with the constitutional legality of the death penalty. In this case, the Supreme Court upheld the legitimacy of capital punishment under Section 302¹⁵ of Indian Penal Code, 1860. This case challenges the validity of capital punishment and contended that it was a violation of Article 14 and 21 of the Indian Constitution.

In the landmark case, **Mithu v State of Punjab**¹⁶, the Supreme Court repealed Section 303 of Indian Penal Code, 1860¹⁷ as a violation of Article 14 and Article 21 of the Indian Constitution. Under section 303 of the Indian Penal Code¹⁸ death penalty is one of the punishments for the offence which was seen as a violation of fundamental rights by the court, it also ruled that death penalty and life imprisonment are not mandatory punishments to give and thus, repealed section 303 of Indian Penal Code, 1860.¹⁹

On the analysis of the above-mentioned precedents, in today's scenario, capital punishment

¹⁴ Jagmohan Singh v. State of U.P, AIR 1973 SC 947

¹⁵ Supra 4

¹⁶ Mithu v State of Punjab, AIR 1983 SC 473

¹⁷ Supra 10

¹⁸ Supra 10

¹⁹ Supra 10

does not uphold the validity of Article 14 and 21 of the Indian Constitution because in India, capital punishment is not followed thoroughly and in its strict sense and is only given in cases which are extraordinary in nature. Death Penalty should not be made a punishment for every offence committed which violates the fundamental right of a citizen but it should be given for heinous crimes and the court should cut no slack. There are many cases which are relatively more heinous in nature and yet courts are reluctant in pronouncing capital punishment.

The case of **Vinay Sharma v Union of India** ²⁰ also famously recognized as **the Nirbhaya Case**, was a shocker to everyone. The court upheld the doctrine of rarest of the rare and gave capital punishment to the offenders who were major and not to the offender who was a juvenile. Justice R Banumati not only agreed to the exceptional nature of the crime but also stated that the fact that the crime required deeper social reform. She believed that the crime was worthy of the punishment which was given.

The juvenile here, was not given the punishment of death penalty though he was turning 18 in a few months but still was convicted as a juvenile. He was tried separately in the Juvenile Justice Care System and was sentenced to three years of imprisonment. Though he was the main reason of the girl's death, his actions were the primarily result of her death and he was the most violent one amongst the lot but still was not sentenced to death. This shows that capital punishment is the last resort of punishment in India.

India did not pass this judgement of death penalty with an ease; it took several years to pass the judgement for this case and it did not want to infringe with anyone's fundamental right and this can be found in relevance with the judgment in the case of Jagmohan Singh v State of UP where it contended that death penalty is a violation of fundamental rights. After looking at the mitigating factors and aggravating factors the court decided to pass the judgement of death penalty. The judgement was an absolute necessity and it gave justice to the victim involved.

In the recent case of **RG Kar v State of West Bengal**, the victim was found in a seminar hall semi-naked and unconscious with severe injuries inflicted. The autopsy later revealed that she had been sexually assaulted and raped brutally. Initially the case was being handled by the Kolkata Police but later it was transferred to the CBI. The court in this case passed the

²⁰ Vinay Sharma v Union of India, AIR 2020 SC 1451

judgement of life imprisonment to the accused.

Court did not pass the judgement of death penalty because it did not fall under the doctrine of “rarest of rare” case which is bizarre after looking at the condition of the victim whose pelvis was broken. Still life time imprisonment was only given instead of death penalty. The victim in this case died because of the injuries inflicted upon her. The Supreme Court took Suo Motu cognizance on this case and expressed its views on the conditions and safety of the doctors in the government hospitals.

The case has been appealed by the CBI for a harsher punishment to the convict and not just life imprisonment.

Reformation of hardcore criminals who deliberately commits a crime after pre-mediation may be a great notion, but the chances of him not being reformed should also be taken into account. It is generally perceived that passing death sentence will create a fear and in some cases for example, planned murders, dacoity, rape along with murder will act as a deterrent.

There is plethora of cases in India where the families have taken the law in their own hands by killing the offenders where they believed they were denied justice by the law; it is important to keep in mind the retributive aspect and the urge of common men to seek justice²¹.

The law should be robust and should consider all the possibilities keeping in mind the fundamental right of every individual be it the victim or the convict and giving justice should be at the realm.

Chapter V: CONCLUSION

With the references provided in this article, a substantive conclusion can be made out that capital punishment should be given in the cases where there is no chance of reformation and on the grounds of morality. There is a need to make law more stringent and effective and the implementation should be done well. The heinous crimes which are committed should be stopped at the root only – “kill the baby in its crib” to protect the society and the people inhabiting it, death penalty should be given to those offenders who committed heinous offences

²¹ Justice J. Eswara Prasad, Death Sentence as Effective Deterrent, Vol. 46, No. 3, Journal of the Indian Law Institute, 5-6, 2004

like murder, treason, genocide. These are offences which creates a deterrent at large and the criminals should not be given a chance of reformation because these are crimes are serious offences and punishment is necessary in these crimes. The death penalty is not explicitly prohibited by the **Eight Amendment of the Indian Constitution** which restricts cruelty and unusual punishment. This proves that in certain situations capital punishment is a requirement and should be given to protect the society from further damage.

Community Service, reformation of the criminals will only complement the society when it will help the public living in it. Once it starts to create panic or fear {in such crimes) capital punishment should be awarded to the criminals committing those crimes to safeguard the security of the society.

Socially, people have accepted the punishment of death penalty because everyone in the society wants justice. For example, when Nirbhaya happened everyone in the society wanted the convicts to be hanged because of their actions which was so brutal. The new R.G Kar case also boiled everyone's blood and everyone wanted justice for the girl by hanging the rapists. However, though socially capital punishment is accepted legally it cannot be enforced. It does not have the impediment to give death penalty to all the offenders because of the theory it follows- reformation. India believes to reform the convicts.

“This year marked the highest number of prisoners sent to death row in nearly 20 years, with 561 prisoners, a report has revealed. As per the report, there has been a 45.71% increase in the population of inmates sent to death row since 2015.

In 2023, 120 death sentences were imposed by trial courts across the country, and 561 prisoners were living on death row at the end of the year,” a report - ‘Death Penalty in India: Annual Statistics Report’, published by Project 39A said.

“This marks the largest death row population in nearly two decades. Only one death sentence was confirmed in 2023, making it the year with the lowest rate of death sentence confirmations by the appellate courts since 2000. The year 2023 also witnesses a 45.71% increase in the death row population since 2015,” the report stated.

“Project 39A is a criminal justice research and legal aid program at the National Law University

in Delhi, and is inspired by Article 39-A of the Indian Constitution, which promotes equal justice and equal opportunity by removing economic and social barriers.”²²

Thus, people have acknowledged the concept of death penalty and are willingly ready to see the convicts hanged to death but legally it is not possible because of the Constitution which follows ‘equality before law’ and ‘equal protection of law’, legally it creates an impediment to enforce it.



²² Saptarshi Das, 561 inmates on death row in India, highest in 20 years: Report, Hindustan Times, Feb 11, 2024, 05:47 PM IST,

<https://www.bing.com/ck/a?!&&p=dffa2e8ab0a51f9be77028a5d3722caacafda2f44d21a05222f91111022d4da0JmltdHM9MTcyOTU1NTIwMA&ptn=3&ver=2&hsh=4&fclid=08607953-4b21-61f8-0d0d-6b1d4aba6090&psq=death+penalty+in+india+annual+statistics+2023&u=a1aHR0cHM6Ly93d3cuaGluZHVzdGFudGltZXMuY29tL2luZGhlLW5ld3MvNTYxLWlubWF0ZXMTb24tZGVhdGgtcm93LWluLWluZGhlLWlpZ2hlc3QtaW4tMjAteWVhcnMtcnVwb3J0LTEwMTcwNzY1Mzg3ODAzNy5odG1sIzpz-OnRleHQ9JUUYJTgwJTIDSW4IMjAyMDIzJTJDJTlWMTIwJTlWZGVhdGglMjBzZW50ZW5jZXMIIMjB3ZXJlJTlwaW1wb3NIWCUyMGJ5LEFubnVhbCUyMFBvY2pY3QIMjAzOUeIMjBzYWlkLg&ntb=1>