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# **DEATH PENALTY: A CRITICAL ANALYSIS**

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## **ABSTRACT:**

*The recent executions and increased crime rates over the decades have necessitated implementation of harsh executions in order to bring humanity to its civilized integer. However, with the increased impetus on human rights, emphasis on abolishing of capital punishment has been made. This research paper delves into the nuanced relationship between capital punishments and their fundamental rights, exploring the webwork from commission of the atrocity to conviction of punishment, which may suffice the fate of execution or clemency from the Executive branch. Through the comprehensive case studies and tabular representations, this study will corroborate the multifaceted impact and repercussions of capital punishments in premedieval to dynamic times.*

*This paper shelves into the key recommendations from the latest Law Commission Report, which critically analyses the application and efficacy of the death penalty in the contemporary legal landscape. Furthermore, the study scrutinizes statutory provisions governing the execution of the death penalty across different jurisdictions, comparing procedural safeguards, methods of execution, and the roles of judicial discretion. Special attention is given to the clemency powers vested in executive authorities, examining their legal basis, procedural intricacies, and the impact of such powers on death row inmates. Case studies and statistical data are utilized to underscore the disparities and challenges inherent in the current system. A comparative study is undertaken to understand the application and abolition trends of the death penalty under international law, incorporating relevant treaties, conventions, and the jurisprudence of international courts. It enlightens precocious delay in pronouncing death sentence which forces the prisoners through mental pain and agony and praying for death sentence themselves. Such lags are violative of the fundamental rights enshrined under the Constitution and forebear the liability of violating Rule of Law. The qualitative and quantitative representations contain empirical data on the jurisdiction of death penalty in India in comparison to the world economies and suggests reforms on development of death penalty legislation in India.*

*Keywords: Capital punishment, Death<sup>1</sup> Penalty, fundamental rights, Clemency powers, international law, Execution of death penalty*

## INTRODUCTION

*"The death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in this country is, Do we deserve to kill?"*

— Bryan Stevenson

Death Penalty is the conviction of an accused by law wherein the person is executed and deprived of his life for committing a brutal crime against the society. Such process of penalization is also known as Capital Punishment. The term Capital originates from the Latin term 'capitalist' i.e. regarding the head. The concept of death penalty finds prevalence in the legal system all around the world. Reigning from the 18<sup>th</sup> century BC, the laws relating to such capital punishment were first codified by King Hammurabi of Babylon on stone tablets. Later these punishments have been found in the Hittite Code of 14<sup>th</sup> century BC, the Draconian Code of Athens and the 12 tablets of Roman Tables wherein death penalty was executed by burning, beheading, crucifixion etc.<sup>1</sup> In India, the prevalent system of awarding death penalty is by shooting or hanging. According to the Criminal Code of Procedure, hanging is the mode of execution of death penalty in the civilian court system whereas the Army Act, 1950 provides for executing death penalty both by shooting and hanging in the court-martial system. These punishments are not offered for petty offences, but only in situations where the capital crime is detestable or heinous in nature, gruesomely evil against humanity such as rape, child rape, murder, terrorism, waging war with government etc. With the advent of Human Rights Organizations and International Laws, the penalization of death penalty encompasses the aspects of criminal jurisprudence, sociology as well as the human rights. Some reformists view it as a *deterrent and retributive* mode of punishment, while abolitionists have widely critiqued this method to be violative of the fundamental rights. The UN Charter of Rights has declared death penalty as a crime against society and requested its member states to abolish such arbitrary form of punishment. Currently, 56 countries worldwide are patrons of death penalty, 106 countries have abolished it from the root, whereas 8 nations have removed capital punishment for ordinary offenses except special circumstances. China has about 1000 death penalty every year and is the leading country for such punishment. India also enshrines the

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<sup>1</sup> <https://www.findlaw.com/criminal/criminal-procedure/history-of-death-penalty-laws.html#:~:text=The%20Hammurabi%20Code%2C%20which%20was,more%20lightly%20in%20most%20countries.> (last viewed on 12.06.2024)

punishment of death penalty in 'rarest of rare cases' and holds its stance on the Moratorium of death penalty in US General Assembly and Human Rights Convention that death penalty is a statutory provision of Indian criminal jurisprudence and is awarded only at exceptional circumstances.

#### Objectives of the Research

- To know about capital punishment
- To understand the historical perspective of capital punishment
- To figure the constitutional validity of death penalty
- To find the relevance of death penalty with respect to different world jurisdictions and international organizations

## **HISTORICAL EVOLUTION OF DEATH PENALTY IN INDIA**

### **ANCIENT ERA**

Socrates and Jesus were the most renowned convicts to be awarded death penalty in the ancient period. The Bible prescribes death penalty for murder and commission of crimes including kidnapping and witchcraft. With the rise and fall of dynasties, India seemed to adhere to one common method of administering justice to the offenders i.e. the death penalty. The existence of capital punishment in the ancient times has been prevalent from the writings of Kalidasa and Kautilya and also through the religious texts of Hindu philosophy like Mahabharata. Such specific form of punishment was provided for specific offenses like

- i. undermining the state
- ii. murder of Brahmana
- iii. drinking sura by a dwija
- iv. infidelity with master etc.

The Mauryan empire followed the retributive principle of eye for an eye, hand for a hand. The later dynasties followed the principle of cutting of the head, stampede by the elephant and other such brutal forms of execution. The advent of Mughals made death penalty to be provided for premeditated murder, claiming it to be a deterrent form of punishment.

### **PRE-INDEPENDENCE**

By 1500, England awarded death penalty for major felonies like murder, larceny, rape and arson. In

1700s, Parliament enacted nuanced list of capital offences whereby hundreds of convicts were being put to death each year. The advent of British empire led to codification of the criminal jurisprudences and establishment of Federal courts and Privy Councils to overpower the Indian laws. The two major legacies of the Benthamite codification period of 19th century British rule: the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1898, which codified the punishment of death penalty in India. The 1898 Code directed the judges to provide reasons for non-conferment of death sentence in case of serious offences as per Section 367(5). Attempts of abolishment of capital punishment took place in pre-independent India by Gaya Prasad Singh which was severely criticized and rejected by the British Government.

### POST COLONIAL PERIOD

A remarkable development in the Indian legal sphere took place after independence when Section 367(3) of the Code of Criminal Procedure, 1973 was changed to '*When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence*' restricting the judiciary from arbitrary use of its power. After several attempts, 35<sup>th</sup> Law Commission Report directed on retaining capital punishment on Indian Criminal system.

### THEORIES OF PUNISHMENT

*"Punishment is not for revenge, but to lessen crime and reform the criminal."*

— Elizabeth Fry There are mainly 4 theories on conferment of punishments to convicts

#### 1. Deterrent Theory

This theory was developed by Jeremy Bentham, which postulates that a potential offender refrains from committing the same crime again if the previous punishment was severe and swift. It creates a fear in the mind of the potential offenders from committing similar crime or the same criminal from committing the crime once again. The consequences of the crime act as a lesson to the society and leads the offenders to weight the potential cost and benefits of their actions. In this theory, there should be a nexus between the crime committed and punishment given keeping in mind the gravity of crime and effect on the general public. In *State of H.P.v. Nirmala Devi (2017)*<sup>i</sup>, Court had emphasised on the importance of punishment to deter serious offences, however this theory does not give option to reform the offender.

## 2. Retributive Theory

This theory is based on the popular proverbs 'an eye for an eye' and 'tit for tat'. The primary motive of this theory is to endure a pain to the offender which is proportionate to the moral culpability and harm inflicted on the victim by the offender. It emphasizes the moral obligation of holding offenders liable for their action and instating justice to the victims and the society. This theory is the most stringent and harsh of all, acting as societal revenge, balancing justice and reformation of societal norms. This theory has been condemned later in 262<sup>nd</sup> Report of Law Commission for its harsh nature.<sup>2</sup>

## 3. Reformatory Theory

This theory is based on the principle of reforming or correcting the criminal behaviour of the offender where he is given proper time and chance for reforming themselves. It portrays that a punishment is given to offender for his own benefit.

Reformatory theory supports criminology, which states that every crime is a disease and every criminal has a mild form of insanity. It is necessary to treat them in hospitals and homes rather than punishing them in prisons. It also supports criminal psychology, criminal sociology, focussing on changing the socio-economic environment for prevention of crimes and psychoanalysis whereby education and psychological treatment is given to offenders to reduce crimes. Such superior theory is against capital punishment and aims to turn the offender to a law-abiding citizen. International organisations worldwide are adopting this humanistic approach of punishment and supporting the establishment of correctional homes, juvenile schools etc. the case of *Dharambir v. State of Uttar Pradesh (1979)*<sup>ii</sup> first initiated the concept of open jails, thereby introduced reformation of criminals.

## 4. Preventive Theory

This theory is also known as disablement theory whereby the accused is eliminated from the society to prevent repetition of the crime again. This theory protects the society from anti-social order by giving death punishment or life imprisonment to the offenders. Such theory prevents other offenders from committing the crime. In *Sunil Batra v. Delhi Administration (1978)*<sup>iii</sup>, the court upheld that if a prisoner is violent or dangerous, he should be put in solitary confinement to

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<sup>2</sup> <https://thelawbrigade.com/wp-content/uploads/2020/06/Ishaan-IJLDAI.pdf> (last viewed on 12.06.2024)

segregate them from the society, thus following the retributive theory of punishment.

Indian Criminal Justice is a combination of deterrent and reformatory theories of punishment. While the punishments are imposed to deter the offenders from commission of the crime again, simultaneously the offenders are also to be given opportunity for reformation.

## CONSTITUTIONALITY OF CAPITAL PUNISHMENT IN INDIA

The death penalty is globally contested for violation of the right to life, equality, humanity against the offenders etc. In India, the constitutional validity of the penalty was first challenged in the Supreme Court in the case of **Jagmohan Singh v. State of UP<sup>iv</sup>**. Here, the petitioner challenged the provisions of death penalty claiming them to be violative of Article 14, 19 and 21 of the Constitution of India due to the lack of procedure for its application. The five-judge bench at the Supreme Court upheld that the procedure established by Code of Criminal Procedure was to confine guilt and not award death penalty. The procedure established by the Code is to allow the discretion of the judge whether to award death penalty or life imprisonment depending on the facts, circumstances during the nature of trial. Hence, it is not violative of Article 14, 19 and 21 of the Constitution and the said procedure can give the best possible relief to the victim.

In 1979 in the case of **Rajendra Prasad v. State of UP<sup>v</sup>**, Justice Krishna Iyer empathetically upheld death penalty to be unconstitutional and violative of Article 14, 19 and 21 of the Constitution. He emphasized on the ground that death penalty would not be justified unless the accused continues to be an ongoing serious risk to the social security. The power conferred to the judge to decide between life imprisonment and death penalty by Article 354(3) of CrPc was arbitrary and violated Article 14 of the Constitution. He also pleaded for abolishment of death penalty except for white collar crimes. However, Justice Sen held that the abolishment of death penalty or curtailment of power under Section 302 IPC or 354(3) CrPc was a duty of the Parliament and not judiciary. But in 1980, Supreme Court upheld the constitutional validity of death penalty.

The Supreme Court of India overruled the judgement of Rajendra Prasad's case in the case of **Bachan Singh v. State of Punjab<sup>vi</sup>** and interpreted the amendment made in Section 354 of the Crpc, 1973. A new amendment was introduced wherein the judge is required to give 'special reasons' while death penalty was imposed to an offender instead of life imprisonment. With the

establishment of 'rarest of rare' case doctrine, the Supreme Court conferred that imprisonment of life is a rule and death penalty is an exception. Only in exceptionally grave circumstances, death penalty should be awarded to the victim, when punishment of life imprisonment seems insufficient. Such punishment should depend on the circumstances of crime and criminal. The majority of the judges held Section 302 IPC to be constitutional and not violative of Article 21 of the Constitution of India since : i) death penalty was provided as an alternative to the sentence of life imprisonment ii)'special reasons' have to be stated under Section 354 CrPc to remove arbitrariness iii) accused is given an opportunity to be heard on the sentence given to him under 235(2) CrPc. Such principles are validity has been reaffirmed by various cases of the Hon'ble Supreme Court.

In **Sher Singh v. State of Punjab<sup>vii</sup>**, SUPREME COURT reiterated that capital punishment was constitutional and permissible as per the principles laid down in the Bachchan Singh's case, which is to be treated as law of the land.

In **Mithu Singh v State of Punjab (1983)<sup>viii</sup>**, it was held that mandatory death penalty under Section 303 IPC was unconstitutional and violative of Article 14 and 21 of the Constitution. The Court iterated that no rational justification can be made for punishment between murderers who are under life imprisonment and murders who are not under life imprisonment. A standardized mandatory sentence in case offender one fails to give a safe guideline to the accused disregarding the facts and circumstances of the case and the offender.

### **RAREST OF RARE CASE DOCTRINE**

In the Indian criminal jurisprudence, the rarest of rare case doctrine is the yardstick for awarding death penalty. The Supreme Court formulates the rules of 'rarest of rare' doctrine in the case of Bachchan Singh whereby death penalty is to be provided to unusual offences which comes as a shock a prudent man of the society, thereby not sufficing any alternative punishment. They held that a balance sheet of the *aggravating and mitigating* circumstances should be prepared for the offence, giving importance to the mitigating circumstances before rendering death penalty to the accused.

In the case of **Machhi Singh v. State of Punjab<sup>ix</sup>**, the Court attempted to lay down the circumstances which constitute the rarest of rare case. In such instances, collective conscience of

the society is so shocked that it expects the judicial authority to award death penalty to the convict ignoring the reverence for life. The 3-judge constitutional bench held the community may enter into such sentiment under the following instances-

- I) Manner of commission of crime – When the murder is committed in a brutal, diabolical, dastardly manner that arouses extreme indignation of the public i.e.
  - a) when the victim's house is set ablaze to burn the residents alive
  - b) when the victim is subjected to inhuman torture or cruelty that results in their death
  - c) when the victim's body is dismembered into pieces
- II) Motive of crime – When the murder is committed for total depravity and immoral motive i.e.
  - a) Hired killer murdering for monetary gain
  - b) Cold-blooded murder in a thoughtful manner to inherit the property or gain control of it
- III) Socially despicable nature of the crime – Assassinating a member of the Schedule Caste, Schedule Tribe or minority for arousing social wrath. Bride burning, dowry death or remarriage for monetary extraction are also included in such cases.
- IV) Magnitude of crime: when large number of members of a family, case or community are executed, the magnitude of the crime is serious to award death penalty.
- V) Personality of the victim: If the victim is an infant, helpless or old women, public figure killed for political reasons, then such murder comes under the purview of serious offences against the society.

Certain mitigating circumstances were also highlighted which would favour the accused i.e. offence committed in extreme emotional disturbance, minority of accused, offence committed under intimidation of another person, offence committed by mentally defective person or possibility of reformation of accused.

## **LAW COMMISSION REPORTS ON DEATH PENALTY IN INDIA 35TH REPORT**

There has been an increasing discussion regarding the retainment or abolition of death penalty in India. On the 35<sup>th</sup> Report by the Law Commission of India, the issue of abolishment of death penalty was raised. It suggested the conduction of an experiment whereby the death penalty should be abolished primarily and later re-introduced after completion of the experiment. However, after an analysis of the possibilities of increase in crime rate and terrors to the society, it suggested on continuation of capital punishment in the same manner as it persisted.

## 187<sup>TH</sup> REPORT

This report of the Law Commission was presented in 2003 which encompassed incidental matters and mode of execution of death penalty. However, it failed to address the constitutionality of death penalty in the contemporary context. Their consultation paper “Mode of Execution of Death Sentence and Incidental Matters” portrayed comparisons between hanging, intravenous lethal injection and shooting. The Committee admitted that asphyxia or strangulation is the primary cause of slow and agonizing death in hanging. It weighed the process of hanging against international standards, modern criminological theories and developing standards of human decency and thereby suggested addition of lethal injection in hanging. The Report stated that the process of execution should be humane, swift and unambiguous and must render dignity. In order to follow these rules, prison manuals have outlined a specific process for execution of death row convicts.

## 262<sup>ND</sup> REPORT

The Law Commission of India published its 262<sup>nd</sup> Report on August 2015. The Committee was headed by Justice A.P. Shah and focused on the death penalties in India. It suggested *that death penalty does not serve the penological goal of deterrence any more than life imprisonment*. Further life imprisonment for heinous crimes is itself granted after 30-60 years stay in prison in many cases. Retribution should not be ultimate goal of punishment.<sup>3</sup>

In the light of constitutional development from giving reason for life imprisonment in 1955 to giving special reason for awarding death penalty in 1973 to rarest of rare case doctrine in 1980, death penalty in India has gained right direction. Focusing on the broad aspects of Right to life, the Report aimed to develop Indian criminal jurisprudence towards emancipation and established the requirement of connection between the individual and state, thereby abolishing death penalty. Since certain legislators feared about curtailment of national security in abolishing capital punishment for terrorism and war crimes, the Commission suggested abolition of death penalty for all crimes except death penalty. It hoped such abolition would be sooner and irreversible.

The Report also recommended implementation police reforms, witness protection schemes, and victim compensation schemes by the government for focusing on rehabilitation than retribution

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<sup>3</sup> [https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081\\_670.pdf](https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081_670.pdf) (last viewed on 12.06.2024)

of prisoners.<sup>4</sup>

## LEGAL FRAMEWORK GOVERNING DEATH PENALTY IN INDIA

In India, capital punishments are conferred in the rarest of rare cases which are grotesque, diabolical and of highly criminal nature against the humanity. The penalties for such offences are given under the substantive penal legislation of India i.e. Indian Penal Code, 1860 while the process is governed by CrPc. As per the National Crime Record Bureau's Prison Statistics Reports 2023, 561 marks the highest number of death row prisoners at the end of a calendar years in two decades with the latest death penalty given in the Nirbhaya case in 2020 where four convicts were punished for gang rape and murder of a young girl in December 2012. The Law Commission of India has also advocated for abolition of Capital Punishment for all crimes in India except for terrorism and war crimes.<sup>5</sup>

List of Capital offences (Indian Penal Code, 1860)

S.NO	SECTION NO	DESCRIPTION OF THE OFFENCE
1.	Section 120B	Being part of a criminal conspiracy for commission of an illegal act
2.	Section 121	Committing/ attempting treason for waging war against government of India
3.	Section 132	Abetment of mutiny by army, naval or Airforce
4.	Section 194	Giving or fabricating evidence that leads to conviction of an innocent
5.	Section 195A	Giving false evidence that leads to conviction or sentence of an innocent
6.	Section 302	Punishment for aggravated murder
7.	Section 305	Abetment of suicide of a child or an insane person
8.	Section 307(2)	Convict of life imprisonment murdering another

<sup>4</sup> [https://blog.iplayers.in/capital-punishment-in-india-2/#Constitutional\\_validity\\_of\\_capital\\_punishment](https://blog.iplayers.in/capital-punishment-in-india-2/#Constitutional_validity_of_capital_punishment) (last viewed on 12.06.2024)

<sup>5</sup> Law Commission of India, On Death Penalty, Report no. 262 (Aug, 2015).

		individual
9.	Section 364A	Kidnapping a person for ransom in order to compel Government or foreign state for paying ransom or restraining to do any act
10.	Section 376	Rape of a child below 12 years or women leaving her in a vegetative state
11.	Section 396	Murder committed by any member of the group of dacoits

#### Capital punishment in case of other crimes

S.NO	SECTIONS	PARTICULARS
1.	34, 37, 38(1)	The Air Force Act, 1950
2.	14, 17, 18(1)(a), 46	The Border Security Force, 1968
3.	34, 37, and 38(1)	The Army Act, 1950
4.	. Section 4(1)	The Commission of Sati(prevention) Act, 1987
5.	5	The Defence of India Act, 1971
6.	3	The Geneva Convention Act, 1960
7.	Section 16, 19, 20(1)(a), and 49	The Indo-Tibetan Border Police Force Act, 1992
8.	34, 35, 36, 37, 38, 39, 43, 44, 49(2) (a), 56(2), and 59	The Navy Act, 1957
9.	3(2)(i)	The Scheduled Castes and Scheduled Tribes (prevention of Atrocities) Act, 1989

10.	3(1)(i)	The Suppression of Universal Acts against Safety of Maritime Navigation and fixed platforms on Continental Shelf Act, 2002
11.	16(1)(a)	The Universal Activities Prevention Act, 1967

In 2019, the POCSO Act was amended by the Andhra Pradesh Legislative assembly wherein they introduced provisions for awarding death penalty to non-homicidal penetrative sexual offence on children. The bill awarded death penalty to rape convicts and were to be settled within 21 days. It amends section-376 IPC by mandating death penalty for rape. Nuanced section of Section 354E, 354F and 354G were added regarding women harassment, sexual assault and aggravated sexual assault on children respectively.

As per Annual Statistic Report 39a on 2019, death penalty is given mostly to murdersimpliciter (213 persons), followed by sexual offenders(84 persons) and terrorist offences(31 persons). UP, Bihar ranks among murder simpliciter whereas Maharashtra has highest no. of sexual offenders followed by Karnataka having majorterrorist offences.

## CONSTITUTIONAL SAFEGUARDS TO THE ACCUSED

**Article 21** of the Constitution of India provides protection to life and liberty to every people. The article states “No person shall be deprived of his life or personal liberty except according to the procedure established by law”. This means that if there is a fair and just procedure established by law, then the state can infringe the right to life of individuals. In the case of **Maneka Gandhi v. Union of India**<sup>X</sup> states that the procedure which deprives an individual of their sacrosanct life should be just, fair and reasonable. The process of conferring death penalty or life imprisonment to the convict depends on the discretion of judge where death penalty is provided only in ‘rarest of rare cases’ after recording ‘special reasons’ for such punishment [Section 354(2) Crpc]. Such process protects the victim from arbitrary judicial action making it a just, fair and reasonable process of law, as stated in the cases of Jagmohan Singh and Bachchan Singh.

**Article 19 and 22** renders freedom of expression and the right to not be tortured in trial to the convict.

**Article 136** of the Constitution of allows the accused can file a SLP to the Supreme Court if they

are dissatisfied with the death penalty conferred by the Hon'ble High Court.

**Article 72 and 161** confers the power to the President of India and Governor of the State to review the merits of the matter and provide clemency to the convict.

## EXECUTION OF DEATH PENALTY IN INDIA

### Current scenario of Capital punishment in India

Since 1995, death penalty has been given only to convicts in various instances to Auto Shankar in 1995 for murder of six persons in a period of 2 years by hanging, Dhananjay Chatterjee in 2004 for allegedly raping and murdering a 14 year old girl, Ajmal Kasab in 2012 for murder and treason against Indian Government and Afzal Guru in 2013 for conspiracy attack on Parliament in 2001. Most recently in 2020, four convicts has been hanged for brutally raping and murdering a young girl in 2012.

Since the mythological times, India has viewed death penalty by Vadhanand i.e. amputation by bits. With the establishment of British administration, it was rendered by hanging the convict in public to prevent deterrence of the crime. The Indian Penal Code, 1860 and the Code Of Criminal Procedure, 1973 primarily governs the offences and the procedure of conferment of death penalty to the convicts. Section 354(3) of it provides that Courts have to record special reasons for the cases in which death penalty are given.

### Modes of Execution of Death sentence in India

The procedure of carrying out the death penalty conferred to the convict by law is known as execution. In the ancient era, execution of death sentence to the convicts was conducted through torture, breaking on the wheel, slow strangulation, crushing under elephant's feet etc. But with the emergence of the constitutional principles relating to just and fair procedure relating to execution, punishments were promoted to be fair, equal and humane in nature. Slow torture was replaced by swift and quick executions.

### Execution by Civilian Court in India

The execution of death sentence in India is conducted in two ways - Hanging by neck till death and being shot to death. Once the death sentence is confirmed to the convict and all remedies for acquittal are exhausted, in that case the execution in the civilian court is carried out by *Section-354(5)* Code of criminal procedure 1973 i.e.

**person is hanged by neck to death.**

In 1949, the murderer of Mahatma Gandhi was executed by hanging in autonomous India. In **Deena v Union of India<sup>xi</sup>**, the Supreme Court laid down a test which should be satisfied for execution of death sentence – 1. Execution of death penalty should be swift and simple, free from any action that unnecessarily raises the pitifulness of the prisoner's apprehension 2. Execution should lead to immediate senseless, quickly leading to death 3. Process should be decent 4. It should not involve severing body parts of the convict i.e. mutilation. Here, Section 354(5) Crpc was challenged as hanging till death was considered barbarous and violative of Article 21. However, since this mode of execution is provided by law in the Code, the mode of execution was fair and not violative of Article 21.

**Execution by Army Act, Airforce Act and Navy Act<sup>6</sup>**

Section 34(a) of the Air Force Act, 1950 provides discretion to the court martial to award death penalty to the convict by hanging or being shot in relation to offences with enemy. Section 160 of the also provides similar discretion to the court martial to determine the mode of execution of the convict. Section 147 of Navy Act, 1957 and Section 166 of the Army Act, 1950 provides similar discretion to the court martial to determine the mode of execution.

**Procedure of Execution of Death Penalty**

The Sessions Judge is the lowest court in Indian courts hierarchy to provide death verdict to a convict. When a person has been awarded death penalty by the Sessions Judge, the same needs to be confirmed by the High Court. Under Section 432 and 434 CrPc, the Government may suspend or remit death sentence on application of accused after fulfilment of certain conditions.

The High Court might confirm the death sentence and has to give 'special reasons' for such confirmation. If the High Court changes an order of acquittal to order of death sentence, the convict can make an appeal before Supreme Court under Section 379 CrPc. The High Court also certifies whether the case to be fit for appeal under Supreme Court or not.

If the convict is dissatisfied with the order, he may make a mandatory appeal to Supreme Court under Article 134A and the Supreme Court may grant leave to appeal under Article 136. If the Supreme Court refuses the petition, a review petition can be filed within 30 days from such order

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<sup>6</sup> India, Law Commission of India, Report No. 187th on the Mode of Death Penalty, October 2003, PP. 31-32

under Article 137. If the conviction has been given by grave miscarriage of justice, then a curative petition can be filed for rectifying such mistake.

If the death sentence is confirmed after the above process, the convict has the last resort to apply for 'Mercy Petition' to the President of India and Governor of State under Article 71 and 161 of the Constitution respectively. Even after rejection of mercy petition, a writ petition can be filed for judicial review of executive's action.

In **Mohd Arif @ Ashfaq v The Registrar<sup>xii</sup>**, Supreme Court of India & Ors, review petitions on death sentences are to be heard before 3 judge bench. In **Rupa Ashok Hurrah v. Ashok Hurrah & Ors**, it was held that Supreme Court would allow curative petition after review petition if there was violation of principles of natural justice or judge's bias. Such would be placed before the same judges or three senior most judges and can be disposed off without oral arguments unless ordered otherwise by Supreme Court. In **Shatrughan Chauhan v. Union of India**, the Supreme Court held that if the President or Governor does not consider the supervening circumstances while refusing the requests for pardon, the Court therefore have the power to commute the death sentence to imprisonment for life. Such supervening circumstances include *late execution of the sentence, insanity/mental instability/ schizophrenia, solitary confinement, reliance on judgments declared per incuriam and procedural lapses in the disposal of the request for pardon*.

### **DELAY IN EXECUTION OF DEATH PENALTIES**

It has been an established fact that inordinate delay in execution of the death sentence is a reasonable ground for commutation of death sentence to life imprisonment on account of mental agony and torture inflicted on the death row convict during the tenure. The Supreme Court has confirmed through various judicial pronouncements that excessive delay in execution of death sentence leaves the convicted prisoner to suffer a 'dehumanizing effect' of 'facing the agony of altering between hope and despair'. Thus, the process become too inhumane and ineffective, raising the torture on the family and the convict.

By the end of 2017, 371 convicts waiting on the death row in India with the oldest case dating back to 1991 which is 27 years back according to the death penalty report published on January 2018. As per the Research of Centre on death penalty, 5 years is the average time faced for trials by the 373 death row convicts in states like Karnataka, Bihar etc. The NCRB released the data on

31<sup>st</sup>, 2018 whereby 2493 people were sentenced to the death penalty, however, at the time the data was released only four executions took place. Since 2000, there has been total 8 executions till now. Such lower rate of execution is due to the procedural requirements for confirmation of capital punishment and the legislative protection to the death row convicts. The Law Commission of India recommend that only in cases of terrorism and waging war, death penalty should be provided whereas abolished for the rest of the crimes.

Delay in execution of death sentence is done mainly due to constitutional safeguards of rarest of rare doctrine, appeal to Supreme Court of High Court orders. Mercy petitions provided for confirmation of death sentence. Another reason might be physical and mental health of the convict i.e. the convict needs to be fit while execution of death sentence. However, due to such prolonged delay, the convict loses their will to live and requests the officials to give them death sentence to put an end to their torture. In **Triveniben v. State of Gujarat<sup>xiii</sup>**, Supreme Court held that inordinate delay in the execution of death sentence, may be a significant factor, but that by itself cannot render the execution unconstitutional. Nor it can be divorced from the dastardly and diabolical circumstances of the crime itself. However in **Shatrugan Chauhan<sup>xiv</sup>** case, the Supreme Court commuted the death sentence of 13 convicts on ground of delay of communication of mercy petition and of 2 convicts on the ground of insanity faced due to such delay, supervening the rejection of mercy petition by President. It did not lay down any time but published certain guidelines for ensuring quick disposal of mercy petitions, thereby reducing the delay in execution of death sentence. In the case of **Devender Pal Singh Bhullar & Anr vs State Of NCT Of Delhi<sup>xv</sup>**, similarly a Khalistan terrorist, languishing in Tihar jail was commuted of his death sentence to life imprisonment as he suffered schizophrenia on account of inordinate delay in disposal of mercy petition.

As per Annual Statistics Report of Mental Health and Criminal Justice, Project 39A, NLU, 2019, 51 death row prisoners (62.2%) were diagnosed with at least one mental illness post conviction. Death row prisoners are treated as a distinguished class of prisoners facing such violence and alienation in the prison that they are bestowed to be the “the living dead”.<sup>34</sup> (over 50%) out of the 63 prisoners thought about suicide while 8 had attempted suicide as a consequence of their long stay in the prison. study found that *vilification of the prisoner in and outside the jail, particularly by the media, circumstances of death row incarceration, non-suicidal self-injury and suicide, and death row distress* are considered to be the pains and mental and emotional agony of death row

convicts<sup>7</sup>. Not only the prisoners, their families also receive collective condemnation of the society and suffer from ambiguous grief regarding whether they will lose their family member or not. Hence, there is a need for quick disposal of execution of death sentence.

## CLEMENCY POWERS

### Provision of Clemency Powers by the President and Governor

The President is the Executive head of the country and is rendered clemency power to the convicts under **Article 72** of the constitution of India. He is allocated power “*to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.*” **Article 161** provides pardoning power to the Governor; however, it does not extend to death sentences. Hence, when the Supreme Court of India rejects the appeal for cancellation of capital punishment, they may file mercy petition to the President of India and the Governor of the State. Clemency power is exercised for rendering justice with full conscience to the convict after scrutinizing the record of the case and determining the viability of the judicial verdict on the point of guilt or sentence. The Executive is not bound to provide any reasons for the acceptance or refusal of the mercy petition, but is bound to reach the final decision on advice of his Council of Ministers. The 35<sup>th</sup> Law Commission Report was also against rendering an exhaustive list of principles on the basis of which death sentence was to be commuted by the Executive. The decision making differs from case to case, having no upper limit for the number of mercy petitions that can be filed by an offender. Whenever, a substantial ground rises, the prisoner can file another mercy petition for presenting his case. Such decision-making process is an Executive action and does not result in abrogation of prior judicial record.

### Procedure of filing Mercy Petition

When the Supreme Court dismisses the appeal or SLP of the convict, the Superintendent of Jail has to inform it to the convict. On receipt of the information, the convict is given 7 days for filing the mercy petition. The Ministry of Home Affairs holds the authority to determine the merits of the petition in liaison with the State governments. After consultation, the petition is sent to the President for their approval. The President does not hold absolute power in deciding mercy petition. Hence, on the advice of his council members taking into account the circumstances of the case, socio-economic circumstances of the prisoner, age, sex, mental deficiency etc. he accepts or rejects the plea of mercy of the convict. During the pendency of 7 days before filing mercy plea

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<sup>7</sup> <https://www.project39a.com/deathworthy> (last viewed on 12.06.2024)

as well as the time of decision of mercy plea, the SP of Jail cannot execute the death sentence. The convict may also be allowed to file mercy pleas after 7 days in exceptional cases to be decided by State Government. However, if the mercy plea has been dismissed without considering the relevant facts of law or done arbitral, judicial review of the decision can be done before the Supreme Court. In **Shatrughan Chauhan v. Union of India**, the Supreme Court held that if the President or Governor does not consider the supervening circumstances while refusing the requests for pardon, the Court therefore have the power to commute the death sentence to imprisonment for life. Such supervening circumstances include *late execution of the sentence, insanity/mental instability/ schizophrenia, solitary confinement, reliance on judgments declared per incuriam and procedural lapses in the disposal of the request for pardon.*

### Judicial Precedents

In **Kehar Singh v. Union of India<sup>xvi</sup>**, SC refused to provide any guidelines for exercise of power under Article 72. However it should be carried out to rectify judicial errors and for 'reasons of state'. It held that President's power of commutation falls within judicial domain and can be examined by judicial review. Further, it held that the President does not modify or supersede the judicial records but acts as a completely different plane.

In **Kuljeet Singh alias Ranga v. Lt. Governor of Delhi<sup>xvii</sup>**, the petitioners alleged that President had transgressed his executive constitutional power by rejecting the clemency petition of the convict. The Supreme Court, in this case discussed the power of the President to commute death sentence and dismissed the petition.

In **Mohinder Singh v. State of Punjab<sup>xviii</sup>**, the Supreme Court held that it lacks jurisdiction to hear application of stay of execution while the mercy petition is pending before the President of India. The President has to be approached for such stay.

In **Maru Ram v. Union of India<sup>xix</sup>**, Supreme Court held that the President or the Governor cannot take independent decisions while rendering pardon an individual, since their actions are bound on the advice of the Council of Ministers.

## CASE STUDY

In the case of **Afzal Guru<sup>xx</sup>**, he was convicted for his involvement in 2001 Parliamentary attack. Supreme Court confirmed his sentence in 2005 and he filed mercy petition in 2006. The then President of India, Pranab Mukherjee, after considering the circumstances and on humanitarian grounds, commuted his sentencing to life imprisonment on 3<sup>rd</sup> Feb, 2013. This action remains as a precedent upholding importance of fair trial procedures, due process, and the humanitarian treatment of death convicts, even in serious offences. However, President's decision was challenged and Afzal Guru was executed on 9<sup>th</sup> Feb 2013.

The **V. Sriharan alias Murugan & Others v. Union of India & Others (2014)<sup>xxi</sup>** is popularly known as the Rajiv Gandhi assassination case, whereby Supreme Court rendered sentence to 4 convicts in 1999. However, while one female convicts' death sentence was commuted to life imprisonment in 2000, the mercy petition of rest 3 convicts were pending over a decade causing mental agony to the accused. In 2012, the prisoners filed an appeal on the ground of inordinate delay in mercy petition. The SC gave its verdict on 2014 and held 11-year delay in mercy petition was violative of Article 21 rendering mental torture to the convict and undermining their human dignity. Hence, a guideline was provided for quick disposition of mercy petitions.

### LANDMARKS CASES ON DEATH PENALTY IN INDIA

1. **Bachan Singh v. Union of India** - The Supreme Court explains formulates the rules of 'rarest of rare' doctrine in the case of Bachchan Singh whereby they death penalty should be provided to unusual offences which seem shocking to a prudent man of the society, for which there is lack of alternative punishment. They held that a balance sheet of the *aggravating and mitigating* circumstances should be prepared for the offence, giving importance to the mitigating circumstances before rendering death penalty to the accused.
2. **Ediga Anamma v. Union of India<sup>xxii</sup>** – In this case, the convict had committed the murder of another young man and her child due to a feud over an illicit lover. The Supreme Court held that socio-economic, psychological, penal compulsions, social and personal factors, lack of premeditation are to be considered while executing death sentence. The idea that life imprisonment acts as a greater deterrent for murderous violence than leisure judicial death penalty. This case marks the development of Indian criminal jurisprudence which upholds deterrent nature of punishment must be balanced with individual reformation, thereby commuting life imprisonment to the accused.

3. **Dhananjay Chatterjee v. State of West Bengal (1994)<sup>xxiii</sup>** – The convict was the accused rapist and murderer of a 18-year school girl. Such act received nationwide condemnation and the accused was given death penalty. The Supreme Court while delivering the judgement, the Court upheld that death penalty must be proportionate to the gravity of the offence, so that the courts can reflect popular disapproval of the act to create a deterrence. It was held that while awarding punishment the court should not only consider the prisoner's right but also heed importance to the victim's right and their family.
4. **Shankar Kisanrao Khade v. the State of Maharashtra (2013)<sup>xxiv</sup>** – A couple were found guilty and convicted for rape and murder of a little girl with intellectual disabilities. The HC convicted them with death sentence which was overturned by the SC. The SC established the "crime test," "criminal test" and "R-R test" while awarding punishment which means that if all the aggravating circumstances are present and there are no mitigating circumstances, the court needs to apply the rarest of rare doctrine, instead of the 'balancing test'.
5. **Chhannul Verma v. the State of Chattisgarh (2019)<sup>xxv</sup>** – SC held that the restorative and rehabilitative corners of justice are forgotten as death sentence is regarded as final measure of justice for victims. The conferment of the death penalty distracts attention from the plaguing issues of the criminal justice system i.e. inadequate investigation, crime prevention, and victim rights. Efficient victim compensation programs must be introduced to rehabilitate the victims and court should provide adequate compensation to victims in required circumstances. If a victim can be rehabilitated, then death sentence should not be awarded to the victim. Similar judgement was given in *Rajesh Kumar v. NCT Delhi (2011)*
6. **M.A. Antony v. State of Kerala (2010)<sup>xxvi</sup>** – HC has convicted a person of death penalty for murder of 6 people which was overturned to life imprisonment in SC. Here, SC claimed that trial court erred in law while computing effect on collective conscience of society. SC upheld that the Judges while convicting an accused of heinous crimes should refrain from public opinion and provide conviction based on effect on collective conscience of society. It agreed with the judgement of *Bachchan Singh* that judges should not become public figures and maintain judicial restraint
7. **Accused X v. State of Maharashtra (2019)<sup>xxvii</sup>** – in this case the SC held that the convict's post conviction mental illness acts as a mitigating factor for commutation of death penalty. The court established the 'test of severian' for establishing a standard of mental illness which qualifies as a mitigating factor. Thereby, the accused's death penalty was commuted to

transportation of life as Penal Settlement.

8. **Md. Mannan @ Abdul Mannan v. the State of Bihar<sup>xxviii</sup> (2019)** – the accused was convicted for the rape and death of a minor. On this day, it was held that imposition of death penalty as the same day of conviction does not invalidate the sentence if the offender is given an opportunity of hearing to present mitigating circumstances under Section 235(2) of CrPc. However, the convict's sentence was turned to life imprisonment as High Court's short notice to the accused on hearing denied the petitioner effective hearing, thereby violating natural justice.
9. **Mukesh v. State of NCT of Delhi, 2017<sup>xxix</sup>** – Famously known as the Nirbhaya Gang Rape Case, where SC suggested of 2 methods of curing sentencing defects by trial courts i.e. remand of the matter or producing necessary data by the accused to advance their contention against sentencing. The second method was followed in this case which resulted in conferment of death penalty to 4 adult convicts for brutally raping a girl by inserting an iron rod in her private parts and throwing her out of the bus. The victim succumbed to death due to the mental torture the subsequent day. Such an action by the victims shocked the collective conscience of society and the convicts were executed on 2020.
10. **Shabnam v. Union of India<sup>xxx</sup>** -In this case, a woman was issued death warrant from trial court hastily for brutally murdering her family as they wouldn't let her marry her loves. She even killed her younger brother, which acted as an aggravating factor in the case. While conferring punishment to the convict, Supreme court highlighted the importance of exhausting all alternate legal and administrative remedies before initiating a case of death warrant. Issuance of death warrant before exhaustion of alternate remedies violates the right to life of the convict. Hence, a humane approach should be taken while awarding death penalty.<sup>8</sup>
11. In a recent case of **Manoj v. State of Madhya Pradesh (2022)<sup>xxxi</sup>**, SC passed certain guidelines for assessment of 'rarest of rare doctrine' like the presentation of mitigating factors at the trial stage, inclusion of behaviour of the prisoners and their reports while their stay in prison and prisoners' mental stability. It held only when there is a maximum of aggravating circumstance with no mitigating circumstance thereby having no chance of rehabilitation, should death penalty be imposed.

<sup>8</sup> <https://blog.ipladers.in/landmark-cases-on-death-penalty-in-india/#:~:text=The%20Supreme%20Court%20held%20that,death%20penalty%20should%20be%20imposed.> (last viewed on 12.06.2024)

## SOCIO ECONOMIC AND DEMOGRAPHIC ANALYSIS OF DEATH ROW INMATES

### Annual Statistic Report on Death Row Population

As per the report on December 2019, death row prisoners decreased from 162 to 102 from 2018 to 2019. The trial courts convicted 102 death sentences in 2019 and the Supreme Court delivered the highest verdicts on death penalty in 2019 under the tenure of former CJI Ranjan Gogoi. Here, 6 death penalties were confirmed, 17 commuted, 3 acquitted and 2 remanded for fresh trial.<sup>9</sup>

On observing the dynamics of Indian Criminal Jurisprudence, death penalty is imposed on the weaker and marginal sections of the society. The vulnerable sections along the economic and social parameters are prone to suffer the vices of inequality in conviction of offences. The socio-economic analysis of death row convicts is based on the Project 39A Report on 2019.<sup>10</sup>

Age – The case of Bachchan Singh establishes that death penalty should not be given to young offenders. They are the vulnerable section of the society, who have their entire lives ahead. Therefore, they cannot be punished like aged offenders but the reformatory theory of punishment should be followed in this case. Further, elderly prisoners are also refrained from death penalty as they no longer impose serious threat to the society as per incapacitation theory. Despite the profiling, 54 death row convicts were between 18-21 years whereas 7 were above 60 years. Out of these, 18 prisoners claimed to be juvenile while commission of offence. However, most trial courts ignore such claim basing on heinousness of crime.

### Economic Vulnerability

On a national level 74.1% of the prisoners in India belonged to the economically vulnerable sectors of the society as per their occupation and landholdings. Among the states with 10 or more death row convicts, Kerala has the highest percentage of economically weaker offenders who are sentenced to death i.e. 96.6%. Other states having 75% or more death penalties, Delhi ranks highest (80%) followed by Gujarat (78.9%), Jharkhand (76.9%), Karnataka (75%)

### Educational Profile

The national ratio of prisoners about 62% who suffered death penalties did not complete their

<sup>9</sup> [www.questjournals.org](http://www.questjournals.org) (last viewed on 12.06.2024)

<sup>10</sup> <https://www.project39a.com/dpir> (last viewed on 12.06.2024)

secondary education. Convicts from Gujarat (89.5%), Kerala (71.4%), Jharkhand (69.2%) were largely under this category. About 23% prisoners have never attended school, in which Bihar (35.3%) and Karnataka (34.1%) ranks highest. Kerala is the only state where all prisoners have at least attended school.

#### Caste and Religious Profile

People of backward classes and religious minorities hold a significant position among death row convicts i.e. 76% (279 prisoners). The proportion of Scheduled Castes/ Scheduled Tribes among the convicts sentenced to death in India is 24.5% with Maharashtra leading the list by 50% followed by Karnataka (36.4%), Madhya Pradesh (36%) and Bihar (31.4%). Religious minorities are largely represented among death row convicts in Gujarat (79% Muslims), Kerala (5 Muslim & 4 Christians), Karnataka (38%).

The interconnection between these factors provide us the extent of marginalisation of prisoners sentenced to death in India. It also enlightens the alienation faced by the death row convicts from the criminal justice system and their difficulties in trial due to economic, social and educational vulnerabilities.

### **OFFENDERS WHO ARE EXEMPTED FROM DEATH PENALTY**

**Minors** – In Indian Criminal Jurisprudence when the offender is below 18 years at the time of commission of crime, he cannot be awarded death penalty. The lawmaker excluded minors from such harsh penalty as there is an increased chance of reformation of minors by adequate education and environment. Hence, a separate legislation is enacted for minors, known as the Juvenile Justice Act (2015), which treats minors as a separate class of offenders and makes provisions for their reformation through remand homes. It has also been seen in Nirbhaya gang rape case where the four adult convicts are sentenced to death whereas the minor convict was given 3 year imprisonment in reform facility.

**Pregnant woman** – Pregnant woman does not qualify to be conferred death penalty for their crimes. As per Section 416 CrPc, if the High Court finds out that a death row convict is pregnant, the death sentence will be postponed and she will be commuted to life imprisonment. The reason for such legislation is to save the innocent life in the womb of the pregnant convict. Indian jurisprudence does not support killing of an innocent life for punishing one of others.

**Intellectually Disabled** – An intellectually disabled person i.e. person having ADHD, Autism, lunacy etc. do not fall under the category of death punishment offender. If a person is unable to understand the nature and consequence of their action, they are known to be intellectually disabled. Owing to such disability they are unable to comprehend the nature of crime and the punishment accompanied with it. Hence, such offenders are exempted from being awarded death punishment.

## INTERNATIONAL HUMAN RIGHTS TREATIES AND CONVENTIONS

Death penalty is not expressly prohibited by the International Covenant on Civil and Political Rights (ICCPR) or any other virtually international conventions. However, there exists number of instruments in force with fewer states parties that have abolished capital punishment. Though international customary law does not restrict awarding of death penalty currently, but customs are rapidly progressing towards abolition of death penalty worldwide. At the international arena, the quintessential treaty provision relating to the capital punishment is Article 6 of the ICCPR. At the drafting stage of ICCPR (1947-1966), simply ten countries had abolished punitive death, currently as per 2020, some 150 members have abolished death penalty de jure or de facto.<sup>11</sup>

Article 3 of the Universal Declaration on Human Rights (UDHR) states ‘eventual abolition of the death penalty’, which was the primary step for abolition of death penalty<sup>12</sup>. Further Article 6 of ICCPR provides guaranteed legal safeguards to protection of life and safeguards against death penalty to be retained by the signatory countries.<sup>13</sup> In the second optional protocol of ICCPR it was declared that no one in the State party to the protocol should be executed making death Penalty was a matter of United Nations and not domestic jurisdiction.<sup>14</sup> It is the only treaty regarding abolition of death penalty and open to all the signatories. These additional protocols are legally binding on the states and requests them on suspending executing and thrust a moratorium on death penalty. Amnesty International has recently viewed a declining trend in Death Penalty in 2021.

International legislation limits the death penalty, by disbarring minors, pregnant women and elderly from the list of death row convicts<sup>15</sup>. The Convention on the Rights of the Child (CRC) states that no child under 18 years can be given cruel treatment without possibility of release. In

<sup>11</sup> Roger Hood, The Enigma of the ‘Most Serious’ Offences Centre for Human Rights and Global Justice Working Paper Extrajudicial Executions Series (Number 9 2006) NYU School of Law, New York, 2.

<sup>12</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) Article 3

<sup>13</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976) Article 6

<sup>14</sup> 8 G.A. Res 44/128 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, (Dec. 15, 1989) Article 1

<sup>15</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976) Article 6

later International Human Rights Instruments, notably the European Convention on Human Rights and the American Convention on Human Rights, death penalty is regarded as an exception to the right to life. Eventually, three International instruments were made that proclaimed abolition of the death penalty i.e. 3 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms regarding Abolition of the Death Penalty, Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at Abolition of the Death Penalty, The American Convention on Human Rights can also be regarded as an abolitionist instrument as it restricts abolitionist countries from reintroducing death penalty.

In 1984, the United Nations Economic and Social Council (ECOSOC) published a document protecting the rights of executed individuals. It stated that retentionist countries should continue death penalty applying to most serious offences done intentionally, having fatal consequences. It restricts execution of death sentence to economic crimes having no direct victims, or religious or political crimes, like treason which constitute abstract behaviour.

In a 2013 resolution, the UN Human Rights Council acknowledged the repercussions of parents' death sentence on their children and urged for state assistance to those children. In the 2014 Resolution they noted that States with cultures and religious backgrounds have abolished or applying a moratorium on death penalty and deplored that use of the death penalty leads to violations of the human rights of offenders and affected individuals.

Article 37(a) of the Convention on the Rights of the Child ('CRC') prohibits execution of death penalty against person under 18 years old. As of May 2024, 196 countries have ratified to it.

The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment ('the Torture Convention') and the UN Committee against Torture have been providing limitations and necessary safeguards on the death penalty. The Torture Convention does not consider the conferment of death penalty as torture or cruel, inhuman or degrading treatment or punishment (CIDT) but some cruel methods of execution and the phenomenon of long stay of death row convicts have been seen as forms of CIDT by UN body<sup>16</sup>.

In the evolution of International criminal jurisprudence, the death penalty was a legitimate

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<sup>16</sup> India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.44-45

punishment. However, overtime, such punishment excludes to be permissible in international criminal courts. In the Guidance Note of the Secretary- General on the United Nation's approach to Rule of Law assistance it claimed that it will neither participate or involve in tribunals allowing capital punishment.

The feud between continuing between right to life and capital punishment is evident in the international and European human rights instruments. The European Convention on Human Rights and the International Covenant on Civil and Political Rights corroborate an exception for the death penalty and also restrict cruel, inhuman, or degrading punishment. Similarly, Article 6(2) of the ICCPR provides that retentionist countries should impose death penalty for heinous crime as per the law of the land. But, as the unacceptability of the death penalty gained momentum in Europe, European Convention on Human Rights adopted Protocol 6 in 1982, which advocates for abolition of death penalty peacetime. States could make laws for giving death penalty in wartime or under imminent danger of war. However, the Protocol 13 abolished the death penalty in all circumstances in 2013.

### **INDIA'S POSITION ON GLOBAL DEATH PENALTY TRENDS**

Among the aforesaid treaties and conventions, India has ratified the treaties of ICCPR and CRC but is only a signatory of the Torture Convention. As per Article 18 of the Vienna Convention on the Laws of Treaties, a state is bound to exclude itself from actions that defeat the purpose of the treaty.<sup>17</sup> The national laws, The Protection of Human Rights Act, 1994 describes "human rights" in Section 2(1)(d) as the rights relating to life, liberty, equality and dignity of a person provided by the Constitution or infused in the International Covenants and enforceable by Indian courts in India. Additionally, Section 2(1)(f) signifies "International Covenants" as the ICCPR. A constructive reading of Sections 2(1)(d) and 2(1)(f) it can be said the ICCPR has been incorporated into the given statute protecting human rights.<sup>18</sup>

UN General Assembly has vouched for a moratorium on execution of death penalty on multiple resolutions, where in 2007, the General Assembly called for taking a evolutionary step by prohibiting the use of the death penalty and imposing a moratorium on them for protection of

<sup>17</sup> ["Vienna Convention on the Law of Treaties 1969"](#) (PDF). United Nations Office of Legal Affairs. (last viewed on 11.06.2024)

<sup>18</sup> ["The 262nd Report of the Law Commission of India - The Death Penalty"](#) (PDF). Law Commission of India.

human dignity and development of the humanrights<sup>19</sup>. India has repeatedly voted against these resolutions expressing that it shall be opposed to their statutory law of the land which confers death sentences only in rarest of the rare cases.

## HUMAN RIGHTS VIOLATION AND CONCERNS

The aspiring change in the decline of death penalty has been evidentially attributed to human rights<sup>20</sup>. The primary debate continues whether death penalty violates human rights and the retentionist countries are breaching them. Article 21 of the Constitution of India provides security to life and liberty of an individual except according to the procedure established by law.

The answer to be the debate is ambiguous and has been varying through different jurisdictions. For e.g., in **Furman v. Georgia<sup>xxxii</sup>**, the US Supreme Court held it as cruel and unusual punishment, condemning it to be violative of US Constitution, however within four years, the same was reversed by **Gregg v. Georgia<sup>xxxiii</sup>**. The SUPREME COURT in India, after surveying American jurisprudence held in the Bachchan Singh case, death penalty to be constitutional and provided only in 'rarest of rare' phenomena.

UDHR portrays the human rights which are to protected by the nation. Article 3 of UDHR states that every individual has right to life, liberty and their security. Article 5 restricts the nations to impose cruel, inhuman or degrading punishment on individuals, as well as Article 9 prohibits a person to suffer arbitrary arrest, detention or exile. The international acceptability of death penalty primary revolves around these three rights. Hence, state can take the life of an individual after meeting due process of law. ECHR and ICCPR have exceptions in the treaties to permit death penalty which should not inhumane or cruel.<sup>21</sup>

Article 2(1) of the ECHR states that an individual should not be deprived of his life intentionally except by execution by conviction of court. Simultaneously, Article 3 restricts providing inhuman or degrading punishment. Article 6(2) of the ICCPR confers power to provide death penalty in most serious offence which should not be cruel or degrading as per Article 7.

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<sup>19</sup> ["General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty | Meetings Coverage and Press Releases". un.org. Retrieved 9 October 2020.](#)

<sup>20</sup> ODEATH PENALTY: A WORLDWIDE PERSPECTIVE (Roger Hood and Carolyn Hoyle, 4th ed, 2008)

<sup>21</sup> 56 COMPARATIVE HUMAN RIGHTS LAW (Sandra Fredman, 6th ed, 2018)

The UN High Commissioner for Human Rights (OHCHR) voices arguments for abolition of capital punishment. He has pointed out at the absence of procedure for conferment of death penalty at the same time said that death penalty lacks any deterrent effect on potential offenders, thereby simply violating human rights<sup>22</sup>. The international progression toward human rights have portrayed capital punishment as a violation of universal right to life and right to be free from cruel and inhuman punishment. Hence, the matter cannot be left to individual states.

The abolitionist countries pressurise the retentionist countries to end executions<sup>23</sup>. Crimes that are punishable with capital punishment are themselves violation of human rights in certain countries. For eg, Homosexuality is punishable in most Sharia law countries. Exercising of freedom, leading to death is a violation of universal human rights. Similarly, the next strict punishment after death penalty is life imprisonment without parole, which crushes the hopes of the convict, giving them no chance to return to the society as a law abiding citizen<sup>24</sup>.

There is a steep pace of abolition of the death penalty worldwide, particularly reaching to the democratically elected legislatures. However, if they fail to prohibit such practice, the human rights instruments, and judge have the duty to ensure that the fundamental principles of human rights are being followed and adhered.

### **ABOLITIONIST AND RETENTIONIST COUNTRIES**

Article 6 of ICPR gives guidelines for awarding death penalty only in serious offences. In 1986, death penalty has been abolished by 46 countries for commission of ordinary crimes. The number has significantly risen to 112 countries which abolished all crimes as per 2022 reports of Amnesty International.<sup>25</sup> Kazakhstan and Papua New Guinea are the recent countries that are abolishing death penalty, making the percentage of abolitionist countries to 70%, as per the reports of the Death Penalty Information Centre.

The abolitionist and retentionist countries are categorised as follows-

- Abolitionist for all crimes: Countries where death penalty is not provided for any offence
- Abolitionist for ordinary crimes: Countries where the legislation provides for death penalty

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<sup>22</sup> OHCHR, 'Death Penalty' <http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.asp>

<sup>23</sup> David T. Johnson, A Factful Perspective on Capital Punishment. 11 Journal of Human Rights Practice 2 (2019)

<sup>24</sup> David T. Johnson, A Factful Perspective on Capital Punishment. Journal of Human Rights Practice 2 (2019)

<sup>25</sup> <https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries>

(last viewed on 11.06.2024)

in case of exceptional crimes.

- Abolitionist in practice: Countries retaining death penalty for ordinary crimes but progressing towards abolition or has refrained from execution for the last 10 years.
- Retentionist countries: Countries which retain conferment of death punishment for ordinary crimes.

Type of Country	Number
Abolitionist for all crimes	112
Abolitionist for ordinary crimes	9
Abolitionist in practice	23
Retentionist countries	55

Report as per December 31, 2022 (Amnesty International)

In major countries of the world, death penalty has been abolished for adhering to the humanitarian grounds. In 1995, Spain abolished death penalty citing that such harsh punishment has no place in modern civilised society. Whereas Switzerland has abolished the same for gross breach of right to life and dignity. Further South African Court has abolished the death penalty by stating that right to life should also be given to offenders. India is one of the retentionist countries, though 262<sup>nd</sup> Report of Law Commission suggested to abolish death penalty for terror related offences.

## **DEATH PENALTY PRACTICES ACROSS OTHER DEMOCRACIES**

Modes of Execution of Death Penalty around the world

Apart from shooting and hanging, some other modes of execution of death sentence were compiled throughout the world-

Gas chambers – This mode of execution includes inclusion of individuals in a tightly closed room with no air passage. The room is infested with toxic gases like nitrogen oxide which are detrimental to human health and leads to death of convict. This punishment was used earlier in Nazi administration and is currently used as secondary punishment in California, Arizona etc.

Stoning – This form of punishment is conducted in public by a group of people or community. The crowd throws stones at the convict which leads to severe injury and thereby death to the executed person. This procedure was earlier used in Islam and is currently found in Gulf countries

like Saudi Arabia, Qatar, Iran, Yemen, Sudan and UAE.

**Electrocution** – In this method, the convict is restrained or tied to a chair whereby they receive electric shocks at predetermined levels which escalate overtime until it causes death to the person. Such harsh punishment is used in industrialized countries of the world like China, US, Philippines.

**Decapitation** - The head is chopped off from the rest of the body to cause death to the person. In ancient times, such painstaking bloody punishment was given by the kings to their enemies. Currently certain middle eastern countries still use this process.

**Lethal Injection** – It is a method of execution whereby the condemned prisoners are administered primarily three kinds of drugs which lead to nausea, muscle numbing and thereby irreversible cardiac arrest. This method was started in Oklahoma in 1977 and is currently used in punishing United States of America, China etc.

Profiles of the Top 10 countries that executed Death Penalty in 2022 (Amnesty International Records)

#### China

China is the leading country for awarding death penalty to the convicts. Although their execution data is confidential, it is estimated to be in thousands annually. They employ firing squads for execution which is an unfavourable technique as per the ethical standards. Another humane method of execution followed by them are lethal injections.

#### Iran

Calculation of the exact number of death row convicts is difficult as about 88% executions are conducted in secrecy. However, the estimated results show about 246 executions in 2020 and at least 314 in 2021, including minors, thereby violating the international law. They are also accused of forceful confessions and frequent execution for trivial offences. In 2021, they executed 40% offenders for drug-related crimes and about 4% for religious offences.

#### Egypt

Executions in this African country has risen strikingly after the 2011 revolution, particularly after President Abdel Fattah al-Sisi joined office in 2014. Many human rights organizations have

accused them for secret unfair trials and confession through torture for the suppression of political dissent.

### Iraq

Iraq is infamous for having vague and broad anti-terrorism laws, which awards death sentence to convicts for trivial offences, like that of Iran. Crimes such as smuggling of automobile, theft of official government files, army desertion result in death penalty. They also conduct executions through forced confessions by torture, which are usually carried out by hanging.

### Saudi Arabia

The country faced international condemnation for executing death penalty by beheading a convict in 2020. The lowest number of executions in five years is 27 in 2020 due to the pandemic COVID-19, hosting of G-20 Summit etc. However, the number surprisingly spiked to 65+ in 2021 and 81 in 2020, which gained international furor. The country is frequently criticised for waiving the rights of fair trial and forceful confessions for awarding death penalty to convicts.

### Japan

Japan follows a strict secrecy policy for executions whereby the convict themselves are informed about the execution 1-2 hours ago. Once the prisoner is executed, the prison officials inform the mass about the incident. Hanging is the only method of execution in Japan, where the convict is blindfolded and adorned in hood before release of the trap door. Between 2019-2021, only six executions have taken place, most of which included murder of multiple persons or the grievous nature of crime.

### South Korea

The method of execution employed in South Korea differs with the commission of crimes. In most cases, executions are carried out by hanging, in case of military offences, the prisoner is convicted by fire squad. The latest execution in South Korea is 1997, although in 2021 death row convicts were accounted to be as much as 60.

### The United States

The death penalty was reenacted in the U.S. in 1976, which resulted roughly in 1,543 executions since that time. Since 2009-2020, the U.S. has been the only American country to award death sentence to criminals. As of 2022, 27 of 50 US states hold death penalty legal, with Virginia

abolishing death penalty in 2021. The country is known to have the world's highest incarceration rate i.e. 629 prisoners per 10,000 residents, particularly in California, Florida, Texas. Since 1976, the most popular methods of executions used are lethal injection, electrocution, lethal gas, hanging, and firing squads.

## ROLE OF PUBLIC OPINION

Public opinion gained populace on legal framework of conferment of death penalty from the case of **Machhi Singh v. State of Punjab**. Here, death penalty was imposed due to the anti-social or socially abhorrent nature of the crime as per public demand. Further in the case of **Dhananjay Chatterjee v. State of West Bengal**, the Supreme Court delivered that the punishment must be suitable to the crime so that the courts can mirror the societal disdain of the crime. The judiciary should not only protect the rights of the victim but also the rights of the victim and the society while awarding death penalty.

However, in **MA Antony v. State of Kerala<sup>xxxiv</sup>**, 2018, the death sentence of a convict was commuted into life imprisonment by the SUPREME COURT as it held that trial court erred while calculating the impact of law by the collective conscience of society. It was held that public opinion and judges' perception of collective conscience of the society must be avoided while sentencing a convict. But as seen in **Mukesh v. State of NCT Delhi**, May 2017, , public opinion and collective conscience occasionally plays a quintessential role on conferment of death penalty, where 4 convicted adults were executed in 2020 for gang rape and murder of a young girl.

## AFFIRMATIVE AND NEGATIVE ARGUMENTS ON DEATH PENALTY

### AFFIRMATIVE ARGUMENTS

1. This preventive theory of punishment averts the convicts from re-commission of the crime by completely removing them from the society. Instances of life sentence convicts killing their prison inmates have made death penalty a viable option for convicts of serious offences.
2. This punishment renders justice to the innocent victims who suffer an untimely death torture due to the action of the convicts. There is a proverb that "life is sacred and innocent lives should be valued over the lives of killers.". Hence, death penalty acts as a retributive form of punishment.
3. Death is also accounted as a traditionally acknowledgement punishment by the Historians,

Jurists and constitutionalists in ancient times, which acted as a deterrent for premeditated murder and should be given to the convicts of heinous offences.

4. The majority of nations globally follow reformatory theory of punishment for rehabilitating the convicts. But there are certain class of serial offenders, who inflict harm on the larger masses of society with a future possibility of infliction of harm. Hence, these offenders are beyond the opportunity of retribution and should be executed sooner to protect the society from a menace.
5. Death Penalty reduces the overpopulation in jails and detainees leaving more assets and rooms for the offenders who are capable of being rehabilitated.
6. For maintenance of law and order in society and protection of the civilians, death penalty should be attributed to the convicts.

### **NEGATIVE ARGUMENTS**

1. Capital punishment lacks concrete evidence to prove that it acts as a deterrent of homicides. In some cases, the families of the convicts take revenge for such execution by committing further crimes.
2. Gandhiji's principle that an eye for an eye, will make the whole world blind is to be remembered while conferring punishment. When a retributive form of punishment is provided to the convict, Article 21 of the convict is protected and they are given an opportunity of returning to the society as a law-abiding citizen. Their mental instability is treated in the rehabilitation centres, giving them a new life. This theory of punishment is widely acclaimed worldwide.
3. The total expenses borne by the government is substantially high than keeping a prisoner in jail for life imprisonment. Though the cost of execution is minimal, the overall expenses surrounding the entire case including vast requests, excessive techniques and lawful trials are enormously high.
4. Conferment of death penalty on the convict does not provide any relief to the victim or their family, except for a sense of revenge, which is highly undesirable for a civilised society.
5. Numerous global human rights organizations, like the United Nations, oppose the conferment of such a brutal form of punishment as it violates right to life and dignity.
6. Since judicial system is not infallible, wrongful executions of innocent persons can take place owing to media pressure, political influence etc. The trial and confirmation procedures are so exhaustive it's close to difficult to convict a guiltless individual.

7. The discriminatory application of death penalty is often levied disproportionately on the minorities, the poor, who are unable to seek adequate legal representation, leading to furtherance of systemic bias and injustice. The families of the convict has to condone insufferable psychological pain and disrespect in society, owing to such discriminatory application.

## **SUGGESTIONS & RECOMMENDATIONS**

Death punishment has been vastly criticised for violating the fundamental rights of the convicts and proven to be ineffective in deterring crimes in the society. Hence, the punishment of life imprisonment was developed to provide an alternative to death penalty, viewing the retributive form of punishment. Statistically, life imprisonment without parole can provide similar deterrence of crime as per the 262<sup>nd</sup> Law Commission Report. Therefore, with the increasing cost of execution of death penalty, certain predispositions need to be made to the ancient legal framework of our country. Primarily, qualified guards need to be allotted to the prisons who do not give discriminative treatment to prisoners on the basis of their religion, race or monetary standing, ensuring fair and equal treatment. Death penalty itself being an unethical, unsocial terrible public punishment, certain alternative punishments can be employed for treating convicts.

- Convicts of heinous offences should be given 25 years of compulsory punishment without parole. It should be given irrespective of the class of offences committed, where the convict is given the time to reflect on his behaviour and be reformed.
- Educated and intellectual prisoners should be given meaningful work opportunities, respecting their aspirations and motivations and not slave-like jobs.
- Income earned by the prisoners should be contributed towards their imprisonment and generating compensation to the victim or their family for the emotional, mental damage borne to them for the convict's actions. This will be helpful for victim families who lose their earning members.
- Lower courts should adhere to precedent given in Manoj and Ors. vs State of Madhya Pradesh (2022) whereby a fair and just trial is given to convicts.
- Addressing structural discrimination by appointing impartial guards and police who investigate the matter fairly, irrespective of the caste, creed of individuals. About 76% of death row convicts are from SC, ST and minorities, as of a 2016 report.

The Law Commission of India has also put forwards certain recommendations-

- Removal of age limit for death penalty in heinous offences since a juvenile performing offences like murder, rape etc have sufficient understanding of the cause and consequence of their actions.
- No pardoning power to the terrorists who affect the public at large.
- No delay in execution of death penalty.
- Death penalty should be provided on case-to-case basis, depending on the gravity of the crime. Hence, no list of grounds are required to be issued for conferment of death penalty.

Death Penalty in India has been a complex discussed issue which needs to be reformed in accordance with the world. The old legislations of the country are going to be replaced by the Bharatiya Nyaya Sanhita Bill, the Bharatiya Nagarik Suraksha Sanhita Bill and the Bharatiya Sakshya Bill, focusing on reformation rather than retribution. In the recent legislations, life imprisonment has been mentioned as the default alternative to death penalty. Further, a rational and uniform policy for remission of convicts should be introduced which would be independent of political controversy and media trials.

## CONCLUSION

*“We are all the creation of God. I am not sure a human system created by a human being is competent to take away a life based on artificial and created evidence” -*

A.P.J. Abdul Kalam. In 2000s, India showed signs of moving towards abolishing the death penalty, but recent legislative trends suggest a resurgence in its use. Concerns arise from new capital offenses, including non-homicidal crimes and mandatory death penalties. The imposition of the death penalty eliminates the possibility of substantial rehabilitation of a convict by removing him from the society. Hence, countries worldwide have accepted the reformatory discipline hypothesis rather than the retributive or obstacle hypothesis. Death penalty is a contentious issue in India and although, it has been challenged numerous times for violating the right to life and dignity of an individual under Article 21 of the Indian Constitution, it remains constitutionally valid. It is essential to note that a criminal should be punished in accordance with the crimes, and as a society, punishing the offence should be prioritised than punishing the offender. India follows the doctrine of “Rarest of rare case” for death penalty. Death penalty must exist worldwide to punish cases of extreme brutality that shock the collective conscience of the society. Since United Nations and other International Human Rights Organisations advocate for abolition of death penalty, a reevaluation of the criminal legislation needs to be conducted for conferment of such punishment

only in severe cases, moving towards a humanitarian and reformatory approach of punishment to convicts.

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