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# CAPITAL PUNISHMENT IN INDIA

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## **1.1 INTRODUCTION :**

All punishments are based on the same proposition i.e. there must be a penalty for wrongdoing. There are two main reasons for inflicting the punishment. One is the belief that it is both right and just that a person who has done wrong should suffer for it; the other is the belief that inflicting punishment on wrongdoers discourages other from doing wrong. The capital punishment also rests on the same proposition as other punishments.<sup>1</sup>

Capital punishment is an integral part of the Indian criminal justice system. Increasing strength of the human rights movement in India, the existence of capital punishment is questioned as immoral. However this is an odd argument as keeping one person alive at the cost of the lives of numerous members or potential victims in the society is unbelievable and in fact, that is morally wrong.<sup>2</sup>

## **1.2 MEANING OF CAPITAL PUNISHMENT:**

Capital punishment, also called death penalty, execution of an offender sentenced to death after conviction by a court of law for a criminal offense. Capital punishment should be distinguished from extrajudicial executions carried out without due process of law. The term death penalty is sometimes used interchangeably with capital punishment, though imposition of the penalty is not always followed by execution (even when it is upheld on appeal), because of the possibility of commutation to life imprisonment.<sup>3</sup>

The term "Capital Punishment" stands for most severe form of punishment. It is the punishment which is to be awarded for the most heinous, grievous and detestable crimes against humanity. While the definition and extent of such crimes vary from country to country, state to state, age to age, the implication of capital punishment has always been the death sentence. By

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1 <http://newindialaw.blogspot.in/2012/11/constitutional-validity-of-capital.html>

2 <http://www.allsubjectjournal.com/archives/2015/vol2issue4/PartK/62.pdf>

3 <http://www.britannica.com/topic/capital-punishment>

common usage in jurisprudence, criminology and penology, capital sentence means a sentence of death. 4

### 1.3 HISTORICAL BACKGROUND:

In the Code of Criminal Procedure (CrPC), 1898 death was the default punishment for murder and required the concerned judges to give reasons in their judgment if they wanted to give life imprisonment instead. 5 By an amendment to the CrPC in 1955, the requirement of written reasons for not imposing the death penalty was removed, reflecting no legislative preference between the two punishments. In 1973, when the CrPC was amended further, life imprisonment became the norm and the death penalty was to be imposed only in exceptional cases, particularly if a heinous crime committed deems the perpetrator too dangerous to even be 'considered' for paroled release into society after 20 years (life imprisonment without parole does not exist in India since it is too expensive to freely feed and house dangerous criminals all their lives, and eliminating the possibility of parole after a life sentence removes the positive and rehabilitative incentive to improve behaviour; all criminals sentenced to life imprisonment in India are automatically eligible for parole after serving 20 years, as per IPC 57), and required 'special reasons'.6 This significant change indicated a desire to limit the imposition of the death penalty in India. The CrPC, 1973 also bifurcated a criminal trial into two stages with separate hearings, one for conviction and another for sentencing.7

### 2.0 CAPITAL PUNISHMENT IN INDIA:

A careful scrutiny of the debates in British India's Legislative Assembly reveals that no issue was raised about capital punishment in the Assembly until 1931, when one of the Members

4. Capital Punishment in India by Dr. Subhash C. Gupta, 2000, p. 1

5. "Project 39A — Annual Statistics". *Project 39A*. Retrieved 25 June 2022.

6. "Nirbhaya Rape Case Hanging: Everything you need to know". *Mumbai Mirror*. 20 March 2020. Retrieved 6 October 2020.

7. "Section 252 in The Indian Penal Code". *Indian Kanoon*. Retrieved 7 October 2020.

from Bihar, Shri Gaya Prasad Singh sought to introduce a Bill to abolish the punishment of death for the offences under the Indian Penal Code. However, the motion was negatived after the then Home Minister replied to the motion.

The Government's policy on capital punishment in British India prior to Independence was clearly

stated twice in 1946 by the then Home Minister, Sir John Thorne, in the debates of the Legislative Assembly. "The Government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided". 8

At independence, India retained several laws put in place by the British colonial government, which included the Code of Criminal Procedure, 1898 ('Cr.P.C. 1898'), and the Indian Penal Code, 1860 ('IPC'). The IPC prescribed six punishments that could be imposed under the law, including death.

For offences where the death penalty was an option, Section 367(5) of the CrPC 1898 required courts to record reasons where the court decided not to impose a sentence of death:

If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed.

In 1955, the Parliament repealed Section 367(5), CrPC 1898, significantly altering the position of the death sentence. The death penalty was no longer the norm, and courts did not need special reasons for why they were not imposing the death penalty in cases where it was a prescribed punishment.

The Code of Criminal Procedure was re-enacted in 1973 ('CrPC'), and several changes were made, notably to Section 354(3):

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.

This was a significant modification from the situation following the 1955 amendment (where terms of imprisonment and the death penalty were equal possibilities in a capital case), and a reversal of the position under the 1898 law (where death sentence was the norm and reasons had to be recorded if any other punishment was imposed). Now, judges needed to provide special reasons for why they imposed the death sentence.

These amendments also introduced the possibility of a post-conviction hearing on sentence,

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8. Ibid. pp. 104-105.

including the death sentence, in Section 235(2), which states:

If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.9

Various laws under which death penalty can be prescribed as a possible punishment in India are given at Annexure-I

### **3.0 INTERNATIONAL SCENARIO:**

The international landscape regarding the death penalty – both in terms of international law and state practice – has evolved in the past decades. Internationally, countries are classified on their death penalty status, based on the following categories:

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

At the end of 2014, 98 countries were abolitionist for all crimes, 7 countries were abolitionist for ordinary crimes only, and 35 were abolitionist in practice, making 140 countries in the world abolitionist in law or practice. 58 countries are regarded as retentionist, who still have the death penalty on their statute book, and have used it in the recent past.<sup>10</sup> While only a minority of countries retain and use the death penalty, this list includes some of the most populous nations in the world, including India, China, Indonesia and the United States, making a majority of population in the world potentially subject to this punishment. Country wise list of these four categories is given at Annexure-II.

9. India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp. 17-18.

10 India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.38-39

### **3.1 CAPITAL PUNISHMENT IN INTERNATIONAL HUMAN RIGHTS TREATIES:**

- i) The International Covenant on Civil and Political Rights ('ICCPR') is one of the key documents discussing the imposition of death penalty in international human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty.<sup>11</sup>
- ii) The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty is the only treaty directly concerned with abolishing the death penalty, which is open to signatures from all countries in the world. It came into force in 1991, and has 81 states parties and 3 signatories.<sup>12</sup>

iii) Similar to the ICCPR, Article 37(a) of the Convention on the Rights of the Child ('CRC') explicitly prohibits the use of the death penalty against persons under the age of 18. As of July 2015, 195 countries had ratified the CRC.<sup>13</sup>

iv) The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment ('the Torture Convention') and the UN Committee against Torture have been sources of jurisprudence for limitations on the death penalty as well as necessary safeguards. The Torture Convention does not regard the imposition of death penalty per se as a form of torture or cruel, inhuman or degrading treatment or punishment ('CIDT'). However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by UN bodies.<sup>14</sup>

v) In the evolution of international criminal law, the death penalty was a permissible punishment in the Nuremberg and Tokyo tribunals, both of which were established following World War II. Since then, however, international criminal courts exclude the death penalty as a permissible punishment.<sup>15</sup>

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11 Ibid. p.40-41

12 Ibid. p.43

13 Ibid. pp.43-44

14 India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.44-45

15 Ibid. pp.45-46

vi) Of the treaties mentioned above, India has ratified the ICCPR and the CRC, and is signatory to the Torture Convention but has not ratified it. Under international law, treaty obligations are binding on states once they have ratified the treaty. Even where a treaty has been signed but not ratified, the state is bound to "refrain from acts which would defeat the object and purpose of a treaty".<sup>16</sup>

#### **4.0 POLITICAL COMMITMENTS REGARDING CAPITAL PUNISHMENT GLOBALLY:**

i) Several resolutions of the UN General Assembly (UNGA) have called for a moratorium on the use of the death penalty. In 2007, the UNGA called on states to "progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed" and "establish a moratorium on executions with a view to abolishing the death penalty." In 2008, the GA reaffirmed this resolution, which was reinforced in subsequent resolutions in 2010, 2012, and 2014. Many of these resolutions noted that, "a moratorium on the use of the death penalty contributes to

respect for human dignity and to the enhancement and progressive development of human rights.” In 2014, 117 States had voted in favour of the most recent resolution. India has not voted in favour of these resolutions.<sup>17</sup>

In a 2013 resolution, the UN Human Rights Council acknowledged “the negative impact of a parent’s death sentence and his or her execution on his or her children,” and urged “States to provide those children with the protection and assistance they may require,” Human Rights Council resolution, 2014 noted that “States with different legal systems, traditions, cultures and religious backgrounds have abolished the death penalty or are applying a moratorium on its use” and deplored the fact that “the use of the death penalty leads to violations of the human rights of those facing the death penalty and of other affected persons.” The Human Rights Council urged states to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights

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16      ibid. p.46

17.      ibid. pp.51-52

ii) The law of extradition has been another tool for countries pushing for the abolition of the death penalty. Several abolitionist countries either require assurances that retentionist-extraditing countries not impose the death penalty, or have included such a clause in bilateral extradition treaties.<sup>18</sup>

## **5.0 CAPITAL PUNISHMENT : THE CURRENT STATUS :**

### **5.1 Supreme Court on Validity of Capital Punishment in India:**

Article 21 of the Indian Constitution ensures the Fundamental Right to life and liberty for all persons. It adds no person shall be deprived of his life or personal liberty except according to procedure established by law. This has been legally construed to mean if there is a procedure, which is fair and valid, then the state by framing a law can deprive a person of his life. While the central government has consistently maintained it would keep the death penalty in the statute books to act as a deterrent, and for those who are a threat to society, the Supreme Court too has upheld the constitutional validity of capital punishment in “rarest of rare” cases. In *Jagmohan Singh vs State of Uttar Pradesh* (1973), then in *Rajendra Prasad vs State of Uttar Pradesh* (1979), and finally in *Bachan Singh vs State of Punjab* (1980), the Supreme Court affirmed the constitutional validity of the death penalty. It said that if capital punishment is provided in the law and the procedure is a fair, just and reasonable one, the death sentence can be awarded to a convict. This will, however, only be in the “rarest of rare” cases, and the

courts should render “special reasons” while sending a person to the gallows.<sup>19</sup>

### 5.2 Criteria for Rarest of Rare:

The principles as to what would constitute the “rarest of rare” has been laid down by the top Court in the landmark judgment in *Bachan Singh vs State of Punjab* (1980).

Supreme Court formulated certain broad illustrative guidelines and said it should be given only when the option of awarding the sentence of life imprisonment is “unquestionably foreclosed”. It was left completely upon the court’s discretion to reach this conclusion. However, the apex

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18 India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.52-53.

19 Indian Express, New Delhi, dated 27.5.2015

court also laid down the principle of weighing, aggravating and mitigating circumstances. A balance-sheet of aggravating and mitigating circumstances in a particular case has to be drawn to ascertain whether justice will not be done if any punishment less than the death sentence is awarded. Two prime questions, the top court held, may be asked and answered. First, is there something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for a death sentence? Second, are there circumstances of the crime such that there is no alternative but to impose the death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offenders.<sup>20</sup>

death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases .....

The observations in *Swamy Shraddhanand* [2] case have been followed by the Court in a multitude of cases such as *Haru Ghosh v. State of West Bengal*, *State of Uttar Pradesh v. Sanjay Kumar*, *Sebastian v. State of Kerala*, *Gurvail Singh v. State of Punjab* where full life or sentence of determinate number of years has been awarded as opposed to death penalty.<sup>21</sup>

### 5.3 CLEMENCY POWERS:

If the Supreme Court turns down the appeal against capital punishment, a condemned prisoner can submit a mercy petition to the President of India and the Governor of the

State. Under Articles 72 and 161 of the Constitution, the President and Governors, respectively

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20 Indian Express, New Delhi, dated 27.5.2015

21 India. Law Commission of India. Consultation Paper on Capital Punishment, May 2014, pp.26-27

have the 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”.<sup>22</sup>

Neither of these powers are personal to the holders of the Office, but are to be exercised (under Articles 74 and 163, respectively) on the aid and advice of the Council of Ministers. Clemency powers, while exercisable for a wide range of considerations and on protean occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a heavy responsibility on those wielding this power and necessitates a full application of mind, scrutiny of judicial records, and wide ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution.

The Ministry of Home Affairs, Government of India, has drafted the “Procedure Regarding Petitions for Mercy in Death Sentence Cases” to guide State Governments and the prison authorities in dealing with mercy petitions submitted by death sentence prisoners.<sup>23</sup>

#### **5.4 JUDICIAL REVIEW OF EXERCISE OF MERCY POWERS:**

The Supreme Court in Shatrughan Chauhan case has recorded that the Home Ministry considers the following factors while deciding mercy petitions:

- a) Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);
- b) Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;
- c) Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;

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22 Indian Express, New Delhi, dated 27.5.2015

23 India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.176, 179

- d) Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;

- e) Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench;
- f) Consideration of evidence in fixation of responsibility in gang murder case;
- g) Long delays in investigation and trial etc.

However, when the actual exercise of the Ministry of Home Affairs (on whose recommendations mercy petitions are decided) is analysed, it is seen that many times these guidelines have not been adhered to. Writ Courts in numerous cases have examined the manner in which the Executive has considered mercy petitions. In fact, the Supreme Court as part of the batch matter Shatrughan Chauhan case heard 11 writ petitions challenging the rejection of the mercy petition by the Executive.<sup>24</sup> Supreme Court, last year held that judicial clemency could be granted on the ground of inordinate delay even after a mercy petition is rejected.<sup>25</sup>

### 5.5 LAW COMMISSION OF INDIA'S REPORT ON DEATH PENALTY:

The Law Commission of India in its 262nd Report (August 2015) recommended that death penalty be abolished for all crimes other than terrorism related offences and waging war. Complete recommendations of the Report are as follows:

- a) The Commission recommended that measures suggested that police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.
- b) The march of our own jurisprudence -- from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was

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<sup>24</sup> India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.190-191

<sup>25</sup> Indian Express, New Delhi, dated 27.5.2015

- c) restricted by the Supreme Court to the rarest of rare cases – shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the Right to life and strengthened due process requirements in the interactions between the State and the individual, prevailing standards of constitutional morality and human dignity, the Commission felt that time has come for India to move towards abolition of the death penalty.

d) Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism-related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the Commission did not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

d) The Commission accordingly recommended that the death penalty be abolished for all crimes other than terrorism related offences and waging war.

e) Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible.<sup>26</sup>

## 6.0 CAPITAL PUNISHMENTS UNDER INDIAN PENAL CODE:

1. Section 121 - Treason, for waging war against the Government of India
2. Section 132 - Abetment of mutiny actually committed
3. Section 194 - Perjury resulting in the conviction and death of an innocent person
4. Section 195A - Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person
5. Section 302 - Murder
6. Section 305 - Abetment of a suicide by a minor, insane person or intoxicated person  
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- 26 India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.217-218
7. Section 307 (2) - Attempted murder by a serving life convict
8. Section 364A - Kidnapping for ransom
9. Section 376A - Rape and injury which causes death or leaves the woman in a persistent vegetative state
10. Section 376E - Certain repeat offenders in the context of rape
11. Section 396 - Dacoity with murder

## 6.1 CAPITAL OFFENCES IN OTHER LAWS:

### Sl. No. Section Number Description

1. Sections 34, 37, and 38(1) The Air Force Act, 1950
2. Section 3(1)(i) The Andhra Pradesh Control of Organised Crime Act, 2001
3. Section 27(3) The Arms Act, 1959 (repealed)
4. Sections 34, 37, and 38(1) The Army Act, 1950
5. Sections 21, 24, 25(1)(a), and 55 The Assam Rifles Act, 2006
6. Section 65A(2) The Bombay Prohibition (Gujarat Amendment) Act, 2009

7. Sections 14, 17, 18(1)(a), and 46 The Border Security Force Act, 1968
  8. Sections 17 and 49 The Coast Guard Act, 1978
  9. Section 4(1) The Commission of Sati (Prevention) Act, 1987
  10. Section 5 The Defence of India Act, 1971
  11. Section 3 The Geneva Conventions Act, 1960
  12. Section 3 (b) The Explosive Substances Act, 1908
  13. Sections 16, 19, 20(1)(a), and 49 The Indo-Tibetan Border Police Force Act, 1992
  14. Section 3(1)(i) The Karnataka Control of Organised Crime Act, 2000
  15. Section 3(1)(i) The Maharashtra Control of Organised Crime Act, 1999
  16. Section 31A(1) The Narcotics Drugs and Psychotropic Substances Act, 1985
  17. Sections 34, 35, 36, 37, 38, 39, 43, 44, 49(2)(a), 56(2), and 59 The Navy Act, 1957
  18. Section 15(4) The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act, 1962
  19. Sections 16, 19, 20(1)(a), and 49 The Sashastra Seema Bal Act, 2007
  20. Section 3(2)(i) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
  21. Section 3(1)(i) The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002;
  22. Sections 10(b)(i) and Section 16(1)(a) The Unlawful Activities Prevention Act, 1967
- Source:** India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.31-32

## **7.0 Landmark Cases Related to Capital Punishment In India:**

### **7.1.1 Mithu Vs State of Punjab (1983)**

In this case, the Supreme Court struck down Section 303 of the Indian Penal Code, which recommend for mandatory capital punishment for offenders.

### **7.1.2 Bachan Singh Vs State of Punjab (1980)**

In this case, the Supreme Court says that the capital punishment or death penalty was given only in the rarest cases.

### **7.1.3 Jagmohan Vs State of U.P. (1972)**

This was the first case dealing with the question of constitutional validity of capital punishment in India.

## **8.0 Conclusion:**

Deterrence is most effective when the punishment happens soon after the crime. The more the legal process distances the punishment from the crime - either in time, or certainty - the less effective a deterrent the punishment will probably be.

