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# **CAPITAL PUNISHMENT: A QUESTION ON CONSTITUTIONALITY AND MORALITY**

Authored By - Shruti Ashri

## **ABSTRACT**

Capital punishment i.e. Death penalty is the most fearsome and gruesome form of punishment adopted from the monarchial form of government. Inflicting pain and monetary loss on the people convicted of a crime is an old traditional approach of punishment, Capital punishment is also in the same arena. In modern society humans are capable of innovating the things that old scientists have long dreamed of. Punishing a person with the old and outdated approach i.e. Capital punishments seem odd. There are pro-studies and antithesis on the very same subject matter either challenging or supporting it with moral and legal grounds, this paper tends to provide the wide scope of capital punishment along with the constitutionality and morality of capital punishment.

**KEY WORDS:** Death Penalty, Morality, Constitutionality, Punishment.

## **INTRODUCTION**

Justice in its literal sense means treating people in an impartial way, without any biases and sidelines. There are punishments recognised in Bharat i.e. Death Penalty, Life imprisonment, Simple imprisonment and rigorous imprisonment and fines. Capital Punishment i.e. Death penalty means taking the person's life by the procedure as per the law consequences of his action. Capital punishment is not a modern concept, it has been observed that the death penalty existed since time immemorial. It can be said to be barbaric in many senses, it has also been observed that inflicting the death penalty can discourage the crime. One more possibility is that it may render irreversible injustice on an innocent person. Capital punishment is a two way sword, it can either serve justice or can be a reason for grave injustice. The question is, whether the death penalty renders justice or causes grave injustice? The clarity of evidence shows that it neither acts as a way of reducing crime by creating deterrence nor acts as an irreversible injustice. Death penalty has become a topic of discussion, questioning the constitutionality and morality of the death penalty.

## CAPITAL PUNISHMENT

Death penalty i.e. capital punishment is the execution of the criminal convicted for the offense falls under the category of Rarest of the rare as given by Supreme court. The execution by the state with the proper procedure established by the law. Capital punishment is awarded to the criminals convicted for the most heinous crimes. In literal sense, "*Capital*" means "*Head*". Capital punishment is considered to be the last resort in awarding punishment, the ultimate and absolute punishment. Ending the life of a person for the reason of serving justice and deterrence at the same time. Corporal punishment is the expression used to describe the punishments of harsh nature, inflicted on the criminals of heinous crime. In the modern era it is considered to be the most fearsome punishment inflicted on the doomed in the living. In India, Death penalty is awarded in 2 ways, Hanging till death and Shooting.<sup>1</sup> Though, Shooting is restricted only to armed forces, Hanging is the only way to Impose death penalty on convicts. In this the convict is placed on a platform with mechanized floor, with a movable pedestal. The platform opens and makes the convict hang from the neck till the confirmation of death. It is one of the most painful ways of execution. Countries like U.S.A, uses Drugs and toxins to execute the convict in the least painful way. The practice of death penalty is not just limited to India, Other countries also have the very same practice.

## HISTORY OF CAPITAL PUNISHMENT

The history of Capital Punishment revolves from the Ancient times moving to the colonial period.

### ANCIENT INDIA

Capital punishment was a widely used method of punishment in ancient India. It was the worst type of punishment, and there were several ways to administer it. Several of these techniques included:

- **Stoning:** The death penalty known as "*stoning*" involves a crowd of people throwing stones at a victim till he dies. In it, the offender is forced to stand in a little hole uncovered in the ground while he is surrounded by people who stone him until he dies.
- **Pillory:** The culprit in 'Pillory' was forced to stand in a public area while his hands and head were imprisoned in an iron frame, preventing him from moving. Then he would be

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<sup>1</sup> Prof. N.V. Paranjape, "Criminology & Penology"; (Allahabad, Central Law Publications, Twelfth edition- Re print 2008), pp. 239, 245

stoned, beaten, or have his ears tied to the pillory's support beams. Dangerous offenders were occasionally tied to the walls before being shot or stoned to death. Unquestionably, it was a very harsh and terrible method of punishment that persisted into the 19th century.

- **Immurement:** The culprit in this crime was built into a wall. It was the most inhumane, brutal, and agonizing method of carrying out the death penalty.
- **Execution by elephant:** In this kind of punishment, the criminal was dumped beneath the weight of a drunk elephant, who then crushed him or her to death.

## WITCH TRIALS

Due to the word's negative meaning, those who practice witchcraft are disregarded by society and treated with suspicion. Witch hunting, on the other hand, is an odd practise in which women accused of having negative influences are labelled as witches by Ojhas (witch doctors/tantriks) or locals and are then pursued, exiled, flogged, raped, paraded through the village naked, made to eat human excrement, balded, thrashed, etc. Numerous names have been used to refer to the women suspected of being witches, including dayan, tonahi, beta khauki (son eater), adam khauki (man eater), bhaikhauki (brothereater), maradmuhi, kheldi (characterless), bisahin (poisonous lady), bhootni, Dakan, etc. Therefore, witch hunting includes both verbal and physical assault.

In Assam, Bihar, Chhattisgarh, Gujarat, Haryana, Jharkhand, Madhya Pradesh, Maharashtra, Orissa, Rajasthan, Uttar Pradesh, and West Bengal, witch hunts are a usual event.

Most often, old ladies and widows who have been falsely accused of being witches do so because of their physical characteristics, such as hunches, odd hairstyles, or unusual skin tones. Even men have occasionally been falsely accused of possessing magical abilities and forced to bear the penalties. The woman's family and children also suffer since they are frequently kicked out of the community and forced to leave the village, or in the worst cases, killed.

The only punishment which the people thought to be valid was burning alive the person being accused for such an act. This was also a kind of capital punishment which was brutal in its own way and never being proved for the crime. It was only based on assumptions and doubt.

## COLONIAL INDIA

Seth Govind Das posed many inquiries in the Legislative Assembly in 1946 about the potential for India to do away with the death penalty. The debate included official figures from 1925 to 1944, documenting death sentences handed down by Sessions Courts, confirmations by High Courts, and then hangings. Statistics on executions for the late nineteenth century were very scarce, but this discussion provided numbers for that time period. One thing became obvious as a result of the investigations: the hangman was active in late imperial India. 23,937 execution warrants issued by Sessions Courts were listed in the document. Since every sentence needed to be confirmed in a High Court, this was the best chance to get out of jail; at this point, 41% of sentences were modified or acquitted. far slower pace than this increase in executions.

The only remaining option for confirmed sentences was to request executive MERCY. 83% of the cases that got to this level ended up at the bottom of the death penalty after a somewhat challenging and time-limited legal process. This resulted in 11,539 executions in all, or 577 each year on average. From 346 hangings in 1925 to a peak of 789 in 1943, the number of hangings increased with time. Even if there had been an increase in murders during this time, it had happened at a much slower rate than this increase in executions.

## CAPITAL PUNISHMENT IN MODERN ERA

The Death Penalty in India Report states that 488 inmates were on death row by the end of 2021, the highest number in 17 years.<sup>2</sup>

In 2021, trial courts handed down a total of 144 death sentences, but only 39 cases were resolved by the High Courts during that time, according to the study.

The Supreme Court resolved just 6 cases in 2021 compared to 11 in 2020 and 28 in 2019, despite identifying death sentence cases as a priority in September of last year.

India killed four people found guilty of the cruel sexual assault of a 22-year-old paramedical student in New Delhi in 2012 in March 2020. The incident became known as the "Nirbhaya case"<sup>3</sup>

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<sup>2</sup> Amnesty International Report 'Death Sentences and Executions, 2014' pp.64-65.

<sup>3</sup> Mukesh v. State (NCT of Delhi), (2017) 6 SCC

or "16 December case" in honor of the day the crime occurred. The last people to be executed in India were the four people accused in the Nirbhaya case<sup>4</sup>.

## INTERNATIONAL RECOGNITION OF DEATH PENALTY

Death penalty is a global issue, countries either developed or developing have the very same practice though different means are there, some are painless and others are gruesome and painful. Most countries argue against it as it is one of the most inhumane practices which is being practiced under the ambit of law. It violated the Human rights. The United Nations have a great role in protecting human rights and making the policies for the nations signed, to adopt the ways of the United nation. Principles of natural justice and fair trial are just some examples of what the United Nation has made the world adopt. UNODC is against the practice of the death penalty in every situation and circumstance. The reason for this criticism is the possibility of irreversible injustice. Death penalty is the only punishment recognized by the law to be irreversible in nature, If once rendered on the convict there is no chance of fixing it.

- Article 5 of the Universal Declaration of Human Rights 1948 provides the provision of non-cruel treatment as a form of punishment.
- Article 7 of the International Covenant on Civil and Political Rights (ICCPR) 1966 placed the bar on Inhuman treatment and cruelty as a form of punishment.

Currently more than 70% of the countries have abandoned the practice of capital punishment, developed countries are primarily focusing on abandoning traditional inhuman approach and abolishing capital punishment is one of the key signs of their developed legal provisions.

Concept of "*Police state and welfare*" state can also be linked with the practice of capital punishment, A state is known by its development and by the development of its people.

- **Police State**

Police state is the concept in which the maximum power is in the hands of law enforcement. This is not to maintain order in the society but to create deterrence in the society and to regulate the actions of the people. It is more of a state centric system in which the state favors by suppressing the citizens, suppressing protests etc.

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<sup>4</sup> Mukesh v. State (NCT of Delhi), (2017) 6 SCC

- **Welfare state**

Contrary to the police state, the welfare state focuses on the overall development of the citizens of the state. It's more of a public centric system in which the policies of the state favors the society.

It is to be believed that the concept of a capital system is to protect and favor the interest of the state or the government. Death penalty is the extreme form of punishment which tends to end the life of the violator, in any scenario if once rendered wrongly there is no way of changing it. This extreme form of irreversible punishment is absolute.

## **CONSTITUTIONAL VALIDITY OF CAPITAL PUNISHMENT OR DEATH PENALTY IN INDIA.**

India is one of the nations that has neither totally removed the death penalty provision nor passed legislation outlining its legitimacy. The validity of the death penalty has been contested on several occasions since the Indian Constitution was established through Supreme Court petitions.

The death penalty may be imposed on criminals for seven different offenses. These include murder, dacoity coupled with murder, and assisting a child, minor, or intoxicated person in committing suicide.

Since the beginning of time, the death penalty has been a kind of punishment used to execute offenders and punish the most dangerous crimes. The foundation of Indian criminal law is a blend of reformatory and deterrent views of punishment. While the penalties must be applied to discourage future offenses, they must also provide the possibility for reformation.<sup>5</sup>

The death sentence has been the subject of a variety of opinions in India, with some favoring its continuation and others calling for its abolition.

The right to life is guaranteed by the Indian constitution to every individual, subject to its deprivation through the legal process. The Abolitionists have contended that the death penalty in its current form violates the citizen's right to life. Many eminent lawyers have argued that it is

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<sup>5</sup> Jagmohan Singh v. State of U. P, AIR 1973 SC 947 Cr. LJ 3301973 SCC 162 .

against everyone's right to life for the death sentence to remain in Indian criminal legislation. It is asserted that these esteemed jurists are likely unaware of the fact that even the right to life is not a given.

In addition, Article 14 of the Constitution stipulates that everyone is entitled to "equality before the law and equal protection of the laws," which means that discrimination against anybody is prohibited unless it is necessary to achieve equality. In the Case of *Bachan singh vs state of punjab*<sup>6</sup>. Supreme court gave the doctrine of "*Rarest of the Rare case*"<sup>7</sup>

## ARGUMENTS IN FAVOR OF DEATH PENALTY

Those who advocate the death sentence believe that it should be used to the most horrific and rarest of crimes, such as Delhi Gang Rape Case where the demand for the accused's execution was made.<sup>8</sup> On the basis of their beliefs in religion, morality, and ethics, many who oppose the death penalty say that it is cruel and immoral. It is also advocated that it be changed to life in prison or any other alternative.

### MORAL ARGUMENTS

The argument in favor of the death sentence is that people who kill have violated their own right to life by taking another person's life. Capital punishment critics contend that by legalizing the precise act of murder that the law tries to outlaw, capital punishment sends the wrong moral message. Furthermore, they contend that the application of the death penalty for less serious offenses is morally wrong since it is utterly excessive in comparison to the harm caused. Abolitionists contend that the death penalty is inherently unjust, inhumane, and demeaning and that it violates the convicted person's right to life.

### PRACTICAL ARGUMENTS

There are disagreements as to whether the death penalty can be carried out in a way that is consistent with justice. Those who favor the death penalty think that rules and procedures may be created to guarantee that only those who truly deserve to die be put to death. Opponents contend that the past use of the death penalty demonstrates that any attempt to select out particular crimes

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<sup>6</sup> 1980 2 SCC 684(10), AIR 1980 SC 898

<sup>7</sup> Machhi singh vs state of punjab [1980] 2 SCR 864

<sup>8</sup> Lethal Lottery, The death penalty in India and people's Union for civil Liberties (2008).

as deserving of the death penalty would unavoidably be arbitrary and discriminatory.

They also list additional circumstances that they believe make it impossible for the death penalty to be imposed equitably, noting that the poor and members of ethnic and religious minorities frequently lack access to competent legal counsel, which feeds into racial prejudice. Finally, they contend that since death penalty appeals take so long, persons who have been given the death penalty are sometimes brutally forced to suffer extended periods of uncertainty about their future.

## **ARGUMENTS AGAINST DEATH PENALTY**

Death penalty is the absolute form of irreversible punishment, if rendered wrongly it destroys the social structure along with legal integrity of the legislature.<sup>9</sup> The mindset of the lawmakers should always be considered before deciding the punishments like death penalty or life imprisonment. The legislature placed the provisions of death penalty and life imprisonment for totally different reasons. Death penalty is awarded for the offenses of such a grave nature that there is no chance of reformation, but why can't it be converted to life imprisonment?

Other than the cost that will be inflicted on the state to keep the prisoner for the rest of his life and chances of jail violence. Criminal activities can be condemned by applying adaptive policies and making the facilities less vulnerable to crimes and more towards atonement and reformation. Religiously speaking, Life and death is in the hand of the GOD!

Constitutionally speaking, Article 21 i.e. Right to Life and Personal Liberty grants the fundamental right to every citizen and non citizen of the country to live freely and no one can be detained or killed without the proper procedure of law. If a person has committed the offense of such a kind that Death is the only option of justice, then this is no justice but retribution or revenge.

## **MORAL ARGUMENTS**

Law is there to serve justice not revenge. In the modern era where the nations are capable of detaining the prisoners in a more efficient way, the need for the death penalty is not the same anymore. Killing a person either by the way of law or without it is still killing, Justifying it under the umbrella of law is still killing. Law is manmade and not universal, the value of life and death is universal.

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<sup>9</sup> "S.R Muralivasan" & "S T. Manasaa", Death penalty in India: an overview, IJLSI| Volume 1, Issue 2 | ISSN: 2581-9453.

## CONCLUSION

Many nations have abolished the death penalty or capital punishment on the grounds that it is cruel and inhumane and violates the people's constitutional rights to life and liberty. However, if a fair view is to be taken, it would be correct to state that the death penalty, despite its brutality, is beneficial in decreasing criminal acts and deterring criminals to some level.

The only thought present in the minds while pronouncing the capital punishment is to set an example to the wrongdoers that if something of this sort happens the result would be the same.

In India, the Capital Punishment and its execution is a harsh method owing to the fact that the more the heinous crime committed the harsher it will be. In a country like ours capital punishment is executed by hanging a person till death this leads to a person.

Not questioning the validity of capital punishment but the way of its execution can be altered. If a heinous crime has been committed brutally in an inhuman way is it necessary to punish the same with inhumanity.?

Treating the person with the same brutality, with the same inhuman behavior is against humanity. By doing this a theory of punishment which is retributive theory will prevail and which is not the ultimate goal.

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