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DO WE ACTUALLY NEED TO DO AWAY WITH CAPITAL PUNISHMENT IN INDIA?

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ABSTRACT

This essay aims to explain what a capital punishment is, along with the historic background and international perspective. The purpose of this essay is to reinforce the minds of the readers with all that information related to capital punishment along with its pros, cons, international jurisprudence, philosophical aspect of common law etc., along even my views [:) please don't take my views as a clear judgement or reasoning, my aim is to make you form a rational view on the topic and decide is it necessary to impose death penalty on the convicts or a comparatively lenient punishment will be apt]. I have referred and read plethora of statues, reports and research publication in arriving on this legal piece.

INTRODUCTION

Every modern state has a law in force in the boundaries of the sovereign territories of the state with the aim to ensure proper governance and regulation of the human conduct, so that liberty of each and every member of state is prevailed and maintained. Humans have an inherent tendency to live in close knitted groups and associations. But not every member association has the same ideas and theories. This further leads to conflicts and many a times the members act in a way which not only affects the rights of individuals but on a broader extent affects the rights of the state as a whole. The common sense propounds that these acts should be reproached and punishment should be provided to deter other members of the society from committing these acts. The foundation of all penalties is the same idea: that misconduct always has to have a consequence. The punishment is being meted out for two key reasons which develop into two schools of thought: the first holds that punishing those who have acted improperly is both morally and ethically acceptable; and the second thought holds that doing so deters others from doing improperly. The same premise that underpins other penalties also applies to the death penalty or capital punishment. There are two thoughts of people, one who believes human rights are supreme

and thus death penalty should not be accorded at all; and other who argue against the former thought that keeping one person alive at the cost of the lives of numerous members or potential victims in the society is unbelievable and morally wrong.

Capital punishment, or “the death penalty,” is an institutionalized practice designed to result in deliberately executing persons in response to actual or supposed misconduct and following an authorized, rule-governed process to conclude that the person is responsible for violating norms that warrant execution¹. It is the most severe and deterrent form of punishment and is awarded for most heinous, grievous and detestable crimes.

HISTORIC ASPECT

The first established death penalty laws date as far back as the Eighteenth Century B.C. in the Code of King Hammurabi of Babylon, which codified the death penalty for 25 different crimes. The death penalty was also part of the Fourteenth Century B.C.’s Hittite Code; in the Seventh Century B.C.’s Draconian Code of Athens, which made death the only punishment for all crimes; and in the Fifth Century B.C.’s Roman Law of the Twelve Tablets. Death sentences were carried out by such means as crucifixion, drowning, beating to death, burning alive, and impalement. In the Tenth Century A.D., hanging became the usual method of execution in Britain. It was only during the reign of William the Conqueror who abolished death penalty in all civil crimes and allowed it to exist only in cases of war crimes and battle prisoners. Hanging was the most usual form of punishment during the early British regime and it was only during Sixteenth Century, under the reign of Henry VIII execution were made by methods such as boiling, burning at the stake, hanging, beheading, and drawing and quartering.²

¹Capital punishment, Internet Encyclopedia for Philosophy available at <https://iep.utm.edu/death-penalty-capital-punishment/> last seen 29/02/24

²Early History of the Death Penalty, Death Penalty Information Center available at <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty> last seen on 29/02/2024

Historically, the purpose of the death penalty was twofold: to inflict physical and mental anguish on the offender and to serve as a public spectacle that sent a moral message about the gravity of sin and crime. Death penalty based on time it takes for the convict to die is divided demarcated as instantaneous and gradual. There are various methods of execution prevalent all over the world with the most commonly used once are hanging, Lethal injection, Electrocution, Gas Chamber and Firing squad. Recently a new method of execution called Nitrogen Hypoxia was used in

Alabama state of United States on 24th January, 2024³.

CAPITAL PUNISHMENT IN INDIA

The first time a bill was introduced in pre independence British India Legislative Assembly for abolishing Capital Punishment was moved in 1931 by Shri Gaya Prasad Singh, Member from Bihar but the same was rejected by the British Indian Authorities on introduction. Until 1955 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.

The abolition of Section 367(5) of the CrPC 1898 by the Parliament in 1955 brought about a fundamental change in the status of the death penalty. The death sentence had become the exception rather than the rule, and judges did not need to give specific justifications for not applying the death penalty when it was the recommended punishment. In 1973, the Code of Criminal Procedure (CrPC) was re-enacted with a number of amendments, most notably to Section 354(3). This marked a dramatic departure from the circumstances that prevailed after the 1955 amendment, which gave the death penalty and prison sentences equal standing in capital cases, and a return to the pre-1898 legislation, which established the death penalty as the default punishment and required justifications for any other punishment meted out. Now, judges needed to provide special reasons for why they imposed the death sentence.

There are 24 such legislations for which capital punishment is proposed. Some of the most notable ones are as prescribed in the table given in the annexure 1.

INTERNATIONAL ASPECT

This section will throw an glimpse on various international authorities which oppose to the infliction of death penalty and consider it an act against basic human rights of individual. Amnesty International considers death penalty as against the human right to life.

³RE: Kenneth Eugene Smith v. State of Alabama, SC-2023-0934 (2023, Supreme court of the United States)

The organization oppose **death penalty in all cases without exception – regardless of who is accused, the nature or circumstances of the crime, guilt or innocence or method of execution**. The 2022 report of Death penalty conducted by the organization show that in 2022 alone 2,016 Death Sentences were awarded in 56 countries and 886 reported execution were conducted in mere 20 countries. Till now total 112 countries have abolished death penalty with 2 countries, Papua New Guinea⁵ and Central African Republic⁶ abolishing the same in year 2022,

Ghana⁷ in 2023 and Zimbabwe⁴ abolishing death penalty as a form of punishment in year 2024.

On 8 March 2023, Azerbaijan signed Protocol No. 13 to the European Convention on Human Rights, on the abolition of the death penalty in all circumstances. This makes the country the last Member State of the Council of Europe to sign the Protocol. Azerbaijan is yet to ratify the Protocol

On 24 October 1990 the Hungarian Constitutional Court declared that the death penalty violates the "inherent right to life and human dignity" as provided under Article 54 of the country's constitution. The judgment had the effect of abolishing the death penalty for all crimes in Hungary.

On 6 June 1995 the South African Constitutional Court declared the death penalty for murder as provided under the country's laws to be incompatible with the prohibition of "cruel, inhuman or degrading treatment or punishment" under the country's interim constitution. In 1998 the South African parliament removed the death penalty from the country's laws under the Criminal Law Amendment Act

The European Court of Human Rights has held that "the manner in which [a death sentence] is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights')]. Article 3 of the European Convention on Human Rights prohibits torture and inhuman or degrading treatment or punishment.

⁴Zimbabwe cabinet scraps colonial-era death penalty law, [www.reuters.com](https://www.reuters.com/world/africa/zimbabwe-cabinet-scraps-colonial-era-death-penalty-law) available at <https://www.reuters.com/world/africa/zimbabwe-cabinet-scraps-colonial-era-death-penalty-law> 2024-02-07 last seen on 3/3/2024

⁵Papua new guinea repeals death penalty 30 years after reintroduction, www.theguardian.com available at <https://www.theguardian.com/world/2022/jan/21/papua-new-guinea-repeals-death-penalty-30-years-after-reintroduction> last seen on 3/3/2024

⁶Central African republic abolishes the death penalty, worldcoalition.org available at <https://worldcoalition.org/2022/06/26/central-african-republic-abolishes-the-death-penalty/> last seen on 3/3/2024

⁷Jurist in Ghana parliament votes to end death penalty available at <https://deathpenaltyproject.org/jurist-ghana-parliament-votes-to-end-death-penalty/> last seen on 3/3/2024

The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, states in its preamble that "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights" and that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life

The Guidelines to EU [European Union] Policy towards Third Countries on the Death Penalty, adopted by the Council of the European Union in 1998, establish that it is an EU objective "to

work towards universal abolition of the death penalty as a strongly held policy” Similarly, Under the Rome Statute of the International Criminal Court, the death penalty is excluded from the punishments which that Court is authorized to impose, even though the Court has jurisdiction over extremely grave crimes: crimes against humanity, genocide and war crimes.

Article 6(2) of the International Covenant on Civil and Political Rights states that a death sentence may be imposed only "in accordance with the law in force at the time of the commission of the crime"

Article 15(1) of the International Covenant on Civil and Political Rights states that a heavier penalty shall not be imposed than the one that was applicable at the time when the criminal offence was committed, and that if, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby

The UN Human Rights Committee has stated that the following offences cannot be characterized as the "most serious crimes" under Article 6(2) of the International Covenant on Civil and Political Rights and that the imposition of the death penalty for these offences therefore violates that article: economic offences, including embezzlement by officials; political offences, robbery, abduction not resulting in death, and illicit sex, committing a third homosexual act, and apostasy. Article 6(5) of the International Covenant on Civil and Political Rights states: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

Article 37(a) of the UN Convention on the Rights of the Child; Article 5(3) of the African Charter on the Rights and Welfare of the Child; Safeguard 3 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984 all states, Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death penalty be carried out on pregnant women, or on new mothers, or on persons who have become insane.

The automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6 of the International Covenant on Civil and Political Rights, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.

Article 14 of the International Covenant on Civil and Political Rights sets out standards for fair trial these include

- The right of anyone facing a criminal charge to a fair and public hearing by a competent, independent and impartial tribunal;

- the right to be presumed innocent until proved guilty;
- the right to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charges against him or her;
- the right to have adequate time and facilities for the preparation of a defence; the right to communicate with counsel of the defendant's choosing;
- the right to free legal assistance for defendants unable to pay for it; the right to examine witnesses for the prosecution and to present witnesses for the defence;
- the right to free assistance of an interpreter if the defendant cannot understand or speak the language used in court;
- the right not to be compelled to testify against him or herself or to confess guilt

Article 6(4) of the International Covenant on Civil and Political Rights states: "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases

In resolution 1989/64, adopted on 24 May 1989, the UN Economic and Social Council called on UN member states in which the death penalty may be carried out "to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency

Safeguard 8 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, states: "Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence

Article 6(4) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) states that the death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children

THE LEGAL IRONY

With the publishing of writings of Quaker, E. Roy Calvert who gave the first scientific argument on abolition of death penalty in his essay *Capital Punishment* in the 20th century in 1925, a modern campaign in favour of abolition of death penalty erupted. Later the Royal Commission on Capital Punishment with a remit to examine all aspects of the death penalty short of considering complete a abolition gave a huge blow to the retentionist theory. Finally on December 4, 1964 Mr

Silverman introduced the draft Murder (Abolition of death penalty bill) which later on November 2, 1965 entered into the Common law statute as Murder (Abolition of death penalty) Act, 1965. And since then not even a single execution have been made in British regime. But the irony is that despite our previous colonial masters have done away with such draconian law nearly 54 years ago, the Indian legal system is carrying the rope of the gift given to us by Lord Macaulay till today. Now is the time to relieve our legal system with such chain, and let it too smell liberty and dignity of human life in true aspect.

L.J. Blom-Cooper Murder (Abolition of Death Penalty) Act 1965 , Vol 29 Modern L.R., 184-186 (1966)

TORCH BEARERS OF JUSTICE: APPROACH AND IDEAS

This section aims to give a account of measured evolved by the Supreme Court of India through its judgement in order to ensure that no innocent is convicted and hanged. These measures in modern day India are a guidelines to ensure that the draconian law introduced in formal Indian Legal System (though historically adopted from the Macaulay Penal code) is regulated and controlled.

Instead of Jumping directly on the measures it would be apt to first discuss on what ground does the Supreme Court declared death penalty as a constitutional act.

CONSTITUTIONAL VALIDITY OF DEATH PENALTY

In the case of Bachan Singh v. State of Punjab (1980) 2 SCC 684 the supreme court validated the constitutional validity of Death Penalty and also affirmed with the decision in Jag Mohan Singh vs State of Uttar Pradesh. The court said that as India is ratifying party to International Covenant on Civil and Political Rights, which even does not unconstitutionalize death penalty. The court further held that as right to life of a person does not come under the domain of right to freedom as per article 19 of the constitution of India, thus article 19 cannot be invoked against death penalty as no freedom of a person is restricted by such act. The founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. The Court enumerated several circumstances as indicators of aggravating⁸ and mitigating⁹ circumstances relevant for determining sentence (**Given in Annexure 2**). Young age of the accused, the probability of reform and rehabilitation, lack of recidivism, mental condition were some of the mitigating factors illustrated by the Court. It was stated that the sentencing policy enshrined in Section 354 (3), Code of Criminal Procedure,

1973, entailed that the scope and concept of mitigating factors must be interpreted liberally and expansively. The Court reiterated that life imprisonment is the rule and the death sentence is an exception which, the Court held, should be imposed only in **the “rarest of rare” cases when the alternative option of life imprisonment is unquestionably foreclosed.**

⁸Aggravating circumstances are any relevant circumstances, supported by the evidence presented during the trial that makes the harshest penalty appropriate, in the judgment of the judge 9

Mitigating factors are any evidence presented regarding the defendant's character or the circumstances of the crime, which would cause a juror or judge to vote for a lesser sentence.

The Bombay High Court in *Indian Harm Reduction Network v. Union of India* 2011 SCC OnLine Bom 715 held that the Section 31 A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“NDPS Act”) was violative of Article 21, Constitution of India, 1950. Section 31 A, NDPS Act, leaves no option to the Court but to impose the death penalty.

Further, even though the sentence provided under Section 31 A, NDPS Act is of death penalty, the Court is not required to record special reasons, unlike the other crimes under the Indian Penal Code, 1860 or for other offences under the provisions of the NDPS Act. It makes the pre-sentence hearing under Section 235(2) Code of Criminal Procedure, 1973 irrelevant.

The Court stated that there is no express provision in the NDPS Act to override the mandate of Sections 235(2) and 354(3) of the Code of Criminal Procedure, 1973. Instead of declaring Section 31-A as unconstitutional, the Bombay High Court held that the provision should be construed as being directory by reading down the expression "shall be punishable with death" as "may be punishable with death".

In *Mithu v. State of Punjab* (1983) 2 SCC 277 The Supreme Court held that the mandate of Articles 14 and 21, Constitution of India, 1950 is that every procedure established under law must be fair, just and non-arbitrary. There is no rationale for drawing a distinction between a person who commits murder and a person who commits murder while serving a life sentence so as to make the death sentence mandatory for the latter class. A standardized mandatory sentence of death deprives courts of the exercise of its discretion and is, therefore, harsh, unjust and unfair

ROLE OF REFORMS AND PSYCHOTIC TESTS

In *Chhannulal Verma v. State of Chattisgarh* (2019) 12 SCC 438 On the issue of the future of the death penalty in India, Justice Kurian Joseph, in his dissent noticed that various benches have over a period of time expressed concerns regarding the inconsistent application of the principles laid down in *Bachan Singh v. Union of India*. Having regard to the 262nd Report of the Law

Commission of India which stated that the constitutional regulation of capital punishment attempted in Bachan Singh has failed to prevent death sentences from being “arbitrarily and freakishly imposed” and that capital punishment has failed to achieve any constitutionally valid penological goals, Justice Joseph stated that the time had come to review the need for the death penalty as a punishment. The Court also stressed the importance of a psychological/psychiatric assessment to be done by the State to conclude that there is no possibility of reform

EVOLUTION OF GUIDELINES FOR JUDGES WHICH NEED TO BE CARTERED WHILE AWARDING DEATH PENALTY

In *Machhi Singh v. State of Punjab* (1983) 3 SCC 470 the Supreme Court laid down five categories where society might mandate judges to impose the death sentence. These were the

1. manner of commission of murder,

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (i) When the house of the victim is set aflame with the end in view to roast him alive in the house. (ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death. (iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner

2. motive of the murder,

When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (2) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, (c) a murder is committed in the course for betrayal of the motherland

3. anti-social or abhorrent nature of the crime,

(a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of or make them with a view to reverse past injustices and in order to restore the social balance

4. magnitude of the crime

When the crime is enormous in proportion. For instance, when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

5. Personality of the victim.

When the victim of murder is,

(a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder,

(b) a helpless woman or a person rendered helpless by old age or infirmity

(c) a person vis-a-vis whom the murderer is in a position of domination or trust

(d) a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

In order to apply these guidelines inter-alia the courts must answer whether the crime rendered life imprisonment inadequate and whether the circumstances of the crime were such that there was no alternative but to impose the death sentence. Courts may proceed with imposing the death sentence if upon taking an overall global view of all the circumstances, the circumstances of the case are such that the death sentence is warranted.

CLEMENCY POWER AND MENTAL HEALTH

In *Shatrughan Chauhan v. Union of India* 2014 (3) SCC 1 The three judge bench held that supervening circumstances like delay, solitary confinement, and insanity were relevant considerations at the post-mercy stage. On delay, it was held that 'undue, unexplained and inordinate delay' in execution due to pendency of mercy petition, would on its own be a ground to commute the sentence of death. Further, the Court laid down that the gravity and nature of the offence would be irrelevant at this stage. The SC also noted that keeping a convict in suspense while consideration of his mercy petition by the President for many years causes agony, it creates adverse physical conditions and psychological stresses on the convict under sentence of death. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with Article 21 of the Constitution, cannot excuse the agonizing delay caused to the convict only on the basis of the gravity of the crime.

PROCEDURE OF ISSUE OF DEATH WARRANT

In *Shabnam v. Union of India* (2015) 6 SCC 702 The Court ruled that it was impermissible to issue a death warrant when judicial and administrative remedies are still pending in a death sentence case. In this case it held that the limitation period for filing a review and thereafter reasonable time to file mercy petition had to be given to the petitioners. The Supreme Court also gave its stamp of approval to the guidelines given by the Allahabad High Court in the case of *Peoples' Union for Democratic Rights (PUDR) v. Union of India & Ors.* (2015) SCC Online All 143 and made it mandatory in all cases:

- The convict must be given notice of the warrant to be issued by the Sessions Court so that she can arrange for a counsel to represent her.
- The death warrant must specify the exact date and time of the execution.
- There must be a reasonable period of time between the date of order on the warrant and the date of execution so that the convict can pursue legal recourse against the warrant and meet her family.
- A copy of the warrant must be immediately supplied to the convict.
- Where required the convict must be provided with legal aid.

REMISSION

In *Laxman Naskar v State of West Bengal* (2000), the top Court laid down the following guidelines for considering premature release:

1. Whether the offence is an individual act of crime without affecting society at large;
2. Whether there is any chance of future recurrence of committing a crime;
3. Whether the convict has lost his potential to commit a crime;
4. Whether there is any fruitful purpose of confining the convict any more;
5. Socio-economic condition of the convict's family

In *Swamy Shraddhananda v State of Karnataka* (2008), a three-judge Bench of the Court doubted whether a life sentence till the "last breath" would be "carried out in actuality" by the executive.

In *Sangeet & Anr vs State Of Haryana* There, the Court observed that there is a "misconception that a prisoner serving a life sentence" has a right to release on completion of fourteen years. It held that remission should be granted by the appropriate government only on a "case-by-case basis and not in a wholesale manner." In February 2013, the Ministry of Home Affairs issued an advisory prescribing that remission should not be granted in a "wholesale manner."

In *Union of India v V. Sriharan* (2015), a Constitution Bench deliberated whether an offender can be convicted of life imprisonment till their “last breath”, without the option of remission. This “special sentence” was endorsed by a three-judge majority who viewed it as an “alternative punishment” to the death penalty. Former Chief Justice U.U. Lalit, one of the dissenters, argued that alienating the possibility of remission “is not conducive to reformation.” Since the “special sentence” is not found in any statute books, he felt it “would not be within the powers of the court” to prescribe it.

STAGES OF DEATH PENALTY LITIGATION IN INDIA

1. Awarding of death penalty by court of session: As per Section 366 of CrPC; When the Court of Session passes a sentence of death, the proceedings shall forthwith be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.
2. The High Court may confirm the death sentence awarded by the Court of Session, pass any other sentence warranted by law, annul the conviction, convict the person of any offence for which the Court of Session might have convicted her, order a new trial on the same or amended charge or acquit the accused person.

In exercise of its suo-moto revision powers, the High Court may, even in the absence of an appeal from the State against the inadequacy of the sentence, enhance the sentence awarded by the Court of Session.

The High Court shall not enhance the sentence awarded to the accused without giving her a reasonable opportunity of showing cause against such enhancement and while showing such cause, the accused may even plead for acquittal or reduction of sentence awarded by the Court of Session.

High Court also has the power to withdraw a case pending before a subordinate court and conduct the trial, and may award the sentence of death.

3. Proceedings before Supreme Court of India: As per Article 134 of Indian Constitution In cases where the High Court reverses the order of acquittal on appeal and sentences the accused to death, or where the High Court withdraws a case for trial before itself from a subordinate court and in such a trial convicts the accused and sentences her to death, an appeal shall lie with the Supreme Court.

Under article 134A High Court may grant a certificate for appeal to the Supreme Court against its judgment, decree, final order or sentence, either on its own or on an oral application made by the aggrieved party, immediately after the passing or making of such judgment, decree, final order or sentence.

Under Article 136 of the Constitution The Supreme Court may in its discretion grant a special leave to appeal under Article 136 of the Constitution from any judgment, decree, determination, sentence or order passed in any case, by any court or tribunal in India

4. Review Petition: Under Article 137 of the Constitution a petition seeking review of a judgment or order passed by the Supreme Court may be filed before the Supreme Court within thirty days from the date of such judgment or order.\
5. Curative Petition¹⁰: After the dismissal of the review petition, the Supreme Court may allow a curative petition to reconsider its judgment or order if it is established that there was a violation of principles of natural justice or apprehension of bias on part of a judge.

¹⁰Rupa Ashok Hurrah v. Ashok Hurrah & Ors

The curative petition would be circulated before the same bench which decided the review petition, if available, or the three senior-most judges of the Supreme Court. The curative petition would be disposed of without oral arguments, unless ordered otherwise by the Supreme Court.

6. Pardon request: The judicial process for confirmation of a death sentence concludes either in the Supreme Court or High Court. Thereafter, a person can file a request for pardon either to the Governor in case of a State or the President of India in case of Union Territories. [Art 72 and 161, Constitution]

In case of States, a request for pardon submitted by a person sentenced to death shall at the first instance be sent to the State Government, seeking orders of the Governor upon consideration, if the request for pardon is rejected by the Governor, it shall be immediately forwarded to the Secretary of the Government of India, Ministry of Home Affairs for consideration of the President of India.; **In case of Union Territories**, the request for pardon submitted by a person sentenced to death shall be sent to the Lieutenant-Governor/ Chief Commissioner/Administrator who shall forward it to the Secretary to the

Government of India, Ministry of Home Affairs, for consideration of the President of India.

The Ministry of Home Affairs tenders advice to the President on the question of the requests for pardon submitted to him and the President is bound to act in accordance with such advice.

The Supreme Court held that the courts may also review whether relevant materials were examined by the Executive while exercising the power to grant pardon. It also held that non-consideration of supervening circumstances by a Governor or the President while rejecting the requests for pardon would be in violation of Article 21 of the Constitution and would be a sufficient ground for the Court to commute the death sentence to imprisonment for life. These supervening circumstances would include delay in execution, insanity/mental illness/ schizophrenia, solitary confinement, reliance on judgments declared per incuriam and procedural lapses in the disposal of the request for pardon.¹¹

¹¹ Shatrughan Chauhan v. Union of India 2014 (3) SCC 1

7. Death Warrant: In cases where the death sentence is awarded, a **death warrant** is addressed to the superintendent of the relevant prison who is supposed to return the warrant to the court after certifying that the death sentence has been carried out.

ARGUMENTS IN FAVOUR AND AGAINST DEATH PENALTY

This section is designed to provide a sketch of arguments both for and against the death sentence

Arguments in Favour of Death Penalty

1. Deterrence: Capital punishment or the death penalty for murder is a deterrent to murder and other serious crimes even if there is no credible evidence about its effect on potential killers, because it incapacitates culprits and thereby prevents them from killing again and/or committing other capital crimes. Besides, life imprisonment cannot prevent culprits who are also drug dealers or members of gangs from orchestrating heinous crimes with colleagues who are not in prison. At times there are various instances found where a person who is imprisoned for life even commit a murder while being in jail. For ex in State of Wisconsin Jeffrey Dahmer who was serving 15

life sentences for his “gruesome exploits of murder, necrophilia and dismemberment” in Milwaukee city in the State of Wisconsin, was, attacked and killed by Christopher J. Scarver, another inmate who was convicted in 1992 and sentenced to life imprisonment¹²

2. Retribution: When someone takes a life, the balance of justice is disturbed. Unless that balance is restored, society succumbs to a rule of violence. Only the taking of the murderer’s life restores the balance and allows society to show convincingly that murder is an intolerable crime which will be punished in kind. Retribution has its basis in religious values, which have historically maintained that it is proper to take an “eye for an eye” and a life for a life. Although the victim and the victim’s family cannot be restored to the status which preceded the murder, at least an execution brings closure to the murderer’s crime (and closure to the ordeal for the victim’s family) and ensures that the murderer will create no more victims

¹²<https://www.bing.com/case+of+Jeffrey+Dahmer+murder+in+jail> last seen on 8/3/2024

Arguments Against Death Penalty

1. Irrevocable sentence: The death penalty alone imposes an irrevocable sentence. Once an inmate is executed, nothing can be done to make amends if a mistake has been made. There is considerable evidence that many mistakes have been made in sentencing people to death. Abdul Kalam has been in the news saying he favours abolition of the death penalty. Had he applied his mind to the file put before him 11 years ago in the case of Dhananjay Chatterjee (who is as reported by many legal luminaries and journalist as innocent), it would have helped save the life of a man who was in all likelihood innocent.¹³

2. Arbitrary and discriminatory: In practice, the death penalty does not single out the worst offenders. Rather, it selects an arbitrary group based on irrational factors. Almost all defendants facing the death penalty cannot afford their own attorney. Hence, they are dependent on the quality of the lawyers assigned by the state, many of whom lack experience in capital cases or are so underpaid that they fail to investigate the case properly. A poorly represented defendant is much more likely to be convicted and given a death sentence.

PERSONAL OPINION

After researching and writing this article no my soul feel relieved that I am entitled to comment on the issue do India actually need to do away with Capital Punishment. Over the history of India

we have seen many invasion and rule by many outside powers, they have in some way or other in order to deter the people used execution as a means. But we are today a part of the largest democracy in world and perhaps the largest civil society the earth has in present in terms of population size. Over the period of time since independence the supreme court judgements have also reflected a will of the legal luminaries of India to move gradually towards abstinence in use of death penalty. In my opinion taking life a person not only deprive him of his right to realize his mistake and reinstate in society again as a better and more civilized citizen it even deprive the right of a son/daughter of the love and care of their father. Death Penalty is not a one shot execution and one stop solution to all heinous crimes.

¹³<https://scroll.in/article/741784/how-india-hanged-a-poor-watchman-whose-guilt-was-far-from-established> last seen on 8/3/2024.

It comes with a cost, a cost of social exclusion, stigma and taboo for the innocent family members and kins of the convict, a cost of an irrevocable decision, a cost of lack of possibility of reformation in convict. Gandhi ji truly said an eye for an eye will one day make the whole world blind. My take on the issue is that India should legally adopt a middle path (which he is doing) a situation in which the state abstains from giving death penalty but in a very extreme or rare circumstance the law permits giving death penalty, and over a period of time it should experimentally reduce the number of crimes with death penalty prescribed. This will help the law makers and executive to observe changes in the perception of people and even change in their criminal behaviour in general with such gradual movement. With such long term experimentation (as has been observed in many abolitionist countries) I am confident that the overall crime rate in the country in respect of heinous crimes punishable with death penalty will reduce to a meagre negligible level, and the need to reintroduce death penalty as a mode of punishment will not be felt.

ANNEXURE 1**Capital Offences in IPC**

1. Section 121	Treason or 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
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

Capital offences in other legislations in India

1. The Air Force Act, 1950	Sections 34, 37, and 38(1)
2. The Andhra Pradesh Control of Organised Crime Act, 2001	Section 3(1)(i)
4. The Army Act, 1950	Sections 34, 37, and 38(1)
5. The Assam Rifles Act, 2006	Sections 21, 24, 25(1)(a), and 55
6. The Bombay Prohibition (Gujarat Amendment) Act, 2009	Section 65A(2)
7. The Border Security Force Act, 1968	Sections 14, 17, 18(1)(a), and 46

8. The Coast Guard Act, 1978	Sections 17 and 49
9. The Commission of Sati (Prevention) Act, 1987	Section 4(1)
10. The Defence of India Act, 1971	Section 5
11. The Geneva Conventions Act, 1960	Section 3
12. The Explosive Substances Act, 1908	Section 3 (b)
13. The Indo-Tibetan Border Police Force Act, 1992	Sections 16, 19, 20(1)(a), and 49
14. The Karnataka Control of Organised Crime Act, 2000	Section 3(1)(i)
15. The Maharashtra Control of Organised Crime Act, 1999	Section 3(1)(i)
16. The Narcotics Drugs and Psychotropic Substances Act, 1985	Section 31A(1)
17. The Navy Act, 1957	Sections 34, 35, 36, 37, 38, 39, 43, 44, 49(2)(a), 56(2), and 59
18. The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act, 1962	Section 15(4)
19. The Sashastra Seema Bal Act, 2007	Sections 16, 19, 20(1)(a), and 49
20. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989	Section 3(2)(i)
21. The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002	Section 3(1)(i)
22. The Unlawful Activities Prevention Act, 1967	Sections 10(b)(i) and Section 16(1)(a)

ANNEXURE 2

Aggravating factors are any relevant circumstances, supported by the evidence presented during the trial, that makes the harshest penalty appropriate, in the judgment of the jurors or judge

Mitigating factors are any evidence presented regarding the defendant's character or the

circumstances of the crime, which would cause a juror or judge to vote for a lesser sentence.

The Supreme Court in the case took the reference of American Supreme court Judgement of Furman v. Georgia.

After the decision in Furman v, Georgia, the Georgian state Legislature amended its statutory scheme introducing a list of aggravating circumstances decided in conscience of the said judgement. The statutory aggravating circumstances, the existence of any of which may justify the imposition of the extreme penalty of death, as provided in that statute, are:

- (1). The offence of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, (or the offence of murder was committed by a person who has a substantial history of serious assaultive criminal convictions),
- (2). The offence of murder, rape armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree,
- (3). The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
- (4). The offender committed the offence of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
- (6). The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
- (7). The offence of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
- (8). The offence of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
- (9). The offence of murder was committed by a person in, or who has escaped from, the lawful confinement.
- (10). The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

The Supreme Court of United States of America in [Arnold v. State](#) (1976) 236 Ga 534, 540, 224

SE 2d 386, 391 held unconstitutional the portion (within brackets) of the first circumstance encompassing persons who have a "substantial history of serious assaultive criminal

. Drawing upon the penal statutes of the State of Georgia framed after *Furman v. Georgia*, in general, and Clauses 2(a), (b), (c), and (d) of the [Indian Penal Code \(Amendment\) Bill](#) passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":

Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion:

- (a) if the murder has been committed after previous planning and involves extreme brutality; or
- (b) if the murder involves exceptional depravity; or
- (c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -
 - (i) while such member or public servant was on duty; or
 - (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
- (d) if the murder is of a person who had acted in the lawful discharge of his duty under [Section 43](#) of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under [Section 37](#) and Section 129 of the said Code. in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of 'special reasons' in Section 354(3), ***circumstance found on the facts of a particular case, must evidence aggravation of an abnormal or special degree.***

Dr. Chitale has suggested these mitigating factors:

Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
- (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

- (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
- (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
- (6) That the accused acted under the duress or domination of another person.
- (7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

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