



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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CAPITAL PUNISHMENT IN INDIA: A CRITICAL ANALYSIS

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ABSTRACT

Capital punishment, also termed as the death penalty, is a government-sanctioned practice whereby a person is killed by the state as a punishment for a crime. The sentence that someone be punished in such a manner is referred to as a death sentence, whereas the act of carrying out the sentence is known as an execution. Crimes that are punishable by death are known as capital crimes or capital offences, and they commonly include offences such as murder, mass murder, terrorism, treason, espionage, offenses against the State, such as attempting to overthrow government, piracy, drug trafficking, war crimes, crimes against humanity and genocide. Death penalty is such a punishment which is mostly debateable matter. Its an ancient form of punishment in almost every society. Awarding capital punishment on rarest of rare cases includes a lot of controversies in different judgments. Capital punishment in India is regulated by the criminal laws in India specially the India penal code 1860 and Code of criminal procedure 1973. The intent of study is to find out that awarding such type of punishment in rarest of rare case is just and fair, to study the capital offences that are punishable by death, to study the types of capital punishments, to understand the effect of capital punishment on the society, to study if the ration of capital punishment has decreased over ages. This paper endeavours to highlight the concept of capital punishment in India, capital punishment executed in India in past 22 years that is from 1998 to 2020, eleven (11) capital offences punishable by death in India according to India penal code 1860, arguments for and against of capital punishment, India laws on capital punishment, cases relating to capital punishment in India, etc, on the basis of existing literature, reports, studies, different cases and other relevant materials.

Key words: Capital punishment, execution, capital offences, murder, mass murder, terrorism, treason, espionage, offenses, offences against state, piracy drug, trafficking, war crimes, punishment, judgment, indian penal code, code of criminal procedure, literature, materials.

INTRODUCTION

Capital punishment, also called death penalty, execution of an offender sentenced to death after conviction by a court of law of 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. Capital punishment for murder, treason, arson, and rape was widely employed in ancient Greece under the laws of Draco (fl. 7th century BCE), though Plato argued that it should be used only for the incorrigible. It also has been sanctioned at one time or another by most of the world's major religions. Followers of Judaism and Christianity, for instance, have claimed to find justification for capital punishment in the biblical passage "Whosoever sheddeth man's blood, by man shall his blood be shed" (Genesis 9:6). Yet capital punishment has been prescribed for many crimes not involving loss of life, including adultery and blasphemy. The ancient legal principle Lex talionis (talion) "an eye for an eye, a tooth for a tooth, a life for a life"—which appears in the Babylonian Code of Hammurabi, was invoked in some societies to ensure that capital punishment was not disproportionately applied.

During the time period of middle ages, the death penalty was characterised by particular brutality. Famous thinkers like Grotius, Thomas Hobbes and John Locke were also supporters of this form of punishment. The trials by fire, water etc followed during the 1600's can be said to be a form of capital punishment. Death penalty is currently practiced in 58 countries, including USA, Japan, Belarus, Cuba, and Singapore. As of 2012 there are 97 abolitionist states. As per the Amnesty International the worst offenders in 2012 were China (1000+ deaths), Iran (314+) and Iraq (129+). The organisation confirmed 1,722 death sentences and 682 executions (excluding China) in 2012. In Europe however it is now a virtually extinct phenomenon with the exception of the Republic of Belarus. As per a study about two-thirds of the countries have either abolished capital punishment outright or have not actually executed any death sentences in the last ten years.

Capital punishment has long engendered considerable debate relating to both its morality and its effect on criminal behaviour. Contemporary arguments in favour and against capital punishment fall under three general headings: moral, utilitarian, and practical. Supporters of

the death penalty believe that those who commit murder, because they have taken the life of another, have forfeited their own right to life. Furthermore, they believe, death punishment is a just form of retribution, expressing and reinforcing the moral indignation not only of the victim's relatives but of law-abiding citizens in general. By contrast, opponents of capital punishment, following the writings of Cesare Beccaria (in particular *On Crimes and Punishments* [1764]), argue that, by legitimizing the very behaviour that the law seeks to repress—killing—capital punishment is counterproductive in the moral message it conveys. Moreover, they urge, when it is used for lesser crimes, capital punishment is immoral because it is wholly disproportionate to the harm done. Abolitionists also claim that capital punishment violates the condemned person's right to life and is fundamentally inhuman and degrading.

i. OBJECTIVITY OF THE STUDY.

- 1) To study the capital offences that are punishable by death
- 2) To study the types of capital punishments.
- 3) To understand the effect of capital punishment on the society
- 4) To study if the ratio of capital punishment has decreased over ages.

ii. HYPOTHESIS

It is assumed that Capital offence in India has not been decreased to a noticeable margin in spite of the provision of strong capital punishments witnessed in past years. The historic instances of capital punishment however has brought a consciousness to the society of the strong power of Indian law but it has not yet been capable of eradicating the crimes from our society completely.

iii. METHODOLOGY

The methodology used in this research is a Doctrinal research. conventional legal sources like reports of committees, legal history, judicial pronouncements, Acts passed by legislature and parliament etc are the sources of doctrinal legal research.

Doctrinal analysis has been the dominant legal method in the common law world, although other categories of research such as reform oriented, theoretical, and fundamental have been acknowledged as important and to this extent doctrinal research has always included an interdisciplinary aspect. The essential features of doctrinal scholarship involve “a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation”. This ‘conceptual analysis critique’ is based on an

understanding of the rules of precedent between the court jurisdictions, the rules of statutory interpretation, the tacit discipline knowledge such as the difference between civil and criminal jurisdictions, and various tests of liability, along with the acknowledged reasoning methods, borrowed from philosophy and logic, such as induction and deduction. This research focuses on case-law, statutes and other legal sources. It differs from other methodologies in that it looks at the law within itself; a pure doctrinal approach makes no attempt to look at the effect of the law or how it is applied, but instead examines law as a written body of principles which can be discerned and analysed using only legal sources.

Doctrinal legal research thus involves:-

- 1) Systematic analysis of statutory provisions and of legal principles involved therein, or derived there from, and
- 2) Logical and rational ordering of the legal propositions and principles.

The conventional legal approach to Law is the Doctrinal Legal Research. Doctrinal Research is basically a research “into” Law. It is an analysis of the blackletters of Law.

Dr. S.N. Jain observed that Doctrinal Research involves analysis of case law and arranging, ordering and systematizing legal proposition and study of legal institution through legal reasoning and rational deduction. Jain and Jain observed that Doctrinal Legal Research is a research into legal doctrine through analysis of statutory provisions and cases by the application of power of reasoning. Thus, in other words this type of Research is called Traditional Research or Arm-chair Research.

CONCEPT OF CAPITAL PUNISHMENT

Capital punishment, also known as the death penalty, is a government-sanctioned practice whereby a person is killed by the state as a punishment for a crime. The sentence that someone be punished in such a manner is referred to as a death sentence, whereas the act of carrying out the sentence is known as an execution. Crimes that are punishable by death are known as capital crimes or capital offences, and they commonly include offences such as murder, mass murder, terrorism, treason, espionage, offenses against the State, such as attempting to overthrow government, piracy, drug trafficking, war crimes, crimes against humanity and genocide, but may include a wide range of offences depending on a country. Etymologically, the term capital in this context alluded to execution by beheading. Fifty-six countries retain capital punishment, 106 countries have completely abolished it de jure for all crimes, eight have abolished it for

ordinary crimes (while maintaining it for special circumstances such as war crimes), and 28 are abolitionist in practice. Capital punishment is a matter of active controversy in several countries and states, and positions can vary within a single political ideology or cultural region. In the European Union, Article 2 of the Charter of Fundamental Rights of the European Union prohibits the use of capital punishment. The Council of Europe, which has 47 member states, has sought to abolish the use of the death penalty by its members absolutely, through Protocol 13 of the European Convention on Human Rights. However, this only affects those member states which have signed and ratified it, and they do not include Armenia, Russia, and Azerbaijan. The United Nations General Assembly has adopted, in 2007, 2008, 2010, 2012 and 2014, non-binding resolutions calling for a global moratorium on executions, with a view to eventual abolition. Although most nations have abolished capital punishment, over 60% of the world's population live in countries where the death penalty is retained, such as China, India, the United States, Indonesia, Pakistan, Bangladesh, Nigeria, Ethiopia, Egypt, Saudi Arabia, Iran, among all mostly Islamic countries, as is maintained in Japan, South Korea, Taiwan, and Sri Lanka. China executes more people than all other countries combined. In India Capital punishment has been carried out in five instances since 1995, mwhile a total of twenty-six executions have taken place in India since 1991, the most recent of which was in 2015.

REPORT OF LAW COMMISSION OF INDIA ON DEATH PENALTY

In response to the resolution moved in the Parliament in 1962 on the abolition of capital Punishment, the Government of India referred the question to the Law Commission. The commission decided to take up this subject separately for the revision of the general criminal law in view of its importance. The Commission presented its report to the Lok Sabha on November 18, 1971 in which it inter alia observed: “even after all the arguments in support of abolition of capital punishment are taken into account, there does not remain a residuum of cases where it is absolutely impossible to enlist any sympathy on the side of the criminal. The commission further expressed a view that ‘retribution’ involved in capital punishment does not connote the primitive concept of ‘eye for an eye’ but it is an expression of public indignation at a shocking crime, which can better be described as reprobation” Therefore, the commission did not recommend any material change in the offence which are at present punishable with death under the Indian Penal Code. As regards the question of exempting certain categories of persons from death sentence, the Law Commission in its 42nd Report published in June 1971 suggested that:

- 1) Children below 18 years of age at the time of commission of the crime, should not be sentenced death.
- 2) It is not necessary to exempt women generally from the death penalty.
- 3) It is unnecessary to insert a statutory provision relating to diminished responsibility in the statute book.
- 4) An attempt to commit suicide should cease to be an offence in India. The present law in this regard is “harsh and unjustifiable and it should be replaced”

Thus the Law Commission strongly feels that capital punishment acts as an effective deterrent which is the most important object and even if all objects were to be kept aside, this object would by itself furnish a rational basis for its retention. In its concluding remarks the constitution observed that having regard to the peculiar condition prevalent in India and the paramount need for maintaining law and order in this country, we cannot risk the experimental of abolition. This is perhaps the most appropriate approach to the problem of capital punishment so far Indian criminal justice system is concerned.

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:

- The Commission recommended that measures suggested that police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.
- 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 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.

- 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.
- The Commission accordingly recommended that the death penalty be abolished for all crimes other than terrorism related offences and waging war.
- Further, the Commission sincerely hopes that the movement towards absolute abolition will be swift and irreversible.

Despite India's stance on capital punishments, the judiciary saves it for extreme violations of law. In the past 20 years the Indian Judiciary has sentenced lot of people to death but only four have been hung till death in this entire two decades.

Table of the total no of Capital Punishment executed in the past 22 years:

Sl.no.	Year	Total no of capital punishment executed in India	Nature of crime	Name
1	1998-2002	0	0	0
2	2003-2007	1	Murder and Rape	Dhananjoy chatterjee
3	2008-2012	1	Terrorism	Ajmal kasab
4	2013-2018	2	Terrorism	Afjalguru, yakubmenon
5	2019-2020	4	Murder and Rape	AkshayThakur, Mukhesh Singh, Pawan Gupta and Vinay Sharma.

Dhananjoy Chatterjee: Date of execution: August 14, 2004 (Alipore Central Jail, Kolkata)
Dhananjoy Chaterjee was accused of raping and then murdering a 14 year old girl, Hetal Parekh. Dhananjoy was born in a village 200 kilometres from the main Kolkata city. He left his village to work as a security guard. The victim lived in the same apartment that Dhananjoy was guarding. According to the official verdict, it was proved that he raped the girl and then

choked her to death. The judiciary declared the crime as "rarest of rare" because the guard was responsible for the protection of the society and the people living in it. The accused was scheduled to hang on June 25, 2004 but his family filed a mercy plea, which was rejected by the then President of India, A.P.J. Abdul Kalam. He was finally hanged on his 39th birthday in Alipore Central Jail in Kolkata.¹

Mohammad Ajmal Amir Kasab:

Date of execution: November 21, 2012 (Yerwada Jail, Pune)

Ajmal Kasab was a part of the group that was responsible for the infamous 26/11 attacks in Mumbai. This case was closely followed by the media of our country which was probably the reason why case was expedited. An 11,000 page charge sheet was filed against Kasab which made a strong case against him. He kept changing his statement from time to time and moved up to the Supreme Court pleading for mercy. President Pranab Mukherjee upheld the judgement of capital punishment on the November 5, 2012 and he was hanged to death on November 21, 2012.²

Afzal Guru:

Afzal Guru was accused of being the master mind behind the attacks on the parliament on December 13, 2001. Five armed terrorists attacked the Indian Parliament which led to the death of 8 security personnel and a gardener. A media person was also shot amidst the attack and succumbed to the injuries later. The case was handed to a special cell of Delhi Police, which was able to track and arrest Afzal by December 15, 2001. He pleaded guilty in front of the media but took back his statement later claiming that he did it due to the pressure induced by the police. A special court was formed under the Prevention of Terrorism Act which finally sentenced him to death on December 18, 2002. Due to various pleads and protests the case went on till February 6, 2013, when his plea was rejected by the President Pranab Mukherjee. His execution was carried out as a secret mission on February 9, 2013.

Yakub Memon:

Date of execution: July 30, 2015 (Central Jail, Nagpur)

Yakub Memon was accused of taking part in sponsoring the 13 blasts that rocked Mumbai in

¹Dhananjay Chatterjee, Available At: https://en.wikipedia.org/wiki/Dhananjay_Chatterjee. Last Modified on 25 June 2019.

² Ajmal Kasab , https://en.wikipedia.org/wiki/Ajmal_Kasab, Last Modified on: 1 July 2019.

1993. A chartered accountant by profession, it was claimed that he sponsored the bomb blasts that were masterminded by his brother Tiger Memon and underworld mafia Dawood Ibrahim. The blasts claimed the lives of 257 people. Yakub pleaded repeatedly before the apex court claiming that his case was not dealt with in the correct manner. Two subsequent mercy appeals were rejected which ended in an unprecedented all-night court hearing. The court rejected the final appeal at 5a.m. in the morning. Yakub was woken up at 4:00 a.m. and was allowed to take a warm water bath. He read the Quran and offered his Namaz before being hanged before 7am and was declared dead at 7:01 am.³

Akash Thakur, Mukesh Singh, Pawan Gupta, Vinay Sharma,

Date of execution: 20 March 2020, (Tihar Jail) at 5:30 am.

More than seven years after a 23-year-old medical student was gang-raped in a moving bus in Delhi, four men convicted for the brutal assault were hanged this morning. The four men -- Akshay Kumar Singh, Pawan Gupta, Vinay Sharma and Mukesh Singh -- were hanged at 5:30 am at Delhi's Tihar Jail, hours after the Supreme Court, in a midnight hearing, refused to grant them relief and stay their executions. The four were hanged simultaneously, a first in Tihar Jail's history. The four men were declared dead at around 6 am, half-an-hour after they were hanged. "[A] doctor has examined [them] and declared all four dead," Director General of Tihar Jail Sandeep Goel said. The four men were convicted in the 2012 Nirbhaya gang-rape and murder case, a crime that shook the country and forced the government to bring in tougher laws on crime against women. The crime took place on December 16, 2012, when a 23-year-old medical student boarded a bus in Delhi along with her male friend. On board the bus, the woman and her friend were assaulted by a group of six people. The woman, who was gang-raped, died two weeks later. The brutal nature of the attack led to country-wide protests and forced the government to set up a commission to review the country's laws on rape and crime against women. The commission's review ultimately led to laws prescribing stricter punishments for crimes against women. Six people were accused of gang-raping and murdering the 23-year-old medical student, who came to be called Nirbhaya. Of the six, one was a juvenile and was convicted by the juvenile justice board. He served three years in a reformation home and was released, of the remaining five, one committed suicide in jail. The four others were convicted by a trial court and sentenced to die. The convictions and the death penalties handed to the four men were upheld by the Delhi High Court and the Supreme Court. The last couple

³Yakub Menon, Available At: https://en.wikipedia.org/wiki/Yakub_Memon, Last Modified on: 29 june 2019.

of months saw a flurry of petitions being filed by the four convicts. In their pleas, the convicts asked the Supreme Court to review their death sentences. The court rejected all the pleas. The convicts also pleaded for mercy in front of the President. The President rejected all the mercy petitions. In the last 24 hours, some of the four convicts again moved various courts seeking relief from the death penalty. All the courts, which included the Patiala House Court in Delhi, the Delhi High Court and the Supreme Court, refused to intervene and stay the executions. After the Supreme Court rejected the final plea at around 3:30 am, the four convicts were hanged at Delhi's Tihar Jail at 5:30 am. Their bodies were sent for post-mortem.



THEORIES OF PUNISHMENT

There are Five theories of punishments.

1. Deterrent Theory
2. Retributive Theory
3. Preventive Theory
4. Reformatory Theory
5. Expiatory Theory

Deterrent Theory: 'Deter' means to abstain from doing an act. The main objective of this theory is to deter (prevent) crimes. It serves a warning to the offender not to repeat the crime in the future and also to other evil-minded persons in the society. This theory is a workable one even though it has a few defects. It is one of the primitive methods of punishments. Those who commit a crime, it is assumed, derive a mental satisfaction or a feeling of enjoyment in the act. To neutralize this inclination of the mind, punishment inflicts equal quantum of suffering on the offender so that it is no longer attractive for him to carry out such commission of crimes. Pleasure and pain are two physical feelings or sensation that nature has provided to mankind, to enable him to do certain things or to desist from certain things, or to undo wrong things previously done by him. It is like providing both a powerful engine and an equally powerful brake in the automobile. Impelled by taste and good appetite, which are feelings of pleasure a man over-eats. Gluttony and surfeit make him obese and he starts suffering disease. This causes pain. He consults a doctor and thereafter starts dieting. Thus the person before eating in the same way would think twice and may not at all take that food. In social life punishment introduces the element of 'pain' to correct the excess action of a person carried out by the impulse (pleasure) of his mind. We all like very much to seize opportunities, but abhor when

we face threats. But in reality pain, threat or challenges actually strengthens and purifies a man and so an organization.

Retributive Theory: ‘An eye for an eye would turn the whole world blind’- Mahatma Gandhi. The most stringent and harsh of all theories retributive theory believes to end the crime in itself. This theory underlines the idea of vengeance and revenge rather than that of social welfare and security. Punishment of the offender provides some kind solace to the victim or to the family members of the victim of the crime, who has suffered out of the action of the offender and prevents reprisals from them to the offender or his family. The only reason for keeping the offender in prison under unpleasant circumstances would be the vengeful pleasure of sufferer and his family. Retribute means to give in return. The objective of the theory is to make the offender realise the suffering or the pain. In the Mohammedan Criminal Law, this type of punishment is called 'QISAS' or 'KISA'. Majority of Jurists, Criminologists, Penologists and Sociologists do not support this theory as they feel it is brutal and barbaric.

J.M.Finnis argues in favour of retributism by mentioning it as a balance of fairness in the distribution of advantages and disadvantages by restraining his will. Retributivists believe that considerations under social protection may serve a minimal purpose of the punishment. Traditional retributism relied on punishing the intrinsic value of the offence and thus resort to very harsh methods. This theory is based on the same principle as the deterrent theory, the Utilitarian theory. To look into more precisely both these theories involve the exercise of control over the emotional instinctual forces that condition such actions. This includes our sense of hatred towards the criminals and a reliance on him as a butt of aggressive outbursts. Sir Walter Moberly states that the punishment is deemed to give the men their dues. "Punishment serves to express and to and to satisfy the righteous indignation which a healthy community treats as transgression. As such it is an end in itself." "The utilitarian theories are forward looking; they are concerned with the consequences of punishment rather than the wrong done, which, being in the past, cannot be altered. A retributive theory, on the other hand, sees the primary justification in the fact that an offence has been committed which deserves the punishment of the offender." As Kant argues in a famous passage:

"Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else... He must first of all be found to be deserving of punishment before any consideration is given of the utility of this punishment for himself or

his fellow citizens." "Kant argues that retribution is not just a necessary condition for punishment but also a sufficient one. Punishment is an end in itself. Retribution could also be said to be the 'natural' justification", in the sense that man thinks it quite natural and just that a bad person ought to be punished and a good person rewarded.

However 'natural' retribution might seem, it can also be seen as Bentham saw it, that is as adding one evil to another, base and repugnant, or as an act of wrath or vengeance. Therefore as we consider divine punishment we must bear in mind, as Rowell says, The doctrine of hell was framed in terms of a retributive theory of punishment, the wicked receiving their just deserts, with no thought of the possible reformation of the offender. In so far as there was a deterrent element, it related to the sanction hell provided for ensuring moral conduct during a man's earthly life. Thus the researcher concludes that this theory closely related to that of expiation as the pain inflicted compensates for the pleasure derived by the offender. Though not in anymore contention in the modern arena but its significance cannot be totally ruled out as fear still plays an important role in the minds of various first time offenders. But the researcher feels that the basis of this theory i.e. vengeance is not expected in a civilized society. This theory has been severely criticized by modern day penologists and is redundant in the present punishments.

Preventive Theory: The idea behind this theory is to keep the offender away from the society. The offenders are punished with death, imprisonment of life, transportation of life etc. Some Jurists criticize this theory as it may be done by reforming the behavior of criminals. This theory aims to prevent the crime rather than avenging it. Looking at punishments from a more humane perspective it rests on the fact that the need of a punishment for a crime arises out of mere social needs i.e. while sending the criminals to the prisons the society is in turn trying to prevent the offender from doing any other crime and thus protecting the society from any anti-social elements. Fichte in order to explain this in greater details puts forward the an illustration, An owner of the land puts an notice that 'trespassers' would be prosecuted. He does not want an actual trespasser and to have the trouble and expense of setting the law in motion against him. He hopes that the threat would render any such action unnecessary; his aim is not to punish trespass but to prevent it. But if trespass still takes place he undertakes prosecution. Thus the instrument which he devised originally consists of a general warning and not any particular convictions.

Thus it must be quite clear now by the illustration that the law aims at providing general threats but not convictions at the beginning itself. Even utilitarian such as Bentham have also

supported this theory as it has been able to discourage the criminals from doing a wrong and that also without performing any severity on the criminals. The present day prisons are fallout of this theory. The preventive theory can be explained in the context of imprisonment as separating the criminals from the society and thus preventing any further crime by that offender and also by putting certain restrictions on the criminal it would prevent the criminal from committing any offence in the future. Supporters of this theory may also take Capital Punishment to be a part of this theory. A serious and diligent rehabilitation program would succeed in turning a high percentage of criminals away from a life of crime. There are, however, many reasons why rehabilitation programs are not commonly in effect in our prisons. Most politicians and a high proportion of the public do not believe in rehabilitation as a desirable goal. The idea of rehabilitation is considered mollicoddling. What they want is retribution, revenge, punishment and suffering.

Thus one can easily say that preventive theory though aiming at preventing the crime to happen in the future but it still has some aspects which are questioned by the penologists as it contains in its techniques which are quite harsh in nature. The major problem with these type of theories is that they make the criminal more violent rather than changing him to a better individual. The last theory of punishment being the most humane of all looks into this aspect.

Reformative Theory: The objective is to reform the behavior of the criminals. The idea behind this theory is that no one is born as a Criminal. The criminal is a product of the social, economic and environmental conditions. It is believed that if the criminals are educated and trained, they can be made competent to behave well in the society. The Reformative theory is proved to be successful in cases of young offenders. It is the most recent and the most humane of all theories is based on the principle of reforming the legal offenders through individual treatment. Not looking to criminals as inhuman this theory puts forward the changing nature of the modern society where it presently looks into the fact that all other theories have failed to put forward any such stable theory, which would prevent the occurrence of further crimes. Though it may be true that there has been a greater onset of crimes today than it was earlier, but it may also be argued that many of the criminals are also getting reformed and leading a law-abiding life altogether. Reformative techniques are much close to the deterrent techniques. Reform in the deterrent sense implied that through being punished the offender recognized his guilt and wished to change. The formal and impressive condemnation by society involved in punishment was thought to be an important means of bring about that recognition. Similarly, others may be brought to awareness that crime is wrong through another's punishment and, as it were, 'reform'

before they actually commit a crime. But, although this is indeed one aspect of rehabilitation, as a theory rehabilitation is more usually associated with treatment of the offender. A few think that all offenders are 'ill' and need to be 'cured' but the majority of criminologists see punishment as a means of educating the offender. This has been the ideal and therefore the most popular theory in recent years. However, there is reason to believe this theory is in decline and Lord Windlesham has noted that if public opinion affects penal policy, as he thinks it does, then there will be more interest shown in retribution in the future.

This theory aims at rehabilitating the offender to the norms of the society i.e. into law-abiding member. This theory condemns all kinds of corporal punishments. These aim at transforming the law-offenders in such a way that the inmates of the peno-correctional institutions can lead a life like a normal citizen. These prisons or correctional homes as they are termed humanly treat the inmates and release them as soon as they feel that they are fit to mix up with the other members of the community. The reformation generally takes place either through probation or parole as measures for reforming criminals. It looks at the seclusion of the criminals from the society as an attempt to reform them and to prevent the person from social ostracism. Though this theory works stupendously for the correction of juveniles and first time criminals, but in the case of hardened criminals this theory may not work with the effectiveness. In these cases come the importance of the deterrence theories and the retributive theories. Thus each of these four theories have their own pros and cons and each being important in it, none can be ignored as such.⁴ **Expiatory Theory:** Expiation” means “the act of expiating; reparation; amends; compensation; atonement. According to Expiation Theory, compensation is awarded to the victim from the wrong-doer. The expiatory theory was based on moral principles, had little to do with law or legal concept. This theory is more related to ancient religious perceptions regarding crime and punishment when prisoners were placed in isolated cells to repent or expiate for their crime or guilt from the core of their heart and resolve to shun crime. It was believed that anyone who sincerely repents for his misdeeds or crimes, deserves to be forgiven and let off. The ancient Hindu law commentator Manu was a great admirer of expiation as a form of punishment for the rehabilitation of the criminal in society. The expiatory theory, being based on ethical considerations, has lost its relevance in the modern system of punishment. In the present age of materialism and declining moral values, expiration can hardly be effective in bringing about a change in criminal mentality of offenders and therefore, expiatory theory as a punishment is not suited in the present context of rationalized penal policies but now it has

⁴ N.V Paranjape, Criminology and Penology, page no- 227, (kamal law publication, 14th edition, 2010)

come with broader aspect with different retributive concept in tortious liability and in some penal provision of Indian Criminal justice as in compoundable offense reference section 320 of criminal procedure code.⁵

CAPITAL PUNISHMENT IN INDIA

Death penalty or capital punishment is the highest degree of punishment that can be awarded to an individual under any penal law in force in any part of the world. Capital punishment is the legal procedure of the state in which it exercises its power to take an individual's life. It has been in existence since the inception of the State itself. In the British era, there have been countless instances of Indians being hanged after trial or even before it. The dawn of Independence brought about a new era in the judicial system of India. It was in stark contrast to the British Judicial system in which the Indians hardly had any access to justice, or the time of empires and kingdoms before it when the ruler of a certain state or kingdom was its ultimate authority and the source of all justice wherein his or her statements verbatim, were adopted as the law of the land. The ruler, thus had the power to condemn any man to death whoever may he or she be, even on a whim. After 1947, India became a democratic state, and the system of awarding death penalties too changed drastically. The Indian Penal Code in accordance with the provisions enshrined in the Constitution of India provided for awarding of capital punishment for certain specific offences.

Art. 21 of the Constitution, which guarantees to every citizen the fundamental right to life, also expressly states, "no person shall be deprived of his life or personal liberty except according to procedure established by law." This means that under no circumstances your right to live will be taken away from you except by the due procedure established by law, that is the state can take away your life through the given process of law if it deems fit. Not all offences are punishable by death, in fact, most of the agencies do not elicit capital punishment; instead, it is only reserved for the most heinous of crimes.⁶

According to the Indian Penal Code along with other acts eleven offences committed within the territory of India are punishable by death:

⁵ Expiatory theory of punishment, Available at: <https://indianlegalsolution.com/the-expiatory-theory-of-punishment/> Last modified on April 23 2019.

⁶ Capital Punishment In India, Available At: <https://acadpubl.eu/hub/2018-120-5/1/98.pdf> 2018

Section under IPC or any other Act	Offense
120B	Being a party to a criminal conspiracy to commit a capital offence
121	Waging, or attempting to wage war, or abetting waging of war, against the Government of India.
132	Abetting a mutiny in the armed forces (if a mutiny occurs as a result), engaging in mutiny
194	Giving or fabricating false evidence with intent to procure a conviction of a capital offence
302,303	Murder
305	Abetting the suicide of a minor
364A	Kidnapping, in the course of which the victim was held for ransom or other coercive purposes
376A, Criminal law Amendment act ,2013	Rape if the perpetrator inflicts injuries that result in the victim's death or incapacitation in a persistent vegetative state, or is a repeat offender
396	Dacoity with murder – in cases where a group of five or more individuals commit Dacoity and one of them commits murder in the course of that crime, all members of the group are liable for the death penalty.
Part II, Section 4 of Prevention of Sati Act	Aiding or abetting an act of Sati
31A of the Narcotic Drugs and Psychotropic Substances Act	Drug trafficking in cases of repeat offences

The Indian justice system is based on deterrent and reformative measures and the inherent principle of 'Innocent until proven guilty.' Thus awarding of a death sentence is an infrequent phenomenon in India and it is no wonder that when it happens it draws the eyes of not only the indigenous media houses but also international media moguls. There are no plausible statistics as to the number of executions that occurred in India after Independence, but the numbers may be on the higher side than the statistics claim. Apart from the dispute on the number of executions, the death penalty itself has been the centre of debate for decades, with the current penal system drawing the ire of numerous human rights and civil liberties organizations not

limited to one single country. Well known International human rights organizations such as Amnesty International, European Centre for Human Rights (ECHR), have constantly been striving in this regard to achieve the goal of worldwide abolition of death penalty for any offence. It is not only the International Organizations but there is a consensus within the United Nations itself to abolish the death penalty for good. Till now India has maintained a clear stance in the international arena on the question of the validity of the death penalty in spite of the ongoing discussions and debates going on both inside and outside the country. One of the major achievements of the international human rights organizations has been the passing of Juvenile Justice (Care and Protection of Children) Act, 2000. Before the passing of the Juvenile Justice Act in 2000, although never practised, the law still allowed people under the age of 18 to be hanged. In the year 2007, the UN proposed to all its member nations to put a stop on awarding death penalty in their respective states for any kind of offence. India firmly rejected the above-mentioned proposal.

“As of June 2004, a total of 118 countries (including Canada, Mexico, Australia, Russia, South American nations and most European nations) have abolished the death penalty in law or practice. Of these, 80 countries and territories have abolished the death penalty for all crimes, fifteen countries have abolished the death penalty for all but exceptional crimes (such as wartime crimes) and 23 countries can be considered abolitionist in practice, i.e., they retain the death penalty in law but have not carried out any executions for the past ten years or more and are believed to have a policy or established practice of not carrying out executions.” As it can be inferred, there is a general solidarity amongst most member states of the world to do away with the death penalty. India, however, does not seem eager to jump on the boat. The constitutional validity of the death penalty has been challenged many times. It was first challenged in *Jagmohan v. State of Uttar Pradesh* in which the Hon’ble Supreme Court upheld its validity stating that the capital punishment itself was not unreasonable per se and neither was its abolition in the public interest and hence not violative of the Art. 19 of the Constitution. It has been challenged many times since but the decision has remained same.

One of the most interesting developments that occurred with regard to the future of the death penalty in India was a report of the 20th Law Commission in 2015. The law commission under the chairmanship of Justice A. P. Shah recommended the abolition of death penalty in a swift manner except in terror related cases. It is to be noted however that the commission did not recommend this abolition immediately, but in a way that its complete abolition can be brought

about in the near future. The commission in its report argued that the aim of any penal law was to act as a deterrent, and the capital punishment was unable to fulfill its role in this regard. On the point of exception in terror related cases, the commission came to the conclusion that getting rid of the death penalty as a whole in terror related cases might compromise national security. Before giving a verdict on whether or not the death penalty should be abolished, few things need to be considered. Although India has up to now, stood firmly behind retaining the capital punishment, the judiciary saves it for the heinous of crimes and it occurs on extremely rare occasions. If we take into account, the number of people who were awarded death sentence and the number of people who were actually executed, the numbers speak for itself. In the last decade, there have been only 3 executions, and all the three were of terrorist cases. In *Bacchan Singh v. The state of Punjab*, the Hon'ble Supreme Court made it amply clear that the death penalty could only be awarded in the 'rarest of rare' cases which shows the inherent intention of the court to minimize the practice of awarding capital punishment as much as possible. This judgement became a benchmark for all the courts in India on which they were to base their decisions of giving death sentences in cases where the guilty had committed a capital offence. Thus, not only do the courts exercise their power to award capital punishment in extremely rare cases, but also many of these death sentences are commuted to lifetime imprisonment on grounds health, pregnancy, family conditions, etc. Whenever any court awards a death sentence, it mentions special reasons for giving such punishment relating to the special circumstances of the case. Is the death penalty valid in today's world? It is up to the Judiciary and legal experts to decide.

- **In the case of Reddy Samath Kumar v. State of Andhra Pradesh,**⁷ the accused who was a medical practitioner (Doctor) on 11/12/ march 1998 caused the death of his father-in-law and three minor children by poisoning them injecting Pan Curonium Bromide (called PAVULON). The accused doctor made his father-in-law and mother-in-law and their three minor children believe that they were suffering from AIDS when actually it was not so. He then managed to kill them by giving poisonous injection under the pretext of giving treatment in order to grab the property. Since the High Court had not issued notice for enhancement of punishment death sentence, the Apex Court held that looking to the gravity and manner in which the murders were committed, the ends of justice would warrant that the appellant should be in jail in terms o section 57 of IPC

⁷Reddy Samath Kumar v. State of Andhra Pradesh. AIR 2005 SC 3478

and he should not get the benefit of any remission either granted by the state or central government on any auspicious festival.

- **In the case of Swamy Shraddananda alias Murli Manohar v. State of Karnataka,**⁸ the appellant was convicted for the offence of murder under section 302/201 IPC and was sentenced to death by the session court, Bangalore on 20th may, 2005 which was confirmed by the High Court of Karnataka on 19-9-2005. The appellant came to the supreme court against the judgement of the High Court. The two judge Bench of the Apex Court unanimously upheld the conviction but differed on the quantum of punishment. Katju j., held that the appellant deserved nothing but the death whereas S.B. Sinha, j. felt that the punishment of lifeimprisonment, rather than death, would serve the ends of justice. He however, added that the appellant would not be released from prison till the end of his life.

The facts of the case briefly stated were that the deceased victim belonged to high reputed and wealthy princely family holding vast property including a big bungalow in Bangalore constructed over 38,000Sq fit of land which she got in gift from her parents. She was married to one Akbar Khaleeli an indian foreign service official and had four daughter from him. She sought the services of the appellant to handle her property disputes. Her husband was posted in Iran and she lived in her bungalow in Bangalore. She divorced her husband in 1985 married the appellant in the hope of having a son from him. It was registered marriage. Her four daughters from previous husband mostly living in abroad. After marriage she appointed appellant as an attorney by a testamentary will and they held the properties jointly. The daughters however maintained love and affection for their mother. By end of may 1991, the deceased victim shakereh suddenly and mysteriously disappeared. Her daughter made frequent enquiries about their mother from the appellant who once said that she has gone to Hyderabad, another time said she has gone to kutch to attend a marriage and always give evasive reply which raised doubt in the mind of the daughter. When she personally came to Bangalore and enquired about her mother, the appellant said that she had gone to gone to USA. For treatment in Roosevelt Hospital. When she contacted the hospital, they said there was no such patient in their record. She confronted the appellant and accused him of giving false and evasive information. The appellant now told her that her mother gone to london and she wanted to keep

her movement confidential. However the appellants stood totally exposed when daughter of the deceased called him in a hotel room in Bombay and chanced to see the passport of her mother laying around. Now she was sure that there some foul play with her mother and therefore registered a case against the appellant on 10th June 1992.

Investigation revealed that the appellant had administered a heavy dose of sleeping pills to the deceased and kept her alive in a wooden box which put in a pit in the backyard of his bungalow in Bangalore. It was also found that the appellant had submitted fabricated return to income tax authorities in 1993. Bearing forged signature of the deceased. He was although deposing as shrewd and cunning man with no remorse for his gruesome murder.

It was because of the conflicting opinions of the aforesaid two-judge Bench that the matter came up before a large Bench which felt that the case of the appellant fell just short of rarest of rare case and therefore the appellant should be awarded the sentence of imprisonment. For rest of life and the prison Act does not confer any authority a power to commute or remit sentence. It only provides for regulation of prison and treatment of prisoners confined therein. There is no rule conferring an indefeasible right on a prisoner sentenced to life imprisonment to an unconditional release on the expiry of a particular period of time including remission. Nor a less sentence can be substituted for a prisoner sentenced to rest of life. Imprisonment for life implies imprisonment for whole of remaining life.⁹

ANCIENT BACKGROUND OF CAPITAL PUNISHMENT IN INDIA

The ancient law of crimes in India provided death punishment or sentence for quite a good number of offences. The Indian epics, viz, the Mahabharata and the Ramayana which meant amputation by bits. Fourteen such modes of amputating the criminals to death are known to have existed which included chaining and imprisonment of the offenders. Justifying the retention of death penalty, king Dymatsena observed: if the offenders were leniently let off, crimes were bound to multiply. He pleaded that true ahimsa lay in the execution of unworthy persons and therefore, execution of unwanted criminals was perfectly justified. His son satyaketu, however, protested against the mass scale execution and warned his father that destruction of human life can never be justified on any ground. But Dymatsena, ignored the advance of his son and argued that distinction between virtue and vice must not disappear and

⁹ Swamy Shraddananda alias Murli Manohar v. State of Karnataka, AIR 2008 SC 3040.

vicious elements must be eliminated from society.

The great ancient law-giver Manu also placed the element of fear as an essential attribute of judicial phenomenon. According to him, in order to refrain people from sinful murders, death penalty was necessary and in absence of this mode of punishment or sentence, state of anarchy will prevail and people would devour each other as the fish do in water, the stronger eating up the weaker. During the medieval period of Moghuls rule in India, the sentence or punishment of death revived in its crudest form. At times, the offender was made to dress in the tight robe prepared out of freshly slain buffalo skin and thrown in the scorching sun. The shrinking of the raw-hide eventually caused death of the offender in agony, pain and suffering. Another mode of inflicting death penalty was by nailing the offender under the British System of criminals justice administration during early decades of nineteenth century when death by hanging remained the only legalised mode of inflicting death sentence.¹⁰

The arguments for and against death sentence may be summarised as follows:

Retentionist's Arguments-

- 1) Elimination of murderers by execution is fair retribution and saves potential future victims.
- 2) Punishments must match the gravity of offence and worst crimes should be severely punished.
- 3) Societies must establish deterrents against crime. Death sentence serves as an effective deterrent.
- 4) Death is a just punishment and death penalty has been held constitutionally valid to ensure justice for condemned offenders.

Abolitionist's Arguments-

- 1) An execution arising out of miscarriage of justice is irreversible.
- 2) Capital punishment is lethal vengeance which brutalizes the society that tolerates it.
- 3) Capital punishment does not have deterrent effect. Hired murderers take the risks of criminal justice system whatever the penalties. Thus it has no rational purpose.
- 4) Death penalty is unjust and often discriminatory against poor who cannot defend themselves properly.

¹⁰ Death Penalty, Available At: <https://www.lawetopus.com/academike/death-penalty-repercussions/> Last modified on 13 November 2015.

A perusal of arguments for and against the retention of capital punishment in a penal system makes it abundantly clear that atleast its retention in the statute book would better serve the ends of justice, though in practice it may be used sparingly. This approach to capital punishment is well reflected in the judicial pronouncement handed down by the supreme court ever since the historic Bachan Singh's case, where the court laid down the "rarest of rare case" Principle.¹¹

INDIAN LAW ON CAPITAL PUNISHMENT

The members of the judiciary are sharply divided on the crucial issues of life or death sentence. Those who support abolition argue that death penalty is degrading and contrary to the notion of human dignity; it is irrevocable and an expression of retributive justice which has no place in modern penology. The retentionists, on the other hand, justify capital punishment as a social necessity having a unique deterrent force. The shifting trend towards imposition of death sentence for the offence of murder is clearly discernible from the amendmends made in criminal law from time to time. Prior to 1955, judicial discretion in awarding a lesser penalty instead of death penalty was circumscribed by requiring the judge to record his reasons for awarding a lesser punishment. This in other words, meant that the discretion of the judge was open to further judicial review. However, subsequently realised that this restriction on the power of court was unnecessary because at times it nullified the achievements of the judge if his reasons for awarding life imprisonment instead of death sentence, did not argue well even though he might be ultimately correct in his final judgment. Thus in *Avtar Singh v. Emperor*, the judge concerned considered it proper to award a sentence of life imprisonment instead of death, for the reason that the accused was initially condemned to death which remained suspended for a period of over six months. Giving reasons for his decision, the learned judge observed that it was unjust to keep the sentence of death hanging over the head of the accused for a long period of over six months because it must have caused him great mental torture. He therefore, thought it proper to reduce the sentence of death to one of life imprisonment. But in another case *Queen V. Osram Sungra*, where the accused committed a deliberate cold blooded murder for ulterior motives, the court awarded a lesser punishment of life imprisonment instead of death, without recording reasons of such leniency. Restrictions on the discretion of the judge to record reasons for awarding a lesser punishment of life imprisonment to the murderer instead of sentence of death were withdrawn by the Amendment Act, of 1955. After this amendment,

¹¹N.V. Paranjappe, *Crimonology and Penology*, page no- 266, (kamal law publication, 14th edition, 2010)

the judge had the discretion to commute the sentence of death to that of life imprisonment but in case he considered the imposition of death sentence necessary, he had to state the reasons as to why a lesser penalty would not serve the ends of justice. Thus the amendment clearly reflected the shift in trend towards death penalty.

The Code of Criminal Procedure, 1973, also contains a provision regarding death sentence. Section 354 (3) of the code provides that while awarding the sentence of death, the court must record special reasons justifying the sentence and state as to why an alternative sentence would not meet the ends of justice in the particular case. Commenting on this provision of the code, Mr justice V.R. Krishna Iyer of the Supreme Court of India, observed that the special reasons which section 354 (3) speaks of provides reasonableness as envisaged in Article 19, as a relative connotation dependent on a variety of variables, culture, social, economic and otherwise. The Code of Criminal Proceedure, 1973 further requires that the sentence of death imposed by the Sessions Judge can be executed only after it is confirmed by High Court. That apart, section 235 (2) of the Code further casts a statutory duty upon the court to hear the accused on the point of sentence. The court should also call upon the state, i.e., the public prosecutor to mention with reasons whether or not that extreme penalty prescribed by law is called for in view of the facts and circumstances of the case. It is thus evidently clear that a heavy duty cast by section 302 of the Indian Penal Code on the judge of choosing between death and imprisonment for life for the person found guilty of murder, is now expected to be discharged in a highly responsible manner by complying with the provisions contained in section 354 (3) and 235 (2) of the Code of Criminal Proceedure 1973 so that the principle of natural justice and fair play holds its way in the sphere of sentencing. These provisions also help the judge to individualise sentencing justice and make it befitting to the crime and the criminal. The rationale of the above procedural safeguards and the awful consequences of a death sentence on the convict, his family and society were considered by the supreme court once again in the case of *Allauddin Mianvrs State of Bihar*. In this case the Apex court held that when the court is called upon to choose between the convict's cry "I want to live" and the prosecutors demand, he deserves to die, it must show a high degree of concern and sensitiveness in the choice of sentence. The supreme court further observed that special reason clause contained in section 354 (3) of Cr.pc implies that the court can impose extreme penalty of death in fit cases. The provision of section 235(2) of the code calls upon the court that the convicted accused must be given an opportunity of being heard on the question of sentence. This provides the accused an opportunity to place his antecedents, social and economic background and mitigating and extenuating

circumstances before the court.

Besides the statutory provisions, the constitution of India also empowers the president and the Governor of the state to grant pardon to the condemned offenders in appropriate cases. These powers are, however, co extensive with the legislative powers. The powers to cut short a sentence by an act of executive clemency is not subject to judicial review. It is exclusive domain of the executive in India and elsewhere. It is significant to note that the controversy raised in this regard in Nanavati's case has been settled by supreme court once for all in the case of Sarat Chandra v. Khagendra Nath, which affirmed the principle that sentencing powers of judiciary and executive are readily distinguishable.¹²

Types of punishments in India:-

Imprisonment for life – The Indian penal code prescribes five types of punishment namely.

- a. Death
- b. Life imprisonment
- c. Imprisonment which may be a rigorous or simple
- d. Forfeiture of property and
- e. Fine.

Thus imprisonment for life has been authorised by Act 26 of 1955 with effect from 1stjanuary, 1956. The supreme court, in Naib Singh v. state held that the nature of the punishment of imprisonment for life is rigorous imprisonment only and a criminal court could under section 418 of the code of criminal procedure.

W H I T E B L A C K

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 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”. 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.

¹²N.V .Paranjappe, Crimonology and Penology, page no- 269, (kamal law publication, 14th edition, 2010)

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.¹³

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.¹⁴

CAPITAL PUNISHMENT IN INTERNATIONAL HUMAN RIGHTS TREATIES

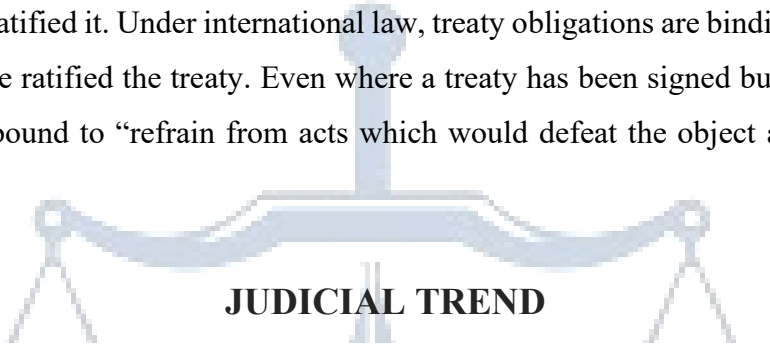
- The International Covenant on Civil and Political Rights (‘ICCPR’) is one of the key documents discussing the imposition of death penalty in international human rights law. The ICCPR does not abolish the use of the death penalty, but Article 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty.
- 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.
- 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.
- 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

¹³Pardon Available At: <https://en.wikipedia.org/wiki/Pardon> Last modified on 21 July 2019

¹⁴ Capital Punishment In India. Available At: http://164.100.47.193/intranet/CAPITAL_PUNISHMENT_IN_INDIA.pdf Last Modified on: 5/6/2019.

(‘CIDT’). However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by UN bodies.

- 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 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”



JUDICIAL TREND

The Magistracy has more often than not, used section 354(3) of the Code of Criminal Procedure to justify its stand either in support of or against the award of Capital Punishment. The abolitionists see this provision a green signal for dilution of Capital Punishment while for the retentionists the special reasons contemplated by section 354(3) implicitly suggest that death sentence is legally and constitutionally permissible. It must, however, be noted that what appears to one judge as extenuating circumstances justifying commutation of death sentence to that of life-imprisonment, may not be necessarily so with the other judge.¹⁵

CASES RELATING TO CAPITAL PUNISHMENT IN INDIA:

- **In the Case of Jagmohan Singh V. State of Up.**¹⁶

The Supreme Court observed that the capital punishment is not unreasonable per se and is not violative of Article 19 of the Constitution of India.

- **In the Case Of Machchi Singh and others V. State of Punjab.**¹⁷

The Apex Court realised that the rarest of rare cases doctrine had caused inner conflict in the minds of the judges because it was left much to the judicial discretion to decide whether the case fell within the category of rarest of rare case or not. Hence, the supreme court laid down a five-points formula based on the manner in which the murder was committed and the motive, nature and magnitude of the crime and the personality

¹⁵N.V .Paranjappe, Criminology and Penology, page no- 269, (kamal law publication, 14th edition, 2010)

¹⁶Jagmohan Singh V. State of Up. AIR 1973 SC 947

¹⁷Machchi Singh and others V. State of Punjab 1983 AIR 957, 1983 SCR (3) 413

of the victim. The factors which the court was expected to take into consideration for this purpose may be briefly stated as follows-

1. The manner in which the offence of murder was committed. If it was committed with extreme brutality
Such as burning the victim alive or cutting body into pieces, it would be a fit case to be considered as rarest of rare.
2. The murder is committed for a motive which evinces total depravity and meanness.
3. When murder is that of a member of Scheduled Caste or minority community.
4. When murder is in enormous proportion that is several persons are murdered.
5. When the victim of murder is an innocent child or a helpless woman or a n old or infirm persons.

The court ruled that death penalty should be the only punishment to be awarded in the aforesaid cases.

- **In the case of Bachan Singh v. State of Punjab, AIR 1980 SC 898¹⁸**

The public order contemplated by clauses (2) to (4) of Article 19 is different from law and order. Justifying retention of death penalty as an alternative punishment in reference to section 354 (3) of the code of criminal procedure 1973 the court inter alia, observed:

“The question whether or not death penalty serves any penological purpose is a difficult, complex and intricate issue. It has evoked strong divergent views. Notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of the society”.

The court further observed: The Supreme Court should not venture to formulate rigid standards in an area in which the legislators so wearily tread, only broad guidelines consistent with the policy indicated by the legislature can be laid down”.

The majority, however, expressed the need for liberal construction of mitigating factors in the area of death penalty and held that dignity of human life postulates resistance to taking life through laws instrumentality, that ought not to be done save in rarest of rare cases when alternative option is unquestionably foreclosed. Negating the abolitionists contention that vengeance which is no longer an acceptable end of punishment, that it

¹⁸Bachan Singh v. State of Punjab, AIR 1980 SC 898

is contrary to reformation of criminal and his rehabilitation and finally that it is inhuman and degrading, the supreme court ruled that though life imprisonment is the rule, death sentence must be retained as an exception for the offence of murder under section 302 IPC to be used sparingly.

- **In T. V. Vatheeswaram v. state of Tamil Nadu**,¹⁹ once again supreme court ruled that prolonged delay in execution exceeding two years will be a sufficient ground to quash death sentence since it is unjust, unfair and unreasonable procedure and only way to undo the wrong is to quash the death sentence. The court further observed that the cause of delay is immaterial when the sentence is that of death and a person under sentence of death may also claim death fundamental rights. i.e., the procedure under Article 21 must be just, fair, and reasonable.
- **In Sher Singh v. State of Punjab**,²⁰ the supreme court overruled its earlier ruling in **Ventheeswaran's case**. Delivering the judgement in this case Chief Justice Mr. Y.V. Chandrachud observed that death penalty should only be imposed in rare and exceptional cases but any death sentence upheld by the supreme court should not be allowed to be defeated by applying any rule of thumb. The Learned Court further observed that no hard and fast rule can be laid down as far as the question of delay was concerned. If a person was allowed to resort to frivolous proceedings in order to delay the execution of death sentence, the law laid down by court on death sentence would become an object of ridicule. Thus, dismissing the writ-petition the supreme court in this case directed the punjab government to explain the delay in execution.
- In the case of **Javed Ahmed Abdulhamid Pawala v. State of Maharashtra**,²¹ the supreme court upheld the sentence of death for a gruesome and brutal murder. In the instant case the appellant was convicted for multiple murders. He killed his sister-in-law aged 23 years, his little niece aged 3 years, his baby nephew aged about one and half years and the minor servant aged about 8 years. The motive of murders was the golden ear-rings and bangles of the deceased. The sister-in-law sustained 23 stab-injuries, niece 13 stab wounds, servant incised wounds and baby niece 3 injuries. The accused was convicted for murder and sentenced to death. His conviction was upheld by the High Court. He thereupon moved an appeal to the Supreme Court only on the question of sentence. Dismissing his appeal the Supreme Court, inter alia observed-

¹⁹T. V. Vatheeswaram v. state of Tamil Nadu, AIR 361, 1983 SCR (2) 348.

²⁰Sher Singh v. State of Punjab, AIR 465, 1983 S

²¹Javed Ahmed Abdulhamid Pawala v. State of Maharashtra, AIR 231, 1985 SCR(2)8

“The appellant acted like a demon showing no mercy to his helpless victims three of whom were helpless little children and one a women. The murders were perpetrated in a cruel, callous and fiendish fashion. Although the appellant was 22 years of age and the case rested upon circumstantial evidence, the court were unable to refuse to pass the sentence of death as it would be satisfying the course the court had no option but to confirm the sentence of death.

In the notorious joshi-Abhyunkar murder case the accused committed a series of gruesome murders during january 1976 and march 1977. They were sentenced to death by the trial court which was confirmed by the Bombay High Court on 6th April 1979. The appellants thereupon filed special leave petitions before the supreme court for commutation of death sentence to one of life imprisonment as the death was hovering over their minds for five years. Two of the petitioners namely Shanta Ram Jagtap and Dharendra Bramhachari into Marathi. Dismissing the petitions the supreme court observed that the book-writing and translation work of the petitioners believed that any spectre of death penalty was hovering over their minds during the period they have been in jail. Therefore, any mercy shown in matter of sentence would not only be misplaced but will certainly give rise to and foster a feeling of private revenge among the people leading to destabilisation of society.

DELAY IN EXECUTION OF DEATH

A survey of available case-laws on death sentence would reveal that the attention of the supreme court was forced on the question whether inordinate delay in the execution of death penalty can be considered to entitle the convict to claim commutation of the sentence to that of life imprisonment. In *Triveniben v. State of Gujrat*,. The five judges Bench of the Supreme Court overruled *Vatheeswaran* and *Javed Ahmed* to the extent they purported to lay down the two years delay rule, and held that no fixed period of delay could be held to make the sentence of death inexecutable. The court, however, observed that it would consider such delay as an important ground for commutation of the sentence.

In *Madhu Mehta v. Union of India*., the supreme court held that a delay of eight years in the disposal of mercy petition would be sufficient to justify commutation of death sentence to life imprisonment since right to speedy trial is implicit in Art. 21 of the constitution which operated through all the stages of sentencing including mercy petition to the president.

In *State of UP v. Ramesh Misra*., The supreme court reduced the death sentence of the accused

to one of imprisonment for life in view of long lapse of time from the date of commission of crime. The incident had occurred on the intervening night of september 26/27, 1985 in kaewi town of Bandra district of UP. The accused was a practising advocate who had committed horrendous bed-room murder of his 28 years old wife whome he had married only 5 months ago. He was found guilty of offence under section 300 and 498-A dowry death and his plea of alibi was not established hence he was convicted on the basis of circumstantial evidence and sentenced to death.²²

MODE OF EXECUTION OF DEATH SENTENCE

The Section 354 (5) of the code of criminal procedure 1973 requires that when a person is sentenced to death, the judge in his sentencing order shall direct that the condemned person be hanged by neck till he is dead. The constitutional validity of this mode of execution of death sentence was challenged in Dina v. State of UP on the ground that it was violative of Article 21 of the constitutional being barbarous and inhuman in nature. The supreme court however rejected or refused the contention and held that hanging the condemned person by neck till he is dead was perhaps the only convenient and relatively less painfull mode of executing the death sentence. The issue was once again raised in smt. Shashi Nayer v. Union of India,. But the supreme court upheld the validity of hanging by neck untill death reiterating its earlier decision in Dina's case.²³

SUGGESTION

1. In the present circumstances it would not be desirable to abolish death penalty totally. Death Penalty may be used as punishment of last resort considering the nature of offence, security of state, public welfare or anticipated grave potential danger from dangerous criminals.
2. Mandatory death sentence be abolished and whenever death penalty is prescribed, it must be associated with imprisonment for life with a disjunctive 'or' so that either of the punishment may be imposed according to the discretion of the judge. In the rarest of rare cases the capital punishment should be imposed in against the capital offender for committing the capital offence.

²²Prof N.V.Paranjapee, Criminology and Penology, page no 304 (kamal law publication, 14th edition, 2010).

²³ Ibid Page no- 304.

3. Death Penalty is often imposed on the poor, uneducated, underprivileged and minorities. They seldom win: a legal battle in a Court of Law. While arguing a case where one's life is at stake the advocate who is engaged by the state for the accused should be an advocate with proper experience.
4. The prescription of death penalty must be proportionate to the nature and gravity of the offence and in the context of legislative judgment world-over, if we alone in India prescribe death penalty; it is likely to be vulnerable as a punishment disproportionate to the nature and gravity of the offence.
5. The movement towards abolition of death penalty as a result of various international Covenants, Protocols and Resolutions and the increase in the number of countries which have either abolished death sentence or confined it to rarest of rare cases.
6. In any event, it is not possible to impose a mandatory death penalty for a second offence, mandatory death penalty which deprives the court from applying its mind to the question whether the case is the rarest of the rare cases or which deprives the accused of his right to be heard on the question of sentence, will be unconstitutional and violation of Art. 21.
7. If any person has committed any capital offences in against of another person which is also known as heinous offence and it falls under the category of rarest of rare cases then the court may impose the capital punishment, but the heinous case which does not fall under the category of rarest or rare principle then the court may commute or reduce the punishment from capital punishment to life imprisonment.
8. In India, As of June 2004, a total of 118 countries (including Canada, Mexico, Australia, Russia, South American nations and most European nations) have abolished the death penalty in law or practice. Of these, 80 countries and territories have abolished the death penalty for all crimes, fifteen countries have abolished the death penalty for all but exceptional crimes (such as wartime crimes) and 23 countries can be considered abolitionist in practice, i.e., they retain the death penalty in law but have not carried out any executions for the past ten years or more and are believed to have a policy or established practice of not carrying out executions. As it can be inferred, there is a general solidarity amongst most member states of the world to do away with the death penalty.
9. Capital Punishment must be existed in India like other countries for the capital offences which are heinous and rarest of rare cases in nature to maintain the retributive and reformatory approach.

10. In India the capital punishment is actively in practice, it will be imposed on the rarest of rare cases.

CONCLUSION

In my conclusion part, i would like to state that, it may be reiterated that capital punishment is undoubtedly against the notions of modern rehabilitative processess of treating the offenders. It does not offer an opportunity to the offender to reform himself. That apart, on account of its irreversible nature, many innocent persons may suffer irredeemable harm if they are wrongly hanged. As a matter of policy, the act of taking another's life should never be justified by the state except in extreme cases of dire necessity and self preservation in war. Therefore it may be concluded that though death punishment is devoid of any practical utility yet its retention in the penal law seems expedient keeping in view the present circumstances when the incidence of crime is on a constant increase. Time is not yet ripe when complete abolition of capital punishment can be strongly supported without endangering the social security. It is not exaggeration to say that in the present time the retention of death punishment seems to be morally and legally justified. It serves as a reminder to everyone that in case of unpardonable crime one has to forfeit his own right to life and survival. It must also be stated that the essence of criminal jurisprudence has always been to provide protection, as also to contrive measures against the fears both from within and without, for the individuals and also for the social order itself. Thus the criminal jurisprudence while it provides protective devices through punitive sections, also aims to securing better social order by insulating against the unwarranted acts emanating from the individual. It is with this backdrop that the desirability or otherwise of the capital punishment has to be judged. As a note of caution S Venogopal Rao who chaired the session on capital punishment of international congress of criminal law, rightly pointed out there is no objection to according a humane treatment to the offender but this should not mean that the victims be at the mercy of criminals who pose a danger to the society and deserve treatment through deterrent and preventive measures. Therefore there is a need for searching out a viable alternative to deterrence, which has a vital protective function in society.

At present 127 countries of the world have retained death penalty but renovations are continuously being made by them in the methods of execution so that the person on whom the sentence has been ordered suffers minimum torture. The Amnesty International has decided to launch a global wide camaign in 1989 for the abolition of death sentence. It yet remains to be

seen as to how far it succeeds in its mission. The Indian law in this regard, however, seems to be satisfactory as the Supreme Court in the case of *Allauddin Mian v. State of Bihar* has stressed on the penological aspects of death sentence and observed that provisions of sections 354 (3) and 235 (2) of the Code of Criminal Procedure, 1973, require the sentencing judge to state reasons for awarding death sentence and giving an opportunity to the condemned person to be heard on the point of sentence. Satisfy the rule of natural justice and fair play. This enables the sentencing court to endeavour to see that all the relevant facts and circumstances which have bearing on the question of sentence are brought on record and no injustice is caused to the accused. In the instant case, the Apex Court noted that the trial judge had not attached sufficient importance to mandatory requirements of the above provisions and High Courts confirmed the death sentence without having the sufficient material placed before it on record to know about the antecedents of the accused, his socio-economic conditions and impact of crime etc, which rendered the rationale of the judgment doubtful.

Undoubtedly, there are admirable principles which the judge who has responsibility for passing sentence, should bear in mind while finalising the sentence of the accused. The objectives of sentence and the range of sentences have widened over the years and this calls for properly marshalled observation of the result of similar sentences imposed in similar circumstances in the past. The sentencing courts should therefore keep themselves abreast of the penological developments specially when the choice is between death or life imprisonment.

In the ultimate study, it will be observed that considered from the angle of social justice and protection of society from hard-core criminals, death sentence is not unreasonable or unwarranted or obsolete type of punishment. The death penalty is no doubt unconstitutional if imposed arbitrarily, capriciously, unreasonably, discriminatorily, freakishly or wantonly, but if it is administered rationally, objectively and judiciously, it will enhance people's confidence in criminal justice system.

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Chapter 2: The Miscarriages of Justice & Cost of Capital Punishment

Chapter 2: The Miscarriages of Justice & Cost of Capital Punishment the law is not always correct and miscarriages of justice happen from time to time, but with capital punishment it is far more serious as the results can be fatal. Austin, S et al (2009) states that in America, law often fails and becomes a tool of injustice. As capital punishment bears a harsher outcome, it is well known that the majority of the major miscarriages of justice cases are capital cases. According to Austin (2009), exonerations from death row have amplified since 1973 and more than 125 people in 25 different states have been released from death row due to their innocence (Austin 2009). Continuing from the work of Austin et al (2009), Loge, P (2003) explains the growing understanding of the flaws in the American Justice System. As a result of increasing exonerations and the shift in the way the Americans looked at capital punishment, the Innocence Protection Act (IPA) was introduced in 2001. This was the first federal death penalty reform to be enacted and it would hope to solve any of the problems that have come to the fore. There are two core elements that construct the IPA; access to post-conviction DNA testing and the improvement of defence counsel in capital cases (Loge 2003). With a major advancement in technology in the US, DNA testing has provided pivotal to capital cases. Since it was introduced, Loge explained that more than 100 people have been found innocent, with more than a dozen were on death row. Importantly, over 90% of Americans support the access of DNA testing on death row inmates. Unfortunately, there is no guarantee of the use of the DNA testing as the IPA changes from one jurisdiction to another, and there is no requirement to preserve the evidence, but although the dialect of the bill has changed over time, the core areas still remain the same (Loge 2003).