
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

**CAPITAL PUNISHMENT- “THE SOLUTION” TO STOP THE HEINOUS
CRIME?**

- Srishti Sinha¹ & Yashika Mishra²

Abstract

India is a developing country, either in the context of economy or crime rates. There are various codes, principles and laws for crimes but still, the rate of crime is increasing day by day. The main reason for the increase in crime is insufficient punishment and time-taking procedures. The death penalty is considered the highest punishment given to any individual but, is it right to kill someone who himself has killed another person? Will this be considered as proper justice in every case? This paper tries to answer these questions not only in the context of India but all over the world. This paper is also concerned about the status of capital punishment all over the world. Further, the paper explains about the historical background of capital punishment, its most important doctrine, i.e., rarest of rare cases, the notion of justice with the help of various theories, and the various contentions on capital punishment in India.

Keywords: *Capital Punishment, justice, crime, rarest of rare cases, societal view.*

INTRODUCTION:

Capital punishment, also known as the death penalty has been a widely recognized punishment to control major crimes such as murder, acts of waging war against the government, rape and all other heinous and severe crimes, not only in India but around almost all leading law-driven countries across the globe. Scenes from various Bollywood movies can be recalled whereby a lawyer can be seen shouting “The culprit must be hanged for the sake of justice”, such dialogues can be best for the purpose of entertainment of masses but in reality, the efficiency of such punishment is in question.

In the words of great American activist, Martin Luther King Jr., “*Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars*”. A

¹ 2nd Year (3rd Semester) student at Institute of Law, Nirma University, Ahmedabad.

² 2nd Year (3rd Semester) student at Institute of Law, Nirma University, Ahmedabad.

person's life is believed to be the most prized possession. Despite being wrong, one cannot go on snatching or taking away something which a person himself is not entitled to do so. We witness people with a mentality that, "The only justice is vengeance." But how far this statement is true is an enigma. In layman's terms, those who commit horrible crimes must be hanged till death, but do we really believe that capital punishment is helpful in regulating such acts when we talk about justice? If yes, then there should not be any report of sexual abuse after what we witnessed in the 2012 Delhi case.³

Capital punishment has been used for a long time, but as the globe and civilization evolved with new norms, people learned that capital punishment should be reserved for the most serious offences. Capital punishment has already been banned in more than two-thirds of the world's countries.⁴

RESEARCH OBJECTIVE:

1. To see if execution punishment is the only way to stop severe and horrible crimes.
2. To investigate the significance and establish the principles based on the philosophy of the rarest of rare crimes.

RESEARCH METHODOLOGY:

The qualitative research methodology employed in this study is based on secondary sources. Online portals, research papers, publications based on the Indian Penal Code, reports issued by renowned authorities, media, legal databases that help us interpret diverse instances, and so on, are some secondary sources of data.

QUESTIONNAIRES FOR RESEARCH:

1. Is capital punishment a suitable means of punishment for today's society?
2. What is the test that a person must pass in order to be sentenced to death in India?

LITERATURE REVIEW:

On the subject of capital punishment, there is a wealth of information available. The literature

³ Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673.

⁴ TIMES OF INDIA, 2014. 98 countries have abolished death penalty. [online] Available at: <<https://timesofindia.indiatimes.com/india/98-countries-have-abolished-death-penalty/articleshow/42493356.cms>> [Accessed 24 January 2022].

study is studied in order to determine the work that has been done on this idea by various researchers thus far.

1. *International Covenant on Civil and Political Rights Charter, 1979*

The concept of the most serious crime arose during the formulation of Article 6 of the ICCPR, which provides the right to life. It has a wide meaning and states that capital punishment should be reserved for the most heinous crimes, although only a few states abolished the capital penalty until 1954.⁵

2. *Swasit Mahapatro, 2013*

The 'theory of social engineering,' developed by Roscoe Pound, provides the foundation for the 'Rarest of Rare' ideology. The goal of social engineering is to create the most efficient societal structure feasible, which needs the fulfillment of the greatest number of desires with the least amount of friction and waste. It entails reconciling conflicting interests.⁶

3. *WGHR, 2013*

Working Group on Human Rights (WGHR) believes that the death sentence in retributive form is as harsh as the offence committed after a fast-track court awarded the death penalty to the accused in the gruesome Delhi gang-rape case on December 16, 2012.⁷ There is no scientific basis to claim capital punishment as a deterrent effect, studies show that punishment becomes stricter. WGHR commented on Justice Verma's committee on amending the law relating to rape and sexual assault, saying there is no scientific basis to claim capital punishment as a deterrent effect. The imposition of the death penalty will enhance impunity and diminish the number of convicts. The death sentence, according to the Ministry of Home Affairs, is not a deterrence to murder. In **Bacchan Singh v. State of Punjab**,⁸ the Supreme Court stated that the death penalty shall be awarded only in the rarest of rare cases, and that this decision will be based on established criteria. During the UN Human Rights Council's second intergovernmental review

⁵ International Covenant on Civil and Political Rights Charter. (1979). Article-6. Comment 6 of ICCPR states India has steadfastly refuses to alter its sentencing policy. Retrieved November 8, 2021 from <<http://www.ohchr.org/>>.

⁶ Mahapatro, S. (2013), "Rarest of Rare doctrine and Concept of Social Engineering" Journal of International Academic Research for Multidisciplinary, 1(5) 282.

⁷ *Supra* note 1.

⁸ Bacchan Singh v. State of Punjab AIR 1980 SC 653. Retrieved November 8, 2021 from <<http://www.indiankanoon.org/>>.

of Indian human rights, known as the universal periodic review, in 2012, the UN Human Rights Council made 169 recommendations, 18 of which were related to the abolition of the death penalty in India, but none of these were accepted by the Indian government.⁹

HISTORICAL PERSPECTIVE:

In 621 BCE, Athens a ruler named Draco introduced the Draconian Law Code, which contained crimes which by their nature were harsh, so far so the code is said to be written with blood instead of ink and prescribed death punishment for almost all crimes contained in the code. In the 18th century BC Code of King Hammurabi of Babylon, the death penalty was codified for almost 25 crimes.¹⁰ In the early societies, the methods for capital punishment were slow, painful and tortious these methods included beating a person to death, drowning, burning the criminal alive etc. The method of hanging originated in Britain during the reign of William the Conqueror but this method was restrained to only to wars.

The laws governing the death penalty in the past were extremely draconian. Back then the crimes of perjury, theft were too dealt with the punishment of hanging which today are dealt with much lighter punishments. In the 5th century BC, the Roman law of the Twelve Tables also had the death penalty.¹¹ The process of carrying out the punishment here was callous and barbarian as it included beheading, boiling in oil, burying alive, hanging, being thrown to wild animals and even quartering that is being torn apart.¹²

Hence, the death penalty or the “Capital Punishment” was much more widespread and harsher than it is today. The history of death penalty laws is long; stretching back a few thousand years right from the Babylon- the capital of Mesopotamia which was the first human civilization of the world.

DOCTRINE OF RAREST OF RARE CASES:

In India, capital punishment is based on the concept of the rarest of the rare situations. The doctrine states that in order to condemn someone to death, the crime test must be completely

⁹ WGHR. (2013). Capital Punishment not a deterrent: WGHR demands Abolishment of Death Penalty. Working Group on Human Right in India and US. Retrieved December 30, 2013 from <<http://www.wghr.org>>.

¹⁰ Death Penalty Information Center. n.d. *Early History of the Death Penalty*. [online] Available at: <<https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty>> [Accessed 24 January 2022].

¹¹ Historyguide.org. 2009. *The Laws of the Twelve Tables, c.450 B.C.*. [online] Available at: <<http://www.historyguide.org/ancient/12tables.html>> [Accessed 24 January 2022].

¹² Robert Hoag, *Capital Punishment*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (Nov. 8, 2021, 2:33), <<https://iep.utm.edu/cap-puni/>>.

completed, and it must not favour the accused in any way. This idea is founded on societal perceptions, and the court should consider a number of factors, including society's abhorrence, the nature of the criminal, the purpose and manner of the crime's commission, great indignation and hostility to certain crimes, such as rape of young girls, and so on.¹³ The death penalty is imposed by the courts because the situation requires it, as a result of constitutional compulsion, rather than a judge-centric approach. The death penalty, on the other hand, can only be applied in exceptional situations, and there must be a balance of mitigating and aggravating considerations.

The rarest of rare doctrine was introduced in the case of **Bacchan Singh v. The State of Punjab**¹⁴ based on Section 354(3) of Criminal Procedure Code, 1973.¹⁵ In this decision, the Supreme Court sought to eliminate a theory that applied only to crimes punishable by death, in order to reduce judicial ambiguity about when to use the harshest punishment available. The Supreme Court maintained the death sentence's legitimacy by a 4-1 vote, and established a concept that the death penalty should only be used in the "rarest of rare cases." The extent of this statement, however, was left undefined. According to the Bacchan Singh case's Ratio Decidendi, the death penalty is constitutional if it is imposed as a last resort for the crime of murder, and the customary sentence for murder is life imprisonment. This indicates that the death sentence can only be applied in the "rarest of rare instances" where there is no other option.

The Supreme Court, in considering the scope of this doctrine, found that it is constitutionally valid and that the purpose of this doctrine is not to be a deterrent but to be a gesture of society's disapproval of the crime, and that if this doctrine or capital punishment is abolished, society will be at greater risk.

Thus, in India, the theory or philosophy of the rarest of rare cases is closely followed with a great degree of consideration when it comes to imposing the death penalty, as offenders do have fundamental rights, but that does not imply they should be left alone. The circumstances and evidence are carefully weighed before the sentence is handed down, unless the offence is very heinous and affects society's ethics, acting as a model for others to avoid committing similar crimes.

¹³ Shivani, (2019), "Execution of Capital Punishment in India: Is It a Violation of Human Rights?", International Journal of Advanced Research, 8(1) 255-256.

¹⁴ Bacchan Singh v. State of Punjab AIR 1980 SC 653. Retrieved November 8, 2021 from <<http://www.indiankanoon.org>>.

¹⁵ The Code of Criminal Procedure, 1973, § 354(3), No. 02, Acts of Parliament, 1949 (India).

JUSTICE AND DEATH PENALTY:

The term justice derives its origin from an old French term '*justitia*' meaning "righteousness and equity".¹⁶ There have been four widely accepted theories of justice named distributive justice theory, procedural justice theory, retributive justice theory and restorative justice theory.¹⁷ The concept of capital punishment or death penalty can be attributed to the Retributive justice theory but we as society functions on the concept of Restorative justice system or the Restorative Justice theory. As far as Restorative justice is concerned, the theory believes in the notion of rehabilitation and correcting the wrongs by undertaking the treatment individually and reforming him so that the person again can be introduced into the society without posing any danger or threat to the society. This theory is what exactly defines the notion of "JUSTICE".

The retributive theory has been criticized on the ground that it allows for a breakdown of law and order in the society because crime goes unpunished and the victim gets no justice. To illustrate the above statement, if a person is a victim of sexual harassment or a heinous crime, the person ultimately gets a stigma and hanging the offender does not in any way serve justice to the victim. It will not remove the stigma imposed on the person.

SCENARIO ABROAD:

The notion of Capital Punishment has been widely criticised in today's era. More than 70% of countries have abolished Capital Punishment from their justice system.¹⁸ But there still exist some countries where capital punishment still finds its place in the statutes and laws. Though there has been a widespread movement for the abolition of capital punishment. One might look into the movements worldwide and we can witness the support that the UN provided to such movements. The UN drafted a Universal Declaration of Human Rights in 1948¹⁹ in support of the same. The draft can be found in Article 3 of the UDHRs.²⁰

Among the countries practicing capital punishment, the US is also a part of the list. Though in

¹⁶ Jason Boatright, (2018), "The History, Meaning, and Use of the Words Justice and Judge", St. Mary's University, 49(4) 10.

¹⁷ Alan Tomkins & Kimberly Applequist, *Civil Juries and Civil Justice* (Springer, 2008), B. H. Bornstein et al. (eds.), 258.

¹⁸ DEATH PENALTY INFORMATION CENTRE, <<https://deathpenaltyinfo.org/policy-issues/international>> (last visited Nov. 8, 2021).

¹⁹ Nations, U., n.d. *Universal Declaration of Human Rights | United Nations*. [online] United Nations. Available at: <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> [Accessed 24 January 2022].

²⁰ *Id.*

recent years, 86% of the death penalty is found in Iraq, Iran, Saudi Arabia, and Pakistan, the USA has only executed 22 prisoners according to a report of 2018.²¹ Also, Russia has the punishment of the death penalty enshrined in its laws but it has not executed any person since 1996.²² Turkey is also on the verge of abolishing the provision of the death penalty. Poland also abolished the death penalty in 2013.²³

There has been a global dereliction on the notion of the Death Penalty and to support the same there are 142 countries that have abolished the law about the same and have reduced it to life imprisonment.²⁴

INDIA'S STANCE:

In India, the laws regulating or dealing with capital punishment can be attributed to the rarest of the rare doctrine that traces its development to a landmark judgment. When we talk about the legislature, Article 21 of the Indian Constitution states, "Protection of Life and Liberty"²⁵ which means that everyone is entitled to protect their own lives and the government has no right to take any individual's life. Now, this is what the constitutional provision has to say about an individual's life and liberty. On the other hand, Section 354(3) of the Criminal Procedure Code 1973²⁶ states, "*When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.*" Also, there is a Section 368²⁷ of the CrPC, 1973 which provides powers to the High Court regarding confirmation of the death sentence. The death sentence in India is provided for various offences like Murder, Rape, Terrorism, Waging war, Drug trafficking, and also in the rare of the rarest cases.

India has witnessed various cases in which the question of capital punishment was raised,

²¹ DEATH PENALTY INFORMATION CENTRE, *Executions Around The World* [online] Available at: <<https://deathpenaltyinfo.org/policy-issues/international/executions-around-the-world>> [Accessed 24 January 2022].

²² 2015. *The Death Penalty*. [eBook] New Delhi: Government of India, p.42. Available at: <<https://lawcommissionofindia.nic.in/reports/report262.pdf>> [Accessed 24 January 2022].

²³ AMNESTY INTERNATIONAL, <<https://www.amnesty.org/en/what-we-do/death-penalty/>> (last visited Nov. 8, 2021).

²⁴ Smit, D.V.Z. Life imprisonment as the ultimate penalty in international law: A human rights perspective. *Crim Law Forum* 9, 5–54 (1998). <https://doi.org/10.1007/BF02677812>

²⁵ INDIA CONST. art. 21.

²⁶ *Supra* note 11.

²⁷ The Code of Criminal Procedure, 1973, § 368, No. 02, Acts of Parliament, 1949 (India).

starting from the case of **Jagmohan Sinha v. State of U.P.**²⁸ then, in the case of **Bachan Singh v. State of Punjab**; the court clearly mentioned that capital punishment is given in the rarest of the rare cases.

The main goal of these protests is to stop inhumane and cruel punishments because they violate Article 21 of the Constitution, which is a fundamental right guaranteed by the constitution. Also, one of the learned Justice of India, Justice V.R. Krishna Iyer also opposed the movement and contended that “If God has given Life to an individual then no one has the right to take away from him or her.” Therefore, in India, the concept of capital punishment has been widely contended and has remained a bone of contention among the masses.

CONCLUSION:

The death penalty, or capital punishment, is thus the cruelest, most brutal, and most demeaning form of punishment. Every year we see people getting executed and we cannot ignore the risk of executing an innocent person.²⁹ This particular method of punishment has a number of flaws. First of all, Capital Punishment in itself is a failure because it does not deter crime.³⁰ It cannot be argued that the death penalty is ‘The solution’ because it has been a discredited argument. Second of all Capital Punishment often operates within crooked judicial systems. People are often inadequately represented. Also, in most cases, the underprivileged class, the less advantaged socio-economic classes become the victim of discrimination and hence fall into the trap. On the other hand, when a terrorist commits a crime, our Constitution affords us the right to seek a pardon from the President or Governor. According to the Indian scenario, such crimes are regarded to bring harm to the general public, and as a result, they should be directly hanged to death. Such punishments are dependent on the severity of the offence, in order to instill dread in the minds of criminals, causing them to refrain from committing it. There have been numerous landmark cases in which the accused was granted the death penalty but the decision was later reversed because the judge determined that the accused would not harm the public at large, making the verdict just and fair. As a result of the aforementioned research, the doctrine of the rarest of rare with regard to capital punishment demonstrates that it is for the general benefit.

²⁸ Jagmohan Sinha v. State of U.P., AIR 1973 SC 947.

²⁹ Bradley R. Hall, *From William Henry Furman to Anthony Porter: The Changing Face of The Death Penalty Debate*, 95(2) J. CRIM. L. & CRIMINOLOGY 371, 373 (2004-2005).

³⁰ *Supra* note 18.