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**ABOLITION OF DEATH PENALTY AND ITS APTNESS IN MODERN
INDIAN JUDICIAL SYSTEM**

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ABSTRACT- The article starts with the definition of death penalty it states it is a form of punishment where by the accused is succumbed to death as a form of punishment for the offence he has committed. It also discusses about the history behind the imposition of death penalty. A brief discussion is also given about how fundamental right of a particular individual is violated when awarded with death sentence. in the years 1952 and 1962 death sentence as a form of punishment was discussed multiple times in the parliament Prithvi raj Kapoor moved the first resolution for the abolishment of the death penalty where out of 14 MPs 4 supported the abolishment and the rest didn't support the resolution. The death penalty can be inflicted by the due process established by law and only in case of those offenses for which the death sentence as a punishment has been specifically mentioned under the Indian penal code, 1860. The legislature also puts an obligation on the part of the judiciary to record its "special reasons" for imposing death sentence which is enshrined under sec 354(3) of Code of criminal procedure,1973. There are moral, practical and utilitarian arguments against and in support of the abolition of death penalty. Those who are in favour of the death sentence consider that right to life of the people who commit murder should have forfeited since they have taken the life of another. Furthermore, they feel that it falls under retributive kind of punishment and also it is a legal form of taking revenge, This not only encourages the moral anger of the victim's family, but also the moral anger of the individual who complies with all laws.

Keywords- death penalty, utilitarian, retributive, fundamental rights, right to life.

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Introduction

Martin Luther King once said “Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars”. India is one of 59 countries that retain the death penalty as a means of inflicting punishment. In 2007 India and several countries like the U.S rejected the proposal given by the UN to all its member countries to put an end to the use of the death sentence as a punishment for any crime.³ There has been seen rise the number of countries that have abolished the death penalty From 1991 to 2017. According to an international organization

Amnesty International, developed Countries like Russia, South American countries, Mexico, Australia, Canada and most European countries abolished the death sentence as a form of punishment. There 142 countries in the world that abolished it. They issued a moratorium (Which is a kind of an agreement to put a policy or action on hold) for the abolition of the death penalty. Death penalty as a form of punishment has challenged as being unconstitutional but in many cases court has upheld the validity of death penalty.

Historical background

The concept of the death penalty goes back to the pre-independence period looking back at the history one can easily make out how the concept of the death penalty has evolved; before independence, the justice system was purely administered by the Britishers where the death penalty was awarded for petty offenses. Many resolutions were passed for the abolishment of the death sentence in India starting in the year 1932 Babu Gaya Prasad Singh member of the Bihar legislative assembly first challenged the death penalty and demanded its abolishment. Congress also appealed for the abolishment of the death sentence but nothing changed. Later in the years 1952 and 1962 death sentence as a form of punishment was discussed multiple times in the parliament Prithvi raj Kapoor moved the first resolution for the abolishment of the death penalty where out of 14 MPs 4 supported the abolishment and the rest didn't support the

³ Alanp, Abolishment of Capital punishment in India, Indian 4 Social Change, (May 27, 2022, 9:29 PM) <https://indians4sc.org/2020/04/24/abolishment-of-capital-punishment-in-india/#.Yo8Q-ahBzrc>

² Roger Hood, Arguments for and against capital punishment, Britannica,(May 27, 2022, 10:15 PM) <https://www.britannica.com/topic/capital-punishment/Arguments-for-and-against-capital-punishment> ³ Arghya sengupta, Ritwika Sharma, Death Penalty in India Reflection on the law commission report, Vol 50, no 40 (October 3, 2015), Economic and Political weekly, [Death Penalty in India: Reflections on the Law Commission Report on JSTOR](#)

resolution.⁴

The right to life as a fundamental right has been enshrined under Article 21 of the Indian constitution which stipulates that “no person shall be deprived of his life or personal liberty except according to procedure established by law” which indicates the legislative intent behind awarding death sentence and offenses for which it can be awarded. In 2015 It was proposed by the Law commission report (262nd) that India should abolish death penalty for all crime except crime related to terrorism. The death penalty can be inflicted by the due process established by law and only in case of those offenses for which the death sentence as a punishment has been specifically mentioned under the Indian penal code,1860. Offences for which death sentence can be awarded under indian penal code,1860 and other act are as follows:

- “Being a party to a criminal conspiracy to commit a capital offence”- 120B of IPC,1860.
- “Waging, or attempting to wage war, or abetting waging of war, against the Government of India”-121 of IPC,1860.
- “Abetting a mutiny in the armed forces (if a mutiny occurs as a result), engaging in mutiny”-132 of IPC,1860.
- “Giving or fabricating false evidence with intent to procure a conviction of a capital offence”- 194 of IPC,1860.
- “Murder”-302 of IPC,1860.
- “Abetting the suicide of a minor”-305 of IPC,1860
- “Kidnapping, in the course of which the victim was held for ransom or other coercive purposes”-364A of IPC,1860.
- “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”-376A of IPC,1860.
- “Banditry with murder – in cases where a group of five or more individuals commit banditry and one of them commits murder in the course of that crime, all members of the group are liable for the death penalty”-396 of IPC,1860.

⁴ ABOLISHMENT OF CAPITAL PUNISHMENT IN INDIA - INDIANS 4 SOCIAL CHANGE, <https://indians4sc.org/2020/04/24/abolishment-of-capital-punishment-in-india/#.Ypjll6hBy5e> (last visited Jun 2, 2022)

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India is the only country that still imposes death penalty for heinous offences whereas countries like UK and France have completely banned death sentence as a form of punishment because they believe it violates the basic human rights of an individual. Moreover, countries like Saudi Arabia, china and Iran have the highest no. of individuals awarded with death sentences. The Indian criminal justice system is based upon reformatory and deterrent theory of punishment where the main objective is to reform the individual and help them to rehabilitate back in to the society as a result of which death sentence is not mandatory and life imprisonment is available as an alternative to death sentence under IPC,1860.⁵ The legislature also puts an obligation on the part of the judiciary to record its “special reasons” for imposing death sentence which is enshrined under sec 354(3) of Code of criminal procedure,1973 which states that⁶ “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.” Further it also requires that the session court needs a confirmation from the high court in cases where it desires to award death sentences.

Arguments for and against the imposition of death penalty

The opinions of intellectuals are divided in context to the abolition of death penalty. There are moral, practical and utilitarian arguments against and in support of the abolition of death penalty. Those who are in favour of the death sentence consider that right to life of the people who commit murder should have forfeited since they have taken the life of another. Furthermore, they feel that it falls under retributive kind of punishment and also it is a legal form of taking revenge, This not only encourages the moral anger of the victim's family, but also the moral anger of the individual who complies with all laws². The death penalty is justifiable in certain cases, according to retributivist arguments, not just because it reduces or deters violent crime, but because the offender deserves it or because it underlines respect for the victim's dignity.³ they also claim that it is a particularly effective deterrent for potentially violent offenders for whom incarceration is insufficient. On the other hand according to the abolitionist We don't consider or give much importance to the theories which are based on the principles of "hate the crimes, not the criminals," that every criminal may be a victim of some

⁵ DEATH PENALTY IN INDIA, <http://www.legalservicesindia.com/article/2418/Death-Penalty-in-India.html> (last visited Jun 2, 2022)

⁶ CHOICE BETWEEN ' DEATH ' AND ' LIFE ' FOR CONVICTS Author (s): K I Vibhute Source : Journal of the Indian Law Institute , JULY - SEPTEMBER 2017 , Vol . 59 , No . 3 Published by : Indian Law Institute Stable URL : <https://www.jstor.org/stable/10.2307/268>, 59 221–264 (2017)

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unavoidable circumstances, and everyone deserves a second chance in a life thus the punishment should be imposed with the rehabilitation of the criminals in mind; retributive theories are old and outmoded. In modern theories and principles of penology should have avoid theories like retributive and in anyway the agonies and pains of the family of the victim will not reduce with giving death penalty to the criminal.⁷ It is more important to observe that at the end what actually we achieve. In the modern justice system revenge is not the objective of the punishment. The objective of the punishment inflicted in the modern justice system is to reform the offender.

Here the question arises, How can we deter murder by murdering someone? Killing the killer is not justice it is revenge. The countries that retain the death penalty as punishment reflect the violent culture. Intellectuals who support the death sentence arguing that human body is sacred and those who inflict harm to another body is guilty and should be punished with death penalty, here the question is the offender also posses a human body so who gave us the right to execute them and took the life of that person?

Under the Universal Declaration of Human Rights,1948 which was adopted by UN the right to life and the right to live free of any kind of torture and other inhuman and cruel punishment or treatment which are degrading are protected so the death penalty is a clear violation of human rights. The Universal Declaration of Human Rights is a commitment by states to promote fundamental rights as the cornerstone for justice, and freedom. The death penalty is always against the human rights we can't assume it as exception, Regardless of the rationale for a government's execution of detainees or the method of execution chosen. The struggle for human rights is integral to the abolitionist movement.⁸ Many countries have realised that capital punishment and respect for human rights are mutually exclusive. The United Nations has expressed its support for the abolishment of death penalty. The death penalty has been abolished by two-thirds of countries in the world.

According to the report of Amnesty international In 2021, at least 2,052 death sentences were passed in 56 countries, there was a rise of 39% from the whole of 1,477 reported in 2020. Towards the end of 2021, at least 28,670 persons around the world were reported to be on the death row. In 2021, there were at least 579 executions were made in 18 nations, and there was a rise of 20% from 2020 in which it was least 483 executions. This is the lowest number of

7 A. Prasad, Should India Retain Death Penalty?, Vol.1 Issue 1 (2016), Liberal Studies, <https://sls.pdpu.ac.in/downloads/ExpertsSpeakFinal.pdf>

8 Amnesty International, Why abolish the death penalty?, Amnesty International, (May 28, 2022, 7:48 Pm), <https://www.amnesty.org/en/what-we-do/death-penalty/>

executions according to the report of Amnesty International since 2010.

Why Death penalty should be abolished ?

There are many reasons why the death penalty should be abolished, first of all, death penalty is irreversible and in case of failure of justice, we can't give the innocent person his/her life back. Here we can't eliminate or avoid the possibility of execution of an innocent person. There are many cases where justice gone wrong and an innocent person executed just because of the failure of justice system. In a judgement Madras HC once said "1000 culprits can escape, but, one innocent person should not be punished" this is the basic criminal justice system.

Secondly, according to the existing data death penalty doesn't help in crime deterrence. So what's the point still India retains death penalty as a punishment? The punishment do not fulfil its paramount objective. The primary objective of the punishment is to deter crime but according to the existing data it is no way helpful in crime deterrence. According to NCRB (National Crime Records Bureau) the crime rates in India is more or less the same throughout the years.⁹

Thirdly, in India specifically there is no consensus among judges according to the report of project 39A nearly 30 percent of death sentences which were passed in between the year 2000 to 2015 by the trial courts, the accused were acquitted by the higher courts when they approach to higher courts. The death penalty was commuted in another 65 percent of instances. With so much doubt about what constitutes a proper punishment and it may have adverse effect on the society.

Fourthly, it targets weaker sections of the society Several reports from various national and international organizations, revealed that societal prejudices are clearly observable in justice system in India, particularly biases against the poorest members of society those who are not capable of approach or afford good lawyers and unable to appeal to the higher courts due to lack of financial support. According to a research published earlier this year, the number of Scheduled Castes and Scheduled Tribes are high in Indian prisons, out of three undertrials, one is belonging to one of these groups. According to another survey, 3/4th of death row inmates in India belong to religious minorities or lower castes. In Madhya Pradesh, most of the convicted person belongs to low-income families and they have to rely on the state to bear the expenses of

⁹ Jahnvi sen, Seven Reasons Why We Shouldn't Demand the Death Penalty for Rape, The Wire, (May 29 2022, 6:50 Am), <https://thewire.in/women/rape-death-penalty>

defending themselves.¹⁰ According to project 39A data, nearly 74 percent of the accused against whom death sentence has been passed are economically not stable. Among the states with 10 or more criminals condemned to death, Kerala had the highest number of financially deprived convicts sentenced to death, nearly 94% of the convicts falls under the category of economically weak. in case Bihar and Chhattisgarh it is 75 percent, in Delhi and Gujarat it is almost 80 percent, in Jharkhand, Karnataka, and Maharashtra it is nearly 75 percent.¹¹ In India, out of total inmates who are sentenced to death at least 279 are falls under category of unprivileged people, minorities (Religious), backward classes which means 76% are under this category. While debate on the death penalty we must consider the number of inmates falls under these category, which shows flaws in justice system. Almost 25% of inmates against whom the death sentence has been passed had never attended school.

Fifthly, the time has changed vengeance or revenge is outdated concepts a developing country like India should more incline toward justice. Even while the frequency of documented crimes against women, such as rapes and property conflicts, has increased throughout time in the country, The death penalty has remained unchanged. Is it because grieved parties have not received justice, as evidenced by the enormous number of outstanding court Further Contemplation Required cases around the country? This condition has resulted from a high level of corruption, a lack of faith in the judiciary, and the poor's impotence in pursuing justice. Should there be a solution to this problem, India is expected to cross China in population as the world's biggest democratic country. As a result, the discussion over capital punishment (death penalty) must take a back seat to developing better ways to provide justice to the residents of this country.¹²

Indian Judiciary on Death penalty

In the last 50-60 years, the Supreme Court has considered the constitutional legitimacy, process, and a variety of other problems linked to the death penalty and gave its valuable judgement on multiple occasions. The legitimacy and constitutionality of the death penalty severally have been challenged before the Supreme Court on the grounds that it violates Indian Constitutional provisions. However, the Supreme Court has stated numerous times that the imposition of the

10 Jahnvi sen, Seven Reasons Why We Shouldn't Demand the Death Penalty for Rape, The Wire, (May 29 2022, 6:50 Am), <https://thewire.in/women/rape-death-penalty>

11 Dr. Anup Surendranath, Death Penalty India Report, Project 39A, (May 29, 2022, 10:40 AM) <https://www.project39a.com/dpir>

12 A. Prasad, Should India Retain Death Penalty?, Vol.1 Issue 1 (2016), Liberal Studies, <https://sls.pdpu.ac.in/downloads/ExpertsSpeakFinal.pdf>

death penalty is not incompatible with the supreme law of the land. Bhagwati, J., believes that Section 302 of the IPC (Indian Penal Code) violates Articles 14 and 21 of the Constitution because it depicts the death penalty imposition as an alternative to life imprisonment, thus it is void and ultra vires.¹³ Now here the question is when the courts should be inclined to sentence an accused to death. The death penalty can only be imposed under exceptional circumstances, according to section 354(3) of the Cr.P.C. In Bachan Singh's case, the Supreme Court changed the wording and stated, *"A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed..."*¹⁴

In Rajendra Prasad v. State of Uttar Pradesh, Krishna Iyer, J., concluded that we can't justify capital punishment (Death penalty) unless the perpetrator posed a threat to society. He held in his judgment that it would be a violation of Art. 14, which prohibits arbitrariness if the authority is given to the judge to decide between life imprisonment and death sentence for any special reason under Section 354 (3) of the Crpc (Code of criminal procedure). In Jagmohan Singh's case, it was held that the death penalty is not the rule but the exception.¹⁵

The court has complete discretion over whether or not a case comes into the category of rarest of rare cases (The term which was evolved in Bachan singh case). However, the Supreme Court has established a few factors to be considered while deciding on a punishment. One of the most crucial elements is the distinction between aggravating and mitigating factors. The court believes that before deciding on a punishment, a balance should be maintained between both aggravating and mitigating elements in that particular case. The mitigating circumstances should be given full weight, and the death penalty should only be imposed if the court feels or believes that the punishment lesser than death penalty would not serve justice. In the case of Machhi singh vs. State of Punjab in the year 1983 the Hon'ble court laid down some questions which shall be considered before deciding the death penalty¹⁶

(a). Is the crime so uncommon or exceptional that a life sentence would be insufficient and the death penalty is required?

(b). Even if the mitigating circumstances that speak in favour of the offenders are given the greatest weight Are the consequence of the crime such that there is no other option left but to

13 Kritarth Pandey, Indian Judiciary on Death Penalty, SSRN: <https://ssrn.com/abstract=2399332> (May 29, 2022, 01:30 PM).

14 Bachan singh vs State of Punjab, AIR 1980 SC 898

15 Jagmohan singh vs. State of UP, 1973 SCR (2) 541

16 Machhi Singh And Others vs State Of Punjab, 1983 SCR (3) 413

impose a death sentence?

These Landmark Judgments by Hon'ble apex court is followed by the courts till date to decide the cases in which the punishment is death penalty.

Current position of India in cases of death penalty

At the end of the year, 2021 death sentence has been passed against 488 people, the year witnessed the biggest number of prisoners on death row since 2016, a rise of about 21% from 2020. When we analysed the data from the report of NCRB National Crime Records Bureau's Prison Statistics of India reports, we can observe since 2004 it has been the highest death row population. Due to the pandemic, the number of accused against whom death sentences has been by trial courts fell or reduced to 78 in 2020, which is the lowest number in the last six years, but 2021 saw a significant spike to nearly double that at 144. Appellate courts, on the other hand, decided much fewer cases, with the High Courts determining 39 cases in 2021 and 31 cases in 2020, compared to 76 in 2019.¹⁷ The Supreme Court prioritized death penalty cases in September 2021, and six cases were decided in 2021, compared to 11 in 2020 and 28 in 2019. Because of the limited functioning of appellate courts in both 2020 and 2021, fewer appeals of death-row inmates were decided, and a considerably greater number of inmates remained on death row at the expiration of the year.

The Supreme Court did not uphold a single death sentence in 2021, the first time in six years, as a consequence of significant changes in the apex court's approach to death penalty cases. While commuting death sentences in 2021, the Supreme Court demonstrated an increasing disapproval of lower-court failures to follow the Supreme Court's sentencing procedures and guidelines set throughout time. These changes, taken together, reflect a significant shift in approach. The Supreme Court has ruled against the death punishment. It symbolises a Prioritization of death penalty issues and a greater emphasis on before this, non-compliance with established processes. It is possible to administer exceptional punishment. It once again attracts attention to absolute breakdown of death sentence in India's framework.

Conclusion

Death penalty it states it is a form of punishment where by the accused is succumbed to death as a form of punishment for the offence he has committed. The right to life as a fundamental right has been enshrined under Article 21 of the Indian constitution which stipulates that "no person shall be deprived of his life or personal liberty except according to procedure established by

¹⁷ Hrishika Jain and Adrija Ghosh, Death Penalty in India, Project 39A National Law University Delhi, Live law, (May 30, 2022, 01:02 PM) https://www.livelaw.in/pdf_upload/annualstatisticsreport2021-408596.pdf

law” which indicates the legislative intent behind awarding death sentence and offenses for which it can be awarded. Before we came to any conclusion that whether death penalty should be abolished or not we should consider some questions, How can we justify murder is a crime by murdering someone? If death penalty doesn't deter crime why are we still using it? Is it right to retain death penalty for developing country like India whilst most of the developed nations abolished it? There are many reasons why the death penalty should be abolished, the most important point is death penalty is irreversible and in case of failure of justice, we can't give the innocent person his/her life back. Here we can't eliminate or avoid the possibility of execution of an innocent person. There are many cases where justice gone wrong and an innocent person executed just because of the failure of justice system. India is a progressing country; it should focus on crime reform and crime deterrence rather than retaining death penalty, which glorifies revenge and not justice. India should also stand on a par with the developed international community that abolished death penalty.

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