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CAPITAL PUNISHMENT

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“The death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in any country is, do we deserve to kill” – B. Stevenson

Abstract

“Capital discipline” or “Death Penalty” is the loftiest position of discipline rewarded in any society or republic to conserve law and order. But killing another mortal commodity in the name of justice is no better than boggling someone. We should concentrate on barring the crime not the miscreant. In India the doctrine of “Rarest of the Rare” is followed and frequently the death judgment gets changed to life imprisonment. But still India has executed an aggregate of 4 culprits from the period of 2002 to 2015. Both the nations have colorful parallels in the procedure and law of capital discipline, but in China once the death penalty is rewarded it cannot be abandoned. This is the argument why United Nation UN) defied the conception of death penalty and stated that “Life is expensive, and death is irrevocable”. Further UN also spoke that killing another mortal commodity in the name of justice also kills the fact that we are mortal.

Capital punishment is the most controversial penal practice debated highly all over the world. A common notion is that the focus of the law must not be on eliminating the criminal but on the elimination of the crime. The killing of an accused in order to serve justice is equivalent to murdering that being.

A country where capital punishment is practiced at its peak is China, with more than 1000 executions each year. The possession of illegal drugs has a mandatory death sentence in countries like Iran, Malaysia, the Philippines and Singapore. Few Countries impose capital punishment for economic crimes such as corruption of public officials, embezzlement of public funds, bribery etc. Sexual offences too attract this form of punishment in certain Islamic states. United States of America also allows such punishment and 75 people are put to death every year there, on an average.

Keywords: Death Penalty, Reformatory Theory, Preventive Theory, Capital Punishment, Offender etc.

INTRODUCTION

"Penalty" is used as coercion "law of the land" which acts as one of the pillars of modern civilization. It is duty of the state to punish criminals in order to maintain law and order in the country. Inside in the past there were no specific rules or procedures for these crimes and the extent and scope of Punishment rests largely on the king. After all, the idea of this time is punishment development and compliance with our voluntary rights and is empowered to maintain order and order State. The cruellest or we can say the highest the present tense is "the capital" Punishment'. Civil penalty is the penalty including lawful killing committed a crime prohibited by law. ¹The punishment for murder is also known as "death Sanction' approved by the government which the state kills people like punishment for the crime he committed. Sentencing of the guilty party until death is known as "the death of death" and the act of execution is known like "murder". Whenever the court convicts are a theory or prediction on its own basis makes his decision. These ideas are known such as "penalty detection" and in general four types & also called Theories of Punishment.

The four main theories of punishment have been discussed as follows:

1. Deterrent Theory:

This theory of punishment refers to the situation where punishment is awarded in order to stop further crimes. Fear is considered to be the key factor of the deterrent theory. The main object of this theory is to punish the criminals in order to set an example for other individuals' Creating fear in the minds of the people, in order to deter crimes, is the ultimate goal of the states. The duty of the concerned government is to punish the wrongdoer when any offence is committed against the society. There are three main components of the deterrent theory of punishment are severity, certainty and celerity. Severity refers to the degree of punishment. Certainty refers to the fact that punishment should exist whenever a crime is committed. Celerity means that the punishment must be awarded in a smooth and swift manner, implying that faster the punishment is awarded; the more excessively it affects the deterrence of crime.

2. Reformatory Theory:

The reformatory theory is supporting the principle that '*a criminal does not cease to be a human even if he commits an offence*'. According to this theory of punishment, the method of individualisation must be used to reform the offender. This must be the main objective of any sort of punishment. It may be possible that he/she committed the crime only under a particular circumstance and the chances of it to reoccur are low or nil. Therefore, it is necessary to make an effort to reform the offender during the period of incarceration. According to the advocates of the theory, in order to bring about a revolutionary difference in the character or thought process of criminals, they must be treated sympathetically, act fully and lovingly. Severe punishment may further damage his sentiments and tenderness. The hanging of an offender, being the last resort, clarifies that human beings failed to reform him.

¹ Roger Hood, *Capital Punishment, Encyclopaedia Britannica, <https://www.britannica.com/topic/capitalpunishment>*

3. Preventive Theory

As suggested by the name, the motive of this theory of punishment is to prevent prospective crimes by disabling the offender. Deterrent theory of punishment is based on a similar idea, which is to prevent crimes. This theory provides a useful inhibitory measure and proves to be an effective deterrent, as stated by the Preventive Philosophy. Disabling the criminal permanently or temporarily, reforming, re-educating and instilling the fear of punishment may be regarded as classifications of the preventive form of punishment. Thus, it can be said that the preventive theory of punishment is similar to deterrent and rehabilitation theories of punishment.

4. Retributive Theory

Retributive theory of punishment believes in punishing the criminals in proportion to the crime committed. It stands for restoration of proper balance. The manner in which criminals are punished by the society is important and helps set an example for other individuals about the severity of the punishment for a particular crime. Desert and proportionality are the two main principles of the retributive theory of punishment. As per this theory, a criminal must not be punished for a crime that he/she might commit. The convict must be punished for the crimes that he/she has already committed and the penalty must be in proportion to it. Punishment under this theory may be considered as a payback for the crimes that a person has committed.

HISTORICAL BACKGROUND

Capital punishment is an ancient sanction. There is practically no country in the world where the death penalty has never existed. History of human civilization reveals that during no period of time capital punishment has been discarded as a mode of punishment⁵. 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. The Romans also used it for a wide range of offenses, though citizens were exempted for a short time during the republic⁶. This finds support in the observation made by Sir Henry Maine who stated that "Roman Republic did not abolish death sentence though its non-use was primarily directed by the practice of punishment or exile and the procedure of questions"².

CAPITAL PUNISHMENT IN INDIA

"We are all the creation of God. I am not sure a human system created by a human being is competent to take away a life based on artificial and created evidence"- A.P.J. Abdul Kalam³

A careful scrutiny of the debates in British India's Legislative Assembly reveals that no issue was raised about capital punishment in the Assembly until 1931, when one of the Members from Bihar, Shri Gaya Prasad Singh sought to introduce a Bill to abolish the punishment of death for the offences under the Indian Penal Code. However, the motion was negatived after the then Home Minister replied to the

² *Op.cit.* Capital Punishment in India by Dr. Subhash C. Gupta, 2000, p. 1

³ 11th President of India from 2002 to 2007

motion. The Government's policy on capital punishment in British India prior to Independence was clearly stated twice in 1946 by the then Home Minister, Sir John Thorne, in the debates of the Legislative Assembly. "The Government does not think it wise to abolish capital punishment for any type of crime for which that punishment is now provided".⁴

At independence, India retained several laws put in place by the British colonial government, which included the Code of Criminal Procedure, 1898 ('Cr.P.C. 1898'), and the Indian Penal Code, 1860 ('IPC'). The IPC prescribed six punishments that could be imposed under the law, including death. For offences where the death penalty was an option, Section 367(5) of the CrPC 1898 required courts to record reasons where the court decided not to impose a sentence of death:

If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed.

In 1955, the Parliament repealed Section 367(5), CrPC 1898, significantly altering the position of the death sentence. The death penalty was no longer the norm, and courts did not need special reasons for why they were not imposing the death penalty in cases where it was a prescribed punishment. The Code of Criminal Procedure was re-enacted in 1973 ('CrPC'), and several changes were made, notably to Section 354(3):

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.

This was a significant modification from the situation following the 1955 amendment (where terms of imprisonment and the death penalty were equal possibilities in a capital case), and a reversal of the position under the 1898 law (where death sentence was the norm and reasons had to be recorded if any other punishment was imposed). Now, judges needed to provide special reasons for why they imposed the death sentence. These amendments also introduced the possibility of a post-conviction hearing on sentence, including the death sentence, in Section 235(2), which states:

If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law⁵.

Various laws under which death penalty can be prescribed as a possible punishment in India are given at:

⁴ *Ibid.* pp. 104-105.

⁵ *India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp. 17-18.*

Whenever a Punishment is awarded for the wrong doing there are two main reasons for inflicting such punishment;

- 1.) One is that the person who committed the wrong must suffer for it.
- 2.) And, the other one is that inflicting punishment on wrongdoer acts as an example for others.

In India deciding the case for death penalty is based on doctrine of “rarest of the rare test” which was stated in the case of *Bachan Singh V. State of Punjab*. Which means that death penalty will only be awarded in rarest of rare cases only.⁶ Further, in the case of *Machi Singh & Others V. State of Punjab*⁷- the Three Judge Bench followed the decision of *Bachan Singh* and stated that only in rarest of rare cases when collective conscience of community is in such a way that it will expect the holders of the judicial powers to inflict death penalty then it can be awarded if-

- 1.) When the murder is committed in an extremely brutal, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
- 2.) When a murder of a member of a Scheduled caste is committed which arouse social wrath.
- 3.) In case of “Bride Burning” or “Dowry Death”.
- 4.) When the crime is enormous in proportion.
- 5.) When the victim of murder is-
 - An Innocent child
 - A vulnerable Women or a Person rendered unaided by mature epoch or illness.
 - once the injured party is an individual in relation to whom the slaughterer is in point of authority or reliance.
 - as soon as the injured party is a civic figure as well as murder is committed for political or similar reason rather than personal reason.

The Doctrine Of “Rarest of Rare” In the case of *Bachan Singh v. State of Punjab*,⁸ the Supreme Court emphasized that the death penalty should only be used in rare cases. This principle has been consistently upheld by the court to minimize the use of the death penalty. The court ruled that the death penalty is only applicable when there is no other option besides life imprisonment. This same principle should be applied in exceptional cases when all other options have been exhausted. In the case of *Santosh Kumar Barnyard v. Maharashtra State High Court*, the court stated that the death penalty is an exception to the law, and life imprisonment is the norm. The Constitution of India also guarantees the right to life under Article 21, and the death penalty should only be imposed through due process. Once a death sentence has been carried out, no new facts or rules can be introduced into the case. Therefore, the death penalty should only be used in rare and exceptional cases.

⁶ *Bachan Singh vs State of Punjab*, AIR 1980 SC 898 (Y Chandrachur, A Gupta, N Untallied, P Bhagwati, R Sarkari)

⁷ *Machi Singh And Others vs State of Punjab*, 1983 AIR 957 (Thakkar, M.P. (J)).

⁸ *Id* at 34

INTERNATIONAL SCENARIO OF CAPITAL PUNISHMENT

The international landscape regarding the death penalty – both in terms of international law and state practice – has evolved in the past decades. Internationally, countries are classified on their death penalty status, based on the following categories:

Abolitionist for all crimes

Abolitionist for ordinary crimes

Abolitionist *de facto*

Retentionist

At the end of 2014, 98 countries were abolitionist for all crimes, 7 countries were abolitionist for ordinary crimes only, and 35 were abolitionist in practice, making 140 countries in the world abolitionist in law or practice. 58 countries are regarded as retentionist, who still have the death penalty on their statute book, and have used it in the recent past⁹. While only a minority of countries retain and use the death penalty, this list includes some of the most populous nations in the world, including India, China, Indonesia and the United States, making a majority of population in the world potentially subject to this punishment. Country wise list of these four categories is given at

CAPITAL PUNISHMENT IN INTERNATIONAL HUMAN RIGHTS

TREATIES

- The International Covenant on Civil and Political Rights ('ICCPR') is one of the crucial documents agitating the duty of death penalty in transnational mortal rights law. The ICCPR doesn't abolish the use of the death penalty, but Composition 6 contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty.¹⁰ 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.¹¹
- 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.¹²
- 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 ('CIDT'). However, some methods of execution and the phenomenon of death row have been seen as forms of CIDT by UN bodies.¹³

⁹ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.38-39

¹⁰ Ibid. p.40-41

¹¹ Ibid. p.43

¹² Ibid. pp.43-44

¹³ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.44-45

- 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.¹⁴

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”.¹⁵

METHODS OF EXECUTION IN INDIA

- **Hanging:** - All executions in India are by hanging. In 1949, Nathuram Godse, who killed Mahatma Gandhi was the first person to be executed by hanging in independent India. The highest Indian courts have recommended that the death penalty be imposed only in rare cases.⁴⁵ Since 2010, two people have been killed in India. Ajmal Kasab, alone a terrorist who survived the 2008 Mumbai attacks, was killed on November 21, 2012 at Yerwade Central Jail, Pune at 7:32 am IST. The Supreme Court of India has rejected his appeal for mercy, which was later rejected by the President of India. It is hanged a week later. Afzal Guru, a terrorist was convicted of conspiracy in the December 2001 Attack on Indian Parliament, executed by hanging in Tihar Jail Delhi on February 9, 2013. In rare cases, the code should give reasons by sending people to the top of the tree.¹⁶
- **Shooting:** - The Army and Air Force Regulations also provide for the death penalty.⁴⁶ Section 34 of the Air Force Act, 1950 empowers the court to impose death sentence penalty for the offenses mentioned in Section 34 (a) to (o) of the Aviation Act 1950. Section 163 of the Act provides for a form of capital punishment if: - After authorisation, the death penalty, the military court will decide, in its sole discretion, that the person who committed the crime will be killed in the neck. he was hanged or shot. "This one said that a prisoner of war must be punished with death hang him or shoot him. The Army Act 1950 and the Navy Act 1957 also provide for provisions as in the Air Force Act, 1950. (Harcourt 2008; Tus net and Hackles 1997)

CRIMES ASSOCIATED WITH DEATH PENALTY

There are various crimes that have been associated with Capital Punishment. They are discussed as follows:

- (i) **Criminal Conspiracy** is a crime which has been associated with Capital Punishment. Section 120B of the Indian Penal Code talks about an offender who is a party to a conspiracy, criminal in nature, to commit a crime which may be punishable by the death sentence. Any person who commits such a crime may be awarded the death penalty.

¹⁴ Ibid. pp.45-46

¹⁵ Ibid. p.46

¹⁶ Indian Express, New Delhi, dated 27/05/2015

- (ii) ***Waging or attempting to wage war against India*** is another crime which has been associated with capital punishment. Section 121 of the I.P.C. defines the crime of waging of war against the country. Therefore, any person who tries to or successfully wages war against India may be awarded the death Penalty.
- (iii) ***Abatement of mutiny has also been associated with capital punishment.*** Section 132 of the I.P.C. discusses abatement of armed rebellion, by an officer or soldier of the army, navy or air force. Therefore, if the armed rebellion is successful as a result of the abatement by the officers, they may be awarded the death penalty for the same.
- (iv) ***Section 194 of the Indian Penal Code has been included in the list of crimes associated with capital punishment.*** Section 194 talks about forging of false evidence with the purpose of acquiring a conviction for a crime which may be punishable with the death penalty. A person who engages in such a crime may be awarded the death sentence.
- (v) ***Murder*** is a crime which has been closely associated with punishment of execution. Section 302 and 303 of the Indian Penal Code describe murder and punishment for murder to an offender who has already been sentenced to life imprisonment. Thus, an offender may be awarded the death penalty if he or she murders someone. Also, if a convict who has already been sentenced to life imprisonment commits a murder, then that person must be awarded the death penalty.
- (vi) Assisting or supporting the suicide of a minor has been associated with Capital Punishment. Section 305 of the Indian Penal Code discusses the assisting or supporting the commission of suicide by a person below 18 years of age or an intellectually disabled person. Thus, any person who commits this crime may be awarded the death penalty.
- (vii) ***Assisting or supporting Sati has also been associated with capital punishment.*** Part II of Section 4 of the Sati Act talks about assisting or supporting the commission of Sati. Any person who assists or supports the commission of Sati may be awarded the death penalty.
- (viii) ***Kidnapping for ransom or other purposes is a crime which is associated with Capital Punishment.*** Section 364A of the I.P.C. discusses the kidnapping of a person and threatening to cause harm or death or actually causing such harm. Any individual who commits this crime may be awarded capital punishment.
- (ix) ***Section 31A*** of the Narcotic Drugs and Psychotropic Substances Act, 1985 has also been associated with the capital punishment. According to this section, any person who has been recurrently convicted for the trafficking of drugs may be awarded the Death Penalty.
- (x) ***Rape or gang rape*** of a girl less than 12 years of age is a crime which is associated with capital punishment. According to Section 376AB of the Indian Penal Code, anyone who rapes or is a part of a gang rape of a girl who is less than 12 years of age, may be awarded the death penalty. Rape is a heinous crime and it is extremely necessary for it to be included in the list of crimes punishable with capital punishment.

LAWS AND PROVISIONS RELATING TO CAPITAL OFFENCES IN INDIA

- Article 21 of the Constitution of India says that no one can be deprived of his life except in accordance with the procedure established by law.
- A person who carries out a criminal conspiracy receives the death penalty on the grounds of Article 20B of the Indian Penal Code.
- A person who wages war against the government or attempts to do so receives the death penalty under Article 121 of the IPC.
- According to Section 132 of IPC who abets committing mutiny by an officer, soldier, sailor or pilot, in the army, navy or air force of the Government of India, so Mutiny will be committed as a result of that complicity, be punished with death or with life imprisonment, or imprisonment of both descriptions for a term that can be extended to ten years, and also liable to fine.
- Section 194 of IPC states that as an innocent person are condemned and thereby Condemned and as an innocent person are condemned and executed as a result of false Such evidence, the person who gives such false evidence, is punished with death or the or punishment for this described.
- According to Section 302 of IPC, people who commit murder are granted the death penalty.
- Article 303 of the IPC states that the person who, while serving jail for the rest of his life, commits murder, will be punished with death.
- According to Article 305 of the Indian Penal Code, if every person under eighteen years old, every insane person, a frenzied person, an idiot, or a person in a state of drunkenness, commits suicide, who abets the Commission of this suicide, will be punished with death or life imprisonment, or imprisonment of up to ten years, and will also be fined.
- Section 364A of IPC states that whoever abducts or abducts a person or holds you a person in custody after such a kidnapping or abduction, and threatens to cause the death or pain to such person, or by his conduct gives rise to a reasonable fear that such a person person can be put to death or hurt, or cause pain or death.
- To do this person with a view to the government or a foreign state or international force - governmental organization or any other person or abstain from an act or pay a ransom, will be punished with death, or imprisonment for life, and shall also liable for fine.
- According to Section 376A of IPC, an amendment in 2013 provided for the death penalty in the event of an injury to the woman during rape that causes her death or is in a persistent vegetative state.
- IPC Section 396 states that if one of the five or more persons in whom committing dacoity, commits murder in dacoity committed, commits murder so committed dacoity, all of those persons will be punished with death, or a prison sentence of life, or severe imprisonment for a term of up to ten years, and will also be liable to Pay.

CASE -LAWS: - *Ediga Annama vs State of Andhra Pradesh*, In this case the court laid out that apart from looking into the circumstances of the crime the court should also look into the condition of accused section 354 (3) was added to the code of criminal procedure 1973.¹⁷

Rajendra Prasad vs State of UP, in this case the apex court however stated that the question of whether capital punishment should be abolished to retain was a question of the Legislature and not for the Court to decide.¹⁸

Mithu vs State of Punjab, in this case mandatory death sentence under section 303 of IPC was declared unconstitutional and deleted from the IPC.¹⁹

Machi Singh vs State of Punjab, in this case the court elaborated the doctrine of rarest of rare the court guidelines regarding the things to be considered when deciding the issue that whether the case falls under the category of rarest of rare or not.

Allaudin vs State of Bihar, in this case the Court stated that if it was unable to give a special reason for awarding the capital punishment it should go for a lower sentence.

Kear Singh vs Union of India, in this case the assassins of the Indira Gandhi case were sentenced to death sentence. Kear Singh who was one of the conspirators but did not commit it even was included this comes under rarest of rare cases.

Deena vs Union of India, the constitutional validity of section 354 (5) of IPC 1973 was challenged on the ground that it was barbarous inhuman and degrading therefore violating article 21 of the Indian Constitution.

Attorney General of India vs Lakhmi Devi, the court held that the execution of death sentence by public hanging is barbarous at violative of article. The sessions court order execution of Balwant Singh Rajani for the involvement in the assassination of chief minister of Punjab.

Triveniben vs State of Gujarat, AIR 1989 SC 142 The court held that the person sentenced to death sentence is also entitled to procedural fairness till his last breath of life. *Madhu Mehta vs Union of India*, Mercy petition of the petitioner was pending before the president of India for about 8 to 9 years.²⁰

Santosh k. Barnyard vs. St. Of Maharashtra, this case is considered as a major milestone towards the elimination of capital punishment in India. In this case, the four accused kidnapped a person and demanded a ransom of certain amount from the victim's family. They later murdered the victim by cutting his body into several pieces. Even after such brutality, the court did not impose death sentence as the Judge felt that the crime was committed with the purpose of earning some money and the accused can still be reformed. Thus, the 4 people accused of the crime were sentenced to imprisonment for life and were not awarded death penalty.

¹⁷ *Ediga Annama vs State of Andhra Pradesh*, AIR 1973 SC 774

¹⁸ *Rajendra Prasad vs State of UP*, 1979 AIR 916

¹⁹ *Mithu vs State of Punjab*, (1980)2 SCC 684

²⁰ *Madhu Mehta vs Union of India*, (1989)4 SCC 62

CATEGORY OF OFFENDERS EXCLUDED FROM CAPITAL PUNISHMENT

- **Minor:** - According to the laws in India, capital punishment cannot be given to an individual who has committed the crime as a minor, i.e., before the age of 18. Minors have been included in the category of offenders excluded from capital punishment because the law makers felt that any person who hasn't become an adult has some scope for improvement and by providing the person the right environment and education, the person may be able to learn from his mistakes and evolve into a better human being's Also, our laws provide for a separate act known as the Juvenile Justice Act which is enacted solely for cases brought up against minors. This is beneficial as it gives the offenders a chance to reform themselves.
- **Pregnant Woman:** - An alteration in the law in 2009 saw pregnant woman being added to the category of offenders who shall be excluded from the death penalty. The reason behind this amendment is that by hanging a pregnant woman, the system is killing both, the pregnant woman as well as the child in her womb. The child in the womb of the woman has committed no crime and does not deserve to die for the actions of the woman. Thus, any woman who is pregnant may be included in the category of offenders excluded from the capital punishment.
- **Intellectually Disabled:** - According to the law, any person who is intellectually challenged or disabled may be included in the category of offenders excluded from the death penalty. Intellectual disability may refer to the inability of a person carrying out a serious crime to fully understand the nature and outcome of the crime being committed by that person. It is possible for a person to be unaware of the nature of the crime that the person committed due to intellectual disability. Therefore, the law makers included people who are intellectually disabled in the category of offender excluded from capital punishment.

CAPITAL PUNISHMENT IN VARIOUS COUNTRIES:

The death penalty has been applied in different countries from very old times. According to ancient Roman law, to make the death penalty even more painful, the perpetrator was physically tortured before he granted the death penalty. Often this happened in public places to threaten people, so people did not dare to do that again. Roman Republic did not abolish death sentence, its non-usage directed to punishment and exile.²¹ A patricide was put in a bag accompanied by a dog, a cat and a snake, and the bag was thrown into the river to ensure a painful death for him. Someone who has not paid his loans is thrown from a hill. There was also a provision of death penalty in countries like Yunan. The perpetrator was killed in the public place after his skin was removed. In Philistine the perpetrator was killed by throwing him at the point of the spear or throwing stones at him. In countries, such as Australia and Germany, the criminal was buried alive and then crushed with wheels and their eyes were also damaged by hot iron rods. India accused is convicted the judge shall hear the accused and pass the sentence according to law.²² Death penalty is also called as capital punishment and is not always executed sometimes it is commuted to life imprisonment.²³ The constitution

²¹ Capital Punishment in India by Rd. Subash C Gupta, 2000

²² Law commission of India. Report no. 262 on Death Penalty 2015.

²³ www.newindialaw.blogspot.in

of India, part V, chapter I, and Article 72 gives the president and the governor of the state the power to suspend pardon or commute or remit death sentence.²⁴ The state is bound to refrain from the act which would destroy the object and purpose of the Treaty.²⁵ In the United States, the death penalty (also known as the death penalty or execution) is limited in the United States according to the eighth amendment to the United States Constitution and is in practice used almost exclusively for serious murders committed by mentally competent adults. It is currently a legal punishment in 32 states, as well as the federal civil and military legal systems. Since the death penalty was restored in 1979, thirty-four states have performed. Texas has carried out the most executions by far and Oklahoma has had the highest execution per capita until mid-2011. The methods of execution and the crimes to which the death penalty applies vary per state and have changed over time. The most common method since 1976 is lethal injection. Many states such as Texas, Oklahoma, Florida, Ohio and Arizona regularly carry out convicted murderers.

In England, the traditional form of punishment measurement applied in England. But it was not the form of the death penalty. In the eighteenth century and the beginning of the 19th century, hanging up was the punishment for many crimes and not just for murder. During the beginning of the 19th century, the number of crimes that could be punished with death was greatly reduced. Pending as a punishment for forgery was abolished in 1836. At the request of the public, a British Royal Commission was established to consider the abolition of the death penalty in 1949. From now on, the death penalty was banned in 1965 or 5 years in England and Wales and finally abolished in 1969. But since the last two decades, taking into account the increasing crime, the reintroduction of the death penalty has become necessary. (Linebaugh 2003)

The People's Republic of China carries out the largest number of people annually, although other countries (such as Iran or Singapore) have higher implementation rates per capita. The authorities of the People's Republic of China have recently taken measures to reduce the official number of crimes with death, and limit how often the death penalty is officially applied. The death penalty is also imposed for crimes related to the number of perpetrators, i.e. attempts to commit crimes that are not really fully executed, including repeat offenses such as fraud attempts. The recidivist nature of the offenses, not their seriousness in them, is what is judged to earn the capital punishment.

POLITICAL COMMITMENTS REGARDING CAPITAL PUNISHMENT

GLOBALLY

Several resolutions of the UN General Assembly (UNGA) have called for a moratorium on the use of the death penalty. In 2007, the UNGA called on states to “progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed” and “establish a moratorium on executions with a view to abolishing the death penalty.” In 2008, the GA reaffirmed this resolution, which was reinforced in subsequent resolutions in 2010, 2012, and 2014. Many of these resolutions noted that, “a

²⁴ The constitution of India, part V, Chapter I, Article 72

²⁵ Law commission of India report 2015. Pg 45

moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights.” In 2014, 117 States had voted in favor of the most recent resolution. India has not voted in favor of these resolutions¹⁷. In a 2013 resolution, the UN Human Rights Council acknowledged “the negative impact of a parent’s death sentence and his or her execution on his or her children,” and urged “States to provide those children with the protection and assistance they may require,” Human Rights Council resolution, 2014 noted that “States with different legal systems, traditions, cultures and religious backgrounds have abolished the death penalty or are applying a moratorium on its use” and deplored the fact that “the use of the death penalty leads to violations of the human rights of those facing the death penalty and of other affected persons.” The Human Rights Council urged states to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights. The law of extradition has been another tool for countries pushing for the abolition of the death penalty. Several abolitionist countries either require assurances that retentionist-extraditing countries not impose the death penalty, or have included such a clause in bilateral extradition treaties¹⁸

CAPITAL PUNISHMENT: THE CURRENT STATUS

Supreme Court on Validity of Capital Punishment in India: - Article 21 of the Indian Constitution ensures the Fundamental Right to life and liberty for all persons. It adds no person shall be deprived of his life or personal liberty except according to procedure established by law. This has been legally construed to mean if there is a procedure, which is fair and valid, then the state by framing a law can deprive a person of his life. While the central government has consistently maintained it would keep the death penalty in the statute books to act as a deterrent, and for those who are a threat to society, the Supreme Court too has upheld the constitutional validity of capital punishment in “rarest of rare” cases. In *Jagmohan Singh vs State of Uttar Pradesh* (1973), then in *Rajendra Prasad vs State of Uttar Pradesh* (1979), and finally in *Bachan Singh vs State of Punjab* (1980), the Supreme Court affirmed the constitutional validity of the death penalty. It said that if capital punishment is provided in the law and the procedure is a fair, just and reasonable one, the death sentence can be awarded to a convict. This will, however, only be in the “rarest of rare” cases, and the courts should render “special reasons” while sending a person to the gallows.

Position in the United States: - The American Civil Liberties Union thinks that the death penalty is fundamentally unconstitutional because it breaches the constitutional ban on cruel and unusual punishment, as well as the rights of due process and equal protection under the law. Furthermore, we think that the state should not be given the authority to murder individuals, particularly when it does so with premeditation and ceremony, in the name of the law or in the name of its people, and in an arbitrary and discriminating manner.

OPPOSITION & ARGUMENTS AGAINST CAPITAL PUNISHMENT

- ***The worth of a human life:*** - Everyone believes that human life is priceless. Some opponents of capital punishment feel that human life is so important that even the most heinous murderers should not be denied it. They think that the worth of an offender's life cannot be diminished by his or her poor behaviour, even if the offender has murdered someone. Some abolitionists do not go as far as others. They argue that life should be protected unless there is a compelling cause to do so, and that those who support capital punishment must defend their viewpoint.
- ***People who are not accountable for their actions:*** - This is not an argument against capital punishment in general, but rather against its improper use. Some governments, notably the United States, have executed mentally ill persons. People should not be punished for their activities unless they have a guilty mentality, which means they must understand what they are doing and that it is wrong. As a result, crazy persons should not be convicted, let alone killed. This does not prohibit mad persons who 1 (Chaney v. Heckler, 718 F 1174, 1983). have committed atrocities from being placed in secure mental facilities, but this is done for the sake of public safety rather than to punish the insane person. To put it another way, it is improper to impose lethal punishment on those who have only a rudimentary ability for moral action and judgement. Offenders who were sane at the time of their crime and trial but exhibit evidence of insanity before being executed face a more difficult moral challenge.
- ***Unnecessary:*** - This is mostly a political rather than an ethical debate. It's founded on the political premise that a government should carry out its responsibilities in the least intrusive, destructive, and restricted manner feasible. As a method of maintaining an ordered and comfortable community, the state has a commitment to punish crime, but it should do so in the least destructive way feasible. Because capital punishment is the most severe penalty available, the state should only apply it if no other option is available. Other sanctions will always allow the state to achieve its goal of adequately punishing crime. As a result, the state should refrain from using capital punishment.
- ***Capital punishment is extremely barbaric (lethal injection):*** - first used in Texas in 1982, is the most recent method of imposing the death sentence, which has been passed into law by more than 30 states. It's easy to exaggerate the method's humanity and effectiveness; no one knows if lethal injection is truly painless, and there's evidence that it isn't. There is, as the United States Court of Appeals pointed out, "strong and undisputed evidence... that lethal injection executions entail a severe danger of harsh and prolonged death.... A prisoner can be cognizant but paralyzed while dying, a sentient witness to his or her own asphyxiation, even if there is a little mistake in dose or delivery." The lethal injection procedure has transformed death into a still life, allowing the state to execute people without their experiencing anything. Despite the fact that the current technique of lethal injection is constitutional, some people have suffered as a result of this type of execution. Rommel Broom was forced to 18 tries to find a vein in order to be murdered via lethal.

EMERGENCE OF ALTERNATIVE PUNISHMENT TO CAPITAL PUNISHMENT

In the last few years, Supreme Court has entrenched the punishment of “full life” or life sentence of determinate number of years as a response to challenges presented in death cases. The Supreme Court speaking through a three-judge bench decision in *Swamy Shraddha Nand* [2] case laid the foundation of this emerging penal option in following terms:

“The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all. Further, the formalization of a special category of sentence, though for an extremely few numbers of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases”.

The observations in *Swamy Shraddha Nand* [2] case have been followed by the Court in a multitude of cases such as *Haru Ghosh v. State of West Bengal*, *State of Uttar Pradesh v. Sanjay Kumar*, *Sebastian v. State of Kerala*, *Gurvail Singh v. State of Punjab* where full life or sentence of determinate number of years has been awarded as opposed to death penalty.²⁶

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

²⁶ India. Law Commission of India. Consultation Paper on Capital Punishment, May 2014, pp.26-27

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”²⁷.

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.

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. 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 prisoners²⁸. Details of mercy petitions decided by the President in India are given at *Annexure-II*.

JUDICIAL REVIEW OF EXERCISE OF MERCY POWERS

The Supreme Court in *Shatrughan Chauhan* case has recorded that the Home Ministry considers the following factors while deciding mercy petitions:

- a) Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);
- b) Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;
- c) Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;
- d) Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;
- e) Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench;
- f) Consideration of evidence in fixation of responsibility in gang murder case;
- g) Long delays in investigation and trial etc.

However, when the actual exercise of the Ministry of Home Affairs (on whose recommendations mercy petitions are decided) is analyzed, it is seen that many times these guidelines have not been adhered to. Writ Courts in numerous cases have examined the manner in which the Executive has considered mercy petitions. In fact, the Supreme Court as part of the batch matter *Shatrughan Chauhan* case heard 11 writ petitions challenging the rejection of the mercy petition by the Executive²⁹. Supreme Court, last year held that

²⁷ Indian Express, New Delhi, dated 27.5.2015

²⁸ India. Law Commission of India, Report No.262 on Death Penalty, August 2015, pp.176, 179

²⁹ India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.190-191.

judicial clemency could be granted on the ground of inordinate delay even after a mercy petition is rejected.³⁰

LAW COMMISSION OF INDIA'S REPORT ON DEATH PENALTY

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.

SUGGESTIONS

- The reformatory theory of punishment which is the most humane of all theories are based on the principle of reform of the legal perpetrators through individual treatment. According to reformatory theory, the purpose of the punishment is to teach or reform the offender. Such criminals must be adequately punished to justify the authority of the moral law. This theory focuses on their rehabilitation and conforms to the norms of society; in law-abiding member. This theory condemns all kinds of corporal punishment.
- Preventive theory says that "prevention is better than cure". The idea behind the preventive theory of punishment is to keep the perpetrator away from society. This theory justifies the death penalty as an

³⁰ India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.217-218

extreme form of punishment because of its deterrent effect. India follows the preventive theory. A man has taken the life of another man. So, he should be deprived of his life.

- Death Penalty is often imposed on the poor, uneducated, underprivileged and minorities. They win a legal battle in a Court of Law. Legal aid now provided in India is for the poor advocates. While arguing a case where one's life is at stake the lawyer who is engaged by seven years legal standing.
- The Government will pay the fees of an attorney. This would be an interest in the lawyer who is arguing on behalf of the accused.
- Instead of inventing a sophisticated method of execution which is quick, painless and decent, it is better to switch over from death penalty to alternative punishment.
- Life imprisonment is a very good alternative to death penalty. As such it is open to the policy makers that they are not yet reformatory in nature but, a very good income to the government. Now, retentionists need not complain that the murderers behind the bars would cost more for the public exchequer.
- Causing death to an individual may be inevitable at times in certain circumstances, such as when a country is locked in either international warfare or civil warfare. Even at times, police personnel may have their lives or other lives. In such cases, strict legal safeguards must be imposed.
- Instead of spending cores or rupees in constructing gas chambers or gallows, the expenditure may be diverted to train efficient law enforcement authorities and correct errors in the judicial system.
- All measures of abolition for the death penalty should be considered as progress in the enjoyment of the right to life.
- Dangerous offenders can be kept away from the public without resorting to executions. Many abolitionist countries are practicing this method of seclusion. It is as good as bad as keeping the mentally insane in an asylum without causing inconvenience to the healthy.
- Till Capital Punishment may be abolished at the end of the year, and may also be avoided with regard to conjugal visits and visits with the family.

CONCLUSION

Therefore, it is concluded that in India the death penalty has been applied since ancient times, although the methods of the death penalty have changed from time to time. Capital punishment is ancient sanction there is no Country where death penalty never existed.³¹ History is clear that the death penalty has never been declared illegal in India. The awarding of the death penalty to the perpetrator must be regarded as a requirement of justice. The death penalty is the ultimate warning against all crimes. If the criminal knows that the legal system will not stop putting him to death, the system seems more draconian to him. That is why he is less inclined to break and enter. He may not be planning to kill someone who robs them, but is much more anxious about the possibility if he knows he will be executed. So, there is a better chance that he will not break in the first place and come in. A system intended to provide justice cannot do this for the surviving victims, unless the murderer himself is killed. If murder is the deliberate deprivation of the victim's

³¹ Capital Punishment in India by Rd. Subash C Gupta, 2000

right to life, then the deliberate deprivation of the right of the court to have this right - even if it is excessively strict - is a punishment appropriate to the most serious crime that can be committed. Without the death penalty it could be argued that the legal system does not make provision in response to the crime of murder, and therefore does not offer justice for the victim.

ANNEXURE-I

CAPITAL OFFENCES IN IPC

Sl. No.	Section Number	Description
1.	Section 121	Treason, for waging war against the Government of India
2.	Section 132	Abetment of mutiny actually committed
3.	Section 194	Perjury resulting in the conviction and death of an innocent person
4.	Section 195A	Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person
5.	Section 302	Murder
6.	Section 305	Abetment of a suicide by a minor, insane person or intoxicated person
7.	Section 307 (2)	Attempted murder by a serving life convict
8.	Section 364A	Kidnapping for ransom
9.	Section 376A	Rape and injury which causes death or leaves the woman in a persistent vegetative state
10.	Section 376E	Certain repeat offenders in the context of rape
11.	Section 396	Dacoity with murder

Capital Offences in other laws

Sl. No.	Section Number	Description
1.	Sections 34, 37, and 38(1)	The Air Force Act, 1950
2.	Section 3(1)(i)	The Andhra Pradesh Control of Organized Crime Act, 2001
3.	Section 27(3)	The Arms Act, 1959 (repealed)
4.	Sections 34, 37, and 38(1)	The Army Act, 1950
5.	Sections 21, 24, 25(1)(a), and 55	The Assam Rifles Act, 2006
6.	Section 65A (2)	The Bombay Prohibition (Gujarat Amendment) Act, 2009
7.	Sections 14, 17, 18(1)(a), and 46	The Border Security Force Act, 1968
8.	Sections 17 and 49	The Coast Guard Act, 1978
9.	Section 4(1)	The Commission of Sati (Prevention) Act, 1987
10.	Section 5	The Defense of India Act, 1971
11.	Section 3	The Geneva Conventions Act, 1960
12.	Section 3 (b)	The Explosive Substances Act, 1908
13.	Sections 16, 19, 20(1)(a), and 49	The Indo-Tibetan Border Police Force Act, 1992

14.	Section 3(1)(i)	The Karnataka Control of Organized Crime Act, 2000
15.	Section 3(1)(i)	The Maharashtra Control of Organized Crime Act, 1999
16.	Section 31A (1)	The Narcotics Drugs and Psychotropic Substances Act, 1985
17.	Sections 34, 35, 36, 37, 38, 39, 43, 44, 49(2)(a), 56(2), and 59	The Navy Act, 1957
18.	Section 15(4)	The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act, 1962
19.	Sections 16, 19, 20(1)(a), and 49	The Sa shastra Seema Bal Act, 2007
20.	Section 3(2)(i)	The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
21.	Section 3(1)(i)	The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002;
22.	Sections 10(b)(i) and Section 16(1)(a)	The Unlawful Activities Prevention Act, 1967

Source: India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.31-32

ANNEXURE-II

Mercy Petitions Decided by the President of India

Sl. No.	Name of the President	Tenure	Number of Mercy Petitions Accepted	Number of Mercy Petitions Rejected	Total
1.	Dr. Rajendra Prasad	26.1.1950 – 3.5.1962	180	1	181
2.	Dr. Sarvapalli Radhakrishnan	13.5.1962 - 13.5.1967	57	0	57
3.	Dr. Zakir Hussain	13.5.1967 – 3.5.1969	22	0	22
4.	Shri V.V. Giri	3.5.1969 – 20.7.1969; 24.8.1969 – 24.8.1974	3	0	3
5.	Dr. Fakrudhin Ali Ahmed	24.8.1974 – 11.2.1977	NA	NA	0
6.	Shri N Sanjeeva Reddy	25.7.1977 – 5.7.1982	NA	NA	0
7.	Giani Zail Singh	25.7.1982 – 25.7.1987	2	30	32
8.	Shri R. Venkatraman	25.7.1987 – 25.7.1992	5	45	50
9.	Dr. Shankar Dayal Sharma	25.7.1992 – 25.7.1997	0	18	18

10.	Shri K.R. Narayanan	25.7.1997 – 25.7.2002	0	0	0
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