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## Death penalty: Need to exist or not in India

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### Abstract

The death penalty debate is the most generally relevant debate, keeping in mind the situation that has been brought about by today. Death penalty is an integral part of the Indian criminal justice system. Increasing strength of the human rights movement in India, the existence of death penalty is questioned as immoral. However this is an odd argument as keeping one person alive at the cost of the lives of numerous members or potential victims in the society is unbelievable and in fact, that is morally wrong. As against the common belief that an innocent person may be sent to the gallows by false conviction, this paper goes on to explain the various checks and balances available, that ensure that no innocent person is condemned while at the same time ensuring that no person who's guilty of the most heinous crimes is allowed to go free. In this paper the writer discuss the existence of death penalty is must or not in India.

**Keywords:** Crimes, death penalty, executive, judiciary, pardon

### 1. Introduction

The death penalty debate has produced much heat in the present times in India. While the protagonists of death sentence claim that it must be awarded to the most heinous of crimes, the persons who advocate human rights are against the idea of the persistence of death penalty as they declare it to be in violation of the human rights of a human being. Before delving into an justification of the reasons for the persistence of death penalty, it is very important to understand the meaning of death sentence, its connotations, and when it can be awarded with respect to the present scenario.

Firstly, death penalty is the sentence, which legally terminates the natural life of a person. This means that a person's life can be terminated legally by taking recourse to law. This connotes that a person's life is cut short from the natural span of that person's life. Secondly, as according to Indian law, death penalty is awarded only in the rarest of rare cases. This indicates that death penalty is given only for the most heinous of crimes. In a case 2007 Judgment (Omprakash & Anr. v. State of Tamil Nadu ) the Court reiterated that the death sentence could be invoked in the rarest of rare cases.<sup>1</sup> Death penalty is not a contemporary concept; it has been in existence since the ancient times. In the ancient times the death penalty ( usually involved beheading the person ) was awarded by the King for the explicit non – compliance of by any person of any command issued by the King or the non – compliance with any moral obligation imposed upon that person. It was later incorporated into the Indian Penal Code, 1860, leading to its legal incorporation and has been in legal existence in India, ever since. In the 20th century, there was a movement for the abolition of death penalty, which lead to many States complying with the movement and going ahead to abolish death penalty. However, in India the death penalty has continued to exist. This has opened the ground for great discussion and debate, with the human right activists coming out with strong reasons for the abolition of death penalty.

In India death penalty is envisaged in Section 302 of the Indian Penal Code, 1860.( Section 302 of the Indian Penal Code reads thus : Punishment for murder.- Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine. )<sup>2</sup>

In the recent past, however, many western cultures have abolished this practice, considering it grossly inconsistent with human rights requirements. The U.K. and France have both completely abolished the system, after various succeeding abolitionist movements. The US, however, due to a fragmented judiciary, has differing opinions on the issue, varying state-by-state. The Federal US government, however, does use the death penalty, although only in extraordinary cases.

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In India, the Bachan Singh case laid down the “extraordinary circumstances” which define whether or not death sentence was required in the said case. The grievousness of the cause of murder in itself is not a sufficient grounds to pass capital punishment.

## 2. Position in India

In India Article 21 of the Constitution titled ‘Protection of life and personal liberty’ says:

*No person shall be deprived of his life or personal liberty except as according to procedure established by law.*

This article of the Constitution enshrines the Right to Life guaranteed to every individual in India. The constitutional validity of capital punishment has been called into question several times in the India judiciary and this paper shall try to examine those several occasions.

The Indian Penal Code, 1860 awards death sentence as a punishment for various offences. Some of these capital offences under the IPC are punishment for criminal conspiracy (s. 120B), murder (s. 302), waging or attempting to wage war against the Government of India (s. 121), abetment of mutiny (s.132), dacoity with murder (s. 396) and others. Apart from this there are provisions for death penalty in various legislations like the NDPS Act, anti – terrorism laws etc.

The Indian Constitution has provision for clemency of capital punishment by the President. Once the Sessions Court has awarded death sentence to a convict in a case, it must be confirmed by the High Court. Even after that the convict may prefer an appeal to the Supreme Court. If this also fails the accused has the option of submitting a ‘mercy petition’ to the President of India and the Governor of the State. Detailed instructions regarding procedure to be observed by the states for dealing with petitions for mercy from or on behalf of convicts under sentence of death and with appeals to the Supreme Court and applications for special leave to appeal to that court by such convicts are laid down by the Ministry of Home Affairs.

In this respect we may refer to Article 72 of the Constitution of India which says:

“Power of President to grant pardons, etc, and to suspend, remit or commute sentences in certain cases-

(1) The President shall 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

(a) in all cases where the punishment or sentence is by a court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death

(2) Nothing in sub clause (a) of Clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.”

Similarly the pardoning powers of the Governor of a State are mentioned in Article 161. These provisions ensure that the accused is sentenced to death only after there is no room for error left. The culprit gets multiple avenues to appeal and now life imprisonment has become the rule while death sentence is the exception.

## 3. Discussion of Landmark cases dealing with Death Penalty in India

In the case of Jagmohan Singh v. State of U.P<sup>3</sup> which was the first case dealing with

the question of constitutional validity of capital punishment in India. The counsel for the

appellant in this case put forward three arguments which invalidate section 302 of the IPC. Firstly that execution takes away all the fundamental rights guaranteed under Clauses (a) to (g) of Sub-clause (1) of Article 19 and, therefore the law with regard to capital sentence is unreasonable and not in the interest of the general public. Secondly that the discretion invested in the Judges to impose capital punishment is not based on any standards or policy required by the Legislature for imposing capital punishment in preference to imprisonment for life. Thirdly, he contended, the uncontrolled and unguided discretion in the Judges to impose capital punishment or imprisonment for life is hit by Article 14 of the Constitution because two persons found guilty of murder on similar facts are liable to be treated differently one forfeiting his life and the other suffering merely a sentence of life imprisonment. Lastly it was contended that the provisions of the law do not provide a procedure for trial of factors and circumstances crucial for making the choice between the capital penalty and imprisonment for life. The trial under the Criminal Procedure Code is limited to the question of guilt. In the absence of any procedure established by law in the matter of sentence, the protection given by Article 21 of the Constitution was violated and hence for that reason also the sentence of death is unconstitutional.

After looking into the arguments the five judge bench upheld the constitutionality of death penalty and held that deprivation of life is constitutionally permissible for being recognised as a permissible punishment by the drafters of our Constitution.

## 4. Law Commission Report

No discussion on the validity of capital punishment in India can be complete without going through the fine details of the Law Commission Report, which was relied upon by the judges in the case of Jagmohan too. The Law Commission of India, after making an intensive and extensive study of the subject of death penalty in India, published and submitted its 36th Report in 1967 to the Government. After examining, a wealth of evidential material and considering the arguments for and against its retention, that high-powered body summed up its conclusions at page 354 of its Report, as follows:

The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind.

It is difficult to rule out the validity of the strength behind many of the arguments for abolition nor does the Commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to diversity of its population and to the paramount need for maintaining law

and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

In the case of *Ediga Anamma v. State of Andhra Pradesh*<sup>1</sup> which followed Justice Krishna Iyer commuted the death sentence to life imprisonment by citing factors like age, gender, socio-economic background and psychic compulsions of the accused. It was laid out in this case that apart from looking into the details of the crime and deciding based on the extent of violence committed the judges should also look into the criminal and his condition or haplessness while committing the crime. Justice Krishna Iyer in support of the life imprisonment over capital punishment said:

“A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life.”

These cases were followed by three important developments. Section 354 (3) was added to the Code of Criminal Procedure, 1973 which clearly laid down that in conviction for cases which are punishable either with death or life imprisonment, the judgment shall state the reasons for award of the punishment and in the event that it is death sentence mention the special reasons for that decision. This made the lesser punishment the rule and death penalty the exception as opposed to the previous situation. Also in 1979 India ratified the International Covenant on Civil and Political Rights (ICCPR).

Article 6(2) of the ICCPR says: “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide.”

Sub-section 5 of the same Article says that no sentence of death shall be imposed on anyone under the age of 18 years and none can be carried out on pregnant women. Thus, India was now committed to progressive abolition of death penalty. Another major development was the *Maneka Gandhi case*[xiv] which held that every law of punitive detention must pass the reasonability test obtained from the collective reading of the “Golden Triangle” i.e. Articles 14, 19 and 21.

Justice Krishna Iyer reiterated a similar opinion in the case of *Rajendra Prasad v. State of Uttar Pradesh*.<sup>2</sup> However Justice Sen in his dissenting judgement cited his concern over the wide scope for interpretation of the Section 302 of the IPC and Section 354 of the CrPC left to the judiciary. He said in this case -:

“It is not necessary for this Court to attempt to analyse the substantive merits of the cases for and against the death penalty for murder. It is in my view, essentially, a question for the Parliament to resolve and not for this Court to decide.”

The case of *Bachan Singh v State of Punjab*<sup>3</sup> again brought up the question of validity of capital punishment. This was the case that gave birth to the “rarest of the rare cases” doctrine and still remains one of the most important cases in this subject.

In this case not only the constitutional validity of death penalty but also the validity of Section 354(3) on the grounds that it gives unguided discretion to the Court and allows death sentence to be arbitrarily awarded was questioned. The majority were of the view that neither Article 19 nor 21 is

violated by capital punishment. The fact that our Constitution makers were fully cognizant of the fact that death sentence may be given in certain extreme crimes is proven by the existence of provisions for appeal (Article 134) and Pardoning power of the President (Article 72). It was also laid down that for ascertaining the existence or absence of “special reasons” in a case, the Court must pay due regard to both the criminal and the crime equally. The aggravating or mitigating factors need to be looked into. Things like age, mental condition, age of the accused and if the act was done under the command of a superior must be taken into consideration while deciding the punishment.

Justice Bhagwati alone dissented in this case but the issue was that his judgement came only 2 whole years after the verdict had been declared. So, some of the essential arguments that he made against death penalty never came to the limelight. And this very principle he believed clearly violates Article 14 which guarantees equality before law. Also it violates Article 19 and 21 as there are no procedural as to when the state has the power to take away the life and personal liberties of a person in such cases. Justice Bhagwati not only talks about the brutality and indiscretion that accompanies death penalty but also with logic and statistical data shows us how capital punishment doesn't succeed in attaining any of the three penological goals( Reformation, retribution and deterrence). It is obviously impossible to reform a person who is dead and the retribution theory also does not hold ground according to him such a punishment is based purely on emotions of vengeance and revenge which should be curtailed in a civilised society. Last is the Deterrence theory, which most retentionists assume is the most crucial reason for not abolishing capital punishment. They believe that legally sanctioned death of the culprit would dissuade others from doing the same. However Justice Bhagwati cites various eminent criminologists and statistics of other countries which prove that there is no increase in the crime rate even when capital punishment is abolished and no decrease when the court awards death sentence for a crime.

*Mithu v. State of Punjab*<sup>4</sup> was another case where the mandatory death sentence under Section 303 was declared unconstitutional and hence invalid. The section was based on the logic that any criminal who has been convicted for life and still can kill someone is too cold blooded and beyond reformation, to be allowed to live. The judges in *Mithu's* case held that Section 303 violated the Articles 14 and 21 of our Constitution and so it was deleted from the IPC.

In the subsequent cases of *T.V Vatheeswaram v. State of Tamil Nadu*<sup>5</sup> and *Sher Singh v. State of Punjab*<sup>6</sup> the Supreme Court was faced with the question of delay in execution of the death sentence and whether a prolonged delay was reason enough to commute the death sentence to life imprisonment. While the first case laid down that such a situation gave reason enough for the convict to invoke section 21 and get the lesser punishment, the majority in the latter case differed on this point.

These are in brief some of the landmark cases which grappled with the question of death penalty and other issues stemming from it. India in the recent years has seen a number of high profile cases with death penalties being carried. In 2012 Indian courts suffered from two noteworthy embarrassments. Fourteen retired Judges asked for thirteen cases of the death penalty to be commuted after admitting the original sentence was handed down per incuriam (out of error or ignorance). In the same year it was revealed that president Pratibha Patil had, during the course of her five-

year term, commuted the sentence of a rapist who had died five years previously. Events like these are a severe jolt to the judiciary. It was after incidents like these that the protest against capital punishment gained more momentum. The taking away of someone's life due to the error of judgement of the judiciary is injustice of the most grotesque kind.

An unofficial eight year tussle came to an end last year when the first of two executions took place. Mohammad Ajmal Amir Kasab, convicted of involvement in the 2008 Mumbai gun attack was hung 21<sup>st</sup> November 2012. Then in February 2013, Muhammad Afzal – convicted of plotting the 2001 attack on India's Parliament was executed. The quick succession of the two executions, coupled with the Supreme Court's ruling in regards to capital punishment earlier this year, has raised the awareness of controversy surrounding India's penal system. The verdict of the Delhi rape case was announced recently. The judges awarded death sentence to the four accused and a 3 year imprisonment to the juvenile. This decision has reignited the debate on death penalty. The Indian Government had passed Criminal amendment act 2013 which applied the death penalty in cases of rape.

Indian courts sentenced 1,455 prisoners to death between 2001 and 2011, according to the National Crime Records Bureau. During the same period, sentences for 4,321 prisoners were commuted to life imprisonment.

There are 477 people on death row. Many have been there for years. Human rights groups have been alarmed, however, by the vigour with which President Pranab Mukherjee, who was sworn into office in July 2012, has acted in clearing the backlog of clemency pleas. He has rejected 11, confirming the death penalty for 17 people.<sup>7</sup>

## 5. Conclusion

To conclude, the points can be summarized in the following manner, in order to wind up the paper. The existence of death penalty can be viewed to be based on the principle of free will. Every person is the master of his own will. A person who commits the offence of murder for instance, does it of his own free will. The offence is generally committed without any compulsion. As such every person is free to choose the path he / she wants to tread on. A convict is fully aware of the consequences of his actions, hence, it is only just to ensure that the convict is adequately punished for the crime / s committed by him / her. The concept of death penalty can also be viewed from the perspective of the most basic concept of psychology. It is a basic psychological principle that death is the greatest fear for most of the normal persons. Most humans have a natural fear of death. It is the basic trait of humans to fear the unknown, and death is the most unexplored area. Thus it has also been the most naturally feared. Thus when the persons are made aware that for certain offences the inevitable punishment is death, then this would definitely act as a deterrent by preventing people from committing such heinous crimes. One of the prospects of punishment is to serve as a deterrent. This purpose is achieved by capital punishment just as much as any other form of punishment. The issue of death penalty has been one of the most debatable topics in the criminal justice system. The benefits or rather, the requirement of death penalty in the contemporary times has been made crystal clear.

Death penalty itself has a myriad of dimensions to it. But one unchanging aspect is that some crimes are so culpable that death is the only suitable penalty. Moreover no State is advocating the arbitrary imposition of death penalty. There are appropriate checks and balances to ensure that no life of

an innocent is taken. This ensures adequate justice to all the citizens of the State. While the abolitionists argue that awarding death sentence serves no purpose, unfortunately keeping a person who committed such a heinous crime alive, also serves no purpose, except for the negative effect of putting the society at risk in the future. Taking the example of India itself, it's clear that death sentence is very rarely awarded. Moreover even the imposition of death penalty is not followed by execution, as has already been stated, there have instances where the death sentence has been commuted to life imprisonment. The death penalty debate has turned into the most socially relevant debate owing to the recent executions ( as has been stated in the prior part of the paper ). With the human right activists ( calling for the abolition of death penalty ) garnering more strength in their debate, it was considered material and essential to state the viewpoints against the contentions of the activists (abolitionists). To conclude, it can be reiterated that death penalty is a requirement in the contemporary society where each man stands for himself. Harsh punishment is required to keep the potential convicts at bay, and ensuring that the society is not harmed or the peace, tranquility and order of the society is not compromised. The State cannot compromise the lives of hundreds and thousands of innocent persons only for the life of one convict who does not even deserve to live among a society of civilized persons. Thus, death penalty must continue to exist.

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