

## **CAPITAL PUNISHMENT IN INDIA: AN ETHICAL ANALYSIS**

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### ABSTRACT

Capital Punishment is defined as a death penalty ordered by the state owing to commission of a crime. The efficacy of this punishment is highly debatable in contemporary society. From an ethical standpoint, the abolitionists believe that capital punishment is wrong on accounts of human rights violation and bias in sentencing. The proponents of death penalty hold the “deterrent theory” and “eye-to-eye approach” as the major reasons behind their support for this form of punishment. However, several Indian judicial pronouncements have emphasized on resorting to this form of punishment in the “rarest of the rare” situations.

Keywords: deterrent theory, ethics, abolitionists, bias

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### **INTRODUCTION**

In the words of Roscoe Pound, “The law must be stable, but it must not be still.”<sup>1</sup> The concept of “Punishment” has evolved over time in its form and severity. Law is a culmination of accepted human behavioral standards backed by legal sanction. It bears semblances with the definition of ethics, barring the scope of legal sanction. Ethics gives rise to two standpoints: Right and wrong. Since the genesis of law, it is considered necessary to organize societies to protect the moral allegiance and standards of accepted behavior in a society through the medium of punishment.<sup>2</sup> Punishment is defined as, “Any pain, penalty, suffering, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law.”<sup>3</sup> It is hereby evident that punishment is bestowed upon the individuals that deviate from the code of conduct formulated by a society. It is a fundamental ingredient of criminal law. Punishment is used as a legal instrument to deter a crime, rehabilitate the wrong-doer or altogether remove the wrong-doer from the circle of social interaction. Capital punishment is defined as the, “Crimes punishable by death”.<sup>4</sup>

### **Capital Punishment in India**

This form of punishment in India is carried in the form of “hanging”. A series of judicial pronouncements and law commission reports in India regulated the law relating to capital punishment. The aforementioned entities did not isolate the legal aspect from the ethical and moral standards. Indian Penal Code currently prescribes death penalty under sections 121, 132, 194, 195A, 302, 305, 307(2), 364A, 376A, 376E and 396.<sup>5</sup> The dignity of human life was viewed under the lens of ethics in *Bachan Singh v. State of Punjab*<sup>6</sup>. The judgment said, “A real and

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<sup>1</sup> ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 5 (Univ. of Chicago Press, 1923).

<sup>2</sup> James H. Galliher, *Criminology: A “commonsense” theory of deterrence and ideology of Science*, 92 J. OF CRIM.

L. & CRIMINOLOGY 307 (2002).

<sup>3</sup> *Cummings v. Missouri*, 71 US 277 (1867).

<sup>4</sup> HENRY CAMPBELL BLACK, BLACK’S LAW DICTIONARY 339 (4 West Publishing Co., 1951).

<sup>5</sup> Law Commission of India, *The death Penalty*, Report No.262 (Aug, 2015).

<sup>6</sup> *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

*abiding concern for the dignity of human life postulates resistance to taking a life through law instrumentality. That ought not to be done except in rarest of rare cases where the alternative opinion is unquestionably foreclosed.”*

### **Purpose of capital punishment**

The prime reasons behind the concept of capital punishment are the efficacy of the same to deter the identical or similar crimes. It is also reiterated that certain class or classes of crimes take away the right of a person to live. Utilitarian theory<sup>7</sup> propounded by Jeremy Bentham aims at welfare-maximizing actions. This theory conveys the idea that the consequential welfare of the society outweighs the deprivation of life of the criminal.

### **Cross-roads of ethics and Capital Punishment**

Statistical data unleashes the discriminatory trends of Capital Punishment, where a clear class bias is inherent.<sup>8</sup> The ethical problems associated with the utilitarian theory and its “goal-oriented” approach is that in a few cases, an innocent person may be executed. In other cases, a criminal could be executed with the purpose of deterrence in future. This highlights the problem of “favor in capital punishment”. The proponents of capital punishment use “deterrence” as an argument, but this theory fails with hardened criminals.<sup>9</sup> In a democratic set-up, the punishment for similar crimes must be alike, but more often or not the poor, lower caste and ignorant face a death penalty leading to “*uncivilized irrationality*”. General public does not indulge in crimes because of internalized threat of being caught and thus increasing the severity of punishment or a death penalty add *zilch* or negligible value. A seasoned criminal does not believe that he would be caught.<sup>10</sup>

The value of life and the dignity of death have moral allegiance. Capital punishment is viewed as a “gross human rights violation.”

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<sup>7</sup> Tony Draper, *An Introduction to Jeremy Bentham’s Theory of Punishment*, 5 J. OF BENTHAM STUDIES 121, 122-131 (2002).

<sup>8</sup> See, Rakesh Bhatnagar, *Is Capital Punishment Class Specific?* TIMES OF INDIA (Aug 3, 2014, 12:14 AM) at <https://timesofindia.indiatimes.com/india/is-capital-punishment-class-specific/articleshow/812750.cms>

<sup>9</sup> Nalini Rajesh, *Is there an Ethical basis for Capital Punishment?* 33 ECO. AND POL. WEEKLY 701, 702-704 (1998).

<sup>10</sup> *Id.* at 703

## LITERATURE REVIEW

The ethical aspect of Capital Punishment has been questioned by various researchers and jurists. To extensively study the unethical class bias in Death Penalty, the author referred to the journal article titled, ***“Poverty and Death Penalty”***<sup>11</sup>. This article lucidly highlighted how death penalty and poverty have a link and how underprivileged criminals are treated unequally compared to privileged criminals.

In order to obtain a clear picture about the failure of Capital Punishment to deter recidivists, ***Concept of recidivism in India***<sup>12</sup> was referred by the author. This article helped the author to understand how the deterrent theory of Capital Punishment is a failure.

Further, clear ideas regarding the unethical aspects of Death Penalty are extensively covered in ***On Capital Punishment***<sup>13</sup>. This article talks extensively about the “eye to eye” view of the society when it boils down to justifying Capital Punishment.

To omit the bias and gain perspective on contrary opinions, the author has anatomized a journal article titled, ***“Locke on Death Penalty”***<sup>14</sup>. This paper in an elaborate manner discusses about the “Rights of nature” a state had to impose Capital Punishment for the genesis of a civil society.

To understand both sides of the coin simultaneously, the author referred to a book titled, ***“Capital Punishment: The Death Penalty Debate”***<sup>15</sup>. This book extensively covers opinions, laws and stories that speak in favor of each side.

The works of Philosophers like John Locke, Immanuel Kant and Cesare Beccaria were also studied to balance the opinions in the study. The author has identified that the existing literature does not anatomize the ethical perspective of Capital Punishment through the lens of legal

<sup>11</sup> Jeffery L. Johnson & Colleen F. Johnson, *Poverty and Death Penalty*, 35 J. OF ECO. ISSUES 517, 518-523 (2001).

<sup>12</sup> Isha Gupta & Dr. Raj Kumar Yadav, *Concept of Recidivism in India*, 1 PLEBS J. OF L. 240, 241-257 (2015).

<sup>13</sup> Steven Goldberg, *On Capital Punishment*, 85 THE UNIV. OF CHICAGO PRESS 67, 68-84 (1974).

<sup>14</sup> A. John Simmons, *Locke on Death Penalty*, 69 PHILOSOPHY 470, 471-77 (1994).

<sup>15</sup> MEED GOTTFRIED, *CAPITAL PUNISHMENT: THE DEATH PENALTY DEBATE* (Enslow Publications, 1<sup>st</sup> ed. 1997).

provisions and judicial Pronouncements. The author aims to fill this gap of literature through this paper.

## **NEXUS BETWEEN ETHICS AND DEATH PENALTY**

The “Code of King Hammurabi of Babylon” in eighteenth Century BC had the first established set of laws relating to death penalty. Hanging became the most common way of execution in Britain around tenth century AD<sup>16</sup>. This was later followed in India. There is an increasing pressure on the countries to abolish Capital Punishment as there is no global consensus about the legality and constitutionality of it. Today, 106 countries have become “abolitionist states” and have abolished capital punishment in law and practice.<sup>17</sup> The Law Commission of India has also suggested abolition of Capital Punishment for all crimes except “terrorism” and “waging a war”.<sup>18</sup>

This pattern of countries becoming “Abolitionist States” has its roots in ethical and systematic flaws that do not justify Capital Punishment.

### ***Unethical basis for Capital Punishment***

The morality behind Death Penalty is contended world-wide keeping mind different schools of thought. The idea of killing another individual is *prima facie* considered evil. However, the circumstances of killing another individual are often assessed to determine whether the act of killing was right or wrong. Therefore, under utilitarian theory it is mentioned that if killing a human being for saving or protecting the life of other innocent people, it is a justified act.<sup>19</sup> Unlike what the proponents of Capital Punishment claim, countries that have employed it to act as a deterrent to future crimes, have not shown any significant decrease in the violent crimes taking place in their country. Empirical evidence that surveyed criminologists and studied the patterns of

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<sup>16</sup> John Matthews, *Early History of Death Penalty*, DEATH PENALTY INFORMATION CENTRE (12<sup>th</sup> August, 2012, 1:55PM), available at <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty#intro>.

<sup>17</sup> Reality Check Team, *Death Penalty: How many Countries still have it?*, BBC NEWS (11<sup>th</sup> Dec, 2020, 11:32 AM) available at <https://www.bbc.com/news/world-45835584>.

<sup>18</sup> Law Commission of India, *On Death Penalty*, Report no. 262 (Aug, 2015).

<sup>19</sup> ANDREW I COHEN, *CONTEMPORARY DEBATES IN APPLIED ETHICS* 157 (Wiley & Blackwell, 2<sup>nd</sup> ed., 1991).

crime in states that have death penalty, shows that the rate of crimes in states having death penalties exceeded the rate of crimes in abolitionist states by 42%.<sup>20</sup>

The simple argument of the proponents of Deterrent theory is that the severity of threat a death penalty has is greater than that of life imprisonment. However, this suffers the flaw of uniformity. A punishment in order to be effective, has to be employed regularly. However, considering that life of an individual cannot always be taken away, it is irregular and therefore ineffective. As per statistics of Death Penalty in the United States, around 300 cases of death penalty were registered in mid-1990s and that represented only 1% of the total crimes reported. This shows that a small proportion is not being given equal protection of law and also proves that there is irregularity of punishment.

The most important argument against deterrent theory is that any man, including hardened criminals has an element of self-preservation. They would not commit a crime if they believe they could be caught.<sup>21</sup> Another perspective is that some criminals commit crime due to their subconscious or conscious need to commit suicide or cause hurt to others and offsets the purpose of Death Penalty. Studies have conclusively shown that hardened criminals intend to and expect to be punished for their wrongs.<sup>22</sup> In fact, in *Woodson v. North Carolina*<sup>23</sup> the court upheld that enacting “Mandatory death penalty laws is unconstitutional”. Therefore, if the deterrent theory itself does not hold any value in deterring crimes by instituting the Capital Punishment, then there is no point behind depriving another individual of his/her life. Even if the criminal has committed heinous crimes, the pain and suffering one is put into between the time of sentencing to capital Punishment and actual execution, is unjustified. On an average the trial itself of these prisoners lasted for 5-10 years.<sup>24</sup>

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<sup>20</sup> Amnesty Team, *A Clear Scientific Consensus that the Death Penalty does not work*, AMNESTY USA (July 18, 2018), available at <https://cutt.ly/sjONaoe>.

<sup>21</sup> Richard M. Gerstein, *A Prosecutor looks at Capital Punishment*, 51 J. OF CRIMINAL L. AND CRIMINOLOGY 252,253-56 (1960).

<sup>22</sup> Schmidberg, *The Offender's attitude towards Punishment*, 51 J. OF CRIMINAL AND CRIMINOLOGY 328, 322-333(1960).

<sup>23</sup> *Woodson v. North Carolina*, 428 U.S 280.

<sup>24</sup> J. S. Muralidhar, *Death Penalty India Report*, NATIONAL LEGAL SERVICES AUTHORITY, 8 (2015).

### ***Factors of Discrimination***

Statistically, it is reaffirmed that Death Penalty is often applied on the criminals that are poor, belong to minority community than on the privileged and the ones belonging to the majority community.<sup>25</sup> There is a gender bias too as it is observed women are responsible for “One in seven murders”. But only thirty were awarded a death penalty from 1930 to 1962.<sup>26</sup> In India, only twelve out of 397 death penalty convicts are women. In the case of *Renuka Bai v. State of Maharashtra*<sup>27</sup> the apex court held that, “[C]ourts punish the crime, not the person”. Despite this, gender, caste and wealth bias is evident in the records. Retentionists argue that crime is an extremely social issue. Therefore, the vulnerability and social hostility faced by a certain caste and gender is more and should be considered while awarding death penalty. However, this violates the value of life as the value of each life despite the material and social comfort is equally important.

The death penalty Report of India clearly shows that close 76% of convicts of Death Penalty belonged to lower and backward castes. All the twelve women sentenced to death were also from economically and socially backward classes<sup>28</sup>. Additionally 93.5% sentenced to death penalty for crimes of terror belong to Schedule Castes or religious minorities.<sup>29</sup> These figures lucidly reflect the discriminatory trends of sentencing which contravene the philosophy of ethics and morality.

The core idea of Deterrent theory is to prevent other criminals from committing the same crime as the one committed by the criminal being sentenced. Assuming this would work, it is still discriminatory in its roots as it makes the precedent of one person, putting him in a more disadvantageous position.

When it comes to the “eye to eye” theory where it is assumed that the crime committed by an individual is equivalent to him giving up his right to live, it is said that the theory is flawed. The relatives of the victims of murder themselves do not support state-sponsored deprivation of life.<sup>30</sup>

<sup>25</sup> William O. Hochkammer, *The Capital Punishment Controversy*, 60 J. OF CRIMINAL AND CRIMINOLOGY 360, 361-68 (1970).

<sup>26</sup> HUGO ADAM BEDAU, *DEATH PENALTY IN AMERICA*, 116-17 (OUP USA Publications, 1<sup>st</sup> ed., 1964).

<sup>27</sup> *Renuka Bai v. State of Maharashtra*, AIR 2006 SC 3056.

<sup>28</sup> *Supra* Note 24 at 20.

<sup>29</sup> *Id.*

<sup>30</sup> Tim Buckley & Janvier Slick, *From Death to Life*, NOT IN OUR NAME (2018).

Therefore, it can be understood instead of retributive justice that emphasizes on punishment, rehabilitation of criminals would serve a better and more ethical purpose.

### ***Views of Philosophers on Death penalty***

Immanuel Kant was a staunch believer of Retributive justice and Criminal Punishment. He appealed for maximum support for *Lex talionis* which stands for “Law of Retribution”. He believed that if a person has committed a murder, then he deserved to die.<sup>31</sup>

On the other hand, Cesare Beccaria supported abolitionism and called for, “Sympathetic sentimentality and affection of Humanitarianism”. He challenged the authority of the state to carry out the death penalty and the utility of death penalty<sup>32</sup>, which are still the chief controversial elements of the death penalty debate.

### **Legal perspective of Capital Punishment in India**

Under Article 6 of the International Covenant of Civil and Political Rights (ICCPR), it is enshrined that no person shall be denied their “Right to life” or be deprived of it. Although Article 6(6) states that the provision does not bring “Capital Punishment” under consideration, it can be deduced that preservation of life and value of life is the essence of this provision. Under the Indian Constitution, “Article 21” protects an individual’s “Right to life and liberty”. Around 755 death penalty convicts have been hanged in Independent India till now.<sup>33</sup> The Indian Penal Code, 1860 was drafted by the British and they were considered “Sovereign” at that point of time. As per John Austin who belonged to the Positive School of thought, the Sovereign had an unlimited power and therefore section 303 gave arbitrary power to the State to deprive an individual of his life.<sup>34</sup>

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<sup>31</sup>IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 331 (Translated by John Ladd, Bobbs-Merill Publications, 1<sup>st</sup> ed., 1965).

<sup>32</sup> F. Rosen, *Crime Punishment and Liberty*, 20 HISTORY AND POLITICAL THOUGHT 173, 174-85 (1999).



There are four petitions to appeal against the order of Capital Punishment. If the death Penalty is imposed by the Supreme Court, then under Article 136 of the Constitution, a “Special Leave Petition” can be filed to appeal against such an order. A review petition can also be filed under Article 137 and the court may at its discretion allow it considering the fact that the court may have made a mistake. A review petition is not an appeal, but a way to fix a mistake. If a review petition is rejected, a curative petition can be filed to undo a wrong by the court.<sup>35</sup> Here the convict has to prove that “Principles of Natural Justice” were infringed or there was bias to his prejudice. Finally, “mercy petitions” can be filed before the “President” under Article 72 and before the “Governor” under Article 161. This is based on incorporating clemency in the process.

The ethical victory for abolition of mandatory death sentence for all the offenders serving life sentence under section 303 of the Indian Penal Code, 1860 came in the prominent case of *Mithu Singh v. State of Punjab*.<sup>36</sup> It was held by the apex court that section 303 was violative of “Article 14” and “Article 21” of the Constitution as they deprived a man of his life. It was also understood by this case that mandatory life sentence contravened the section 235(2) of Criminal Procedure Code, 1973 as it deprived the convict of his “Right to be heard”. Additionally, such a sentence infringed section 354(3) of the Criminal Procedure Code as it a prerequisite for the court to provide “special reasons” for imposing death penalty.

The concerns of abolitionists with respect to discrimination can be seen in the case of *Ediga Anamma v. State of Andhra Pradesh*.<sup>37</sup> In this case the court observed that, “Crime cannot be separated from the Criminal.” It went to hold that sentences change when the convict is “too young” or “too old”. The judgment neither conformed with the ideas of abolitionists nor that of a retribution. It followed the ideals of “Correctional therapists”.

<sup>35</sup>TaranDeol, *Rarest of Rare: History of Death Penalty in India*, THE PRINT (March 19, 2020, 7:47 PM), Available at <https://theprint.in/theprint-essential/rarest-of-rare-history-of-death-penalty-in-india-and-crimes-that-call-for-hanging/383658/>.

<sup>34</sup>Shashwat Jha, *Jurisprudential Analysis of Mithu Singh v. State of Punjab*, 2 INT’L J. OF L. AND LEGAL JURISPRUDENCE STUDIES 239, 238-244. (2012).

<sup>35</sup> Rupa Ashok Hurra v. Ashok Hurra, AIR 2002 SC 177.

<sup>36</sup>*Mithu Singh v. State of Punjab*, (2001) 4 SCC 193.

<sup>37</sup>*Ediga Anamma v. State of Andhra Pradesh*, (1974) 4 SCC 443.<sup>38</sup> *Jagmohan Singh v. State of Uttar Pradesh*, (1973) 1 SCC 20. <sup>39</sup> *State of Madras v. V.G Row*, AIR 1952 SC 196.

Bias can however be found in the act of commuting her sentence as reason behind the same as given by the court were, “Her femininity, youth, social conditions and expulsion from home”. Though the ideals of morality can be satisfied as Law must be sensitized but the moral code of ethics takes the fall as morals and sensitization are applied selectively.

In the case of *Jagmohan Singh v. State of Uttar Pradesh*<sup>38</sup>, we witness moral relativism. The apex court here held that unlike the Supreme Court of the United States, the Supreme Court of India is not obliged to follow the rule of “Reasonableness” in contrast to what the United States follows under “due process”. The court held that Capital Punishment does not violate “Article 19” as “Freedom to live” is not included within the ambit of “Article 19”. The judicial discretion of the judges to decide upon life sentence was also not considered arbitrary under “Article 14”, as the facts of each case differ.<sup>39</sup>

In *Furman v. State of Georgia*<sup>40</sup>, upon which many Indian judgments relied, it was held that, “*If the Punishment is unusually severe and there is a strong probability that it is being applied arbitrarily and does not serve judicial purpose, it then violates the Eighth Amendment*”. Similarly, until it is applied in a manner justified, the Constitutionality of Capital Punishment is upheld in India.

Perhaps the most important judgment with respect to Capital Punishment in India is *Bachan Singh v. State of Punjab*<sup>41</sup>. This case led to the genesis of the “Rarest of the rare” doctrine. The Court upheld that, “*A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done except in rarest or the rare cases where the alternative opinion is unquestionably foreclosed*”. This governs the criminal system of India even today as it respects the dignity of human life. It emphasized on the prevalence of “special reasons” to deprive a human of his life.

With the increase in the rejection of mercy petitions by the President, the humanity of the apex court can be seen in the case of *Shatrughan Chauhan v. Union of India*<sup>42</sup>. The recent clarification by a three-bench judge delivered that the delay by the president in rejecting mercy petitions was

<sup>40</sup> *Furman v. Georgia*, (1972) 408 U.S 238.

<sup>41</sup> *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

violative of Article 21. The time taken to reject a mercy petition ranged from 1.5 to 11 years. That constituted “torture” as the convict anticipated death every day. This judgment declared that, “[E]xcessive delay in rejection of mercy petition is an essential mitigating factor for plea for commutation”.

Therefore, it can be seen that Indian legal framework and judicial pronouncements resort to Capital Punishment in very rare and unusual cases. This upholds the morality which roots from the fact of value of human life.

## **CONCLUSION AND RECOMMENDATIONS**

India falls in the class of retentionist countries which has retained death penalty for certain crimes. A clear distinction for what constitutes “Rarest of the rare” is not drawn by the law and is left to the discretion of the judges hearing the case which leads to culture, gender and even cognitive bias. In other words, the beliefs and conscience of the judge are the defining factors. Death penalty does not serve the purpose of a deterrent and hence adds no value to deter future crimes. The author believes that Capital Punishment is a state-sponsored killing and must be abolished. On the other hand, the abolitionist countries like Canada show a fall in crime rate after the abolition of Death Penalty.<sup>43</sup> The utilitarian theory of sacrificing the life of one for the greater good does not true here as even after imposing death penalty, there is no case of “greater In a “Constitutional democracy”, an efficient administration of criminal justice is a vital element. The main goal of a criminal justice system should be rehabilitation of the convict. The reason behind commission of crime may in a lot of cases be the deeply rooted “Psychosocial maladjustment”. The correction of this maladjustment must be made the prime goal to deter repeat offences. Rehabilitation has its theoretical base in the belief that unfavorable social conditions are the reason behind commission of crime. Therefore, it is the moral right of the convict to seek the help of society.

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<sup>42</sup> *Shatrughan Chauhan v. Union of India*,

<sup>43</sup> Monica Sakhrani & Maharukh Adenwalla, *Abolition of Death Penalty: A Case*, 40 *ECONOMIC & POLITICAL WEEKLY* 1023, 1024-26 (2005).

Indian judicial pronouncements and laws have shown a humanitarian side, as death penalty is resorted to under “rarest of the rare” cases. The author asserts that Death Penalty must be abolished and life imprisonment with rehabilitation must be the order of the day. In 21<sup>st</sup> Century, an ethical blunder like Death Penalty should find no place. It is in other words, human rights abuse.