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# A Debate on Ethical and Moral Aspects Surrounding Capital Punishment

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## ABSTRACT

*The death penalty has long been a common punishment in India, but the main difference between then and today is that it was better organised and carried out on time before. The Hon'ble Courts of India have the power to condemn a criminal to death under Sections 366 & 368 of the CrPC, but how justifiable is the punishment? The research paper attempts to analyse, in light of prominent judgments delivered by the Supreme Court, the issues surrounding the validity of Capital Punishment. The foremost of such issues being 'Whether the capital punishment is morally and legally justifiable'.*

**Keywords:** *Death Penalty, Capital Punishment, Death Sentence.*

## I. INTRODUCTION TO CAPITAL PUNISHMENT

Utopian The term 'Capital Punishment' finds its origin in the Latin term '*capitalis*' which means 'regarding the head' (a reference to execution by beheading). Capital Punishment is also known as death penalty refers to the State commissioned execution of persons convicted of certain serious offences such as murder. A death sentence is a sentence imposed upon the offender to undergo this form of legal penalty. While several nations around the world no longer practice this form of punishment, yet certain countries emphasize how it continues to be an essential punishment for specific offences. In countries that continue to practice this form of punishment, the legislature prescribes through statutes the commission of which offences or under what circumstances are one eligible for capital punishment.

As of 2021, the use of capital punishment has been retained by 54 nations, while it has been completely abolished in law and practice by 107 nations, while it has been abolished as a form of punishment for general offences only (while possessing the right to impose it under exceptional circumstances such as war crimes) by 7 nations, lastly, it has been abolished *de facto* (not imposed on any offender in preceding ten years) by 27 nations.

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Imposition of death sentences on individuals below the age of eighteen (at the time of the commission of the offence) is prohibited by most nations across the globe, however in recent times three countries namely, Iran, Sudan, and Saudi Arabia are known to have executed persons falling in the said category. It must be noted that under International Law there is an absolute prohibition to the imposition of death penalties to juveniles. Furthermore, it has been prohibited under The Convention on the Rights of Child, a party to which the three aforesaid countries were.

The issue of capital punishment has engendered continuing debate on moral aspects surrounding it and its impact on criminal behavior. For long it has been an extremely controversial subject on which there are varying positions within a cultural region or single political ideology.

In recent times support for the abolishment of capital punishment has seen a steady rise. A resolution reaffirming a call for a moratorium on capital punishment was adopted by the United Nations in December 2008. It called upon the member states to stall all executions with the ultimate objective of its abolition. Subsequent non-binding resolutions of similar nature were passed by the United Nations in 2010, 2012 and 2014. However, it is noteworthy that the four most populous countries in the world namely, India, China, United States, and Indonesia continue the use of this form of punishment, and have voted against the call for its abolishment at the UN.

The purpose of this study is to provide a brief introduction to the concept of capital punishment and critically analyze the ethical and moral aspects surrounding it.

## **II. HISTORY OF CAPITAL PUNISHMENT**

### **(A) In The World Context**

The death penalty is an ancient sanction. It has never been repudiated as a form of punishment throughout the history of human civilization. We can trace back the origins of Capital Punishment to 18<sup>th</sup> Century B.C., a period during which King Hammurabi of Babylon codified laws relating to death penalty in his Code. Capital Punishment was widely employed in Ancient Greece, where the Draconian Code written in the 7<sup>th</sup> Century B.C. provided it to be the lone penalty for all offences, though Plato argued it to be reserved only for the incorrigible. It held a similar position in Roman law where Law of The Twelve Tables written in the 5<sup>th</sup> Century B.C. included it as one of the eight forms of punishment, though during the republic it was exempted briefly.

Executions were usually carried out by hanging in 10th Century Britain. Under the reign of William I in the following century, death penalty was briefly abolished as a means of punishment for all offences. However, this trend was short-lived as death penalty was soon reinstated, reaching its peak in the 16<sup>th</sup> century during the reign of Henry VIII, who was a notorious fanatic towards it. However, the abolitionist trend regained momentum in the 17<sup>th</sup> century; gradually its use was refrained and was ultimately abolished in Britain.

Statistics reveal a lesser number of murders in countries that have abolished the use of death penalty as against countries that retain its use. In recent times the notion of Capital Punishment being degrading, cruel and barbaric has been accepted worldwide.

### **(B) In The Indian Context**

The first known issue to be raised against the subject of capital punishment was in 1931 in British India's Legislative Assembly, when Shri Gaya Prasad filed a motion for leave to introduce a bill that sought to abolish capital punishment. Subsequently, after the Home Minister replied to the motion, it was disallowed.

At the time of independence, India retained certain laws introduced during the colonial rule; this included the Criminal Procedure Code (Cr.P.C.) 1898, and the Indian Penal Code (IPC) 1860. The Indian Penal Code, the main substantive legislation in the country codifies a range of offences and their punishments. It prescribes the imposition of six penalties under the law, which includes the penalty of death. On analysis of the Indian Penal Code- it is safe to assume that the punishments have been formulated by encompassing different principles of punishments.

Section 367(5) of the Cr.P.C. 1898 was rescinded by the Parliament in 1955; this led to the position of death sentence being consequentially altered. Under the provisions of the said section offences where death penalty was a prescribed punishment, the court was under the compulsion to cite reasons for its imposition of some other penalty.

The Cr.P.C. was re-enacted in the year 1973, with several changes made to it, most prominent of which were the ones to Section 354(3), this section read as follows:

*“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”*<sup>5</sup>

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<sup>5</sup> The Code of Criminal Procedure 1973, c 27, s 354(3).

Under the provisions of the aforesaid section, Judges while deciding on a capital case were necessarily required to cite special reasons for their imposition of a death sentence.

In the landmark case of *Mithu vs. State of Punjab*<sup>6</sup>, the question before the Supreme Court was whether fundamental rights guaranteed in Article 21 of the Constitution stood infringed by provisions u/s 303 of the Indian Penal Code. Section 303 of the Indian Penal Code provided as follows:

*“Punishment for murder by life convict-Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death”*<sup>7</sup>

The section mandates a sentence of death for all persons sentenced to life imprisonment u/s 302, leaving no room for the discretion of the Court. The Supreme Court held the provision to be “Draconian in severity, relentless and inexorable” and led the Court to strike it down as being unconstitutional.

### III. CONSTITUTIONAL VALIDITY OF DEATH PENALTY

The Constitution of India, guarantees to every citizen the fundamental right to life and personal liberty under Article 21:

*“No person shall be deprived of his life or personal liberty except according to procedure established by law”*<sup>8</sup>

The rights guaranteed under the article have given rise to questions on the validity of capital punishments like death sentences. The Central Government has responded by saying that the death penalty would act as a deterrent. The Supreme Court too upheld its constitutional validity and significance in a trail of cases most prominent of which are, *Jagmohan Singh vs. Uttar Pradesh* (1973) and *Bachan Singh vs. State of Punjab* (1979).

As far as constitutionality is concerned, the terminology of Article 21 should be duly emphasized. The Article provides the State authority to deprive an individual of his life in accordance of procedure established by law. It has been established through a series of judgments that the procedure for imposition of such penalty ought to be just, rational, and procedurally fair.

#### (A) Doctrine Of Rarest Of The Rare

Courts have implied limiting or avoiding the imposition of death penalty in many cases,

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<sup>6</sup> *Mithu vs. State of Punjab*, (07.04.1983 - SC) MANU/SC/0065/1983.

<sup>7</sup> Indian Penal Code 1860, c 16, s 303.

<sup>8</sup> The Constitution of India, Part 3, Article 21.

especially where there is a scope of reformation (especially in cases of crimes committed by juveniles). The Supreme Court laid down the doctrine of “rarest of rare” in the case of **Bachan Singh vs State of Punjab**, which was further discussed in the case of **Macchi Singh vs. State of Punjab**.

The landmark case of **Bachan Singh vs. State of Punjab**<sup>9</sup> challenged the constitutional validity of Section 354(3) of the Criminal Procedure Code on grounds that it allowed the court to exercise unguided discretion and impose death penalties arbitrarily on persons eligible for such punishment under provisions of the IPC. Justice Sakaria while giving his judgement held that legislative policy underlined u/s 354(3) was as follows:

*“Before opting for the death penalty the circumstances of the 'offender' also requires to be taken into consideration along with the circumstances of the 'crime'. Life imprisonment is the rule and death sentence are an exception.”*

It was further noted in the said case that constitution acknowledges the penalty of death. The judgment introduced safeguards through changes in the sentencing procedure.

Hence penalty of death ought not to be imposed except in “rarest of the rare” cases, where the possibility of alternative punishment has been “unquestionably foreclosed” i.e., where life imprisonment seems insufficient for retribution, keeping in mind of the circumstances and the degree of the crime- where imposing life imprisonment cannot be ‘conscientiously exercised’.

While giving its judgement of the said case, the Supreme Court divided the principles into two categories namely, aggravating circumstances and mitigating circumstances. Aggravating circumstances refers to the “seriousness of the offences” that is concluded based on factors such as the gravity of the injury, criminal record, usage of weapons, culpability of offences. Mitigating factors, on the other hand, define extenuating circumstances that the defense uses to bring leniency in sentencing of the accused. For example, coercion, instigation, abetment, provocation, depravation, poverty, etc.

The Apex Court did not merely cite the said guidelines while deciding on the case of **Macchi Singh vs. State of Punjab**<sup>10</sup>, but also specified certain mitigating circumstances to be taken into account while deciding on grave issues. The court to revive the evaluation of aggravating factors against mitigating factors, the court laid down a balance sheet theory. The court in doing so was seeking to compare aggravating factors relating to the crime

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<sup>9</sup> Bachan Singh vs. State of Punjab, (09.05.1980 - SC) MANU/SC/0055/1982.

<sup>10</sup> Machhi Singh and Ors. vs. State of Punjab, (20.07.1983 - SC) MANU/SC/0211/1983.

against mitigating factors relating to the criminal. The said factors being completely disparate one could draw a balance sheet to evaluate the factors against one another.

The Supreme Court in the landmark case of *Kehar Singh vs. Union of India*<sup>11</sup> held that it came within the ambit of 'rarest of the rare'. The offence committed by the appellant wasn't simply a murder, he had assassinated an incumbent Prime Minister of the country; and was convicted by the Sessions Court and sentenced to death under Section 302/120B of the Indian Penal Code. The learned counsel for the appellant while making an appeal for the reconsideration of constitutional validity of provisions relating to the imposition of a death penalty assailed the judgment given by the court in the Bachan Singh case. The attorney general while addressing this appeal held that the statute provided the imposition of such penalty only on six instances, holding that the doctrine allows the accused benefit of reasonable doubt. It was further held that the penalty was only imposed in exceptional circumstances; therefore there was no case for reconsideration.

### **(B) Procedural Test**

The Supreme Court while deciding on the cases of Bachan Singh and Machhi Singh put forward a Procedural Test as follows:

- 1. One, does the crime hold an uncommon characteristic that renders for death sentence instead of life imprisonment?**

If so, five factors must be considered:

- Manner of commission of murder
- Motive of Commission
- Nature of crime is anti-social (meant to terrorize)
- Magnitude of crime
- Personality of Victim murder (innocent child, helpless women, or public figure)<sup>4</sup>

- 2. Two, is there no other alternative but to impose the death sentence even after the mitigating circumstances with?**

From this, we derive the doctrine of proportionality strikes a vital balance between the nature of the crime and the punishment prescribed by the court. In this way, the judiciary tries to prevent crimes of such nature in the future, by examining the impact of the judgment on the society.

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<sup>11</sup> Kehar Singh and Ors. vs. Union of India (UOI) and Ors., (16.12.1988 - SC) MANU/SC/0240/1988.

### **(C) Reformatory Theory**

In the case of *Narotam Singh vs. State Punjab*<sup>12</sup> the Supreme Court put forward the reformatory theory of criminal justice, where the objective is to rehabilitate the criminal/offender into law abiding citizens. This is in contrast of the Nirbhaya Case, where the Delhi High Court announced a death warrant against the convicts. Such is an example of an aggravating degree of crime where society and lawmakers justify death sentence as a way to punish those rule breakers that have no scope for rehabilitation.

## **IV. ARGUMENTS IN FAVOUR OF CAPITAL PUNISHMENT**

### **(A) Deterrence**

First of all, Capital punishments are said to have a deterrent effect which prevents other potential criminals from committing such heinous crimes which may lead them to such punishment.

Every individual's greatest fear in life is to lose their life and this fear deters them from carrying out the worst crimes.

### **(B) Wastage Of Taxpayer's Money**

The primary alternative to capital punishments happens to be life imprisonment, which keeps the convicted criminals in jails till they die. These criminals are given food and even provided with medical treatments and all these costs incurred are paid by the taxpayer's hard earned money. So instead of life imprisonment, Capital punishments prove to be more judicious and in-fact would save a lot of money of the public treasury.

The death penalty proves to be a cost-effective solution to the nation as it executes the guilty rather than keeping them imprisoned for life.

### **(C) Retribution**

The given argument has been proved to be very judicious in terms of justice been actually felt by the victim's family as well as the criminal's family. It's impossible to bring back the person but the justice system can provide a sense of satisfaction, mental peace and consolation to the aggrieved ones by the implementation of death penalty/capital punishment.

Also, the death penalty does not leave chance of re-victimization of the affected family. It actually shields them from future possible victimization.

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<sup>12</sup> *Narotam Singh vs State Of Punjab And Anr*, (11.01.1978) AIR 1978 SC 1542

‘These criminals should definitely get what their crime deserves.’

However, to ensure deterrence and its effectiveness – the capital punishments must also be quick in terms of delivering justice, because the more time gap between the crime and the legal procedure will deteriorate the sense or level of fear in the criminal’s mind.

Also, the time gap might give rise to execution of some other heinous crimes or it’s planning.

#### **(D) No Escape Possible**

Capital punishment leaves no room for the guilty criminal to escape, whereas, in the course of cases of life imprisonment – one might escape on the first possible chance.

It is better to give death penalty to such criminals because anyways they are not worth it to be living among the general public.

### **V. CRITICISM OF CAPITAL PUNISHMENT**

The right to life is contemplated as one of the essential fundamental rights of every individual and it is been evaluated that at no cost such rights to be deprived to any individual. Even the people who are against capital punishment perceive the value of human life and how even the worst murderers should not be deprived of it.

It can be identified that any actus rea of an offender cannot result in forfeiting the life of oneself even if they killed someone. Some abolitionists do not go that far. They assert that life ought to be preserved unless there is a sensible reason not to, those who are in favor of corporal punishment are those who ought to justify their position.

The dialogue approximately capital punishment offers out the retaliation extra clean to refute regarding traditional freedoms. Certain people apprehend that the counter of lousy behavior like murder is on simple degree requital and cannot be maintained. It is considered because the maximum very unsightly infringement of the simple proper to live, as conveyed within side the Universal Declaration of Human Rights.

Different non-advantage, non-administrative affiliations argue to repeal capital punishment. One of the maximum big is Amnesty International, whose purpose is except supervising ladies, teenagers', minorities and eliminated people's advantages so human satisfaction is gotten. This activates the manner that the censured are constrained with admire to their identification and decrease cash associated foundations.

A file framed via way of means of David Baldus and George Woodworth, precept experts of capital punishment, indicates that faint examiners are three. Nine events extra possible be

condemned to death, even as guys are 98% people performed since 1976. In any case, that information, over 4% people blamed are found affordable as time is going on. As I must suspect, this price is simply too excessive to even consider night recall night recall helping final awareness of this discipline.

Ultra-modern argument pertaining to the criticism of capital punishment can fall under three categories: - Moral, Utilitarian, and Practical.

### **(A) Moral Argument**

There are certain primary objectives of awarding the offenders with punishment, and one of the vital among the slot is contemplated as Retribution. The theory of retribution, states that every individual of a society has an obligation to reform its members (primarily offenders). It is believed that every individual should get a fair second chance to redeem their criminal behavior/ character. Therefore, it should be swallowed to gamble into giving a second chance to the convicted person to change their life. Notwithstanding, capital punishment defeats this pleasantry objective of punishment, and rather, the offenders are denied their Right to Life. Adding to this, it makes the convict forfeit another opportunity to lead their life.

A couple of legal professionals combat that capital punishment is not virtually used as a counter for murder, or dependably for a specific form of manslaughter. They combat that, withinside the USA regardless, simplest tad minorities of executioners are sincerely executed, and that trouble of capital punishment on a "capriciously picked discretionary unobtrusive bundle" of miscreants would not quantity to a stable application of retribution. Since capital punishment is not labored retributively, it is miles ill-suggested to apply backlash to legitimize capital punishment. This warfare could do not have any fee in a normal populace that carried out the loss of life penalty dependably for express kinds of crime.

Moreover, through legitimizing the frightfully lead that the rule hopes to smother—killing—capital punishment is destructive withinside the moral message it passes on. Moreover, they ask, while it's so much used for lesser bad behaviors, execution is unscrupulous by virtue of the obvious reality it's far absolutely disproportionate to the harm done. Abolitionists also articulate that capital punishment ignores the condemned person's more right than wrong to the presence and is fundamentally boorish and corrupting.

### **(B) Utilitarian Argument**

Another significant objective of punishment that can be pondered upon is- Deterrence. Deterrence is subjected to be a demotivation or discouragement of a commitment to an act or an event, which is induced in the mind by the fear of consequences. Barring to the point of

research, we can deduce that capital punishment doesn't produce sufficient proof or shreds of evidence that can corroborate the fact that the death penalty can discourage more than what life imprisonment could or can do. In short, for the most part, has exhibited that capital punishment is anything but a more powerful obstruction than the elective authorization of life or long-haul detainment.

### **(C) Practical Argument**

Furthermore, it can be acknowledged that the Arbitrary Nature of capital punishment is also a significant criticism. It can be said that adversaries stay mindful that the genuine usage of the death penalty shows that any endeavor to single out explicit sorts of terrible conduct as supporting end will be discretionary and off the mark. They additionally highlight different parts that they think block the likelihood that the death penalty can be truly applied, battling that penniless people and ethnic and extreme minorities routinely don't push toward unimaginable genuine help, that racial tendency moves phenomenally white juries in capital cases to convict dull and other non-white respondents in lopsided numbers, and that, since goofs are inescapable even in a general run criminal worth framework, certain individuals will be executed for terrible practices they didn't do.

Moreover, it is been acknowledged that the death penalty is arbitrary in nature in such a way that the constitution lays down certain constitutional remedies pertaining to it, which hinders the judicial decision-making on the present topic. Most of the time death sentences are been awarded based on the judicial conclusion and not based on the facts and pieces of evidence, which ideally, they (judges) should, withal. In relevance to aforesaid, it can be pronounced that the mechanism of the judicial system is poor and lacking drastically.

At last, they battle that, considering the way that the participation of the sales for capital disciplines is expanded; those sentenced to death are frequently unfeelingly compelled to bear gigantic stretches of shortcoming about their destiny.

One of the biggest denials of retribution can be because of the mistaken conclusion by the court, i.e. What if the offender turns out to be innocent, later his/her execution?

The difficulty of the execution of natural human beings is also a problem for the response struggle - watching for there may be a valid risk of executing the guiltless, one of the pressing requirements of response - that people need to get what they merit (and as such exactly what they merit) - is omitted through the contemporary execution of the dying penalty within the USA, and something different kingdom wherein goofs have occurred.

With all that considered, it appears that evidently, the loss of life penalty has to be dropped

thinking about how it's far savage, unfeeling, and inefficient. This paper communicated that capital punishment has to be visible as illegal thinking about the manner that it does not cope with viciousness, but it spreads it. Pondering everything, the existence sentence has to supersede the loss of life penalty when you consider that it's far extra profitable in political, monetary, and social terms.

## **VI. CONCLUSION**

The cultures that retain the use of capital punishment regard certain offences to be so heinous that they shake the foundations of social conscience, and such offences deserve to be severely penalised. In such cases the perpetrators are considered to be a threat to society; however such individuals are an equal part of the very society and efforts should be made to reform such persons.

The principal argument in support of the retention of capital punishment is that it would deter individuals from committing such offences. However, statistics reveal that such measures do not help achieve this very objective, as Non-Death Penalty states have consistently fared better than States with death penalty in regard to murder rates.

Furthermore, Judges while exercising their authority to award such a penalty do so solely on basis of their individual values and biases. The law fails to provide a standard basis for the imposition of such a penalty. Therefore whether the penalty imposed would be one of death would largely depend on the composition of the court. The provision of such unguided discretionary powers might seem as unjust, as another individual who has committed the same offence under similar circumstances might not be subjected to similar consequences. In this light, such provisions come off as a violation of Article 14 of the Constitution, which guarantees to every individual the right to equality before the law.

However, the abolishment of such practice doesn't seem as convenient in practice as it does in theory; this is particularly because it is first necessary to bring about a social change before a legal change can be made. Therefore its abolishment seems distant, while society continues to regard the imposition of death penalty as justifiable under certain circumstances. This calls for social education in the fields of criminology and penology, to make known the importance of social and legal change.

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