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# Constitutionality of the Capital Punishment in India: An Analysis

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## ABSTRACT

*Capital punishment or the death penalty has always been a topic of contradiction not only in India but also in several developed countries. In India, the motive for providing punishment is based on two aspects; the first is that the offender should suffer for the pain and injury he/she cast upon the victim and another motive is to discourage others from committing wrongs by sanctioning punishments. This paper focuses on capital punishment in India which is also known as the death penalty which is awarded by the court in very rare cases. Furthermore, this paper also knows the history of the advent of the death penalty and probes the constitutional validity of capital punishment in the context of the Indian judiciary. The study aims to identify the constitutional validity of the death sentence and to understand the value of differing judicial opinions on its constitutional validity.*

**Keywords:-** death penalty, contradiction, constitutional validity, sanctioning punishments, moral point of view, advent, and capital punishment.

## I. INTRODUCTION

One capital punishment or "death penalty or death sentence" is awarded for serious offences like murder, sedition, rape or for any other offences where there is the provision of a death sentence prescribed in the law. The basic idea for awarding the death penalty is that the people who commit such offences are considered a threat to society. The death sentence is also awarded to have a deterrent effect on society. Although Indian criminal jurisprudence is based on a combination of deterrent and reformatory theories of punishments. While the punishments are to be imposed to create deter amongst the offenders, the offenders are also to be given opportunities for reformatory.

India is one of the 78 retentionist countries which have retained the death penalty on the ground that it will be awarded only in the "rarest of rare cases" and for "special reasons". Though what constitutes a "rarest of rare cases" or "special reasons" (for death sentence) has not to reply either by the legislature or by the supreme court.<sup>1</sup>

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But later the supreme court, the validity of the death penalty, framed certain norms for capital punishment in the case of **Bachan Singh v. the State of Punjab, AIR,1980** and said that it should be given only when the option of awarding the sentence of life imprisonment is 'unquestionably foreclosed' which it was left completely upon the court's discretion to reach this conclusion.

**Meaning of Capital Punishment** According to the Oxford dictionary, capital punishment is the legally authorised killing of someone as punishment for a crime.

1. Capital punishment is the death sentence awarded for capital offences like crimes involving planned murder, multiple murders, repeated crimes, rape and murder etc where the criminal provisions consider such persons as a gross danger to the existence of the society and provide that punishment.
2. Capital punishment or the death penalty is a legal process by the state as a punishment for a crime.

## **II. HISTORICAL BACKGROUND OF THE CONSTITUTIONAL VALIDITY OF CAPITAL PUNISHMENT**

Capital punishment is an ancient sanction. Since the enactment of the Indian penal code, in 1860 death penalty was a part of the code. It has survived since its inception, but with some more subtle changes that needed to be done due to the change of time and this was the way forward. When the code was implemented the death penalty was mandatory under section 303. But section 303 gave the death penalty only to those who, despite having been previously convicted of life imprisonment, had committed the offence of murder. There was no classification of murders as such but the only difference between sections 302 and 303 was that the mandatory death penalty would only be given to offenders who have committed the offence of murder who were convicted and serving life sentences. And the constitutional validity of the death penalty was challenged from time to time in numerous cases. or by the supreme court.

### **(A) Research Methodology**

Doctrine methodology is adopted for this project research. It involves the use of secondary data which is collected from various articles, websites, books etc. Doctrinal asks what is law on a particular issue. This type of research is known as pure theoretical research.

## **III. CONSTITUTIONAL VALIDITY OF CAPITAL PUNISHMENT**

### **(A) Definition**

Capital punishment can be defined as the lawful execution of a criminal who was sentenced to death after being convicted by a criminal court. Here legal execution indicates the observance of due process of law, which specifies that capital punishment is different from extrajudicial execution which is done without due process of law.

### **(B) Constitutional Validity**

The issue of the death penalty has been debated, discussed and studied for a long time but till now no conclusion has been drawn about whether to maintain or abolish the provision. The death penalty has been a method of punishment since time immemorial which is practised for the elimination of criminals and is used as punishment for heinous crimes.

Various countries have different attitudes towards crime in different ways. In Arab countries they choose retaliatory punishment of "eye for an eye", others have different punishments. Recently they have been a shift towards a restorative approach to punishment, including in India.

The constitutional validity of the death sentence was challenged from time to time in numerous cases starting from **Jagmohan Singh vs State of U.P., AIR, 1973** was the first case where the question of the constitutional validity of the death penalty came before the apex court. Section-302 of IPC, 1860 (death penalty to murder) was put under the test of constitutional validity. The main argument before the Supreme court was that this is a violation of several fundamental rights given to citizens and in particular article 14 as the punishment for murder in two similar cases is life imprisonment and in some cases, the death penalty is given. The Apex court rejecting this disputation held that the discretion of awarding the death penalty or giving life imprisonment. The judges have to look into the merits of the case and even the circumstances of the crime and thus section- 302 of the Indian penal code, 1860 was not held to be unconstitutional.

After the case of **Jagmohan Singh vs State of up**, the code of criminal procedure, 1898 was replaced by the code of criminal procedure, 1973 and this new code contains two provisions, sections- 235 (2)to and 354(3), which regulates the inflexion of death sentence wherever provided in the law.

The constitutional desirability of the death penalty came up before the Apex Court in **Rajendra Prasad versus the state of up, AIR,1979** the main question was not of the constitutional validity of the death penalty but the court was invited to consider as to on what grounds and circumstances death penalty can be awarded. Justice Krishna Iyer pointed out that "section-303 of penal simply gave discretion to the judges to impose either death sentence or life

imprisonment on the persons convicted for the offence for murder, without giving any guidelines as to the exercise of that discretion". He stated that "unguided discretion in this matter even in the hands of the judges was a grave risk as the question is of life and death. The matter should be reviewed because of the revocable nature of the death penalty. The error committed by the judges in sentencing a person to death was beyond correction.

The observations made by Justice Krishna Iyer establish that he was not against the complete abolishment of the death penalty but the court can impose the death sentence upon a person when it feels reasonable and necessary. It could be further said that the death penalty was constitutionally valid only if given to persons who are a persistent threat to society and if not hanged may cause further harm to society.

In **Bachan Singh v State of Punjab, AIR, 1980**, the case of **Rajendra Prasad** was overruled and it was firmly established that the death penalty for the offence of murder was constitutional. In the Bachan Singh case it was argued that the case of Jagmohan Singh needs to be considered on the following points:

1. Jagmohan case was decided keeping in mind the old code of criminal procedure whereas in the new code of criminal procedure death penalty is limited in cases of murder.
2. India is a signatory member of the international covenant on civil and political rights and according to the Covenant capital punishment has been abolished, so as a signatory member of the covenant it is admitted that the death penalty is abolished.

The court by a majority of 4:1 ruled that section 302 of the Indian penal code, 1860 and section 354(3) of the Code of Criminal Procedure, 1973 were not violative of the Indian constitution.

Justice Sarkaria in his majority judgement had taken the view that "sentencing discretion was inherent and desirable and the sentencing process would be unjust, unfair and blindly uniform if this discretion was taken away from the judges".

Justice Bhagwati in his dissenting opinion took a view that section 302 of the Indian penal code, 1860 and section 354(3) of the Code of Criminal Procedure, 1973 were both violating article-14 and 21 of the Indian constitution. He also pointed toward the changing trend in the international scenario towards the abolishment of the death penalty. He also in his view opened that the death penalty is different from all other punishments merely because of its nature as it is irreversible and this sole discretion of courts to decide the question of someone's life and death was not proper.

The decision of Bachan's Singh case still holds grounds as the courts are still awarding the death penalty but with great care and caution are awarding the death penalty only in the rarest of the rare cases.

**In Machhi Singh vs the State of Punjab, 1983** the apex court reiterated its view and held that the death penalty should be awarded in the rarest of rare cases but in this case, the apex court went a step further and gave some guidelines for determining rarest of the rare cases. The guidelines related to how the murder was committed, motive for commission of the murder, personality and magnitude of the murder and antisocial or socially abhorrent nature of the crimes.

**Kehar Singh vs Union of India, AIR,1989**, The question of the constitutional validity of the death penalty was again raised before the Apex Court relying upon the dissenting opinion given by Justice Bhagwati in **Bachan Singh's** case. The argument was rejected by the Apex Court.

**In Jumman Khan vs state of up,1991** the supreme court holding firm rejected the plea of the petitioners for the death penalty being unconstitutional for being persuasive was rejected.

#### **(C) The constitutional validity of mandatory death sentence**

The question of the constitutional validity of mandatory death sentence (section-303 of The Indian Penal Code, 1860) came up before the Apex Court in the case of **Mithu vs the State of Punjab, AIR,1983**. The main question contention for challenging the constitutional validity of the mandatory death penalty was that Sec-303 of the Indian Penal Code, 1860 is violative of article 14 (right to equality) and Article 21 (right to life) of the Indian Constitution, 1950. Since Section 303 of IPC has been declared illegal by the Supreme Court as it violates Articles- 14 and 19 of the constitution, it is no longer available to convict any person. Therefore, the conviction under this section(303) has been changed under Section 302 it is necessary to punish a person for the act as the accused is rarest in rare cases. If granted, he shall be punished with imprisonment for life.<sup>8</sup>

#### **(D) Arguments in favour of the death penalty**

Proponents of the death penalty believe that its constitutionality has been upheld not only in India but also in liberal democracies such as the US. Therefore, it would not be correct to deny the necessity of capital punishment by simply assuming that it has been outlawed in many 'civilized' countries.

The death penalty is generally seen as the best and last option to prevent serious crimes like murder. It may be noted that even the Law Commission in its 262nd report did not recommend the abolition of the death penalty.

Supporters believe that the person who commits murder takes away the right to live someone's life, due to which his right to life also ends. Thus the death penalty is a form of retribution.

The effect of any punishment should be judged not by its effect on the criminals but by its effect on the common citizens. Related to this is Kant's theory of free will too. According to this, every person is free of will and he knows that the kind of decisions he takes in favour of society, society also takes the same decisions about him.

It is implied in this theory that a person who commits a heinous crime like murder in society can only expect a decision like capital punishment from society.

Many experts believe that the death penalty reinforces the belief in society that with bad comes bad and with good ultimately good comes. This principle makes a person positive and patient in societies facing all the social problems.

#### **IV. RECENT TREND**

The death penalty still prevails in the present era and is still given in the rarest of rare cases. In the recent judgement of **Mukesh and others versus the State of NCT of Delhi, 2017 SCC** (commonly known as the Nirbhaya case) which took the entire nation by storm and caused a Tsunami in the Supreme Court. The case was purely a case of brutality where a girl was brutally gang-raped leading to her death. In this case, the motive behind committing this cruelty and the cruelty committed by the culprits were also considered.

When The incident came into the limelight it led to protests across the country, and candle matches across the country demanding justice for the victim. Considering the gravity of the offence and how the offence was committed, the rape laws were changed and the Indian penal code 1860 was amended. The death penalty was also added as a punishment in cases where during the offence of rape an injury is caused which causes the death of the victim or to be in a persistent vegetative state **-(Section-376a of IPC, 1960)**.

The death penalty was awarded to the four convicts. A lot of efforts were made by the convicts till the last minute to stay the death sentence or reduce the sentence but to no avail. The Apex Court didn't stay the execution and after all the legal remedies available they were hanged.

##### **(A) Amnesty International's report on the death penalty**

In a report to be published in April 2020, Animacy International stated the following facts related to the death penalty all over the world. Amnesty International reported that 657 executions of the death penalty were implemented in 20 countries in 2019, a 5% reduction (at least 690) compared to 2018. This is the lowest level of capital punishment implementation in the past decade.

China, Iran, Saudi Arabia, Iraq and Egypt saw the highest implementation of the death penalty. Death penalty figures have been hidden by China. Excluding China, 86% of all reported executions took place in just four countries – Iran, Saudi Arabia, Iraq and Egypt.

The death penalty was not implemented in Bangladesh and Bahrain in 2018 but was reintroduced in 2019. While Afghanistan, Taiwan and Thailand implemented the death penalty in 2018, these countries did not implement it in 2019. The Central African Republic, Equatorial Guinea, The Gambia, Kazakhstan, Kenya and Zimbabwe took initiatives to end the death penalty in 2019.

Barbados also removed the mandatory death penalty from its constitution. New Hampshire in the United States of America became the 21st US state to abolish the death penalty for all crimes. The Gambia, Kazakhstan, Malaysia, the Russian Federation and Tajikistan continued to adhere to official moratoriums on the implementation of the death penalty.

At the end of 2019, 106 countries (most of the world's states) had abolished the death penalty in law for all crimes, and 142 countries (more than two-thirds) had abolished the death penalty in law or practice.

Amnesty International said that in 24 countries including India, a pardon has been granted in the case of the death penalty. At least 26,604 people have been sentenced to death globally at the end of 2019.

## **V. CONCLUSION**

If we look at the historical background regarding the constitutional validity of the death penalty, it was present since ancient times. The Indian penal code, 1860 which was made during the time of British India, also had the presence of capital punishment. Although for the past several years, the death penalty (abolition) has been a matter of debate in the world, while some countries have abolished the death penalty but in some countries, the death penalty is still given. India is also one of those countries where the death penalty is still given. But in India, the death penalty is given only in the "rarest of rare cases" which is considered completely constitutional. That is, we can say that the death penalty has been given constitutional validity in the "rarest of rare

cases". That is why the death penalty has neither been abolished completely nor made compulsory in India. In conclusion, the author would like to conclude that the death penalty should not be abolished nor should its constitutional validity be questioned as can be seen in the Nirbhaya case that the death penalty should be stayed or commuted by the convicts till the last minute. Many efforts were made for this but to no avail. The Apex Court did not stay the execution and after all available legal remedies, the four convicts were hanged.

In 2015, the Law Commission called for the abolition of the death penalty for ordinary crimes, and activists continue to argue for abolishing it altogether. Political will in India is still bound by populism. However, the constitutionality of the death penalty will continue to be challenged and, sooner or later, the Supreme Court will have to answer whether the absence of a political will is sufficient ground to override the right to life.

## **VI. RECOMMENDATIONS**

The author would like to recommend that the death penalty should never be abolished and should be given only in the rarest of rare cases. Even though many countries around the world and even India are a signatory to the international covenant on civil and political rights and according to the covenant, the death penalty should be abolished, many of the signatories have rejected it. The argument that capital punishment is violated is articles- 14, 19 and 21 of the Indian Constitution and should be abolished but it is given in the rarest of rare cases and what are the rights of those whose rights were violated by these criminals. The death penalty should never be abolished in India keeping in mind the rights of the victims and the abuse and atrocities that have happened to them at least in heinous crimes. Avi Singh is an advocate who is the Additional Standing Counsel for criminal cases for the Government of the NCT of Delhi.

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