

Capital Punishment: Law and Ethics

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ABSTRACT

The death penalty, sometimes known as capital punishment, is the ultimate sanction in every lawful and democratic society. However, if you kill a citizen in the name of the law, you have committed murder. We should stop looking for the perpetrator and instead concentrate on safeguarding against future abuse. Over a thousand people are executed in China every year, while in India, the death penalty is seldom used and sentences are often reduced to life in prison. There are similarities between the two countries in terms of procedure, capital punishment, and statutes, but in China, once the death sentence is imposed, it cannot be reversed. In light of these considerations, the United Nations (UN) has officially declared its opposition to capital punishment. The United Nations has also declared that executing an innocent person in the name of justice is incompatible with human dignity. Humans have no right to choose who lives and who dies. That's why it's preferable to take an alternative tack, like the reformatory one, rather than executing a criminal so that he might make amends and go on with his life peacefully.

KEYWORDS: death penalty, capital punishment, human rights, morality, international perspectives, ethics

INTRODUCTION

In the past, communities have used the death penalty as a sanctioned means of dealing with offenders and those who oppose the established order, whether on religious or political grounds. Formerly, carrying out the death sentence was exceedingly cruel, and executions of the capital penalty were often public.

Only 36 nations still utilise the death penalty today, while 103 have officially abolished it, 6 have done so with respect to regular crimes but not war crimes, and 50 have done so de facto (meaning they haven't used it in at least ten years or it's been suspended).

It's no secret that capital punishment is divisive across national boundaries and between ideological and cultural groups. "Article 2 of the Charter of Fundamental Rights of the European Union" outlaws the death penalty in all member states of the European Union. The 47 member nations of the Council of Europe have a stance against the death sentence.

Towards that end, "the United Nations General Assembly has passed nonbinding resolutions in 2007, 2008, 2010, 2012, and 2014 calling for a worldwide moratorium on executions. Despite the fact that many countries have done away with the death sentence, the

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four most populous countries in the world—China, India, the United States, and Indonesia—are just a few of the many that still use it although in India and in many US states it is rarely employed. These four countries have routinely cast their votes in opposition to General Assembly resolutions.”

Evolution of capital punishment in India

The death sentence was a part of India's Penal Code when it gained independence in 1947. This code had been in effect since 1861. While the Indian Constitution was being established between 1947 and 1949, several members of the Constituent Assembly advocated for the abolition of capital punishment. Throughout the next two decades, abolitionist private members' bills were introduced in both the Lok Sabha and the Rajya Sabha, but neither chamber ever passed them. Between 1950 and 1980, between 3,000 and 4,000 people were put to death, according to estimates. Estimating the total number of persons who were given death sentences and put to death between 1980 and the mid-1990s is more problematic. An average of two or three persons were reportedly hung each year. The Supreme Court decided in the 1980 Bachan Singh verdict that capital punishment should

only be employed in the "rarest of rare" circumstances, although the criteria for determining whether cases qualify as "rarest of rare" remain unclear.

Position in India

India voted against a United Nations resolution that would have put a moratorium on the death sentence because it would violate both Indian law and countries' inherent ability to choose their own legal standards.

It is India's highest criminal punishment. It is given for the most egregious of offences. According to Article 21, no Indian citizen may be denied their "right to life." "The Indian Penal Code specifies the death penalty for a wide range of crimes, including murder, war against the government, criminal conspiracy, dacoity with murder, support for a mutiny, and anti-terrorism. The Presidential pardon of a death sentence is a matter of discretion. *Bachan Singh vs State of Punjab*,¹ the Court held "that capital punishment will only be given in rarest of rare cases."

In matters involving the death penalty, only the president may commute the sentence. Whenever a Sessions Court issues a death sentence, the case must be reviewed and approved by the High Court. A convicted criminal in India has the option of appealing his case all the way to the Supreme Court, and if that fails, he may file a "mercy plea" with the country's president. All requests for clemency by those who have been condemned to death must be processed in accordance with the method outlined in the guidelines that each state must follow. The Ministry of Home Affairs is responsible for defining the steps inmates must take to file for special authorization to appeal to the Supreme Court. According to Article 72 of the Indian Constitution, "the President of India has the power to commute, suspend, remit, or pardon the sentence of any person convicted of an offence."

In the past 14 years only 8 have been hung till death:

1. Dhananjay Chatterjee (August 14, 2004).
2. Mohammad Ajmal Amir Kasab (November 21, 2012).
3. Afzal Guru (February 9, 2013).
4. Yakub Memon (July 30, 2015).
5. Akshay Thakur, Mukesh Singh, Pawan Gupta and Vinay Sharma (March 20, 2020)

Execution Methods Followed in India

There are two methods of execution in India and they are:

Hanging

In India, the act of hanging is always used as the method of execution for those who are sentenced to death. Godse was the first person to be executed in India after independence for his role in the killing of Mahatma Gandhi. He was found guilty of the crime and sentenced to death. The highest court in India came to the conclusion that the application of the death penalty should be reserved for very rare instances.

Shooting

The death penalty is also available under the Army Act and the Air Force Act. The death penalty may be imposed by a court martial under Provision 34 of the Air Force Act, 1950 for the offences listed in subsections (a) through (o) of that section. The Act specifies the format of a death sentence in Section 163 as follows:

"A court-martial has the power to decide whether an offender should be hanged until dead or shot to death when handing down a death sentence."

The Court Martial might then determine whether the condemned person would be executed by hanging or by firing squad. Many of the provisions of the Army Act of 1950 and the Navy Act of 1957 are similar to those of the Air Force Act of 1950.

Capital Punishment in Various Legislation in India

"The Indian Penal Code of 1860, the Arms Act of 1959, the Narcotic Drugs and Psychotropic Substances Act of 1985, the Commission of Sati (Prevention) Act of 1987, the Air Force Act of 1950, the Army Act of 1950, and the Navy Act of 1957" all include the death penalty as a possible punishment. Anyone who intentionally kills another person using an explosive device (such as a bomb, dynamite, or similar device) with the intent to endanger India's unity and integrity or to strike dread in the people is subject to the death sentence, as was the case in the "Prevention of Terrorism Act of 2002." It's also worth noting that judicial discretion is completely removed from the equation when it comes to imposing punishment since the death penalty is the sole option under "the Arms Act, the NDPS Act, and the Scheduled Caste and Scheduled Tribe Act." After the ruling in *Mithu v. State of Punjab*, it's unclear if these clauses will pass constitutional muster. Since the crime under "Section 303 of the Indian Penal Code" was penalised to execute its instruction, the case resulted in an unfair, unjust, and irrational method whereby a person's life was taken. This was found to be in violation of Articles 21 and 14 of the Constitution of India.

¹ AIR 1980 SC 898

Death Penalty Crimes under Indian Penal Code

Sections	Nature of crime
“120B of IPC	Being a party to a criminal conspiracy to commit a capital offence
121 of IPC	Treason for waging war against Government of India
132 of IPC	Abetment of Mutiny actually committed
194 of IPC	Giving or fabricating false evidence with intent to procure a conviction of a capital offence
195A of IPC	Threatening or inducing any person to false evidence resulting in the conviction and death of an innocent person
302 of IPC	Murder
307 (2) of IPC	Attempted murder by a serving life convict
364A of IPC	Kidnapping for Ransom
376A of IPC	Rape and injury which causes death or leaves women in a persistent vegetative state
376AB of IPC	Rape of a child below 12 years
376DB of IPC	Gang rape of a child below 12 years of age
376E of IPC	Certain repeat offences in the context of rape
396 of IPC	Dacoity with murder – in cases where a group of five or more individuals commit dacoity and one of them commits murder in the course of that crime, all members of the group are liable for the death penalty.”

Category of Offenders, Excluded from Capital Punishment**Minor**

No one under 18 at the time of a crime may be put to death in India.

Pregnant Women

A pregnant woman facing the death penalty must be given clemency under a law that went into effect in 2009.

Intellectually Disabled

The Indian Penal Code provides for the death sentence in cases where a criminal was either mentally incapacitated at the time of the crime or lacked the ability to comprehend the nature of the conduct or its wrongness.

Constitutional law

Everyone has the right to life and freedom under the Constitution, including the right to live a dignified life, as stated in Article 21. For the sake of peace and order, the state may even restrict a person's ability to stay alive. But this procedure must be “**due process**” as held in India’s *Maneka Gandhi v. Union*.² Taking a human life should be done in a way that is just, fair, and reasonable since every life is precious. Simply said, this is the foundational concept of our Constitution:

- The use of capital punishment should be reserved for the rarest of crimes.
- The death sentence should be used sparingly and only in the most heinous of instances.
- The accused must be given the opportunity to present their side of the story.
- The sentence must be adjusted based on the specifics of each case.
- Execute a High Court death sentence. A person may appeal to the Supreme Court under Article 136 of the Constitution and Section 379 of the Criminal Procedure Code.
- Under Articles 72 and 161 and Sections 433 and 434 of the Criminal Procedure Code, A criminal defendant may request a mercy, commutation, or sentence reduction from the President or Governors. Articles 72 and 161 provide the President and governor discretionary merits-based power. Judiciary bodies must ensure the President or governor obtains all required papers and evidence.
- The governor's authority shouldn't be based on race, religion, caste, or politics.
- Articles 21 and 22 provide a fast and fair trial and ban torture. Articles 21 and 19 of the Constitution provide the accused freedom of speech and expression while in detention and the right to legal representation.

Process**Trial court**

Section 235 judgments are issued once all necessary processes have been completed in accordance with the Code of Criminal Procedure.³ There must be a pre-sentencing hearing in accordance with Section 235 if the defendant is found guilty (2),⁴ Criminal Procedures Code. There is a provision for "special grounds for death sentence" in the Code of Criminal

² 1978 AIR 597, 1978 SCR (2) 621

³ "Section 235 in The Code Of Criminal Procedure, 1973".

⁴ "Section 235 in The Code Of Criminal Procedure, 1973".

Procedure (1973). In accordance with the maxim " In cases when the death penalty is imposed, as is the case under Section 354(3) of the Code, the court must provide "Special reasons" for the sentencing and explain why a lesser punishment would not achieve the same aims of justice.⁵

Confirmation by High Court

Until a higher court confirms the validity of a death sentence issued by a Court of Sessions, it has no force of law. According to Section 368 of the Code of Criminal Procedure, The Supreme Court has the authority to uphold a death sentence, inflict any other punishment mandated by law, reverse a conviction, declare the prisoner guilty of any offence for which the Court of Sessions may have found them guilty, retry the case using the same or new evidence, or acquit the offender.⁶ Under Section 386 (c) of the Criminal Procedure Code, A death sentence issued by the Court of Session may be upheld by the High Court. The defendant has the right to request a new sentencing hearing before the High Court if he or she believes the sentence handed down by the Court of Session is too harsh.⁷ If the State or the Federal Government feels that the sentence handed down by the Court of Session is excessively mild, they may use Section 377 of the Criminal Procedure Code to direct the Crown to file an appeal with the High Court.⁸ The High Court may also increase the sentence handed down by the Court of Session without an appeal being filed, using its suo moto revisional powers under "Section 397, CrPC read with Section 401, CrPC."⁹ Section 367 of the Code also gives the High Court the authority to undertake or order an investigation into, or the taking of further evidence on, any matter relevant to the defendant's guilt or innocence.¹⁰ A defendant's presence during this investigation or any subsequent gathering of evidence is not required unless the High Court rules otherwise. The High Court has the power to try cases, impose the death penalty, and transfer cases from the jurisdiction of subordinate courts in accordance with Section 407 of the Criminal Procedure Code.¹¹

⁵ "Section 354(3) in The Code Of Criminal Procedure, 1973".

⁶ "Section 368 in The Code Of Criminal Procedure, 1973".

⁷ "Stages in Death Penalty Cases". *Project 39A*.

⁸ "Section 377 in The Code Of Criminal Procedure, 1973".

⁹ "Section 401 in The Code Of Criminal Procedure, 1973".

¹⁰ "Section 367 in The Code Of Criminal Procedure, 1973".

¹¹ "Section 407 in The Code Of Criminal Procedure, 1973".

Special leave petition

There is a process for appealing death sentences under Article 136 of the Constitution, known as a Special Leave Petition (SLP), which may be submitted after the High Court has upheld the sentence.¹² In accordance with Article 136 of the Constitution, the Supreme Court has the option to give exceptional permission to appeal after evaluating the issues involved. The Supreme Court uses its authority granted by Article 136 to determine whether or not the special leave petitions should be considered as appeals. Two cases, "Babasaheb Maruti Kamble v. State of Maharashtra (November 2018) and Jitendra @ Jeetu v. State Of Madhya Pradesh & Others (July 2020)".¹³ "It was opined that in such cases a deeper scrutiny coupled with reasons in support of death penalty should be given by the Court."

Review and reopening of a review

Within 30 days after the date of a Supreme Court decision or order, a petition may be filed with the Supreme Court requesting a review under Article 137 of the Constitution.¹⁴ As per the Supreme Court in "Mohd Arif @ Ashfaq v. The Registrar," Supreme Court of India & Ors, September 2014.¹⁵ All death penalty case review petitions must be considered in open court, however the hearing length is capped at 30 minutes. That kind of approach would be fair and equitable. All cases involving a death sentence where a review was rejected but the sentence had not yet been implemented, including those filed under the Terrorist and Disruptive Activities (Prevention) Act, would be considered by a bench of three judges using a specific method.¹⁶ "Various cases such as M. A. Antony @ Antappan v. State of Kerala, April 2009,¹⁷ Md. Mannan @ Abdul Mannan v. State Of Bihar, April 2011,¹⁸ Ambadas Laxman Shinde And Ors V. The State Of Maharashtra, October 2018 were reopened after being dismissed earlier to be heard in the open court after the above judgement, which resulted in commutations and an acquittal."¹⁹

¹² "Article 136 in The Constitution Of India 1949".

¹³ "Babasaheb Maruti Kamble vs The State Of Maharashtra on 1 November, 2018".

¹⁴ "Article 137 in The Constitution Of India 1949".

¹⁵ "Mohd. Arif @ Ashfaq vs The Reg. Supreme Court Of India & Others on 2 September, 2014".

¹⁶ "University of Minnesota Human Rights Library". *hrlibrary.umn.edu*. Retrieved 7 October 2020.

¹⁷ "M.A.Antony @ Antappan vs State Of Kerala on 22 April, 2009".

¹⁸ "Md.Mannan @ Abdul Mannan vs State Of Bihar on 20 April, 2011".

¹⁹ "Ambadas Laxman Shinde vs The State Of Maharashtra on 31 October, 2018".

Curative petition

In "Rupa Ashok Hurrah v. Ashok Hurrah & Ors," the Supreme Court ruled against the petitioners and in their favour in April 2002 after the review was denied.²⁰ "There was a breach of natural justice or reasonable perception of bias on the part of a judge; thus, the Supreme Court may grant a curative petition to reexamine its decision or order." The Supreme Court in the said case held that "It is possible for it to review its verdicts in the exercise of the inherent powers that it has in order to avoid misuse of its process and to correct serious violations of justice."²¹ If the original bench that heard the review petition is still sitting, then the Supreme Court's three most senior justices would hear the curative petition. Unless the Supreme Court rules differently, the curative petition will be resolved without oral arguments.

Mercy

Articles 72 and 161 of the Indian Constitution provide the President and Governor the ability to commute, pardon, suspend, remit, or reduce punishments. Death row inmates may petition the president or governor for clemency.²²

One of the many different legal difficulties that have often surfaced in connection with mercy petitions is the question of delay. In "V. Sriharan @ Murugan v. Union of India, February 1947,"²³ The Supreme Court reaffirmed that "Article 72/161's mercy system offers convicted convicts and his family members a chance for a life sentence commutation, and the government should use the power of clemency given by the constitution in some form within a fair amount of time."²⁴ A three-judge bench of the Indian Supreme Court ruled that a substantial mitigating factor in a plea for commutation is a delay in carrying out a death sentence. This judgement marks a watershed moment for the abolition of capital punishment in India, since it recognised the importance of a delay in execution as a mitigating factor in a commutation petition. The court may evaluate the state's dilatory behaviour and whether or not the delay served any useful purpose in deciding whether or not to grant a mercy plea.²⁵ Though the

unreasonable delay may be a substantial element, it by itself cannot make the execution illegal.²⁶

Death warrant

The "death warrant" or "black warrant," as it is often known, may be found in Form No. 42 of the Second Schedule of the Code of Criminal Procedure, 1973, and is used in situations when the death penalty is imposed.²⁷ Once the prison warden verifies that the death sentence has been carried out, he or she is required by law to submit this paperwork back to the court. "According to the Supreme Court's ruling in *Shabnam v. Union of India*, May 2015, which upheld the Allahabad High Court's ruling in *PUDR v. Union of India*, January 2015, it is illegal for a sessions court to issue a death warrant before the conclusion of the judicial and administrative procedure."²⁸ In *Shabnam v. Union of India*, the Supreme Court held that A death penalty case must be interpreted in accordance with the principles of natural justice. All appeal, review, and mercy petition options should be made accessible to the convicted person. Before signing a death warrant, it is necessary to follow the standards set out in the PUDR case."

Case laws

In *Jagmohan v. State of U.P.*,²⁹ the Supreme Court held "Articles 14, 19, and 21 were not in violation of the death penalty. It was reported that the court decided between capital punishment and life in prison depending on the specifics of the case presented at trial. The decision to execute followed all legal requirements, as specified in Article 21." But, in *Rajendra Prasad v. State of U.P.*,³⁰ the judge held that "It would be hard to justify the death penalty without proof that the offender posed a significant risk to the public. The eminent jurist argues that capital punishment should be eliminated except in cases of white-collar crime. In addition, it was decided that the application of I.P.C. 302 to a homicide conviction did not run counter to the constitution's most fundamental guarantees."

But, in *Bachan Singh, v. State of Punjab*,³¹ "Article 21 of the Constitution establishes the State's right to take a life in compliance with the due process requirements of the law. The Supreme Court's constitutional bench has upheld this provision. The death punishment for murder under Section 302 I.P.C.

²⁰ "Indian Supreme Court Changes Stance on Death Penalty: Holds Delay to be a Ground for Commutation". *OHRH*. 5 February 2014. Retrieved 7 October 2020.

²¹ "Smt. Triveniben & Ors vs State Of Gujarat & Ors on 7 February 1989".

²² "Thirty Fifth Report" (PDF). *Law Commission of India*.

²³ 2014 (11) SCC 1.

²⁴ *Shatrughan Chauhan v. Union of India*, January 2014 WRIT PETITION (CRIMINAL) NO. 55 OF 2013

²⁵ "Triveniben V. State of Gujarat & Ors, February 1989"

²⁶ [1989] 1 SCC 678

²⁷ "FORM No. 2, WARRANT OF ARREST"

²⁸ "Peoples' Union Democratic Rights ... vs Union Of India Thru' Secy. & 3 ... on 28 January 2015". *Indian Kanoon*.

²⁹ 1973 1 SCC 20

³⁰ 1979 3 SCC 646

³¹ 1980 2 SCC 684

also does not run counter to the Constitution's essential nature.”

Why the Capital Punishment should be abolished

Those found guilty of the most terrible crimes, such as murder and rape of children, are often sentenced to death. This punishment is traditionally meted out in India by "hanging by the neck" until the offender dies. Various methods like the electric chair, gunshot, and others are utilised in different nations.

In recent years, more people have protested the death sentence, even though it's normal for murderers. Some say the death sentence is barbaric, like "an eye for an eye" and "tooth for a tooth." A civilised country has no place for it. A judge's error might lead to the death of an innocent person.

When an innocent life is lost, it is often argued that the death penalty amounts to nothing more than judicial murder. Additionally, contrary to popular belief, the death penalty does not serve as a deterrent. Despite this, murders and other atrocities have persisted. Due to these beliefs, there has been a growing trend in recent years among Western nations to impose life sentences rather than the death penalty. In general, Muslim nations remain superior in this regard.

In spite of widespread calls for its abolition, death punishment remains legal in India. And yet, the use of such harsh measures has decreased even in India. It is currently given only to the most hardened of offenders, and then only if it can be shown that the murder was not carried out on the spur of the moment or in response to little provocation, but was instead deliberate and calculated. Only the death penalty, it is believed, can achieve these goals of justice, and it is just and fitting that these menaces to society be exterminated. Those who engage in antisocial behaviour should be met with the strictest penalties imaginable, particularly if they are repeat offenders.

Therefore, it is appropriate that India has not yet abolished the death penalty but has instead used it with more restraint. There is no valid social purpose for the practise of death punishment, according to sociologists. The killer takes away the breadwinner from the victim's family. It does the victims' families no good to see the killers hanged; it just adds to their suffering. Instead, we take away the main source of income for another family. So, according to the sociologists, the killer should serve a life sentence and be required to provide for both his own family and the victim's. This would save a great deal of pain, hunger, and famine for defenceless women and children. In addition, the offender would be given a chance to change his ways if such measures were put

in place. He would be closely monitored, and if his behaviour improves, he may rejoin society as a productive member.

Such opinions include a lot of truth and should be taken into account before deciding whether to do away with or keep the death penalty. But those who perpetrate the rarest of the rare crimes, such as child rape, gang rape, terrorism, etc., should be subject to the death penalty.

Retention

The death penalty serves as a strong deterrent. The mental feast that motivates some murderers would disappear if they weren't punished for their crimes by death. "Do we want more murders or fewer murders in our country?" All sentences are handed down for the greater good of society's safety and protection, so that all people may live in harmony. To provide this safety, the death penalty is essential.

Second, the eradication of criminals. The death sentence is the only effective deterrent against some types of very hazardous crime that threaten public safety.

Three, there is a chance that the killings may happen again. The public has to be safeguarded against the possibility that a murderer who is not killed may be released and perpetrate more murders once they regain their freedom.

Conclusion

The idea of death as punishment has always troubled the human imagination. The Criminal Justice Administration in India requires that any death sentences meet all international human rights standards.

The execution of Dhananjay Chatterjee in 2004, after he had been in a death cell for fourteen years, and the execution of Md. Afzal in 2006 rekindled the debate between those who support and those who oppose the death penalty over issues like the need for speedy justice, fair trials, protecting the human rights of those under death sentence, and preserving the dignity of those who have been convicted of a crime.

It is impossible to find any consistent approach to the matter in the court rulings, as P.N. Bhagwati, J. said in *Bachan Singh v. state of Punjab*. As a result, the court or bench makeup plays a major role in determining whether the sentence will be death or life in prison. Earlier, we saw that there are no hard and fast rules to calculate delay and other considerations in the identical situations involving execution and commute of death sentences into life imprisonment, as shown by a number of judgements. The fourteen-year delay in Dhananjay Chatterjee's execution of his

death sentence was not considered a violation of human rights or fair procedure, unlike the two-year, two-and-a-half-year, three-year, and nine-year delays in execution that led to the commutation of their sentences to life in prison. Does this not run counter to the Constitution's protection of the right to life and freedom in article 14 and the guarantee of the right to freedom of religion in article 21?

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