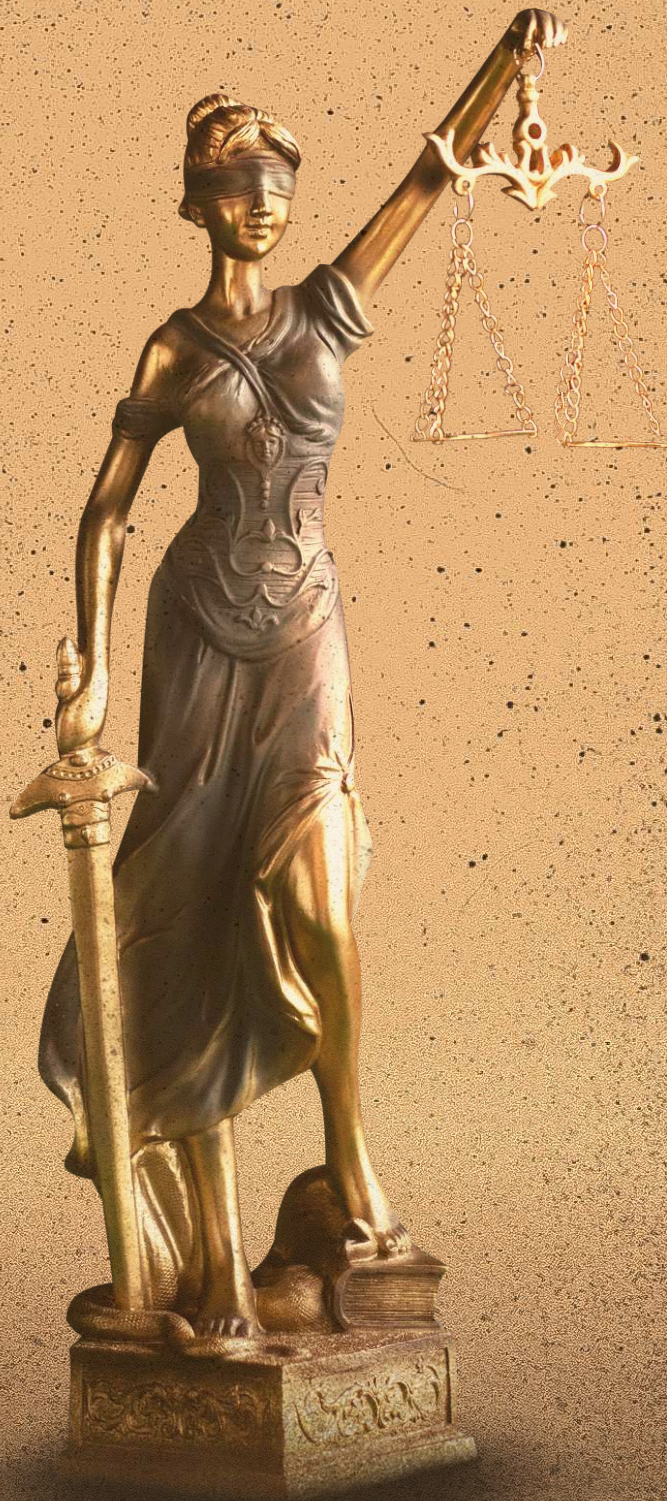


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**DEATH PENALTY – A Legal Analysis****Author** - NOOPUR GARG, STUDENT AT HIDAYATULLAH NATIONAL LAW UNIVERSITY**Best Citation** - NOOPUR GARG, DEATH PENALTY – A Legal Analysis, *ILE Journal of Equity and Justice*, 1 (1) of 2023, Pg. 71-76, ISBN - 978-81-961791-3-7.**ABSTRACT**

Death penalty is the highest form of punishment which can be granted to an accused. It comes the idea of an eye to eye principle and if a person has committed such a crime which has claimed someone's life or any such equivalent crime must repent by giving his own's life. In this article, it is tried to understand the history of death penalty along with its need and importance. it has also mentioned the international scenario as well Indian laws regarding death penalty.

**KEY WORDS** : Death Penalty, Sexual Offences, Murder, Capital Punishment

**I. INTRODUCTION**

Execution of a person who has been executed after being found guilty by a court of law derived from judicial decisions is capital punishment, commonly known as the death penalty. It is important to distinguish between the death penalty and extrajudicial killings that take place without a court order. Although the imposition of the penalty (even when it is sustained on appeal) does not necessarily result in execution, the terms "death penalty" and "capital punishment" are sometimes used interchangeably. This is because there is a chance that the sentence could be commuted to life in prison.

**II. HISTORICAL CONSIDERATIONS**

Although Plato thought that it should only be used for the incorrigible, the death penalty was frequently utilised in ancient Greece under the rules of Draco for crimes like murder, treason, arson, and rape. Although citizens were excused for a brief period of time during the republic, the

Romans also utilised it for a wide variety of transgressions. Most of the major religions in the world have at one point or another approved of it. For instance, adherents of Judaism and Christianity have asserted that the biblical scripture supports the death penalty. Yet, many offences that do not result in the loss of life, such as adultery and blasphemy, carry the death penalty.

Several nations used the ancient legal maxim *Lex talionis* (talion), which is found in the Babylonian Code of Hammurabi and means "an eye for an eye, a tooth for a tooth, a life for a life," to ensure that the death penalty wasn't used arbitrarily. According to Islamic law as outlined in the Qur'an, the death penalty is acceptable. Murder is not one of the "add" (fixed) crimes for which the Qur'an specifies the death sentence, like robbery, adultery, and abandonment of Islam. Instead, murder is dealt with as a civil offence and is governed by *qisas's* law.

In the past, executions were frequently witnessed by enormous audiences, and the dismembered remains were frequently left on display until they decomposed. Public executions were outlawed in England in 1868, but they persisted in some US states up until the 1930s. The European Union considers this practise to be so inhumane that, in accordance with a binding decision by the European Court of Human Rights (1989), EU nations may only extradite a defendant charged with a capital offence to a nation that employs the death

penalty if assurances are provided that the death penalty will not be sought.<sup>58</sup>

### III. ANALYSIS

In a succinct formulation, the primary justifications for favouring the death penalty appear to number about six:

- The death penalty is necessary for justice;
- it upholds moral order and serves as an emblem of public authority;
- it is significantly less expensive than life in prison;
- it is a more powerful countermeasure and thus better prevents crime;
- it more effectively renders the offender incapacitated;
- and in many situations, it is the only practical option.<sup>59</sup>

Deterrence theory's main goal is to stop people from misbehaving by instilling fear of punishment or other negative consequences.<sup>60</sup> This hypothesis is based on the assumption that individuals are reasonable and prudent, and as a result, they will determine that the profit they will obtain from criminal conduct will be significantly worse than the suffering they will experience as a result of legal repercussions.<sup>61</sup>

Everybody hates dying, according to the 35th Law Commission of India Report ("Capital Punishment," 1967), is an important factor which supports the death penalty.<sup>62</sup> Following the precedent-setting decision in *Bachan Singh v. State of Punjab*<sup>63</sup>, the Supreme Court frequently cited the deterrence argument to support the

imposition of the death penalty. As was previously mentioned, the death penalty inflicted on a number of sexual criminals had little deterrent effect. Following the announcement of the death punishment for those responsible for the murder and rape of Nirbhaya, there were numerous allegations of sexual assault in various locations around the nation. Sexual attacks had also happened to international nationals. The tourism authority has additionally advised international female visitors not to venture out alone at night. Despite the fact that sexual offenders have been given the death penalty in cases like that of *Dhananjay Chatterjee*<sup>64</sup> and *Nirbhaya*, all these problems are still present. Even the same crimes are committed repeatedly despite the Justice Verma Committee Report's recommendation to impose the death penalty for sexual offences committed frequently.

In terms of committing crimes related to terrorism and engaging in hostilities, the criminals are essentially those who do not value their life. Among the prisoners were the suicide bombers and well-trained terrorists who wouldn't back down even after an attack from Special Forces or the Army. Someone who is mentally determined to die and does not worry about their life can never be deterred by the death penalty. As a result, the death sentence has been utterly ineffective at maintaining societal deterrence against all forms of crime.<sup>65</sup>

### IV. ABOLISHMENT OF DEATH PENALTY

There are 140 nations that have either legally or practically abolished the death penalty, according to both the Law Commission Report and the UN Report. 11 China, Iran, Pakistan, Indonesia, and the United States of America are among the very small number of nations that still use the death sentence. Although though they still have the death penalty, there have only been a relatively small number of

<sup>58</sup> Hood, Roger, capital punishment, Encyclopaedia Britannica, 9 Mar. 2023, <https://www.britannica.com/topic/capital-punishment>. (Last visited at 5 march, 2023)

<sup>59</sup> Venturi, Giulio Carlo. (2016). The Death Penalty.

<sup>60</sup> Law Commission of India, 35th Report, 1967, Ministry of Law, Government of India, at para 300 and Law Commission of India 262<sup>nd</sup> Report, Ministry of Law, at para 4.3.1.

<sup>61</sup> Ibid.

<sup>62</sup> Hood & Hoyle argue that although it is possible that some people refrained from committing murder because of fear of execution, this is an insufficient basis to conclude that existence of the death penalty deters people from committing murders. See: Roger Hood & Carolyn Hoyle, *Myth of Deterrence*, in *MOVING AWAY FROM THE DEATH PENALTY: ARGUMENTS, TRENDS AND PERSPECTIVES* 67 (United Nations Commission on Human Rights, 2014).

<sup>63</sup> (1980) 2 SCC 684.

<sup>64</sup> *Dhananjay Chatterjee v. State of W.B.*, (1994) 2 SCC 220: (1994) 1 SCR 37.

<sup>65</sup> *Imprisonment for Life and Fine: A Viable Alternative to Death Penalty*, (2017) 7 GJLDP (April) 76

executions recently, with only a handful of the remaining nations being special because of certain peculiar circumstances. Only the most extreme cases should receive a penalty; otherwise, none should. Due to India's varied levels of illiteracy, education, poverty, and other circumstances, as well as the general lack of clarity and uniformity in public opinion, the 35th Law Commission of India recommended that the death sentence be kept. In order to maintain the death penalty, the main focus was placed on the nation's various levels of backwardness because it was thought that this would create a rigorous deterrent to crime. If we look at the court rulings in this area, it used to be said that the judge had to give a cause for not imposing the death sentence; however, the tendency has changed, and it is now said that the capital punishment should only be applied in the most extreme circumstances. And now that we are fully aware of global trends regarding the death penalty—where even the least developed countries have done away with the death sentence for all offenses both in law and practice—it appears that doing away with the capital punishment in India is not necessarily impossible<sup>66</sup>.

#### **V. DEATH PENALTY REGARDING SEXUAL OFFENCES**

It is also important to take into account how the general public feels about applying the death penalty for horrific crimes like rape and savage murder. The Justice Verma Committee Report on Sexual Offenses, which advocated the death penalty for repeat and habitual offenders, was brought to light by the Nirbhaya case in Delhi as an example. When the public demanded that all of the Nirbhaya case's defendants, including the minor, be hanged, the Justice Verma Committee Report advocated the death penalty. The Criminal Law (Amendment) Act of 2013 included a number of sections, including Section 376 A, which permitted the imposition of the death penalty

for repeat offenders, and Section 376 E, which permitted for the death penalty to be given in cases where the victim of rape died as a result of the offence. As a result, it is clear that the Justice Verma Committee on Changes to Criminal Code supported increasing the penalties for some sexual offences and rape. The Criminal Reform Act of 2013 also broadened the application of the death penalty.

The death penalty was only kept for crimes related to terrorism and abolished for all offences after public outcry over Yakub Memon's execution; the Justice Verma Committee Report was not taken into account. The Law Commission of India Report took precautions by keeping the death penalty for terrorism-related offences and waging war, which might have otherwise sent the wrong message to the general population by creating doubts about the methodology followed and the implementation of mind by the judiciary in g. This has actually created ambiguity in the minds of the public, and it is unclear whether the Justice Verma Committee was influenced by the general populace mood and bulk demand for trial for murder for sexual predators or the Law Commission of India report.

#### **VI. INTERNATIONAL LAW AND DEATH PENALTY**

As many States have ratified international agreements that call for the elimination of the death penalty, it is their duty under international humanitarian law to pass legislation to that effect. As a result, the death penalty has already been abolished in a number of States (abolitionist countries). In 2015, four nations—Fiji, Madagascar, the Republic of Congo, and Suriname—abolished the death sentence for all crimes, according to an Amnesty International report. 102 nations in total—the bulk of the world's states—have done so. A specific criminal code that eliminates the death sentence was adopted by Mongolia in 2015 and will go into

<sup>66</sup> Imprisonment for Life and Fine: A Viable Alternative to Death Penalty, (2017) 7 GJLDP (April) 76

action later in 2016<sup>67</sup>. A plurality of the nations in the world—102 in total—have done so. A new criminal rule that eliminates the death sentence was adopted by Mongolia in 2015 and will go into issue later in 2016. Another study found that 36 nations still apply the death penalty actively, 103 have completely abolished it, six had done so for all crimes save in certain cases, and 50 have done so in practise after ceasing to use it for at least a decade or while under a moratorium.<sup>68</sup>

It is significant to note that different execution techniques are employed all across the world, including beheading, hanging, fatal injection, and gunshot. It is quite astounding and distressing to learn that many nations with high rates of executions and death sentences did not follow international norms for fair trials. In certain instances, such as in Bahrain, China, Iran, Iraq, North Korea, and Saudi Arabia, this involved forcing "confessions" out of people by torture or other cruel treatment. For crimes that do not qualify as "deliberate killing," which is the threshold for the "most serious crimes" as defined by international law and regulations, people are nonetheless being given death sentences and put to death. At least 12 nations in Asia and the Middle East were involved in drug-related crimes, and other offences included "adultery" (Maldives, Saudi Arabia), "economic crimes" (China, North Korea, Vietnam), "apostasy" (Saudi Arabia), and "insulting the prophet of Islam" (Iran).<sup>69</sup>

## VII. INDIAN LAWS

The Indian Constitution's Article 51(c) makes it quite apparent that India must work to uphold its duties under international law and treaties.<sup>70</sup> It implies that India must uphold its commitments under international norms (customs and treaties), including those relating to human rights. As India has ratified the ICCPR,

1966, any time it imposes the death penalty, it must do so in accordance with article 6 (Right to life) of the ICCPR, 1966.

In the argument over whether or not to abolish the death sentence in India, proponents of the latter position have maintained that numerous UN human rights committees have repeatedly advised India to do so. For instance, the Committee on Human Rights recommended that India abolish the death penalty, particularly for juveniles, and restrict the offences that are subject to execution to the most serious crimes in 1997 when making coming to the conclusion observations regarding India's certification under the ICCPR, 1966. The goal is to eventually abolish the death penalty altogether.<sup>71</sup>

## VIII. LAWS UNDER IPC

- A. Aggravated Murder: According to Article 302 of the Criminal Code, murder is punishable by death.<sup>72</sup> The Indian Supreme Court ruled in *Bachan Singh v. State of Punjab*<sup>73</sup> that the death sentence was only constitutionally permissible when meted out as an unusual punishment in "the rarest of the rare" situations.
- B. Kidnapping that does not result in death: According to Section 364A of the IPC, 1860, abduction or detaining a person is punishable with death if the abductor poses a threat to murder or injure the person, if the kidnapper's behaviour makes the victim's death or harm likely, or if the plaintiff is actually harmed.<sup>74</sup> Furthermore, the death sentence is applied to abduction for ransom in case the victim is murdered.<sup>75</sup>
- C. Murder committed while carrying out an armed robbery: Under Section 366 of the Criminal Code, if one member of a group kills someone while carrying out an

<sup>67</sup>DEATH PENALTY 2015: Facts and figures <<https://www.amnesty.org/en/latest/news/2016/04/death-penalty-penalty-2015-facts-and-figures/>> (last visited at 6 march, 2023)

<sup>68</sup> Death Penalty <<http://www.revolvy.com/main/index.php?s=death-penalty%20penalty>> (last visited on march 7, 2023)

<sup>69</sup> Death Penalty Under Criminal Justice System: International and National Scenario with Special Reference to India, (2013) 4.2 GNLU L. Rev. 31

<sup>70</sup> The Constitution of India, Part IV, Section 51(c).

<sup>71</sup> U.N. ICCPR Human Rights Committee 1997, Section 20.

<sup>72</sup> Penal Code 1860, Chapter XVI, Sections 302, 303.

<sup>73</sup> (1980) 2 SCC 684; (1983) 1 SCR 145.

<sup>74</sup> Penal Code 1860, Chapter XVI, Section 364A.

<sup>75</sup> Penal Code 1860, Chapter XVI, Section 364A.

attempted robbery, all of the group's members may get the death penalty.<sup>76</sup>

- D. Rape Not Resulting in Death: The Criminal Law (Amendment) Act of 2013 added a new Section (Section 376 A) to the Indian Penal Code (IPC), 1860, which makes it a capital offence for anyone to cause their victim bodily harm during a sexual assault such that the victim dies or is left in a "persistent vegetative state" or suffers from such an injury. The death penalty is also applied to gang rape repeat offenders.<sup>77</sup>
- E. Treason: Warfare or attempted war against the government is considered treason under section 121 of the IPC, and aiding commanders, warriors, or personnel of the Navy, Army, or Air Force in committing mutiny is considered treason under section 132 of the IPC, both of which carry the death penalty.<sup>78</sup>
- F. Criminal Conspiracy and Efforts to Murder: It is noteworthy that Section 120B of the IPC, 1860, imposes a death sentence for those who participate in a criminal conspiracy to execute a capital offence.<sup>79</sup> Also, persons who are serving life sentences for attempted murder are subject to the death penalty if their actions injure the intended victim.<sup>80</sup>
- G. Helping minors or people with disabilities commit suicide: It is illegal under Section 305 of the Indian Penal Code, and those who do so when under the age of 18, suffering from a mental illness, a physical disability, or under the influence of alcohol are subject to the death penalty.<sup>81</sup>

#### IX. EXCEPTIONS REGARDING DEATH PENALTY

- A. Persons Under 18 at Time of Crime: The Juvenile Justice (Care and Protection of Children) Act 2015 prohibits the

execution of anyone who was under 18 when the crime was committed.<sup>82</sup>

- B. Pregnant Women: Under the Amendment Act of 2009, a woman who is pregnant and is given a death sentence must be spared.<sup>83</sup>
- C. Intellectually Disabled: It's vital to remember that mens rea is required for criminal liability. He must have known the severity of the offense and its repercussions, or that the action was unlawful or illegal at the time it was committed. As a result, under the Criminal Code of 1860, people who committed crimes while mentally ill are not criminally responsible because they were not aware of the nature of their actions or that they were illegal.<sup>84</sup> The death penalty is not applied to those who are mentally ill.

#### X. CONCLUSION

Punishment under the criminal justice system may serve a variety of reasons, including retribution or vengeance, public education or incapacitation, retribution or vengeance, and reparation. It is assumed that the death sentence has an incapacitating intent. International initiatives to abolish the death sentence were started after World War II on the theory that carrying out the death penalty leads to abuses of human rights. The judiciary has a very significant role to play while deciding the cases on death penalty.

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<sup>78</sup> Penal Code 1860, Chapter VII, Section 132.

<sup>79</sup> Penal Code 1860, Chapter V, Section 120B.

<sup>80</sup> Penal Code 1860, Chapter XVI, Section 307.

<sup>81</sup> Penal Code 1860, Chapter XVI, Section 305.

<sup>82</sup> Juvenile Justice (Care and Protection of Children Act) 2015, Section 21.

<sup>83</sup> Navrikan Singh, 'Lawyers for Human Rights International: India, Interviewed by DPW', (India Doc. 1 24 February 2010).

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