



Abolition of Capital Punishment in India: The Need of the Hour

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Research Note

Abstract

This article is concerned with the penological perspective of capital punishment in India. It critically examines the contentious views of honorable courts, policymakers, commentators, human rights activists, and the Law Commission of India on whether capital punishment should be abolished or retained as earlier or whether there should be some alternative to it as it is practiced in other nations. In so doing, It has analyzed the penal provisions of different enactments provided in favor of Capital Punishment in India, including a critical examination of the lacuna in the enforcement and implementation of the death penalty. This article has referred to the contradictory landmark judgments of the hon'ble Courts of India. This article reviews the suggestions made by the Law Commission of India in its 262nd Reports to determine whether legislators have considered them for future adoption. It has also discussed the theories advocating capital punishment as well as systems of capital punishment in other countries.

Keywords: Capital Punishment, Death Penalty, Abolition, Retention, India

1. Introduction

The purpose of punishment is to instill contrition, secure justice for the sufferer, and serve as an example for the rest of society. If a punishment meets one or more of these aims, it becomes essential to sentence criminals to different types of punishment, including the death penalty.

Capital punishment, usually known as the death penalty, is the worst form of punishment. According to the laws of the nation, it is the punishment for the most heinous, terrible, and abhorrent crimes against humanity, such as murder, homicide, rape, etc. The term "capital punishment" describes the legalized killing of a criminal who has been found guilty of a serious crime and sentenced to death by a judge. The death penalty should be kept distinct from extrajudicial killings that lack legal, due process. Capital punishment has always meant the death sentence, even though the definition and scope of such offenses vary by country, state, and era (Gupta, 1986). The most significant goals of the death penalty are deterrence or sending a message that such actions will not be tolerated in society, incapacitation, or ensuring that the person will not commit such a severe offense again. Both goals are important, but deterrence and incapacitation are the most important. Executions by the death penalty can be carried out in various ways in today's society, including by hanging, electrocution, lethal injection, or firing squad.

There has been discussion about whether or not the use of the death penalty should be permitted within the context of the Indian legal system. As the human rights movement in India gains momentum, the legitimacy of using the death penalty as an acceptable form of punishment is called into question. Some

contend that it is an utterly immoral act on the part of the system, but others hold that it must be done to create a society free of criminal activity (Tejashwini & Venumadhava, 2016). In India, there is no such thing as a sentence that is less severe than the death penalty but more severe than life in prison at this time. The study focuses on the critical analysis of the circumstances prevalent in the country and the judicial pronouncements of the honorable courts regarding whether there is a necessity to abolish capital punishment or retain it.

2. Historical Background

For a particularly heinous crime, the question of whether or not to carry out the ultimate punishment of putting an offender to death has become a source of passionate debate. Capital crimes, such as premeditated murder, numerous murders, rape, murder, etc., carry the death penalty. Historically, several cultures have utilized capital punishment as a form of social control and vengeance. For extreme offenses, several ancient cultures used the death sentence. The concept that some offenses warranted the death penalty was widely accepted in many ancient communities.

The oldest documented death sentence regulations may be traced back to the Code of Hammurabi, a legislative text from ancient Babylon (modern-day Iraq). The code was drafted in the 1700s B.C. and stipulated capital punishment for twenty-five offenses. Among the offenses was adultery, and another was aiding enslaved people in their attempt to escape. Of the 25 offenses, murder was not one of them. The ancient Egyptians, Assyrians, and Greeks all killed citizens for a wide range of offenses. The Roman and Mosaic laws sanctioned the concept of vengeance, with the proverbial "eye for an eye" and "tooth for a tooth" norms being widely accepted. Socrates and Jesus are the two well-known figures who were beheaded. Approximately one thousand years after the Common Era began, hanging became the preferred method of execution in Britain. A century later, when William the Conqueror came to power, hanging was outlawed save during times of war. Even the United Kingdom gradually phased off its use of the death sentence. This fact alone necessitates rethinking the death penalty in the United Kingdom. Between 1823 and 1837, the death penalty was abolished for more than a hundred of the 222 offenses for which it had previously been imposed (Melusky, Pesto, et. all, 2011).

Currently, the most common methods of carrying out a death sentence in various parts of the world are electrocution, gas chamber, shooting, hanging, guillotine, and lethal injection (Terance & Hong, 2005). Historically, the purpose of the death penalty was twofold: to inflict physical and mental anguish on the offender and to serve as a public spectacle that sent a moral message about the gravity of sin and crime (Banner, 2002). Because it results in the death of the accused, the death penalty is the highest form of corporal punishment. Death can be instantaneous or gradual, and this distinction can be used to categorize the vast array of execution methods used throughout time and space. Beheadings, hangings, and strangulations have been identified as the most prevalent methods of instant or merciful execution (Canton, 1996). Using firing squads, gas chambers, and lethal injections are modern forms of instant death. A lower homicide rate is observed in death penalty-free nations than in those still enforcing capital punishment. The idea that the death penalty is barbaric and demeaning is gaining traction in countries worldwide. It is harmful because it glorifies violence, fails to provide public safety, or discourages violent crimes. The death sentence has been abolished in the world's most prominent faiths, civilizations, and geographic areas. According to UN data, over 150 nations have either stopped using it entirely or outlawed it (Hood & Hoyle, 2009).

3. Legislations and Statutory Provisions Related to Death Penalty in India

There are around 200 legislations in India that outline penalties for criminal behavior. The Indian Penal Code from 1860 contains most of the country's criminal laws. The death penalty is available in India under 59 different provisions of 18 different central laws. Thirteen of these 59 provisions are included in the Indian Penal Code, 1860 (IPC): sections 120B, 121, 132, 194, 195A, 302, 303, 305, 307, 364A, 376A, 376E, and 396. In addition to the IPC, 16 more pieces of core law include crimes with the death penalty. Because of the difficulty in gaining access to state laws, it is hard to offer accurate data on the number of states with death penalty provisions. (The Death Penalty India Report, 2016).

4. The approach of the Judiciary and Law Commission of India toward Capital Punishment

The Law Commission of India has twice undertaken a comprehensive review of the death penalty. Firstly, in its 35th Report, the Law Commission recommended the retention of the death penalty in India. (Capital Punishment Report, 1967) In addition, the Supreme Court of India maintained the legitimacy of the death sentence. Still, it restricted its use to the "rarest of rare situations" in *Bachan Singh v. Union of India*.

Judicial inconsistency and arbitrariness in using the death penalty remain serious issues. Three decades of dealing with the "rarest of rare" have been riddled with worries about judicial inconsistency and arbitrary decision-making. Such concerns have been thoroughly examined and recorded, and the Supreme Court has also openly admitted a lengthy line of instances that have misread and erroneously applied the "rarest of rare" concept. (*Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, 2009), (*Sangeet & Anr. v. State of Haryana*, 2013) & (*Sankar Krishnarao Khade v. State of Maharashtra*, 2013)

Several challenges to the execution of the death penalty have been heard and decided by the Supreme Court. The death sentence must not be enforced under any circumstances, as this is against the law. Thus, making the mandatory death penalty unconstitutional. (*Mithu Singh v. State of Punjab*, 1983) It has been ruled that hanging as a form of capital punishment is consistent with India's constitution. (*Deena v. Union of India*, 1983)

Since the Law Commission's 35th Report, however, things have changed in the country's social, economic, and cultural aspects. Concerns about arbitrary decision-making in death penalty cases have persisted. As a result, in *Santosh Kumar Satish Bhushan Bariyar v. Maharashtra*, the Supreme Court submitted the matter to the Law Commission of India. (6 SCC 498, 2009) and *Shankar Kisanrao Khade v. Maharashtra* (5 SCC 546, 2013) On August 31, 2015, the Law Commission of India, chaired by Justice A.P. Shah, submitted its 262nd Report on the death penalty in India (Death Penalty India Report, 2016). The Law Commission of India has called for the gradual elimination of capital punishment in a new study. It proposed, as a first step, eliminating capital punishment except in cases of terrorism. The Report provided several arguments in favor of abolishing the death penalty, including the fact that 140 other nations have already done so, the death sentence's arbitrary and incorrect application, and the lack of any demonstrated deterrent effect on offenders (Ashok, 2015).

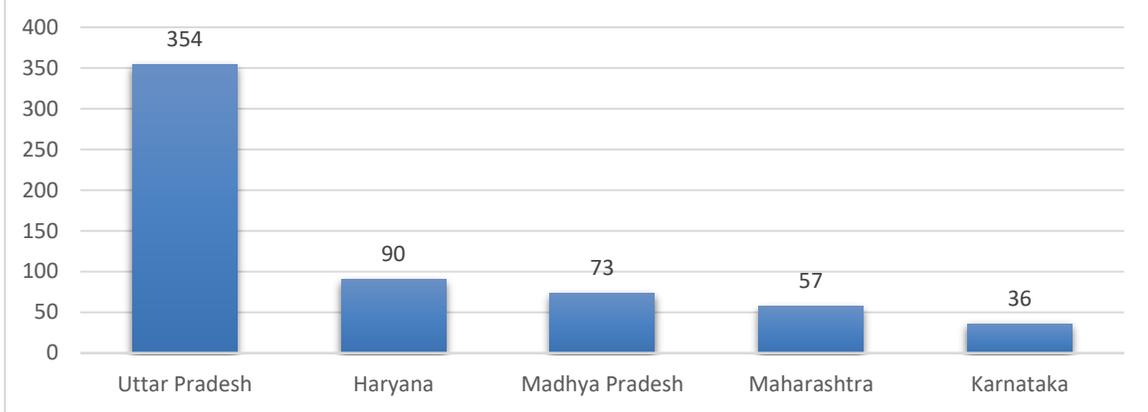
Moreover, Justice Kurian Joseph's parting words in *Chhannu Lal Verma v. State of Chhattisgarh* (Criminal Appeal No(S). 1482-1483, 2018), calling for the gradual abolition of the death penalty necessitates serious introspection on the part of the Court and the public, as well as acknowledging that efforts to make the administration of death penalty more equitable are akin to chasing the wind (Chatterjee, 2019).

5. Execution of Capital Punishment after Independence of India

According to Project 39A data on the "Death Penalty India Report" published in 2016 by the National Law University of Delhi, 720 prisoners have been executed in India since 1947. Uttar Pradesh accounts for nearly half (354) of these executions, followed by Haryana with 90, Madhya Pradesh with 73, Maharashtra with 36, Karnataka with 27, Andhra Pradesh with 24, Delhi with 24, and Punjab with 10.

(PTI, NDTV, 2018) According to the Report, the actual number could be much higher, as the government maintains no proper records on executions (PTI, The Economic Times, 2022).

Fig. 1: Top 5 States with Highest Number of Execution after Independence of India



Source: NCRB Report-2021

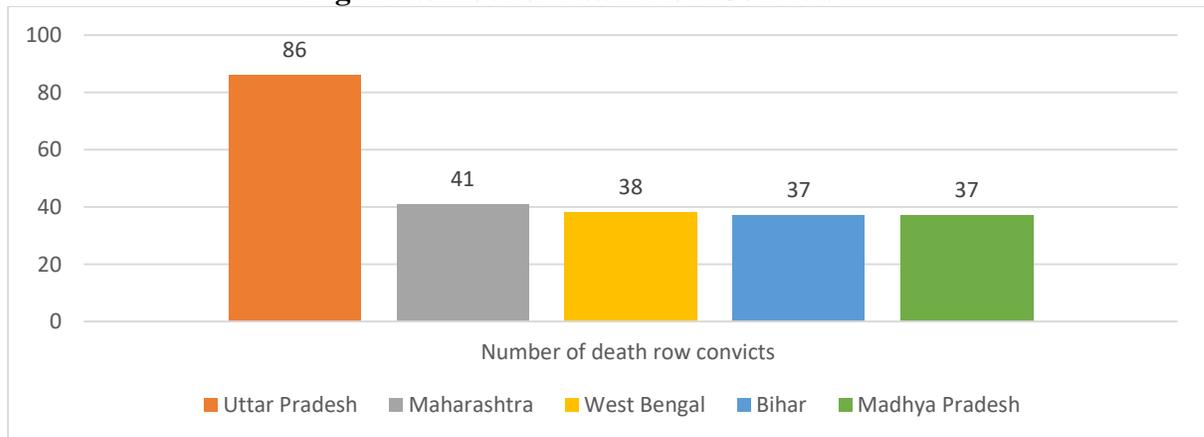
The four convicts in the Nirbhaya gang rape and murder case, Akshay Thakur, Mukesh Singh, Pawan Gupta, and Vinay Sharma, were the last people to be executed in India on March 20, 2020.

6. Impact of Execution on the Crime Rate of India

The 6th edition of the Death Penalty in India: Annual Statistics Report, 2021, was recently published by the National Law University in Delhi. (Death Penalty Annual Statistics Report, 2021) under its Project 39A The Report provides an annual update on the death penalty in India, as well as international and legislative developments pertaining to the issue. According to the Report, as of December 31, 2021, the number of prisoners on death row in India has increased from 404 in 2020 to 488 in 2021. The increase is nearly 21% from 2020 (Dhawan, 2022). This is the highest number of inmates facing execution since the National Crime Records Bureau (NCRB) began keeping track in 2004 and published its Prison Statistics report, which listed 563 inmates on death row (Ahmed, et. all, 2020).

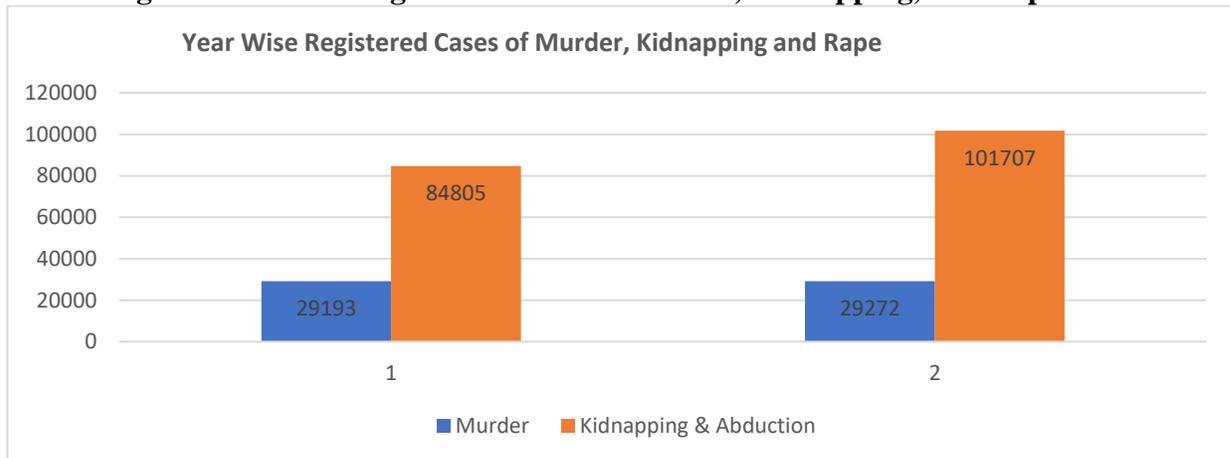
According to the same Report, as of the 31st of December in the year 2021, the five states in India with the most individuals who had been sentenced to death were UP (86), Maharashtra (41), West Bengal (38), and Madhya Pradesh (37). The states with the most people on death row were West Bengal (38), Bihar (37), and MP. West Bengal had the highest number of death row inmates, with 37.

Fig. 2: Number of Death Row Convicts



Despite no execution of any death row prisoners since the execution of four convicts of the Nirbhaya gang rape and murder case in 2020, the NCRB data shows 29,272 cases of murder were registered during 2021 in India, showing a marginal increase of 0.3% over 2020 (29,193 cases). In 2019 the number was 28,915. Similarly, 1,01,707 cases of kidnapping & abduction were registered during 2021, showing a steep increase of 19.9% over 2020 (84,805 cases) (NCRB report, 2021).

Fig. 3: Year Wise Registered Cases of Murder, Kidnapping, and Rape



Source: NCRB Report-2021

After the Nirbhaya gang rape case and the subsequent giving of the death punishment to the convicted perpetrators in 2013, numerous heinous crimes have been committed around the country. One such incident was the mob murder of a dairy farmer named Pehlu Khan in Alwar in April 2017 (Ghosh, 2019) Eight-year-old victim of a gang rape and murder in Kathua, India, in January 2018 (Iqbal, 2018), One November 2019 in Hyderabad, and a veterinarian was raped and burned to death by a group of thugs, (Sadam, 2022) December 2019: a rape victim in Unnao area is burned alive, (Khan, 2020), A Dalit girl, age 19, was killed in Hathras, India, in September 2020 after being brutally gang-raped and assaulted by four upper-caste men, (Jaiswal, 2020) mob lynching of two saints and their driver in Palghar in April 2020, (Yadav, 2022) among others, proves that capital punishment has no deterring effect.

7. Objective Behind Capital Punishment

Provisions of any enactment are related to the objective sought to be achieved. The framers of the Indian Penal Code 1860 have given deterrence as the only objective of various punishments and have accordingly emphasized the severity of the provisions. Capital punishment, too, was prescribed lavishly with the same object. Punishments must be severe enough to serve as a deterrent while not being brutal. Similarly, punishments should be mild enough to be humane but not so mild as to be ineffective. (Report of the Committee on Reforms of Criminal Justice System, 2003). The death penalty has been a powerful deterrent for centuries. The death penalty may be motivated by revenge, which is the seeking of restitution or satisfaction for wrongs done to oneself, one's community, or the world at large. Perhaps the greatest deterrent that keeps a person away from criminality is the fear of being sentenced to death (Krishna, ed., 2007).

However, proponents of the following theories attempt to explain the functions of various forms of punishment: Theories of Retribution; Theories of Deterrence; Theories of Preventive Measures; Theories of Expiation; Theories of Reformative Measures.

8. International Developments Regarding Capital Punishment

The death penalty is not explicitly outlawed in the International Covenant on Civil and Political Rights of 1976 or any other universal international treaty; however, it is explicitly outlawed in the 2nd Optional Protocol to the ICCPR, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The death penalty is restricted in many nations due to international treaties such as the American Convention on Human Rights, the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States, and the Arab Charter for Human Rights.

All countries that have signed the International Covenant on Civil and Political Rights (ICCPR, 1976) are legally obligated to do away with the death penalty. The UNGA passed it in 1966, and it went into effect in 1976. As of the time this Covenant was written (1947–1966), just ten countries had abolished the death sentence, but this has since become a contentious issue (Hood, 2006).

According to Article 6 of the ICCPR (ICCPR, 1976), the death sentence can only be used in certain cases, and they include (but are not limited to) the following:

- The guarantee of a proper trial before the imposition of the death sentence;
- The death sentence should be reserved for the most heinous of crimes;
- The death penalty should not be used in cases when other rights guaranteed by the ICCPR have been infringed;
- Retrospective application of the death penalty is prohibited;
- execution of anybody under the age of eighteen at the time of the crime being committed; the right to petition for a pardon or remission of a death sentence;

Restriction on executing pregnant women. Even though the death penalty is not prohibited under international customary law at this time, public opinion is fast turning in favor of abolishing it worldwide. This includes efforts to halt the execution of mentally ill persons and women with small children. It also covers broader efforts to abolish the death sentence. (ICCPR, 1976).

The use of the death penalty has significantly decreased worldwide ever since Portugal became the first nation in 1976 to completely do away with the practice of executing criminals by hanging. Some countries have either abolished the death penalty for all crimes or have abolished it for ordinary crimes (Ahmed & Jameel, 2018).

On January 2, 2021, Kazakhstan became one of the many countries that have abolished the death penalty as a result of ratifying the 2nd Optional Protocol to ICCPR. The Kazakh Parliament unanimously approved a measure to end the death sentence for all offenses on December 29, 2020. Like 109 other nations, Sierra Leone abolished capital punishment on July 23, 2021. The death penalty for aggressive crimes, including murder, treason, mutiny, and robbery, was abolished by a majority resolution and replaced with prison terms ranging from 30 to life (ICCPR, 1976). Papua New Guinea abolished the death penalty on January 22, 2022, making it the most recent country to do so (Burman, 2022).

The United Nations Human Rights Council appealed to governments on October 8, 2021, encouraging them to consider the abolition of the death penalty and to either ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights or to accede to it as an optional protocol. The appeal was issued on the day that the United Nations marked the 50th anniversary of the signing of the International Covenant on Civil and Political Rights. In the end, the Resolution on the Question of the Death Penalty was approved with the backing of 29 nations, including India, while five nations chose to abstain from voting. India was one of the 12 countries that voted against the Resolution.

9. Views on the Abolition or Retention of Death Penalty in India

9.1. Arguments for Retention of the Capital Punishment

It is constitutional as held by the judiciary. It serves to protect the life and liberty of the individuals of society. It is economical and less cruel than keeping the one imprisoned for life, leaving him to die indefinitely, with no hope of coming out of prison. It prevents overcrowding of prisons. It has great value in satisfying the victims of the crime. All the social contract theories have sanctioned rights of the state to penalize the criminal in the interest of the administration of justice and same a necessary effective tool. Those offenders who are incorrigible and dangerous should be eliminated from society as much as they act heinously and have no regard for Human Values. It has a deterrent and retributive effect, which is the main aim of the administration of justice. It is a substitute for private vengeance and revenge, and the sentence is a must to protect society. Good laws and proper executions can eliminate the possibility of the death sentence being wrongly used and abused. It is a sort of right of private defense to society against the criminal.

9.2. Arguments against the retention of Capital Punishment:

It is inhuman. How is it justified to take a life if one cannot give life? If injustice happens to an innocent, it can't be corrected. It serves no economic gains and is immoral too. It leaves no room for the reformation of the guilty, neither he gets the opportunity thereof. Capital Punishment is neither deterrent nor has a retributive value, as witnessed by history. It is uncivilized, indecent, barbaric, cruel, and vengeful and is a stigma in society.

10. Conclusion

Capital punishment is barbaric and inhuman punishment in the hands of the judiciary. It is usually considered a blot on a society built on ethical and humanitarian values. So far as the statistics are concerned, the death sentence seems unable to deter the commission of offenses, which has increased the crime rate in India. In light of international legal developments which stand against the death penalty, India's judiciary has also emphasized the alternative modes of punishment. It has been shown that there has always been a global tendency to limit the crimes that carry the death sentence. Most nations have either done away with capital punishment altogether or limited its use to just the most serious offenses. Eliminating the death penalty is seen as more of a moral issue than a legal one. In light of the recent NCRB findings and the Report on the death penalty, the debate over whether or not India should abolish the death penalty for capital crimes has been reignited. There has been a decline in the use of the death penalty in India since the country gained its independence in 1947. The Supreme Court of India issued 60 death sentences between January 1, 2000, and June 30, 2015, but later confessed that it had made an error in 15 or 25% of them. As a result, judges increasingly preferred to reduce the punishment. The Supreme Court issued this extremely harsh punishment at its discretion, and the Court has admitted as much on many occasions. The death penalty is immoral on many levels, including morality and decency. Since of this, death punishment must be abolished because it cannot achieve the goals of justice and is incompatible with respect for human dignity.

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