

## CAPITAL PUNISHMENT IN INDIA: A CRITICAL ANALYSIS

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### ABSTRACT

*Whether someone should die in prison for their crime is not the question surrounding the death penalty. The actual debate, though, is whether or not we should be able to execute people in our country. Punishment for wrongdoing can take many different forms in an effort to lower the crime rate. India has a variety of punishment options, including the death penalty, life in prison, incarceration, fines, and more. The death penalty, or capital punishment, is seldom regarded as a severe form of punishment. Murder, rape, rape with murder, and other horrible crimes that cause damage to society as a whole are all punishable by this punishment. This article attempts to analyse the concept of capital punishment along with the laws governing it in India.*

**Keywords:** *Death Penalty, Murder, Prison, Punishment, Wrongdoing.*

## 1. INTRODUCTION

Depending on the nature of the deed, those who committed crimes under the Mauryan Dynasty were subject to many forms of punishment. An eye for an eye, a hand for a hand, etc. was the rule that the dynasty used to punish the offender or criminal. The first monarch to codify the criminal laws pertaining to the death sentence or capital punishment was King Hammurabi of Babylon, according to historical accounts. Indians were given the death penalty during the British era and were hanged till they died, either after or before the formal trial. But with India's independence, the country's legal system entered a new phase. The death penalty system underwent a significant shift following India's independence from the British Empire in 1947 and its emergence as a republic. In the modern world, the rate of crime is continually rising.

There have been more homicides, kidnappings, rapes, terrorist attacks, and instances of child abuse. India's overall crime rate is 44.43, per the World Population Review of 2022. Laws and punishments designed to discourage and prevent crime must be implemented right away in such a scenario. One of the primary tenets of modern civilization is punishment, which is the use of force to enforce the rule of the state. To keep society's law and order, the state must punish violators.

## 2. DEATH PENALTY: MEANING AND CONCEPT

The Latin word "capitalis," which means about the head, is where the word "capital" originates<sup>1</sup>. Therefore, to suffer the death penalty is to lose one's head. The death penalty, or capital punishment, is the execution of a criminal who has been found guilty of a serious felony and given a death sentence by a court of law. It is regarded as the harshest type of penalty. It is a form of retribution for the most egregious, terrible, and disgusting acts against humanity. The death sentence has always been the outcome of such crimes, despite the fact that the definition and extent of such crimes differ by country, state, and age.

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<sup>1</sup> Tejaswa Mohanta, *Capital Punishment – When and Why Is It Justified*, SSRN ELEC. J. (2020)

### **3. DEATH PENALTY IN INDIA**

- The death penalty is permitted under capital punishment. Only the most horrific crimes carry the death penalty in India.
- The Criminal Procedure Code of 1973, Section 368, gives high courts the ability to affirm death sentences<sup>2</sup>.
- In the rarest circumstances in India, the death sentence is applied to the most serious offences and atrocious offences.
- India voted in favour of the resolution, which called on the UN General Assembly to outlaw the death sentence, during its passage.

### **4. INDIAN EXECUTION TECHNIQUES**

The two methods used to carry out the death penalty in India are hanging and gunshot:

- Hanging: Nathu Ram Godse was the first prisoner to be killed under the death penalty in India after independence. The Indian Supreme Court proposed that the death sentence should only be applied in extremely exceptional circumstances.
- Shooting: The Army Act and the Air Force Act of India both have laws pertaining to the application of the death penalty. According to Section 34 of the Air Force Act of 1950<sup>3</sup>, anybody who violates the law may be brought before a court martial for their actions.

### **5. THE DEATH PENALTY IS STIPULATED UNDER HINDU LAW**

Since the dawn of human history, penalties have been a fundamental element of civilization. The two easiest ways to get rid of criminals from society were the death penalty and exile; they were the harshest sanctions and discouragements accessible to them. The death penalty has a long history that predates Hindu civilization. The death penalty is mentioned in ancient literature and books. Hindu law replaced the death penalty, which was deemed inhumane, with the most severe

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<sup>2</sup> Code of Criminal Procedure, 1973, § 368, No. 2, Acts of Parliament, 1974 (India)

<sup>3</sup> Air Force Act, 1950, No. 45, Acts of Parliament, 1950 (India)

form of torture to provide a severe punishment to the general public. Fragments of the death penalty dating back to the 4th century have been discovered.

Kalidas has done an excellent job of explaining why the death penalty is required. The death penalty has also been supported by historical and mythological epics like the Ramayana and Mahabharata, which contend that the king's primary duty is to defend society from threats of all kinds and that this may be accomplished by putting the criminal to death. Moreover, Katyayana and Brahaspati concurred that the death penalty was suitable.

Even at the time of the Buddha, when ahimsa was the norm of conduct, Ashoka did not think that the death penalty was just. The Indian Dand Niti movement was based on the principles of prevention and mental health. Hinduism's criminal justice system is undoubtedly greatly impacted by non-correctional philosophy and social security theories. Manu's note-taking of the subjective and objective events was excellent. Manu's well-known composition, Manu Smriti, illustrates both the crime and the weakness of the perpetrator<sup>4</sup>. Kautilya also addressed the death penalty in his writings, since he thought it was an essential tool for preserving public safety.

## 6. THE DEATH PUNISHMENT IN ISLAMIC LAW

Sharia law, which originated with the Qur'an, the Hadith, the Ijma, the Urf, the Masalih al-Mursala, and the Qiyas, governs Islam. The Qur'an says, "Your Lord said to the angels, I am appointing a vicegerent on earth," in verse 2:30. In addition, the scripture stated, "Your Lord said to the angels, I am going to create a human being out of clay; kneel before him in prostration when I have fashioned him and breathed of My spirit into him." As a result, the Qur'an rejects the right to take human life. Islamic ideologies hold that I'dam, the act of taking life away, and Ijad, the act of giving it, are wholly divine rights.

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<sup>4</sup> Preyasi Dutta, *Critical Analysis of the Parameters of Capital Punishment in India?*, 3(6) INT'L J. L. MGMT. & HUMAN. (2020)

As required by Sharia Law, the Qur'an allows the taking of life by authority other than Allah as long as it is done so via the proper channels of justice and the rule of law<sup>5</sup>. The offences listed below are those that fall under Sharia law.

- Had crimes: The term "Had" or "Huhud" refers to the penalty that Allah himself prescribed for the offences that had an impact on the community. This category of offences includes violence, apostasy, revolt, theft, murder, and alcohol drinking. There will be severe prosecution for these offences, and neither the victim nor the judge will be able to reduce the sentence or carry out the penalty.
- Tazeer crimes: The second group of these offences consists of those that have resulted in a tazeer or criminal offense. Unlike the first category of offences, the courts have the power to determine whether to bring charges against these offenses. This category of offences includes obscenity, false testimony, and attempted adultery.
- Qisas crimes: Retaliatory Qisas and Diyut (blood money) crimes make up the third category of social crimes. Purposeful or felonious murder attempted purposeful or unintentional murder, and intentional or inadvertent harm were among the offences covered by Qisas. When a victim, his legal guardian, or his heir commits this offence, they may be eligible for forgiveness or a reduction in the punishment amount under Qisas or Diyut.

There are distinct penalties for each of these three types of crimes, varying according to the seriousness of the offence committed.

## 7. DURING THE MUGHAL EMPIRE, THE DEATH SENTENCE

The powerful Mughal Empire dominated India's medieval history. Their governance mostly adhered to the laws of the Quran. The law was not consistently applied in all regions of the

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<sup>5</sup> Mohanta, *supra* note 1

world, and judges had the power to administer arbitrary punishments in addition to taking Quranic precepts into consideration when resolving disputes<sup>6</sup>.

Akbar was a very merciful person; he thought that the death sentence should only be used for major sedition offences and only after much thought. In addition, he thought that no one should be killed and then subjected to severe punishments like mutilation or other atrocities. Jahangir and Aurangzeb both had comparable laws.

The death penalty was carried out using cruel and excruciating methods, like burying the victim in the walls with other bodies or throwing the prisoner into the scorching sun while they were wrapped in rawhide that had been recently butchered and fluffed thin to shrink it. Under the current British criminal justice and administration system, the obligatory execution of offenders has superseded these tactics.

## **8. THE DEATH PENALTY BEFORE AND AFTER INDEPENDENCE**

It wasn't until 1931 that the death penalty was brought up in the British Indian legislative assembly by Bihar member Shri Gaya Prasad Singh in an attempt to present a measure that would have repealed the death sentence for offences included in the Indian Penal Code. But after receiving a response from the then-home minister, the proposal was rejected. Twice in Legislative Assembly discussions before independence, the government's stance on the death sentence in British India was made plain by the then-home minister, Sir John Thorne. "For any crime for which it is currently authorised, the government does not think it is prudent to repeal the death penalty."

## **9. CRIMES THAT CARRY A DEATH SENTENCE**

The mix of dissuasive and reforming philosophies of punishment forms the basis of Indian criminal law. In addition to offering the offender the chance to change, penalties must be

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<sup>6</sup> Dutta, *supra* note 4

imposed to discourage future offenses. When the death sentence is applied, the courts have to give a thorough explanation for their ruling. The death penalty is a punishment included in a number of legislative actions, including:

## **10. CLASS OF CRIMINAL NOT SUBJECT TO THE DEATH PENALTY**

### **10.1 Minors/Children**

Indian law states that an individual who committed a crime before the age of eighteen, or while still a minor, is not subject to execution. Because they believed that everyone who hasn't reached maturity had the opportunity for development and might be able to learn from their mistakes by being given the correct environment and education, the lawmakers opted to put children in the category of criminals exempt from the death sentence. Furthermore, our laws include a different statute called the Juvenile Justice Act (2015), which is exclusively applied in cases involving juveniles<sup>7</sup>. This is advantageous as it allows offenders to grow.

### **10.2 Pregnant Women**

One such criminal class that is exempt from the death penalty is pregnant women. A woman who has been given a death sentence may have her sentence postponed or reduced to life in prison, per Section 416 of the CrPC, if the high court determines that the lady is pregnant<sup>8</sup>. This is justified by the fact that hanging a pregnant woman kills the unborn child as well as the pregnant lady. The unborn child in the mother's womb is innocent of any fault and is not deserving of death because of what the mother did. Therefore, pregnant women can be considered offenders who are not eligible for the death penalty.

### **10.3 Mentally Challenged**

As per the legal provisions, those who are cognitively challenged or retarded may qualify as exempt from capital punishment. It is sometimes said that a person who commits a significant crime has an intellectual impairment if they are unable to understand the nature of their acts and

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<sup>7</sup> Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016 (India)

<sup>8</sup> Code of Criminal Procedure, 1973, § 416, No. 2, Acts of Parliament, 1974 (India)

the repercussions of them. Someone with a criminal record may not know the details of their crime because of their intellectual handicap. As a result, lawmakers expanded the list of criminals who were spared the death penalty to include those who are mentally challenged.

## 11. WHAT HAPPENS WHEN THE DEATH PENALTY IS APPLIED?

- **Verification by the Supreme Court:** After the punishment is issued, the session's court, in compliance with Section 366 of the CrPC, shall transmit the case processes to the high court of the appropriate state for confirmation of the sentence<sup>9</sup>. Until the High Court validates the sentence, the court that passes the sentence must place the guilty party under arrest and issue a warrant.
- **Investigation and more proof:** As per the provisions of Section 367 of the CrPC, the high court has the authority to mandate an extra inquiry into the occurrence or the gathering of supplementary evidence if it becomes relevant to the guilt or innocence of the convicted individual<sup>10</sup>.
- **Authority of a high court to validate sentences or overturn convictions:** Section 368 of the CrPC grants the high court the authority to modify the charges and order a new trial, as well as to uphold a conviction and inflict any other penalty the court sees fit. The sentence cannot be confirmed by the court until the deadline for submitting an appeal has passed.
- **Verification of the newly formed phrase:** As per the provisions of Section 369 of the CrPC, a minimum of two judges must accept and sign any order or sentence, whether it is a fresh sentence or one that the High Court has previously passed, before it may be submitted for confirmation.<sup>11</sup>
- **Copy of the order being delivered to the session court:** Section 371 of the CrPC states that the Honourable High Court's confirmation of a sentence or any other order it may

<sup>9</sup> Code of Criminal Procedure, 1973, § 366, No. 2, Acts of Parliament, 1974 (India)

<sup>10</sup> Code of Criminal Procedure, 1973, § 367, No. 2, Acts of Parliament, 1974 (India)

<sup>11</sup> Code of Criminal Procedure, 1973, § 369, No. 2, Acts of Parliament, 1974 (India)



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issue shall be delivered right away to the Court of Session, sealed with the High Court's seal, and authenticated by the official signature of the proper officer of the High Court<sup>12</sup>.

## 12. INDIAN EXECUTION PROTOCOL

### 12.1 Hanging

As per the provisions of Section 354(5) of the CrPC, the sole mode of execution allowed in India for a civilian is hanging, which is also the procedure used in the civilian court system<sup>13</sup>.

### 12.2 Shooting

India, too, used shooting as a means of execution. Someone who has been sentenced to death by a firing squad may carry out the execution of a criminal. Only the Army, Air Force, and Navy are able to carry out capital punishment in this way. Both hanging and gunshot are accepted as legal means of execution under the Army Act of 1950, which governs the army court-martial system<sup>14</sup>.

## 13. CONCLUSION

India has historically applied the death sentence, commonly referred to as capital punishment. In India, the death sentence has been the most popular way to punish crimes and offences that basically break the law since the days of the monarchy. There was no such thing as a grave or serious crime that called for the death sentence. These days, considerations such as "serious offences," "grievous crimes," "rarest of rare cases," "special reasons," etc. are taken into account before the death sentence is applied.

The death penalty is a controversial topic; several countries have banned it as a form of punishment due to the growing global opposition to it. Article 6 of the International Covenant on

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<sup>12</sup> Code of Criminal Procedure, 1973, § 371, No. 2, Acts of Parliament, 1974 (India)

<sup>13</sup> Code of Criminal Procedure, 1973, § 354(5), No. 2, Acts of Parliament, 1974 (India)

<sup>14</sup> Army Act, 1950, No. 46, Acts of Parliament, 1950 (India)

Civil and Political Rights outlines essential safeguards that signatories who continue to apply the death sentence must respect; nonetheless, it makes no mention of outlawing its use. Both Amnesty International India and the International Commission of Jurists denounced the killings, notwithstanding the controversy surrounding Nirbhaya's case. With the exception of India, murder and rape-related offences carry the death sentence under American and Australian law.

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