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# CAPITAL PUNISHMENT – STATE-SPONSORED MURDER OR A DETERRENT? CRITICAL ANALYSIS OF RETRIBUTIVISM AS AN ELEMENT IN CAPITAL PUNISHMENT

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## ABSTRACT

In India, the death sentence is a legal form of punishment and such penalty is reserved for the most heinous crimes. Those who commit the most serious crimes in India are sentenced to death by firing squad. India, which is a rapidly growing country and has a wide range of laws intended at deterring and punishing criminal conduct, has seen a surge in the number of crimes committed because the penalties are not strong enough. There must be tough punishments in order to reduce crime. All fines have one common goal: to exact revenge on the person who committed the offence. The death sentence, life imprisonment, and several other forms of confinement are all available in India. In the eyes of many, death is the harshest kind of punishment. According to this paper, capital punishment is an international issue, as well as what constitutes a capital offence. Aside from the many modalities of capital punishment in India, the Law Commission Report and several rulings and other topics of death sentence jurisprudence are all included in this document. A final judgement on the use of the death penalty in India will necessitate an examination of the country's constitution and legal system, in addition to the concepts of retribution and deterrent. Death penalty abolition in India is dependent on a number of factors, including the prison system's ability to house all inmates on death row, as well as the fact that the death penalty is unjustly applied to some groups. Death penalty abolishment will be difficult to accept in a culture where rape is committed every fifteen minutes. It's unlikely that a community that showers flowers on police officers after a rape occurrence results in the abolition of capital punishment. The death penalty cannot be abolished until the Indian public accepts this change, which can only be achieved through the acceptance of new laws and processes.

**Keywords:** capital punishment, law commission, retribution, deterrent, jurisprudence, death penalty, rape offence, police, constitution.

***“Many that live deserve death. And some that die deserve life. Can you give it to them? Then do not be too eager to deal out death in judgment.” — J.R.R. Tolkien.***

## INTRODUCTION

Punishment for misbehaviour is an essential part of the criminal justice system. The penalty has two basic purposes - One is the idea that punishing wrongdoers deters others from breaking the law and the other is the idea that punishing wrongdoers serves a dual purpose of deterring others from breaking the law. As with other penalties, the basis for the death penalty is the same. Given the current state of affairs, the argument about capital punishment is one of the most relevant. Indian law mandates the use of lethal injection as a penalty of last resort. As the human rights movement in India grows in power, the morality of capital punishment is being called into question. Because keeping one person alive at the expense of the lives of many others in society is unthinkable and ethically wrong, this argument does not hold up. It is commonly acknowledged that "***everyone is born equal, and no one should be denied the right to life***". According to ***Blackstone***, there are two types of wrong: private wrong and public wrong. This is a breach of the individual's civil or legal rights, whereas this is a violation of the public's and is referred to as a crime or misdemeanor.<sup>1</sup> Nobody in society should be concerned about the "reasons" or "motivations" behind the punishment they hand out to those who break the law. For these and other reasons, it's critical to take a breather. It doesn't matter if the incentives driving a society's laws are explicit or implicit, what matters is that they are in existence.<sup>2</sup> Our goal is to avenge the victim by prosecuting the perpetrator, since as the saying goes, "***he must pay for what he has done***". Correction is the best motivator, followed by deterrent, and retribution, which is simply state-sponsored revenge, is the least effective. All of these variables can be found in varying degrees in each given punishment when it is analysed in detail. It would be more effective in changing the criminal's mindset than in deterring future crimes, and it would have little or no revenge in it if the punishment was only for a few months.<sup>3</sup> There is no way to get revenge for a death penalty offence, unlike other types of punishment. It's both irrevocable and pointless as a strategy of self-preservation. More than nine years after

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<sup>1</sup> S.E. Marshall & R.A. Duff, *Criminalization and Sharing Wrong*, CANADIAN JOURNAL OF LAW & JURISPRUDENCE CAMBRIDGE CORE (2015), <https://www.cambridge.org/core/journals/canadian-journal-of-law-and-jurisprudence/article/abs/criminalization-and-sharing-wrongs/04493346B71FEDFBE60A1A50383897B4> (last visited Mar 24, 2022).

<sup>2</sup> Issue, *Moving away from the death penalty*, <https://issuu.com/unitednationshumanrights/docs/moving-away-from-the-death-penalty> (last visited Mar 24, 2022, 10:00 AM).

<sup>3</sup> Webdesk, *India's History of Capital Punishment in the Last Decade*, INDIA TODAY, July 15, 2015, <https://www.indiatoday.in/education-today/gk-current-affairs/story/indias-history-of-capital-punishment-in-the-last-decade-285526-2015-07-30>.

the horrific incident that shocked the nation and sparked mass protests seeking justice, the four Delhi gang rape and murder convicts are hanged together. On this platform, four prisoners will be executed for the first time. Terrorist Yakub Memon, guilty of the 1993 Mumbai bombings and sentenced to death, was hanged on 30 July 2015 by the Indian court system. On March 11, 2013, Ram Singh, one of the six men found guilty in the Delhi gang rape and murder case, allegedly committed suicide in Tihar prison. A third inmate, a minor at the time of the crime, was freed from a reform home after serving three years. Therefore, a crime against humanity that ranks among the most heinous of all time was done by them. It is in our inclination to want the perpetrators of such horrific acts to suffer and receive the worst sentence possible. How severe can sanctions be before they become unconscionable? As long as justice is served, taking a person's life will not be the end of it. A more humane alternative might be a public execution or even torture. Allowing the death penalty is akin to stepping off a ledge into the unknown. A thin line separates justice from state-sponsored murder. At this point, you cannot cross a line. Whether or not the deliberate execution of known criminals by the state, even for the most serious crimes like murder, is a morally acceptable reaction to criminal behaviour is at the heart of the major philosophical question surrounding capital punishment. Retributivism and utilitarianism, or consequentialism, are two widely accepted approaches to the morality of punishment.<sup>4</sup>

## **2. MEANING OF CAPITAL PUNISHMENT AND ITS HISTORICAL BACKGROUND**

2.1. "Execution of an offender sentenced to death for a criminal offence by a court of law" is commonly known as the death penalty. Executions without due process of law should not be confused with capital punishment. It is common to refer to the death penalty as capital punishment, despite the fact that it is not always followed by execution (even if the verdict is maintained on appeal). Instead, the sentence might be commuted to life in prison. Following an authorised and rule-governed process, capital punishment is designed to result in the deliberate execution of persons in response to actual or supposed misconduct and to conclude that the person is responsible for violating norms that warrant execution. capital punishment Executions for a wide range of offences have traditionally been enforced by a variety of authorities, for a wide range of behavior, for political or religious views or practices, for a status that was beyond one's control, or without applying any major due process. Terrorist groups,

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<sup>4</sup> Sonam, *A very thin line separates justice from state-sponsored murder*, THE HINDU, February 20, 2016, at 1.

urban gangs, and mobs have also carried out informal executions for the sake of retribution.<sup>5</sup>

2.2. Death via lethal injection has never been outlawed in the history of mankind. Draco's (fl. 7th century BCE) regulations allowed for lethal punishment to be employed often in ancient Greece for crimes including murder, treason, arson, and rape, despite the claims of Plato that it should only be used for the incorrigible. Sir Henry Marine's statement that even though the Roman Republic did not abolish the death penalty, the practise of punishment or exile mostly controlled its non-use, and the system of questioning confirms this.<sup>6</sup> The Indian Penal Code, 1860" and Code of Criminal Procedure, 1898 were among the laws that remained in existence when India gained its independence from British rule. The death penalty was one of six punishments outlined in the IPC. Section 367(5) of the CrPC 1898 requires courts to record reasons for not imposing a death sentence on crimes for which the death penalty was a possibility. Rewriting Section 367(5) of the Criminal Procedure Code (CrPC) made a dramatic shift in how the death penalty was seen in 1955. There was less of a need for courts to provide exceptional justifications for avoiding implementing the death penalty in circumstances when it was mandated. Section 354 (3) of the Code of Criminal Procedure (the "CrPC") was significantly revised when it was reenacted in 1973. Following the 1955 amendment, the death penalty was no longer an option in a capital case, and periods of imprisonment and the death penalty were no longer equal possibilities (where death sentence was the norm and reasons had to be recorded if any other punishment was imposed). As a result, judges were now required to explain why they handed down the death penalty. Additionally, Section 235 was amended to allow for a post-conviction hearing on punishment, even death, in the event of a wrongful conviction (2).<sup>7</sup>

### 3. PHILOSOPHICAL FRAMEWORK

3.1. According to *Marshall and Duff*, doing illegal acts is a violation of the values and interests that are held in common by the community. According to *Lamond's* view, It is the responsibility of public officials to punish criminal wrongs on behalf of the community that makes criminal wrongs public wrongs. Punishment refers to the physical or financial harm done to the guilty party as a result of their heinous deed. Private vengeance and self-help were all that was available to the victim in the early stages of society when society was primitive,

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<sup>5</sup> Camus Albert, *Reflections on the Guillotine, Resistance, Rebellion, and Death*. TRANS JUSTIN O'BRIEN. NEW YORK, 175-66 (1966).

<sup>6</sup> Capital Punishment in India by Dr. Subhash C. Gupta, 2000, p. 1.

<sup>7</sup> Law Commission of India. Report No.262 on Death Penalty, August 2015, pp. 17-18.

and he was able to get his wrongs redressed with the support of his friends and relatives. The state is currently enacting a shift away from private justice toward public justice. Because of this, a harm done to an individual is now regarded an offence against the state and punishable by the law, rather than a private wrong. Also, Keeping society safe and secure is the goal of law, says **Holland**. So, it is more than just an institution to protect the rights of individuals. One of the most important responsibilities of a state today is the administration of justice through the courts. The courts carry out their duties in accordance with the legislation enacted and all people should be treated equally under the law and in the eyes of the justice system. The wrongdoer's concerns are addressed when he or she is punished.<sup>8</sup>

3.2. As an institution or practise within the context of legal laws, the standard or primary case of punishment is usually discussed philosophically in connection to more general notions as an institution or practise. Or, to put it another way, the interest of the philosopher in the death penalty arises from a bigger philosophical question: Is punishment morally acceptable?. Based on the well-known framework proposed by **H.L.A. Hart**, few questions are asked such as Is punishment necessary? What is the reason for it? These and other questions need to be answered. The question is, who is entitled to be punished? Is there a limit to the quantity of punishment that can be given.<sup>9</sup>

3.3. The primary question isn't whether or not it's morally justifiable to sentence murderers to death but whether or not it's morally justifiable to sentence murderers to death rather than incarceration, for example. What is the goal of punishment in general? What is the correct measure or amount of punishment for a particular crime? These are some of the questions that are asked in response to this inquiry about the death sentence. There are two main schools of thought among philosophers when it comes to the moral worth of punishment in general and the appropriateness of capital punishment in dealing with major criminal wrongdoing. Justifications are offered in two ways: from a prospective perspective, such as the different future impacts or consequences of death punishment, or from a retrospective perspective, such as the various parts of the conduct to be punished. It has since the 1930s been known as 'retributivism justifications' look back to the offence committed in order to link directly to the quantity, kind, or form of the punishment. The question of whether a penalty fits the crime is a

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<sup>8</sup> Hood, R., & Hoyle, C., *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic."*, CRIME AND JUSTICE, 38(1), 1–63 (2008).

<sup>9</sup>N.V. PARANJAPE, STUDIES IN JURISPRUDENCE AND LEGAL THEORY, CENTRAL LAW PUBLISHING, 205-06(2d ed. 2016).

common way to describe this connection. Capital punishment's beneficial effects or consequences are of secondary importance to retributivists. There has been a long history of 'utilitarian' and 'consequentialism' explanations for punishment, which have been termed since the mid-20th century. It is important to distinguish between retributive and consequentialist views to the death penalty since the former focus solely on the future implications of capital punishment, such as deterrence and incapacitation.<sup>10</sup>

3.4. Justifications for capital punishment based solely on the consequences of death, such as murder, can be found in a utilitarian approach. *Accordingly, utilitarianism is typically described as "ahead looking" in contrast to retributivism, which is described as "behind looking" in the context of utilitarianism.* Executing a murderer should only be done when it is in the best interests of society. Some argue that the benefits of capital punishment must surpass the benefits of other criminal remedies to serious misbehaviour, such as long-term jail. The three main goals of punishment are rehabilitation, disability, and deterrent to reduce or avoid crime and increase community satisfaction (that is, setting an example for others). *Bentham* prioritises deterrence among the three possible outcomes of punishment. Punishment is only acceptable if the benefits outweigh the drawbacks. According to *Bentham*, punishment is the best way to reduce crime because it deters future criminal behaviour. Bentham allows capital punishment for heinous murder when the "effect may be the destruction of numbers," but eventually pushes for its eradication. He explicitly applies his utilitarian method to capital punishment.<sup>11</sup>

## 4. CAPITAL PUNISHMENT VIS-À-VIS DETERRENT AND RETRIBUTIVE THEORIES OF PUNISHMENT

### 4.1. Deterrent theory

Death penalty supporters argue that it serves as a deterrent for future offenders because of the punishment's status as a death sentence. However, if this were true, crime would have been extinguished long ago due to the existence of the death sentence for so long. Consequences are inherent in the concept of deterrence. Because of this, one should be afraid of the consequences of his conduct because of the deterrent influence. When it comes to crime, the death penalty has not played a significant role over the years. This is because a criminal who is worthy of the

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<sup>10</sup> Cessare Beccaria, *On Crimes and Punishments*, HACKETT PUBLISHING COMPANY, (1986).

<sup>11</sup> Bedau, Hugo Adam, *Bentham's Utilitarian Critique of the Death Penalty*, Journal of Criminal Law and Criminology (1983).

death penalty is not concerned with the consequences of his conduct, but rather with the realisation of his goal. Fear of death punishment has not deterred the rapists, the murders, and the burglars. For these hardened criminals, the consequences of their actions are of no concern or consideration, as their only motivation is the fulfilment of their desire and they are willing to satiate themselves, at any cost, no matter what. Are criminals justified in fearing death if they have no regard for the repercussions of their actions? Further, deterrence can be divided into two categories. It's important to distinguish between two types of deterrence: those that are targeted at the person who is already serving a sentence and those that are more broad in nature. Criminals are the primary target of the general deterrent, which focuses on their anti-social behaviour. If you want the criminal to pay the price for his actions, you can't give him leniency in the form of a lighter sentence than the victim. In addition, the ideal criminal policy should not grant forgiveness to the criminal in order to prevent the criminal from gaining social superiority over the victim ever again. According to *Garofalo*, when a person's sense of justice and fair play are violated, it is considered a crime. He advocated the use of death, imprisonment for life, or transportation as punishment for criminals, as well as compensation. *Salmond* says Criminal law primary objective is to serve as a warning and an example to those who share his views on wrongdoing. As a result, conceptions of punishment based on deterrence play a significant role in crime prevention, as does the threat of death penalty or life in prison.<sup>12</sup> What's the point of killing someone if you don't intend to punish them? The fundamental goal of death is to scare away potential victims. The major goal of imposing death in modern civilization is deterrence. The true question is not whether death deters, but rather whether death deters more than life imprisonment. However, the absence of evidence to support the idea that death is a deterrent has been a source of concern. The prevention of death cannot be proven to be productive by empirical evidence. Since the deterrent theory of punishment is founded on the prospect of punishment preventing future crime, it must objectively deter as the greatest threat of all is the threat to life. Because there is no association between the rate of crime and the usage of the death sentence, the only method to get the same information is to estimate the amount of crime that would have been prevented but for the death penalty. Death in an uncertain future serves as a deterrent not because of its harshness, but because of its swiftness and certainty. Death is less deterrent than any other form of prompt penalty. The criminal

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<sup>12</sup> P.J. Fitzgerald .(1994). *Salmond on Jurisprudence*(12<sup>th</sup> ed.). Universal Law Publishing.

justice system should be reformed because it is expediency and not severity that yields outcomes.

#### 4.2. Retributive theory and Indian Judiciary dealing with constitutionality and mercy petitions

1. **Professor Hart** writes that as a result of this ancient punishment is distinct from modern social hygiene in that it doesn't focus on reducing crime or protecting society from criminals; instead, it focuses on punishing guilty wrongdoers for their crimes. There are two parts to the concept of "just deserts" the positive (denunciation) and the negative (just proportion), which can be articulated for convenience. However, a positive side is that society as represented by the courts should not penalise the offender too leniently; in other words, the punishment should not be excessively lenient. The defendant must not get a punishment that is more severe than what is justified by his crime, and the sentence must not be excessively lengthy in the negative aspect. Punishment was mostly retributive in nature in Indian early communities. An eye for an eye and a tooth for a tooth is the premise for this philosophy. As outlined in this philosophy, it is imperative that the offender's joy be returned with equal pleasure for the victim. Punishment is not seen as an instrument of public benefit by those who embrace this theory. Instead, they see it as an abstraction to revenge against offenders. While retributive punishment focuses on punishing the perpetrator, deterrence views the individual as a means rather than an aim in and of itself.<sup>13</sup>
2. Observed by **Sir Walter Moberly**, punishing someone for their actions is a way to apply the universal principle of justice, which states that all men deserve to be rewarded for their actions. Because of the horrible deeds perpetrated by the criminals, followers of this position think that punishment is warranted. There is a lot in similarity with the concept of expiation with this thought.<sup>14</sup>
3. The Supreme Court upheld the constitutionality of the death penalty in three different cases: **Jagmohan Singh vs. State of Uttar Pradesh (1973)**<sup>15</sup>, **Rajendra Prasad vs. State of Uttar Pradesh (1979)**<sup>16</sup>, and **Bachan Singh vs. State of Punjab (1980)**<sup>17</sup>.

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<sup>13</sup> Davis, Michael. (1986). *Harm and Retribution* (15<sup>th</sup> ed.). Philosophy & Public Affairs.

<sup>14</sup> Walter, Moberly (1968). *The ethics of Punishment*. Cambridge University Press: Archon books.

<sup>15</sup> A.I.R. 1973, S.C 947.

<sup>16</sup> A.I.R. 1980, S.C 898.

<sup>17</sup> 1980 2 SCC 684.

The death penalty can be handed down to a criminal if the law allows it and the trial is conducted in a way that is fair, just, and reasonable, according to the ruling. *Only in the most extreme of circumstances will the courts use "special reasons" and in rarest of rare case to sentence a person to death.*<sup>18</sup>

4. Unanimous Supreme Court decision in *Jagmohan Singh vs. State of Uttar Pradesh* ruled that capital punishment was lawful and did not violate Articles 14, 19, and 21; and therefore the death sentence was affirmed. According to the Supreme Court, the decision to execute someone should be made in conformity with the legal process. *According to Krishna Iyer in Rajendra Prasad Vs. UP*, the death sentence violates Articles 14, 19, and 21 of Constitution but five-judge bench of the Supreme Court reexamined the issue in *Bachan Singh vs. State of Punjab*, where it reversed its earlier ruling in Rajendra Prasad by a vote of 4:1 (with Bhagwati J. dissenting). Articles 14, 19, and 21 of the Constitution of India were not violated because the "public order" anticipated by paragraphs (2) to (4) is distinct from "law and order", and the principle of awarding death sentence only in the "rarest of rare instances" was enumerated. "Death sentence is not only unlawful, as it violates Articles 14 and 21, but it is also undesirable from various points of view", wrote **Bhagwati J.** in his dissenting opinion.
5. Most people believe that the dignity of human life necessitates opposition to the taking of life through the instrumentality of laws, which should only be done in the rarest of situations when all other options have been exhausted. The Supreme Court maintained the death penalty in the case of *Machhi Singh v. State of Punjab*<sup>19</sup> after the decision in *Bachchan Singh*. Moreover, the Supreme Court in this case has provided some guidelines for the use of the theory of the "rarest of rare cases", noting that judges should interpret the guidelines sensibly and that a death sentence may be awarded if a community's collective conscience has been outraged and divided five categories of situations for this extreme step such as manner of commission of murder, motive, antisocial crime, manner of crime and nature of victim etc.
6. There have been few additional cases where the Supreme Court has affirmed a death sentence for a heinous and brutal murder. Supreme Court affirmed the death penalty

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<sup>18</sup>Deol, Tarun (2020, 19 March). Rarest of rare' — history of death penalty in India and crimes that call for hanging. *Indian Express*, p.1.

<sup>19</sup> 1983 SCC (3) 470.

in *Ranjit Singh v. UT of Chandigarh and in Mithu v. State of Punjab*<sup>20</sup>, both of which were considered 'rarest of rare cases' under Indian Penal Code Section 303. Supreme Court affirmed its earlier ruling on 9 July 2018 in the **Nirbhaya rape-cum-murder case**, rejecting the three convicts' request for their sentences to be lowered to life terms. In 2012, three guys were found guilty of raping and torturing a medical student on a Delhi bus and then escaping justice.

7. To address challenges to death penalty cases, the Supreme Court has in recent years firmly established the punishment of "whole life" or life in prison with an established time. This emerging criminal alternative was put out by the Supreme Court through a three-judge bench ruling in the *Swamy Shraddhanand case*<sup>21</sup>, it would be more just, reasonable, and legitimate for the Court to take over the space between 14 years in jail and death, which, in fact, is their lawful domain. A 14-year prison term in this case would amount to no punishment at all, so the Court will employ the option of a longer sentence.
8. Indian Constitution **Article 72 and Article 161** deals with the President's and Governor's ability to give pardons, to suspend, remit or commute punishments in certain situations. The court ruled in *Maru Ram v. Union of India*<sup>22</sup>, Constitution Bench outlined the limits of judicial review of Articles 72 and 161 of the Constitution in the instant case. All public power, including constitutional power, should not be used arbitrarily or mala fide. In *Swaran Singh v. State of U.P.*<sup>23</sup>, the Governor of UP awarded the Minister of the State Legislature Assembly convicted of murder a life sentence remission. If an order of clemency is issued in complete disregard of the "finer cannons of constitutionalism," the Supreme Court ruled that such an order cannot be approved by law and that the "judicial hand must be extended" in such circumstances. There were differing opinions on whether a death row inmate might request a commutation of his. The 2014 judgement in *Shatrughnan Chauhan & Anr. v. Union of India*<sup>24</sup> settled this argument definitively. The Court observed that keeping a prisoner in suspense while the President considers his or her compassion appeal for several years is undoubtedly an anguish for him or her. It has a negative

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<sup>20</sup> (1983) 2 SCC 277.

<sup>21</sup> (2008) 13 SCC 767.

<sup>22</sup> 1981 (1) SCR 1196.

<sup>23</sup> 998 (4) SCC 75.

<sup>24</sup> (1980) 2 SCC 625.

impact on the convict's physical and psychological health. In reviewing the President's rejection of the clemency plea, this Court cannot ignore the torturous delay caused to the convict only because of the seriousness of the offence while applying Article 32 read with Article 21 of the Constitution.

9. **The 262<sup>nd</sup> Report, Law Commission**, in its 2015 report on 'The Death Penalty', the Commission, under the chairmanship of Justice (retd.) Ajit Prakash Shah, recommended and believes that capital punishment should be abolished for all offences other than terrorism and war. It is unconstitutional in our criminal justice system to use the "eye for an eye, tooth for a tooth" principle. The constitutionally mandated penological objectives of capital punishment are utterly thwarted. Rehabilitative and rehabilitative parts of justice are overlooked when the death sentence is seen as the ultimate measure of justice for victims. With the death penalty as the only option, it is easy to ignore the needs of victims and the rights of those who have been harmed by criminals.<sup>25</sup>
10. Death sentence for murder is justifiable even if social repercussions cannot be achieved since society no longer exists. For capital punishment, Kant is an excellent example of pure retributivist capital punishment. The social consequences of a murder are irrelevant, and "the Law of Retribution", an ancient maxim, *lex talionis*, rooted in the "principle of equality", is the basis for linking the death penalty to the crime. Capital punishment is supported by *Kant's "The principle of equality"*, which determines the appropriate punishment for a crime. Irrespective of how Kant's ideas are best understood, the general tenet behind this approach is that offenders should be punished in proportion to the harm they have caused to the victim. However, as has been shown time and time again, applying *lex talionis* as a general concept to crimes and punishments is impossible. Rape, theft, fraud, assault, arson, etc., all appear to warrant punishments such as being raped, robbed, defrauded, assaulted, burned out, and so on. Forgery, drug trafficking, mass murder, terrorism, genocide, and other forms of genocide are all crimes that *lex talionis* does not explicitly authorise or demand any specific punishment. In the single murder instance, it appears that the *lex talionis* can be taken literally. Using a literal interpretation of *lex talionis* to justify capital punishment for murder is therefore opposed by both practical and moral

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<sup>25</sup> *Id.*17.

concerns.<sup>26</sup>

## 5. CAPITAL PUNISHMENT—INTERNATIONAL PERSPECTIVE<sup>27</sup>

Is the death penalty an acceptable exception to the right to life, or should it be abolished altogether? The death sentence in the United States has a complicated history. It was declared unconstitutional at one point, but was quickly reinstated. A variety of jurisdictions, including India and South Africa, have looked to the US death penalty case law for guidance on whether or not capital punishment is appropriate in those countries. A strong anti-death penalty stance has been adopted by the European Union, which has made death penalty a condition for membership. According to Amnesty International, the death sentence is being used less frequently. Abolition of capital punishment at the international level began with Article 3 of the UDHR and Article 6 of the ICCPR, which stated that the death penalty would be abolished "eventually" and "legally safeguarded". Second optional protocol to ICCPR made significant strides in ensuring no one within the jurisdiction of a State party to this protocol was executed. Because the articles of the protocol apply as additional provisions to the ICCPR and are legally enforceable on party States, the death sentence would no longer be a subject of local jurisdiction but rather of international concern. State governments are urged by the International Covenant on Civil and Political Rights (ICCPR) to put a moratorium on the death sentence. No state shall deprive any individual of life, liberty, or property, without due process of law, according to the Fourteenth Amendment of the United States Constitution. And Section 11 of South Africa's Constitution does not place a condition on the right to life. If a reasonable, reasonable, and acceptable limitation is required in a society founded on human dignity, equality, and freedom, only the general limitation provision in section 36 applies. In one of its first judgements, the South African Constitutional Court declared the death sentence unconstitutional because it violated the right to life. In both international and European human rights instruments, there is a tension between allowing the right to life and capital punishment. Both the European Convention on Human Rights and the International Covenant on Civil and Political Rights make an exception for the death sentence while outlawing harsh, inhuman, or degrading

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<sup>26</sup> Sorell, Tom. (1987). *Moral Theory and Capital Punishment*. Oxford: Basil Blackwell in association with the Open University.

<sup>27</sup> DEATH PENALTY: A WORLDWIDE PERSPECTIVE (Roger Hood and Carolyn Hoyle, 4th ed, 2008).

treatment.<sup>28</sup>

## 6. CRITICAL ANALYSIS OF RETRIBUTIVISM AS AN ELEMENT IN CAPITAL PUNISHMENT AS PER INDIAN CASE LAWS ANALYSIS--FINDINGS<sup>29</sup>

1. Retributivism is popular because of the belief that enforcing proportional punishment will help restore justice in society. There are some crimes that cannot be judged on the basis of morality, as the instance of the mass murderer illustrates. Retributivism relies on the ability to maintain a morally neutral scale. If a mechanism for achieving this moral balance through the administration of punishment cannot be clearly defined, then a crucial criteria of retributivism has been violated. Retributivism is doomed to failure until an alternative technique of giving proportional punishments in these particularly terrible circumstances is discovered.<sup>30</sup>
2. In **Bachan Singh's** framework, there are intrinsic gaps that do not give normative support for mitigating variables or the weighting of aggravating and mitigating factors. One portion of this difficulty is due to these gaps. The judges have been given the task of filling in the blanks in this case. Bachan Singh is likewise quiet on procedure; no clarification is provided on who is required to offer evidence of mitigating conditions and what factors constitute such proof. Bachan Singh. The Bachan Singh framework's flaws have only been exacerbated by the inclusion of sentencing public opinion. Using the term "collective conscience", the court's decision in Machhi Singh has resulted in capital sentences being influenced by popular anger.
3. If the alternative option is absolutely denied in any given case, then the genuine litmus test of 'rarest of rare,' as laid out in Bachan Singh, applies. At the time, the only other choice was fourteen years in prison for life without parole. But the alternatives to death have grown since then, so it might be prudent to reconsider the Bachan Singh judgement in light of these changes. Swamy Shraddananda's increased territory should be incorporated within Bachan Singh's framework. The legitimacy of this punishment has

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<sup>28</sup> Schabas, William A., *International Law And Abolition Of The Death Penalty: Recent Developments*, ILSA Journal of Int'l & Comparative Law, Vol. 4:535 (1998).

<sup>29</sup> R. Basant, *An ideal death penalty law*, Youtube (last visited February 20, 2022, 6: 00 P.M.). <https://www.youtube.com/watch?v=qOP0jb5hM8g>.

<sup>30</sup> Emerson, Deet. *Changes in Capital Punishment Policy Since 1939*, 38 *J. Crim. L. & Criminology* 584. (1947-1948).

been questioned by the courts, hence it is urged that the IPC be amended to include the mandatory life sentence envisioned in *Swamy Shraddanada*.

4. When the Supreme Court is considering death penalty cases, all judges should be required to write their own opinion. Having the same opinion as someone else is not enough to show initiative and drive. There should be a distinct bench in the Supreme Court just for death sentence cases, and capital offence cases should be given priority in the High Court for confirmation. Delays can be reduced and, as a result, the agony of death row inmates can be avoided.
5. Removing public opinion from lethal punishment is another option and many of the traditional tools of punishment have undergone significant transformations. Punishment is no longer based on retribution. It is better to treat criminals than to punish them. Reformation has a new focus, but it must be applied selectively to different types of criminals. Delinquents should be taught new behaviours in prisons, not only punished. Prevention of crime, by detecting as early as possible individuals with qualities prone to lead to delinquency, correcting the external situations which create for crime, and placing around each person the forces which stimulate to social behaviour, is receiving key emphasis.
6. Retributionist alternatives to the death penalty are numerous and diverse. However, a comparison of even a small number of examples shows that there are many commonalities that undermine this way of thinking about the moral justification of death. There are two ways to approach retributivism when it comes to capital punishment: either it relies on principles that are plausible only in the context of death as a penalty for murder; or it relies on principles that are met with reasonable scepticism about their general applicability for creating an appropriate penal response to a wide range of crimes, and thus cannot be used to justify capital punishment in general.
7. As retributivists assume that people are responsible for any criminal misconduct that warrants punishment, the reality of capital punishment confronts the presupposition of voluntariness and reasonable social cooperation, for example, which challenge the presupposition of a fairly just system of cooperation. According to critics, retributivists overlook or minimise the repercussions of capital punishment while discussing the

morality of capital punishment. What if no one profits from the practise of death penalty? What if the use of the death penalty led to an increase in murders and other violent crimes? Capital punishment may be arbitrary, capricious, discriminatory, or even erroneous when it comes to deciding which criminals are put to death. A number of additional potential outcomes of lethal punishment are also worth considering. When it comes to death penalties, retributivists tend to overlook or downplay their importance, perhaps in favour of, or against, capital punishment.

8. One of the most extensively discussed retributivism cases is rape. In this situation, *lex talionis* mandates that we rape the rapist. But we can't help but feel a little uneasy about it. Because it doesn't seem to fit with our moral intuitions and punishment, raping a rapist doesn't seem to fit. Repetition of the act is a "punishable crime against humanity," according to Kant, who admits that the strict application of *lex talionis* in this circumstance is problematic. Because raping a rapist fails to reflect the whole depth of the victim's psychological distress, it does not meet the requirement of proportionality. If this is the case, the rapist is likely aware of the punishment he would face, either because a judge told him so in court or because he is aware of the ramifications of his crime under a *lex talionis*-based system of retribution. The rapist benefits psychologically from having knowledge of the rape before it occurs, whereas his victim, who was not given such a warning, did not. Preparation on the rapist's part allows him to avoid the same level of psychological distress as the victim since he has had time to psychologically prepare for the punishment.
9. For the retributivist, situations involving repeat offenders provide a particular set of challenges. Harsher penalties for repeat offenders are unfair to the offender because he or she has previously been appropriately punished for earlier crimes and now only has moral imbalance as a result of committing a new offence to deal with. In order to avoid the appearance of revenge or other consequentialist goal, the retributivist must remain dedicated to avoiding any extra punishment.
10. The only reason capital penalty is being practised today is to uphold the antiquated principle of *lex talionis*, which states: "An eye for an eye." This is a principle that society is moving away from. No matter what has transpired, society has no right to take a human life. It is impossible to undo the execution of a death sentence once it has

been carried out. There have been times when a community has been haunted by doubts about the guilt of a person condemned. Persons previously sentenced to death have been exonerated in retrials. Legal executions have a traumatic effect on the community as a whole, and the possibility exists that those sentenced to death will have no chance to atone. No substantial evidence exists to support the claim that execution punishment deters crime. People who commit suicide aren't always hopeless criminals.

11. In some jails, the vast majority of those convicted of first-degree murder have no prior criminal history; their murder was their only transgression. States that have abolished capital punishment have not seen an increase in killings. A correlation between homicide rates and the death penalty appears to be tenuous at best. As a result, some states without the death penalty actually have less homicides than others.
12. The number of lynchings has not increased since the death penalty was abolished. Because of the defendant's mental health issues, capital punishment is clearly the wrong course of action. Because of the widespread opposition to the death penalty, it is almost ineffectual as a deterrent. The court system would work better if juries were more ready to convict. Even a sentence of life in prison can be considered a severe enough penalty. It is possible that it will be excluded from consideration for pardon. It is also possible to limit the amount of commutation that it is subject to. There are currently very few cases of life in prison sentences being commuted or pardoned.
13. Due to increased efforts to hide the actual act of execution, the so-called exemplary characteristics of capital punishment have largely been abandoned. The release of some data about executions is occasionally accompanied by inexcusable and offensive performances. The focus of attention is shifted away from the real issues. Preventing criminal activity and enforcing the law as quickly as possible should be top priorities. As a means of punishment, the death penalty conflicts with current ideas of punishment that concentrate on research and the use of subjective tests. There should be no special treatment for those who have committed crimes punishable by death.
14. Rather than working to resolve the doctrinal and normative difficulties that plague the Bachan Singh framework, future Supreme Court benches have twisted it by offering various interpretations, some of which go against the core grain of Bachan Singh. It is

a pity that this has happened. Its own normative and procedural flaws have contributed to the original framework's deterioration over the past forty years. Mitigating elements have been overlooked due to a lack of a doctrinal framework. The legislative mandate that life imprisonment is the standard punishment under Section 302 of the IPC has been reduced because there is no indication on the elements of the "unquestionably foreclosed" threshold to rule out life imprisonment as an option. In many cases, death sentences have been handed down without explicitly ruling out the possibility of life in prison. When it comes to the death penalty, we must pay more attention to fundamental normative and procedural concerns, which have been demonstrated by this study. An initial examination of how sentencing information is presented in court and the constitutional standards should take place.

15. These deficiencies must be filled before any effort can be made to mend the broken nature of capital punishment in India and assure meaningful realisation of a defendant's right to a fair trial. Addressing normative inadequacies may take time, but the death penalty's seriousness and irreversibility must motivate the Supreme Court to take early action to establish clear sentencing procedures and define remedies accessible to the accused when due process is violated.

## **6. SUGGESTIONS AND CONCLUSION**

A thorough theory of punishment is required for a rational approach to the death penalty. Providing a standard for the legal loss of rights is at the heart of a complete theory of punishment because it distinguishes punishment from arbitrary and unjust violence. The utilitarian theory of punishment has been used to argue against the death penalty, beginning with Beccaria. Punishment, according to this theory, is a moralization of the instinct for self-defense. Both are based on the desire for pleasure and aversion to suffering, but the latter lets us transcend the restricted boundaries of ourselves and link our own with the pleasures of others. Therefore, it can only be considered appropriate if it brings more pleasure than it costs. The time is frightening that the highest court's notion of 'rarest or rarest instance' necessitates revision and execution of the death penalty must be based on the gravity of the crime committed by the accused, which would cause apprehension in the accused's thoughts. Judiciary and the President and Governor are expected to set an example by enforcing a higher rate of death penalty executions, and the criminal should be discouraged from committing crimes that undermine the rule of law. As long as the severity of the moral wrong can be adequately

captured, the retributivist need not analyse each circumstance on a case-by-case basis when applying the more liberal interpretation implied by the *lex de jure talionis*. It is conceivable to take into account individual offender circumstances and the moral propriety of specific punishments under a broader reading of *lex talionis*. Proportionality can still be met by modifying the *lex talionis* so long as it provides punishments that equal the moral gravity of the offence at hand and restore the balance of morality to its pre-crime status. Punishment is meant to teach a criminal a lesson and make him see the error of his ways. It's to make him feel remorse for what he's done. It's to hold him accountable for the wrongdoing he's done. If you commit a crime and violate someone else rights, you deserve to feel the same level of agony that you caused them, and you need to be punished in the same way. Death sentence is warranted in cases of rape and murder, where victims' rights have been violated and their offences have been so severe that a harsh punishment is warranted. If the individual dies, he does not experience the misery and pain that should have been inflicted on him. Isn't death a simple way out? According to this argument, the penalty should be designed to have an impact on the individual and be proportional to the offence committed. The victims of the death penalty in this instance are the victim's family, not the perpetrator. Terrorists like Kasab, for example, have come to kill and die and they were trapped with no way out. Because of this, there is no gain for the state in the deaths of these individuals. As a result, killing someone in order to make him or her recognise their own heinousness does not accomplish the goal of punishing the offender. When it comes to retribution, death doesn't even come close to providing a satisfactory answer. The killing of the guilty serves no purpose for the victims. Harming another person's eye won't help one's own already damaged eye, and the world would be a blinder for it. Only a false sense of justice has been created in the minds of the victims, and there is no actual advantage to this. A murderer's death isn't enough to reclaim the lives or the rights that he or she has infringed upon. We need a new definition of "retribution" that is less esoteric. Because retribution and reformation go hand in hand in the criminal justice system, it serves to refute the illusions of vengeance and serves the objective of reformation. Other practical considerations weigh in on the question of whether form of punishment is preferable. However, the death penalty is a hindrance to the criminal justice system's efficiency rather than a solution to the problem at hand. As a result of a reliance on the death sentence, the underlying causes of crime are obscured and helpful social interventions are overlooked. Politicians that advocate the use of lethal injections as a crime-fighting tool mislead the public and hide their own unwillingness to support effective anti-crime measures. If it approves of the death penalty, we have the erroneous idea about the strength of the state. Because of its paternalistic role, it

is unable to carry out its responsibility and is an example of the system's failure, disguised as justice. “*We kill people who have killed people, so that we may demonstrate to them and the world that killing people is wrong*”- this statement has enough errors to make us realise that we need better laws to prevent crime in the first place, rather than to look for ways to fight it with a larger crime.

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