

**A BROAD PERSPECTIVE ON CAPITAL PUNISHMENT****M Elavenil<sup>1</sup>****Abstract**

“Capital Punishment” or “Death Penalty” is the highest level of punishment awarded in any society or democracy to maintain law and order. But killing another human being in the name of justice is no better than murdering someone. We should focus on eliminating the crime not the criminal. China is the only country in the world where the practice of death penalty is still at its peak with over 1000 executions every year, whereas in India the doctrine of “Rarest of the Rare” is followed and often the death sentence gets commuted to life imprisonment. But still India has executed a total of 4 criminals from the period of 2002 to 2015. Both the countries have various similarities in the procedure and law of capital punishment. We are no one to decide who gets to live and who gets to die. Therefore instead of hanging someone to death we should adapt a different approach i.e. the reformatory approach so that one could improve himself and can live peacefully thereafter. This paper will discuss current scenario of capital punishment in India and how it still lingers here.

**KEYWORD:** Capital Punishment, Indian Penal Code, United Nations, Human Rights.

**I. Introduction:**

“An eye for an eye”, though makes the whole world blind, the same concept has been recognised as the central and effective element in the Administration of justice. Capital punishment is a penalty given to the convicted criminal for the crime he has committed<sup>2</sup>. It is nothing but a state sanctioned execution of the convicted criminal, which is enforced by the state when the accused is found guilty of heinous crimes.

**II. Origin of capital punishment:**

The origin of death penalty laws can be found in the Code of King Hammurabi of Babylon which belonged to the eighteenth century BC, the code codified death penalty for 25 different crimes. In the Seventh Century B.C.’s Draconian Code of Athens, made death the only

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<sup>2</sup> N.V. Paranjape, Crime and Punishment- Trends and Reflection (Edition- 2015).

punishment for all crimes; Death sentences were carried out by such means as crucifixion, drowning, beating to death, burning alive, and impalement. Britain influenced its colonies more than any other imperialist country and it has a long history of punishment by death. In the Tenth Century A.D., hanging became the usual method of execution in Britain.<sup>3</sup>In the Sixteenth Century, under the reign of Henry VIII, as many as 72,000 people were estimated to have been executed, it is noteworthy to mention that one among the 72,000 people was Queen Anne Boleyn, the wife of King Henry VIII. Some common methods of execution at that time were boiling, burning at the stake, hanging, beheading, and drawing and quartering<sup>4</sup>.

The number of capital crimes in Britain continued to rise throughout the next two centuries. By the 1700s, 222 crimes were punishable by death in Britain. Because of the severity of the death penalty, many juries would not convict defendants if the offense was not serious. This led to reforms of Britain's death penalty. From 1823 to 1837, the death penalty was eliminated for over 100 of the 222 crimes punishable by death. Through the nineteenth and twentieth centuries, more and more capital punishments were abolished, not only in Britain, but also all across Europe, until today only a few European countries retain the death penalty<sup>5</sup>.

### **III. Capital punishment in India:**

The Indian penal code which is the only penal law of the land since the year 1860, was drafted on the recommendation of the first law commission of India, under the chairmanship of Lord Macaulay, states death as a punishment for certain capital offences such as Waging war against the government of India (section 121), Mutiny and its abetment (section 132), Giving or fabricating false evidence upon which an innocent person suffers death (section 194), Murder (section 302), punishment for murder by life convict (section 303), abetment of suicide of child, insane person (section 305), Dacoits accompanied with murder (section 396), attempt to murder under sentence of imprisonment, if hurt is caused in such attempt (section 307), kidnapping for ransom (section 364A), causing death or resulting in a persistent vegetative state of the victim (section 376A), causing the death of a rape victim (the criminal amendment act 2013). Other offences which are punished by capital punishment in India are terrorism-related

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<sup>4</sup> M Swathi & R Roja, A Critical Study on Capital Punishment in India, International Journal of Pure and Applied Mathematics, 120 (2018).

<sup>5</sup> Dr. Vimal R. Parmar, Capital Punishment in India with Recent Recommendation of the Law Commission of India, Indian Journal of Research, 4 (2015).

cases not resulting in death, rape not resulting in death, kidnapping not resulting in death, drug trafficking not resulting in death, treason, espionage, military offenses not resulting in death and abetment to the commission of Sati. The two modes of execution of the prisoners in India are execution by hanging and execution by shooting.

#### **IV. Research Methodology**

The methodology of this research paper is based on non-doctrinal research. This paper broadly used an exploratory research technique based on past pieces of literature from respective journals, reports from government authorities and extensive academic literature on the real estate sector. For the research, secondary data are relied upon. The research design of this paper is descriptive, describing the effect of various Laws on allottees in the real estate sector.

#### **V. Literature Review**

Is it cost effective for state to embark in criminal execution? This question continues to feature in a growing amount of literatures. Aviram takes the Marxist perspective which predicts that the severity of punishment is determined by the economic capacity of the state (Aviram, 2015). The assumption here is in the case of death penalty, some state view this as the easy way to deal with criminals instead of spending funds in taking care of them.

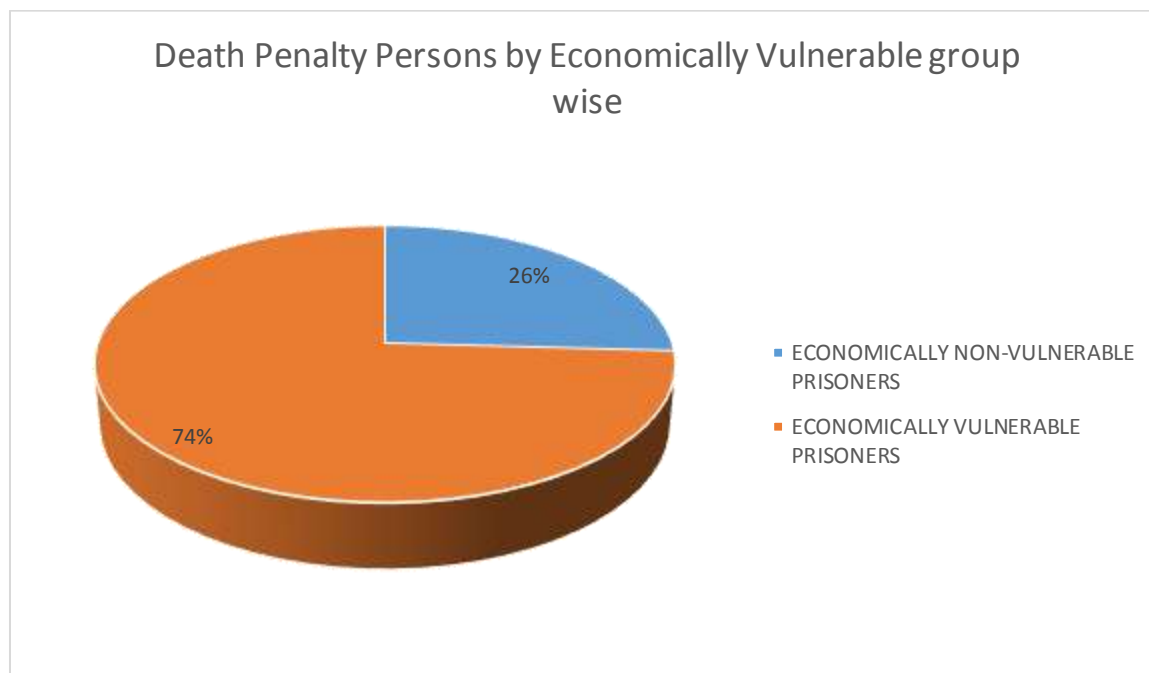
M. Swathi and K.Roja observed that, “We have to reform our laws especially for death penalty in India. Our laws should reform and the punishment should be so rigours and it should be an example for people around him, about his unlawful acts. There is a punishment worse than death penalty. Make the offender continuous discussion about capital Punishment and the rigorous life in prison is worse than capital punishment. Each day and night the offender should feel for his offence. The capital punishment is not effective to reduce crimes in Society. Hence null hypothesis proved” (M. Swathi and K.Roja, 2018).

In earlier years, Miethe had ushered a different perspective. Miethe research finding is from a cross-national study which reveals that the use of death penalty has a correlation with the economic development in the countries but is not a good predictor to determine if states would retain or abolish death penalty (Miethe et al, 2005).

#### **VI. Statistical Research Analytics**

The following table helps us in better understanding the Death Penalties in India and it based on the report of Project 39a and National Law University, Delhi.<sup>6</sup> The Analytics interviewed 373 out of the 385 prisoners who were on the death row at the time and their families. Besides socio-economic data, the DPRP also documented accounts of prisoner experiences with police investigation, access to legal representation, experience at the trial courts, and life on death row, relationships with family through the years in prison, and other associated aspects.

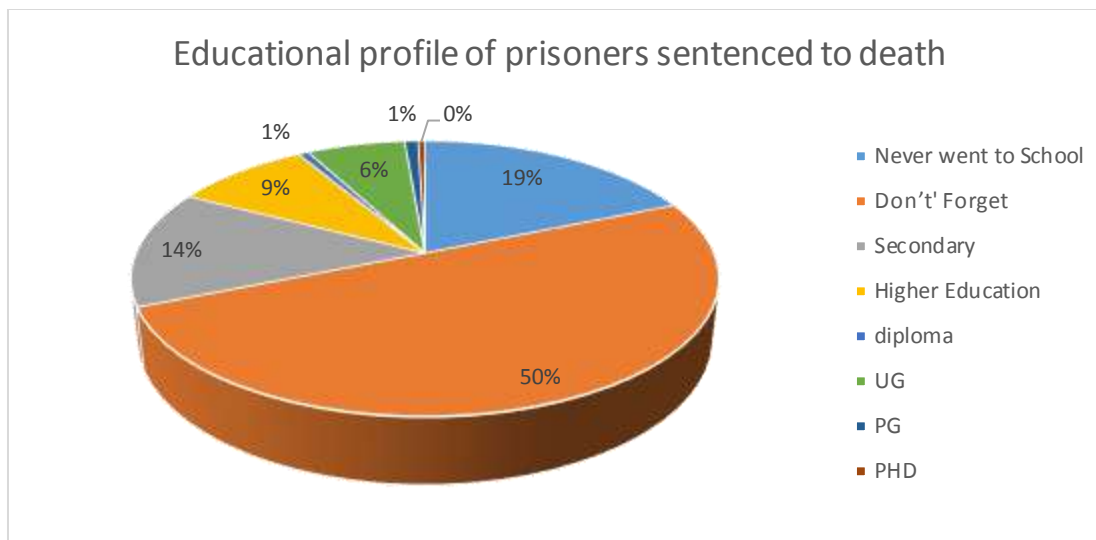
**Table 1** Death Penalty Persons by Economically Vulnerable group wise.



According to the national figures, 74.1% of the prisoners sentenced to death in India are economically vulnerable according to their occupation and landholding. Amongst the states with 10 or more prisoners sentenced to death, Kerala had the highest proportion of economically vulnerable prisoners sentenced to death with 14 out of 15 prisoners (93.3%) falling in this category. Other states which had 75% or more prisoners sentenced to death belonging to the 'economically vulnerable' category were Bihar (75%), Chhattisgarh (75%), Delhi (80%), Gujarat (78.9%), Jharkhand (76.9%), Karnataka (75%) and Maharashtra (88.9%).

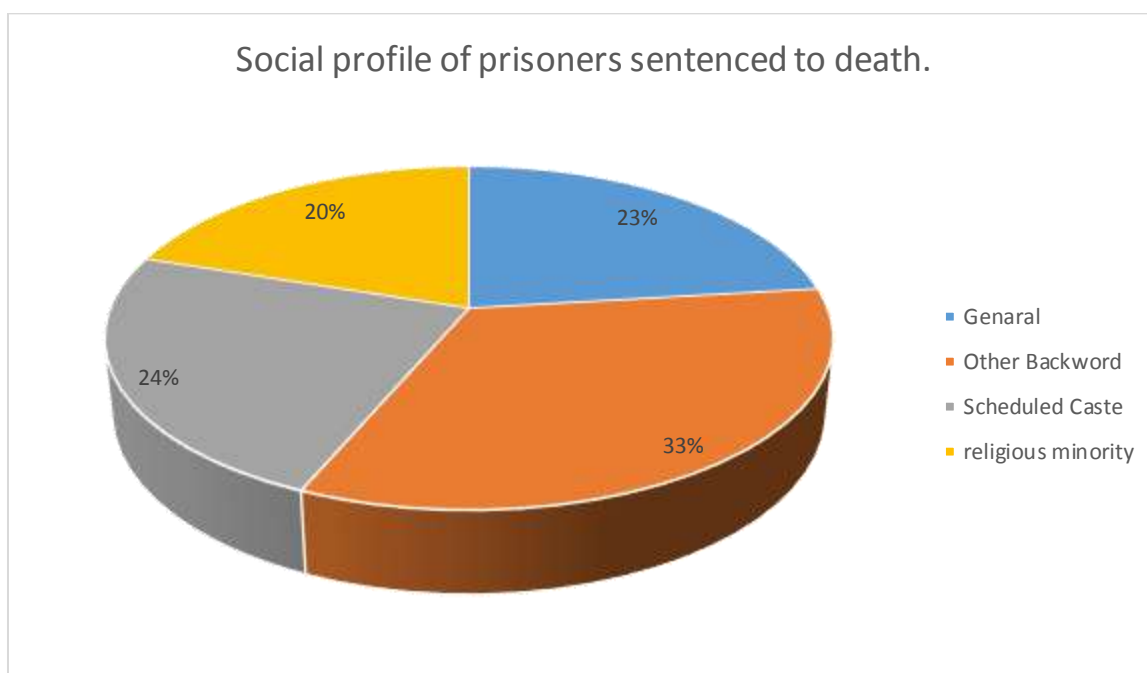
**Table 2** Capital Punishment Prisoners and their Educational Status

<sup>6</sup> Available at: [https://www.project39a.com/s/Death-Penalty-India-Report\\_Summary-5je9.pdf](https://www.project39a.com/s/Death-Penalty-India-Report_Summary-5je9.pdf) (Last Visited at: 17.08.2021)



23% of prisoners sentenced to death had never attended school. A further 9.6% had barely attended but had not completed even their primary school education. Amongst the states with a substantial number of prisoners on death row, Bihar (35.3%) and Karnataka (34.1%) had the highest proportion of prisoners who had never attended school. Kerala is the only state (amongst those states with 10 or more prisoners sentenced to death) where all prisoners had at least attended school. While the national ratio for prisoners sentenced to death who did not complete their secondary education is 62%, states like Gujarat (89.5%), Kerala (71.4%), Jharkhand (69.2%), Maharashtra (65.7%), Delhi (63.3%) and Uttar Pradesh (61%) had a large proportion of prisoners under this category.

**1.3 Social profile of prisoners sentenced to death.**



76% (279 prisoners) of prisoners sentenced to death in India are backward classes and religious minorities. While the purpose is certainly not to suggest any causal connection or direct discrimination, disparate impact of the death penalty on marginalised and vulnerable groups must find a prominent place in the conversation on the death penalty. While the proportion of Scheduled Castes/Scheduled Tribes (SC/STs) amongst all prisoners sentenced to death in India is 24.5%, that proportion is significantly higher in Maharashtra (50%), Karnataka (36.4%), Madhya Pradesh (36%), Bihar (31.4%), Jharkhand (30.8%) and Delhi (26.7%), amongst states with 10 or more prisoners sentenced to death. Religious minorities comprised a disproportionate share of the prisoners sentenced to death in Gujarat, Kerala and Karnataka. In Gujarat, out of the 19 prisoners sentenced to death 15 were Muslims (79%), while 60% of the prisoners sentenced to death in Kerala were religious minorities (five Muslims and four Christians amongst 15 prisoners sentenced to death). Of the 45 prisoners sentenced to death in Karnataka, 31.8% were religious minorities (10 Muslims and four Christians)

#### **VII. Capital punishment and administration of justice:**

The subject Jurisprudence talks about the philosophy of law, without which law will be nothing but a mere set of rules and regulations. It is Jurisprudence that clearly states what law as an instrument of the state seeks to achieve in general. Jurisprudence describes that administration of justice, which is one of the important functions of the state, is the end of the law of a land. The function of the judiciary is to protect and enforce the rights of the individuals and to punish wrong doers. This function is called the Administration of justice. Administration of justice is of two types and they are, administration of civil justice and administration of criminal justice. The term 'justice' here does not mean justice in the abstract sense as a moral virtue or ideal rather it means justice according to law or in other words, enforcement of rights as they are defined by law. The purpose of the criminal justice is to punish the wrong doer<sup>7</sup>. He is punished by the state, the first question that arises about the administration of justice is as to what the purpose of punishment is or in other words, what is the end of the criminal justice? And it is here, where the theories of punishment play a vital role in addressing the purpose of the punishment. There are five theories of punishment, preventive theory, deterrent theory, reformatory theory, retributive theory and expiatory theory. Since capital punishment, disables and prevents the offender from the commission of similar crimes and deters the likeminded persons from commission of similar crimes, it serves the purposes of preventive theory of

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<sup>7</sup> Capital Punishment in India, Lok Sabha Secretate, Reference Note – 27/RN/Ref./October/2015.

punishment and deterrent theory of punishment. It is notable that capital punishment fulfils the purpose of the retributive theory of punishment also because it makes the offender suffer for his crime.

### **VIII. Effectiveness and ineffectiveness of capital punishment:**

The main objective of the capital punishment is that it deters the persons from committing capital offences. The deterrent effect that the capital punishment creates in the society, is considered as the effectiveness of the capital punishment. Many of the legal scholars and activist suggest that capital punishment's motive is to deter the likeminded people who intend to commit capital offences. But every coin has two sides, which suggests that duality is the truth of a philosophy. Many of the legal scholars, activists and advocates suggest that capital punishment cannot be a solution to protect law and order in the society. Because sentencing a person to death, will never reform the offender. Capital punishment will never be enough to make the offender realise his wrong. But capital punishment helps an offender escape his guilt simply by death. One's guilt can be felt and experienced only by making him live with that guilty feeling, and by making him realise his wrong. For instance, Rape not resulting in death as well as rape resulting in death both are capital offences in India and many of the people welcomed the decision that made rape a capital offence. On the other hand, notable activists and advocates suggest that sentencing a rapist to death will never make India safe for other women, capital punishment also encourages the similar offenders to murder the victims after raping them to avoid conviction by erasing all the evidences required to prove rape in the court of law. In last 20 years, four people were hanged to death out of which only Dhanajoy Chatterjee was charged of rape and murder of a school girl while the other three were terrorists. The execution of Chatterjee took place in Alipore Central Correctional Home, Kolkata, on August 14, 2004. It took 14 years to execute him. He was charged of rape and murder of Hetal Parekh, a 14-year-old school girl on March 5, 1990. In the Nirbhaya case Akshay Thakur, Vinay Sharma, Pawan Gupta and Mukesh Singh were sentenced to death by a trial court in 2013<sup>8</sup>.

The four were hanged in the capital's high-security Tihar prison in the first executions in India since 2015. Though capital punishment was given to the offenders in the above mentioned cases, the deterrent effect has not been sufficient to prevent the rape as well as murder rate in

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<sup>8</sup> China mulls ending death penalty for nine crimes, THE HINDU (Oct. 27, 2014, 10:07 am), <http://www.thehindu.com/news/international/china-mulls-ending-deathpenalty-for-nine-crimes/article6538206.ece>

India. According to the statistical report of the NCRB, the total number of rape cases registered in India 32,103 in the year of 2018. Similarly 372 murder cases were registered in the year 2018 in India, though murder is a capital offence and which is to be punished with death penalty. The theory that capital punishment deters the similar offenders and likeminded people seems to have created hardly any deterrent effect on the society. The other theory that opposes capital punishment is, that though capital punishment is a state sanctioned killing of the offender, it is no less than a murder. Capital punishment is a revenge on the wrong doer and revenge cannot be justice, Avenging the offenders does not help in building a crime less society. Hence the capital punishment is considered ineffective in preventing the commission of capital offences.

#### **IX. The human rights perspective and reformatory theory of punishment:**

According to the Office of the High Commissioner for Human Rights “The death penalty has no place in the 21st century.” Some 170 Member States of the United Nations with a variety of legal systems, traditions, cultures and religious backgrounds, have either abolished the death penalty or do not practice it. Yet, prisoners in a number of countries continue to face execution. The Office of the High Commissioner for Human Rights, with its mandate to promote and protect all human rights, advocates for the universal abolition of the death penalty. The UN Human Rights Office argues this position notably in light of the fundamental nature of the right to life; the unacceptable risk of executing innocent people; and the absence of proof that the death penalty serves as a deterrent to crime.

From the early 1960s, although a majority of countries still used the death penalty, the drafters of the International Covenant on Civil and Political Rights (ICCPR) had already begun moves for its abolition in international law. Although Article 6 of the ICCPR permits the use of the death penalty in limited circumstances, it also provides that “nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant. UN General Assembly resolutions In a series of resolutions adopted in 2007, 2008, 2010, 2012, 2014, 2016 and 2018, the General Assembly urged States to respect international standards that protect the rights of those facing the death penalty, to progressively restrict its use and reduce the number of offences which are punishable by death.

The reformatory theory of punishment which is of a recent origin states that the purpose of the punishment is to reform and rehabilitate the offender, because most of the crimes are



committed by the offenders due to their psychological problems and their influence upon their character. This theory suggests that an offender should be considered as a patient who requires proper medical treatment and counselling and not as a criminal who needs to be suffered for his wrong. Though the reformatory theory is of recent origin, many developed countries have been successful in adopting this theory of punishment for their Administration of justice. Most of the human rights activists support this theory because it is the duty of the state to reform and rehabilitate an individual when he is in a wrong path<sup>9</sup>. The state has the right to punish the wrong doer at the same time the state has the duty to educate its people regarding the right and wrong and reform them.

#### **X. Indian constitution and capital punishment:**

The constitution of India guarantees every person a fundamental right to life subject to its deprivation by the procedure established by law, it has been argued that sentence of death in the present form violates the citizen's right to life.

The constitutional validity of the death penalty was challenged in various cases, some of them are stated below:

- In *Jagmohan Singh v state of Uttar Pradesh*<sup>10</sup> the five judge bench the Supreme Court, by a unanimous verdict, upheld the constitutional validity of death penalty held that capital punishment was not a violation of Articles 14, 19 and 21 and. In this case the validity of death sentence was challenged on the ground that it was a violation of Articles 19 and 21 because it did not provide any procedure. It was contended that the procedure prescribed under Cr. P.C. was confined only to findings of guilt and not awarding death sentence. The Supreme Court held that the choice of death sentence is done in accordance with the procedure established by law. It was observed that the judge makes the choice between capital sentence or imprisonment of life on the basis of circumstances and facts and nature of crime brought on record during trial
- In the case of *Rajendra Prasad vs state of Uttar Pradesh*<sup>11</sup>, Justice Krishna Iyer, stressed that death penalty is in violation of articles 14, 19 and 21. He further said that to impose death penalty the following two things are required:

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<sup>9</sup> Attitudes Toward Capital Punishment in America, Thesis by Tezin Thinley, Methodist University, 2020

<sup>10</sup> 1973 AIR 947.

<sup>11</sup> 1979 AIR 916

- The special reason should be recorded for imposing death penalty in a case.
- The death penalty must be imposed only in extraordinary circumstances.

### **XI. Conclusion:**

Though India retains capital punishment as a punishment that should be provided in the rarest of the rarest cases, it is still a debatable concept whether a state has a right to deprive a person from his or her life. As of now, 404 Indians are awaiting death penalty and waiting in their death row along with the first woman offender to be hanged in India since independence. Capital punishment is a cruel punishment because it deprives a person from his or her life which is gifted by nature to him .only nature has the right to deprive a person from his or her life, if any other entity does it , it is nothing less than a murder , same as the offence committed by the offender.

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