

# CONSTITUTIONAL VALIDITY OF DEATH PENALTY IN INDIA: A LEGAL STUDY

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## Abstract

*Punishment etymologically, derives its origin from Greek term meaning to cleanse. The purpose of inflicting punishment upon an individual was initially retribution or private vengeance. But with passage of time the objective shifted from retribution to deterrence and then finally to rehabilitation. In order to be effective, a punishment should be such which creates deterrence in the mind of the offender as well as other members of the society and at the same time also opens new avenues of rehabilitation of victims as well as offenders who are involved in a crime. In India, the law which provides for punishments of almost all the crimes is Indian Penal Code, 1860. It provides for various forms of punishments ranging from Death penalty to fines and compensations. Debates have been going on since decades now regarding the efficacy of these punishments as the rate of crime commission in India is rising day by day despite these punishments. Capital Punishment as a form of punishment has always been a point of contention amongst the legal intelligentsia. Objections as to its efficacy as well as constitutional validity of its mode of execution has always been the main point of discussion in India as well as across the globe. This paper is an attempt of the researchers to analyse the efficacy of Death Penalty as a form of punishment and Constitutional Validity of Hanging as a mode of its execution.*

**Keywords:** Constitutionality, Crime, Death Penalty, Execution, Punishment.

## I. Introduction

Death Penalty, which is popularly known as Capital Punishment, is the highest form of punishment which can be awarded to an accused person for committing the most heinous offences prescribed under the Penal law of a State. Capital Punishment is executed by taking away the life of the convicted person as per the procedure which is prescribed in Law. The word "capital" is derived from the Latin *capitalis*, which means "concerning the head"; therefore, to be subjected to capital punishment means to lose one's head.<sup>1</sup>

In early times, death penalty was even awarded for committing less serious offences, or to suppress dissent against the political superior, etc. It was a gross misuse of this form of punishment and with passage of time the misuse was reduced in the nineteenth and twentieth centuries. As of today, there are various countries including Europe and Latin America which have abolished capital punishment as a form of punishment. The countries which still practice Capital Punishment as a form of punishment have prescribed it for the extremely heinous offences such as premeditated murder, treason, etc.

But there are still many countries across the globe which do not follow any such distinction of gravity of offences while awarding death penalty to a convict.<sup>2</sup> In

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<sup>1</sup> New World Encyclopedia, *Capital Punishment*, (Apr. 05, 2022, 12:00 PM [http://www.newworldencyclopedia.org/entry/Capital\\_punishment](http://www.newworldencyclopedia.org/entry/Capital_punishment)).

<sup>2</sup> *supra* note 1.

May 2012, Amnesty International had provided a data revealing that around 141 countries of the world have abrogated capital punishment either in writing or at least practically. It has been also stated that China holds the record of maximum executions per year and in 2008 the number of executions recorded in China alone were 1,718 approximately. According to another report of Amnesty International, Iran, USA, Saudi Arabia and Pakistan executed approximately (346), (111), (102) and (36) people respectively in 2008.

Gradually the world has witnessed a rapid growth in the number of supports advocating for abrogation of death penalty across the globe. In December 2007, the United Nations adopted a resolution in which it was highlighted that death penalty as a form of punishment lacks the deterrence needed and is in direct contravention of the human rights of an individual. Thus, it was decided in the resolution that a temporary suspension on the executions and work on complete abolition on death penalty as a form of punishment across the globe. However, India has maintained its status of voting against the resolutions of UN against death penalty. Another initiative to abolish death penalty as a form of punishment could be marked in the form of The World Coalition against the Death Penalty (WCADP) which was created in 2002 in Rome. In this direction only, 10<sup>th</sup> day of October in the year 2006 was observed as World Day against the Death Penalty.<sup>3</sup>

## **I. Theories of Punishment**

The basic idea of inflicting punishment is based on the ideology that for every offence committed by any individual, proportionate punishment should be awarded. Every punishment if inflicted, has a certain objective to achieve. Based on the purpose or objective behind punishment inflicted, it can be safely concluded that the approach behind inflicting punishment has changed over a period of time. The objective of punishment is always related to the ideology which is followed by a criminal legal system. This ideology and objective relationship of Criminal system and punishment can be easily understood with the knowledge of theories of punishment.

There are five different theories of punishments which have evolved over a period of time. Various theories of punishments are:

- Retributive Theory
- Deterrent Theory
- Preventive Theory
- Expiatory Theory
- Rehabilitative Theory

### **Retributive Theory**

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<sup>3</sup> BBC, Introduction to Capital Punishment, accessed 04.04.2023 <http://www.bbc.co.uk/ethics/capitalpunishment/intro.html>

According to this theory the main objective or purpose behind infliction of punishment was retribution or personal vengeance. That implies eye for an eye and tooth for a tooth. But this punishment failed in controlling crime commission and thus was stopped being followed.

### **Deterrent Theory**

The retributive theory of punishment was replaced with deterrent theory. According to this theory, punishment such be such which if inflicted would create fear in the minds of the potential offenders as well as other people. But this theory also turned out to be ineffective in controlling crime commission.

### **Preventive Theory**

According to this theory, the potential offender should be detained as a preventive measure in order to control crime commission. But again, this theory also failed.

### **Expiatory Theory**

As per this theory, the main purpose of punishment is making person expiate for the offence committed by him. But again, due to complexities in order to ascertain the guilt realisation of offender, this theory also proved to be non-fruitful.

### **Rehabilitative Theory**

This is the most recent theory prevalent for awarding punishments. According to this theory the main focus of Courts while imposing sentence should be towards reforming and rehabilitation of the offender.

## **II. Kinds of Punishments**

Apart from death penalty, there has been a number of punishments recognized under the judicial system of India as well as across the globe. It goes without saying that the ancient form of punishments were very less rational and more barbaric as compared to the modern form of punishment as they exist in present times. In ancient times, punishments like stoning, crucifixion, docking stools, transportation for life, social boycott, mutilation of body parts, public executions etc., were amongst the various forms prevalent.

With the advent of Mughals in India, came the Islamic penal system. The punishments which were prescribed under the Muslim law were even more barbaric than the ancient punishments and were also based upon bias. The Muslim legal system was lopsided heavily in the favour of muslim men only. The Muslim law didn't give any rights or chance of being heard to the females as well as to people who were non muslims. The punishments which were prevalent during the Muslim era was namely Qisas, Hadd, Dayut, Tazir and Siyasat. These punishments basically talked about blood money, confiscation of property etc. as form of punishments but the basis of awarding these punishments was not rational.

The credit of growth of Indian legal, judicial and penal system, somehow goes to the Britishers. When the Britishers came to India and thought of ruling the same, they started bringing changes in the existing arrangements of India and one such change was formalization of laws and courts in India. The present Penal Law of India i.e. Indian Penal Code, 1860 was also enacted during the British Era and Section 53 of this code talks about the various forms of punishments which are recognised in India in present times. The punishments are as follows:

- Death Penalty
- Life Imprisonment
- Imprisonment (Rigorous and Simple)
- Forfeiture of Property
- Fines

Earlier, Transportation for life was also a kind of punishment but it was later on repealed. Along with fines, the new trend which is upcoming in the Courts these days is compensation which is directly to be paid to the victim of the crime or his dependents.

### **Historical Background**

The historical development of the concept of punishment especially death penalty as a form of punishment can be traced back to the Vedic period. During Vedic era, it was believed that safety of the society is the prime object that by destroying a single offender, the act of execution was productive of religious merit. (Brihaspati XXVII, p.26).<sup>4</sup> It is pertinent to mention here that even the oldest epic Bhagwat Gita has justified killing in some cases as noble- a virtuous act and to act contrary to it is a sin, an act of cowardice, which is unbecoming of a man. According to Dharamshastra, killing a murderer (Atatayinah) is one's duty, may the killer be a preceptor, child, old man or even a learned Brahim. The murderer should be slain at once without considering whether the act is virtuous or vicious.<sup>5</sup> As the society progressed from tribal to social one, it became a general trend of awarding death penalty for a number of offences having serious societal implications and repercussions. The rules and regulations prescribing the code of conduct for the member of society were prescribed in a more formal manner and strict sanctions were attached for those who will not abide by those rules of conduct. Hammurabi, of 1760 BC was another ancient document which was supportive of inflicting capital punishment as a form of punishment. This was the document which was an amalgamation of 282 laws collected by King Hammurabi, and also included the theory of an "eye for an eye." Capital punishment as a form of punishment finds its place in numerous ancient texts like

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<sup>4</sup> ANIL TREHAN, PENOLOGY AND VICTIMOLOGY- A PERUSAL, Shree Ram Law House, 2011 (Ed. 1st) 5-6.

<sup>5</sup> PROF. N. V. PRANJAPE, CRIMINOLOGY AND PENOLOGY, Central Law Publications, 2021 (Ed 20th), 221-222

the Jewish Torah, the Christian Old Testament, and the writings of an Athenian legislator named Draco, etc.<sup>6</sup>

Initially, the manner in which capital punishment was to be executed, were designed in such a manner that they used to enhance the pain to be experienced by the person to be executed. They were designed in such a way that death will occur slow, will be more painful and will torture the person more. Stoning, crucifixion, burning at the stake, and crushing by elephants are some examples of such methods. With passage of time, it was felt that even if a person is guilty of committing certain offence still cruel and barbaric form of punishments should not be used to punish and offender and shift was made towards recognising more humane practices. With passage of time, especially towards the late 18<sup>th</sup> and early 19<sup>th</sup> century, the authorities entrusted with the task of inflicting punishments discovered other methods in which death penalty can be executed in a fast and least painful manner which included hanging and beheading with the guillotine. Although these methods of executions were still bloody, barbaric and violent for some people, others found them to be more compassionate as the result was instant and thus was not torturous to the executed person.<sup>7</sup>

### **III. Modes of Execution**

As of 2008 per Amnesty International, 58 countries of the world have death penalty as a form of punishment. China is the country having highest rate of execution. Around 139 countries of the world have abolished death penalty on moral grounds. In the 37 States and federal governments that currently have death penalty statutes, five different methods of execution are prescribed:

#### **Lethal Injection**

In this method, the condemned person is usually bound to a gurney and a member of the execution team positions several heart monitors on his skin. Two needles (one is a back-up) are then inserted into usable veins, usually in the inmate's arms. Long tubes connect the needle through a hole in a cement block wall to several intravenous drips. The first is a harmless saline solution that is started immediately. Then, the inmate is injected with sodium thiopental - an anesthetic, which puts the inmate to sleep. Next flows pavilion or pancuronium bromide, which paralyses the entire muscle system and stops the inmate's breathing. Finally, the flow of potassium chloride stops the heart. Death results from anesthetic overdose and respiratory and cardiac arrest while the condemned person is unconscious.<sup>8</sup>

#### **Electrocution**

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<sup>6</sup> Crime Museum, Origin of Capital Punishment, accessed 05.04.2023 <https://www.crimemuseum.org/crime-library/execution/origins-of-capital-punishment/> ,

<sup>7</sup> Supra note 6

<sup>8</sup> Death Penalty Information Centre, (2019 Copyright), Description of Execution Methods, accessed 05.04.2023 <https://deathpenaltyinfo.org/descriptions-execution-methods>

For execution by the electric chair, the person is usually shaved and strapped to a chair with belts that cross his chest, groin, legs, and arms. A metal skullcap-shaped electrode is attached to the scalp and forehead over a sponge moistened with saline. The sponge must not be too wet or the saline short-circuits the electric current, and not too dry, as it would then have a very high resistance. An additional electrode is moistened with conductive jelly (Electro-Creme) and attached to a portion of the prisoner's leg that has been shaved to reduce resistance to electricity. The prisoner is then blindfolded. A jolt of between 500 and 2000 volts, which lasts for about 30 seconds, is given. The current surges and is then turned off, at which time the body is seen to relax. The doctors wait a few seconds for the body to cool down and then check to see if the inmate's heart is still beating. If it is, another jolt is applied. This process continues until the prisoner is dead. The prisoner's hands often grip the chair and there may be violent movement of the limbs which can result in dislocation or fractures. The tissues swell. Defecation occurs. Steam or smoke rises and there is a smell of burning.<sup>9</sup>

### **Gas Chamber**

For execution by this method, the condemned person is strapped to a chair in an airtight chamber. Below the chair rests a pail of sulfuric acid. A long stethoscope is typically affixed to the inmate so that a doctor outside the chamber can pronounce death. The warden then gives a signal to the executioner who flicks a lever that releases crystals of sodium cyanide into the pail. This causes a chemical reaction that releases hydrogen cyanide gas. The prisoner is instructed to breathe deeply to speed up the process. The inmate does not lose consciousness immediately. The inmate dies from hypoxia, the cutting-off of oxygen to the brain.<sup>10</sup>

### **Firing Squad**

For execution by this method, the inmate is typically bound to a chair with leather straps across his waist and head, in front of an oval-shaped canvas wall. The chair is surrounded by sandbags to absorb the inmate's blood. A black hood is pulled over the inmate's head. A doctor locates the inmate's heart with a stethoscope and pins a circular white cloth target over it. Standing in an enclosure 20 feet away, five shooters are armed with .30 caliber rifles loaded with single rounds. One of the shooters is given blank rounds. Each of the shooters aims his rifle through a slot in the canvas and fires at the inmate. The prisoner dies as a result of blood loss caused by rupture of the heart or a large blood vessel, or tearing of the lungs. If the shooters miss the heart, by accident or intention, the prisoner bleeds to death slowly.<sup>11</sup>

### **Hanging**

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<sup>9</sup> Supra note 8

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

For execution by this method, the inmate may be weighed the day before the execution, and a rehearsal is done using a sandbag of the same weight as the prisoner. This is to determine the length of 'drop' necessary to ensure a quick death. If the rope is too long, the inmate could be decapitated, and if it is too short, the strangulation could take as long as 45 minutes. The rope, which should be 3/4-inch to 1 1/4-inch in diameter, must be boiled and stretched to eliminate spring or coiling. The knot should be lubricated with wax or soap "to ensure a smooth sliding action," according to the 1969 U.S. Army manual.<sup>12</sup>

Immediately before the execution, the prisoner's hands and legs are secured, he or she is blindfolded, and the noose is placed around the neck, with the knot behind the left ear. The execution takes place when a trap-door is opened and the prisoner falls through. The prisoner's weight should cause a rapid fracture-dislocation of the neck.<sup>13</sup> Death results from slow asphyxiation.<sup>14</sup>

## V. Legislative Provisions

Death penalty in India is awarded for either offences which fall under the country's main substantive penal legislation, the Indian Penal Code, or under other laws. Execution of capital punishment is carried out by hanging as provided under Section 354(5) of the Criminal Code of Procedure, 1973 i.e., "Hanging by the neck until dead". In India, death penalty is an exception while life imprisonment is a rule. This means that death penalty is awarded only in exceptional cases and that too which fall within the bracket of rarest of rare cases dictum.

IPC prescribes death sentence as a punishment for 13 distinct offences such as punishment for criminal conspiracy (s. 120B)<sup>15</sup>, murder (s. 302)<sup>16</sup>, waging or attempting to wage war against the Government of India (s. 121)<sup>17</sup>, abetment of

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<sup>12</sup> Supra note 8

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Indian Penal Code, Section 120B: Punishment of criminal conspiracy (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence. (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.]

<sup>16</sup> Indian Penal Code, Section 302: Punishment for murder.: Whoever commits murder shall be punished with death or imprisonment for life, and shall also be liable to fine.

<sup>17</sup> Indian Penal Code, 1860, Section 121: Waging, or attempting to wage war, or abetting waging of war, against the Government of India: Whoever, wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine

mutiny (s.132)<sup>18</sup>, dacoity with murder (s. 396)<sup>19</sup> etc. The Criminal Amendment Act of 2013 and 2018 have even introduced death penalty in cases of sexual offences. Apart from IPC there are several other legislations which have incorporated death penalty as a punishment for certain specific offences for example the NDPS Act, laws relating to army and security, anti – terrorism laws etc.

In India, the procedure of awarding the capital punishment, its execution and even the pardoning in such cases, has been prescribed in detail under our Constitution and Code of Criminal Procedure. Under Indian Legal system, the Sessions Court is empowered to try and award death penalty to a convict but the same has to be submitted before the high Court of that State for confirmation.<sup>20</sup> If the sentence is confirmed by the High Court, the convict has a right to prefer an appeal against such confirmation order in the Supreme Court of India only after obtaining a special leave to appeal from the High Court concerned.<sup>21</sup> If the convict doesn't succeed in the Supreme Court, then he has another remedy to exhaust. He can submit a 'mercy Petition' before the head of the State. Indian Constitution provides for clemency of capital punishment by the President.<sup>22</sup> Similar powers

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<sup>18</sup> Indian Penal Code, 1860 Section 132: Abetment of mutiny, if mutiny is committed in consequence thereof: Whoever abets the committing of mutiny by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India, shall, if mutiny be committed in consequence of that abetment, be punished with death or with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

<sup>19</sup> Indian Penal Code, 1860 Section 396: Dacoity with murder: If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

<sup>20</sup> Code of Criminal Procedure, 1973, Section 366: Sentence of death to be submitted by Court of Session for confirmation: (1) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court. (2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.

<sup>21</sup> Indian Constitution, Article 134: Appellate jurisdiction of Supreme Court in regard to criminal matters- (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or (c) certifies under Article 134A that the case is a fit one for appeal to the Supreme Court: Provided that an appeal under sub clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Article 145 and to such conditions as the High Court may establish or require

<sup>22</sup> Indian Constitution, Article 72: Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases- (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.(a) in all cases where the punishment or sentence is by a court Martial; (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union



lie with the Governor of a State under Article 161<sup>23</sup>. These provisions are incorporated under Indian law with a view to ensure that the accused is sentenced to death only after all the possible remedies have been exhausted by the offender and there is no room for error left as capital punishment once executed is impossible to reverse.

## II. Judicial Attitude

For the first time, the question pertaining to the constitutional validity of death penalty as a form of punishment was raised before the Supreme Court of India in the celebrated case of *Jagmohan Singh v. State of U.P.*<sup>24</sup> It was contended that execution takes away all the fundamental rights guaranteed under Article 19, Judicial discretion to award capital punishment not based on standards, discretion being violative of Article 14 of the Constitution and no reasonable classification between the important facts and circumstances forming the basis of decision as to whether a person should be awarded death penalty or life imprisonment. After due consideration of arguments advanced by both the parties, the constitutional bench upheld the constitutional validity of death penalty as a punishment as Article 21 recognises deprivation of life with due process of law as valid and constitutional.<sup>25</sup>

Another case of 1974, *Ediga Anamma v. State of Andhra Pradesh*<sup>26</sup> is also a celebrated case on death penalty. Justice Krishna Iyer in this case commuted the death sentence of the convict to life imprisonment by taking into account factors like age, gender, socio-economic background etc. It was held that judges should also take into consideration the condition of the offender and condition or haplessness in which he committed the crime.

*Bachan Singh v State of Punjab*<sup>27</sup> is the case which holds the credit of giving birth to the “rarest of the rare cases” doctrine. In this case although the doctrine was not elaborated in detail but it was emphasised that while deciding culpability, aggravating or mitigating circumstances need to be looked into in each case.<sup>28</sup>

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extends;(c) in all cases where the sentence is a sentence of death (2) Nothing in sub clause (a) of Clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.”

<sup>23</sup> Indian Constitution, Article 161- Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends

<sup>24</sup> *Jagmohan Singh v. State of U.P* 1973 AIR 947 (India).

<sup>25</sup> *Supra* note 24

<sup>26</sup> *Ediga Anamma v. State of Andhra Pradesh* 1974 AIR 799 (India).

<sup>27</sup> *Bachan Singh v State of Punjab* AIR 1980 SC 898 (India).

<sup>28</sup> Aditi Agarwal, (2014), *Death Penalty: An Overview of Indian Cases*, accessed 05.04.2023 <https://www.lawctopus.com/academike/death-penalty-an-overview-of-indian-cases/>

*Mithu v. State of Punjab*<sup>29</sup> was another case where the mandatory death sentence under Section 303 was declared unconstitutional and hence invalid. The Section was held to be violative of Articles 14 and 21 of Indian Constitution thus deleted from the IPC.<sup>30</sup>

In *T.V. Vatheeswaram v. State of Tamil Nadu*<sup>31</sup> and *Sher Singh v. State of Punjab*<sup>32</sup> the question pertaining to delay in execution of capital punishment was raised before the Apex Court. It was also contended that whether a prolonged delay in the execution of death penalty is a sufficient factor to commute the capital punishment into life imprisonment. In the first case, it was laid down that prolonged delays in executions are sufficient reasons to commute, the majority in the latter case had a different view.

*Macchi Singh v. State of Punjab*<sup>33</sup> was the case in which the Apex Court gave detailed guidelines pertaining to the “rarest of the rare rule”. The Court laid down that while awarding death penalty the following factors should be taken into consideration:

1. Manner of Commission of Murder
2. Motive for Commission of murder
3. Anti-Social or Socially abhorrent nature of the crime
4. Magnitude of Crime
5. Personality of Victim of murder

In 1989, in another case of *Allauddin v. State of Bihar*<sup>34</sup>, Justice Ahmadi held that until and unless there are special reasons and special circumstances exist, in a particular case, death penalty should not be awarded as a rule.

In India, more than 700 convicts have been executed since independence. 1810 people were sentenced to death by the trial courts of India during the period of 2000 to 2014. But the sentence of more than half of them was later on commuted to life imprisonment. Out of these, 443 accused were even acquitted by the Higher Courts later on. Till 2015, the four most infamous convicts who were hanged were Dhananjay Chatterjee (2004), Mohammad Ajmal Amir Kashab (2012), Afzal guru (2013) and Yakub Menon (2015).<sup>35</sup> The most recent accused to be executed were the convicts of Delhi gang rape case in 2020.

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<sup>29</sup> *Mithu v. State of Punjab* 1983 AIR 473 (India).

<sup>30</sup> *Supra* note 28

<sup>31</sup> *T.V. Vatheeswaram v. State of Tamil Nadu* 1983 AIR 361 (India).

<sup>32</sup> *Sher Singh v. State of Punjab* 1983 AIR 465 (India).

<sup>33</sup> *Macchi Singh v. State of Punjab* 1983 AIR 957 (India).

<sup>34</sup> *Allauddin v. State of Bihar* 1989 AIR 1456 (India).

<sup>35</sup> Marshan Singh & Shubham Raj, “*Constitutionality of the Death Penalty and its Comparative Study*”, accessed 01.04.2022 <https://law.dypvp.edu.in/plr/Publication/all-publication/Constitutionality-of-Death-Penalty-and-its-Comparative-Study-and-Implications-on-Modern-Penology-ver-1.pdf>

Indian courts sentenced 1,455 prisoners to death between 2001 and 2011, according to the National Crime Records Bureau. During the same period, sentences for 4,321 prisoners were commuted to life imprisonment. According to a survey conducted by a researcher, there are approximately 490 convicts who are waiting for years for the execution of their sentence in Indian jails at present.<sup>36</sup>

### **III. Arguments in Favour of Retention**

1. For very serious offences like murder, sedition, gangrape, etc. simple imprisonment, forfeiture and fines would not be an adequate punishment.
2. Courts while awarding such sentences are always guided by various principles. Thus, if they award such punishment then their rationale should not be questioned.
3. If Capital Punishment or death sentence and life imprisonment without remission will be completely abolished, then it will certainly add on to higher crime rates.
4. Sometimes situations are such that there is a need to put deterrence upon society in order to prevent such crimes from being committed.
5. We adopted a policy that “Life Imprisonment is a rule and death penalty is an exception”. It implies that somehow, we are still not that harsh in our approach.
6. Complete abolition of such sentences would render the police machinery as well as judiciary handicapped because for most heinous crime, we would have to resort to simple imprisonment only.
7. If such punishments will be abolished then the trust of the victim as well as the society as a whole upon the judicial system will be shaken as every offender will get similar sentence irrespective of the nature and gravity of the offence committed.

### **IV. Arguments in Favour of Abolition**

1. These types of punishment are against the fundamental right of life and freedoms as enshrined under Article 19 and 21 of Indian Constitution.
2. Sometimes these punishments go wrong. If an innocent gets convicted and executed of a serious offence then it cannot be reversed.
3. This type of punishment reflects vengeance as well as retribution as it reflects some sort of personal vengeance against the offender.
4. This punishment fails to reform the offender because this punishment doesn't inspire the offender to reform. Whether he is expiating or not, he has to undergo the punishment.
5. This punishment is cruel, inhumane and degrading. The offenders are very much ill-treated by the authorities and other offenders.
6. Also, this kind of punishment brutalises the society as well as State. For imposing such punishment very hard view is to be adopted by the Courts which sometimes make the judges brutal.

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<sup>36</sup> Supra note 28

7. People who are in favour of human rights argue that this punishment doesn't take account of value of human life. The bad conduct of a person in no way destroys the value of human life.
8. People argue that this kind of punishment doesn't teach any lesson to the offender. He is least bothered about the expiation for the offence when he knows he has to remain in jail till his last breath.
9. People argue that prisons are hell upon earth. The authorities indulge in prison abuse and commit atrocities upon the prisoners. Also no one actually bothers to keep a track record of the reformation of the prisoners behind bars.

## V. Recent Trends in India

In *Manoj v. State of Madhya Pradesh* (2022)<sup>37</sup>, the Apex Court observed that that the Bachan Singh principles must be applied to each specific case in light of its circumstances. The Court in this case listed various guidelines for a better assessment of the parameters and scope of rehabilitation.

In *Mohd. Arif @ Ashfaq v. State (NCT Of Delhi)* (2022)<sup>38</sup>, the Supreme Court upheld the execution of Lashkar-e-Taiba militant Mohammed Arif for the 2000 Red Fort Attack case, which resulted in the deaths of three people, including two army officers. The Court denied his review petition, which questioned his conviction and sentence. The Bench noted that terrorist acts are regarded as the most aggravating situations when they pose a threat to the unity, integrity, and sovereignty of India. The Court further stated that this factor completely outweighs all other factors that could possibly be taken into account as mitigating circumstances based on the evidence.

The Project 39A by National Law University, Delhi published the sixth edition of the *Death Penalty in India: Annual Statistics Report* which provides an annual update on the use of the death penalty in India along with legislative and international developments on the issue. As on 31st December 2021, there were 488 prisoners on death row across India (a steep rise of nearly 21% from 2020), with Uttar Pradesh having the highest number at 86. This is the highest the death row population has been since 2004 as per the data from the Prison Statistics published by the National Crime Records Bureau.<sup>39</sup>

In 2021, Punjab and Madhya Pradesh, introduced the death penalty for causing deaths by spurious liquor, while Maharashtra did so for 'heinous' offences of rape and gangrape. The Women & Child Development Ministry also introduced a bill

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<sup>37</sup> *Manoj v. State of Madhya Pradesh* (2022) CRIMINAL APPEAL NOS. 248-250 OF 2015 (India).

<sup>38</sup> *Mohd. Arif @ Ashfaq v. State (NCT Of Delhi)* (2022) CRIMINAL APPEAL NOS. 98-99 OF 2009 (India).

<sup>39</sup> Project 39A, NLU Delhi, Annual Statistic Report, 2021, Available at <https://www.project39a.com/annual-statistics-page-2021> accessed on 01-04-2023

proposing the capital punishment for repeat aggravated trafficking offences involving children and women.<sup>40</sup>

The above data clearly depicts that the Indian courts have recently again shifted towards the approach of awarding Death Penalty in the cases where a strict message is required to be sent to the society at large. Thus, after almost a decade, there is a rise in the instances of death penalty being awarded by the Indian Courts although globally the trend depicts a downfall in the number of cases in which death penalty was awarded or executed.

## **VI. Conclusion and Suggestions**

After measuring both pros and cons of having harsh or soft law, it can be concluded that India, as a nation of various laws, already have several soft legislations and also the penal provisions of the Indian judicial system are somehow soft only. Thus, we need not adopt a softer policy in relation of punishing the offenders. If more and more soft legislations will be introduced then the concept of having a safe and secure State will somehow be defeated. The Indian judiciary has already asserted that the death penalty as a form of punishment is constitutional and hanging as a mode of execution of death penalty is also the most humane and least painful method of executing an offender. Moreover, currently 58 countries representing about one-third of all the countries worldwide, retain death penalty for ordinary capital crimes also. Thus, there is no harm in retaining death penalty as the highest form of punishment in the Country.

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