

International Journal of Legal Enforcement



Volume 1 Issue 1

|February 2021|

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International Journal of Legal Enforcement is an online peer review journal provide dedicated to express views on legal and socio legal aspects. This platform also shall ignite the initiative and desire of the young students. We also provide exclusive review by our Advisory Board for the papers submitted to us. We believe humanity is basic thing to be involved in any law. We do not charge any publication charge for online publications. We process to bring out the analysis and thoughts of every socio legal and legal matters from the young powerful minds. Law can be fulfilled as Law only when there is humanity in it.

With this thought we hereby present you,  
**International Journal of Legal Enforcement**

## Death Penalty – Is It Justified

- H. Thaslima Banu.

### **Introduction:**

All over the World, death penalty is an extreme punishment existing in law and it's practice. It has been abolished by nearly 70% of the Countries in this world. However, it exists in the other countries, including India. In India, death penalty is sanctioned only in some circumstances. Death penalty will be pronounced only for those cases which are considered as the " rarest of rare". This is purely a discretionary power of the judges. In our country, every citizen has a right to live under our Indian Constitution. Some of experts feel that death penalty is cruel , brutal and also against the Constitution of India. Should India abolish it ? This question arises seeing the data regarding the execution of death penalty. Manu Smriti said " Penalty keeps the people under control, penalty protects them, and penalty remains awake when people are asleep, so the wise have regarded punishment as the source of righteousness."

**"I think capital punishment works great. Every killer you kill never kills again." - Bill Mayer.**

### **Death Penalty:**

Death penalty or capital punishment is a legal process by which a person is put to death by a State with respect to a crime committed. The word 'Capital' comes from the Latin word 'Capitalis' (of the head). Crimes that result in death penalty are known as 'Capital Offences' or 'Capital Crimes'. The judicial decree that someone should be punished in this manner is called a death sentence, while the actual process of killing person is called an execution.

### **Historical Background of Death Penalty:**

Capital punishment is an ancient sanction. There is no country in the world where death penalty has never existed. History of human civilization reveals that in no period of time capital

punishment has been discarded as a mode of punishment.<sup>1</sup> Capital punishment is an integral part of the penal system of world, including India.

Death Sentence under the Hindu Law:

In the Hindu society, death penalty is one of the oldest forms of sanction. Death penalty is provided for in our ancient scriptures and law books. The Hindu historical and mythological epics such as the Ramayana & Mahabharata state that it should be the highest priority of the king to safeguard the society from any danger by taking the life of wrongdoer. We can also find the objectives of deterrent theory in our Manu Smriti. Even in the Buddhist period when Ahimsa was the rule of conduct, Ashoka didn't consider capital punishment wrong. We find death penalty mentioned even in the work of Kautilya<sup>2</sup>, according to him this punishment was a universally accepted one to ensure the security of society.

Death sentence under Muslim Law:

Provisions related to crimes and punishments are available in the scared books such as the holy Qur'an and Gita etc. The main aim of punishment under Hindu Law is to create a deterrent effect in the society. There are 3 types of crimes under the Islamic Law, such as

- I. Had Crimes**
- II. Tazir Crimes**
- III. Qisas Crimes**

All these 3 kinds of crime have their own prescribed punishments.

- I. Had Crimes:** These are crimes affecting the society and the punishment is ordered by Allah himself. Crimes falling under this category are adultery, imputation of adultery, larceny drinking wine, shedding of blood, apostasy and rebellion.  
These crimes are not to be forgiven by the judges also.
- II. Tazir Crimes:** For crimes of this kind, penal punishment will apply. Punishment will be pronounced by court other than the punishments pronounced for first category crimes.
- III. Qisas Crimes:** The third category of social offences were those involving retaliation (Qisas) and Diyut blood money or the compulsory mullet. Under this category victim has a right to forgive the crime or remit the punishment.

Death penalty under Mughal Empire:

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

<sup>2</sup>Arthshastra of Kautilya, 4. 11.

The medieval India was ruled by the Mughals. They administered justice on the basis of Islamic Law. One of the great kings of the Mughal period, Akbar, was very lenient regarding this matter. According to him death penalty should be the last order after all matured deliberations<sup>2</sup> and according to his order only for serious offences of sedition, death could be ordered and should be offered by the emperor himself. After the final order of death penalty, it was executed with furious and painful methods.

Death sentence under the British rule in India:

With the arrival of the British East India Company to the Indian territory during the Mughal period, some statutory modifications have been made by the British.

It's replaced the Muslim criminal laws. Murder and Culpable Homicide were differentiated by the law commission in 1846 after completing the process of alterations and references by scholars. At that time Britishers were responsible to generate a systematic penal code and procedure for criminal trials. Under this code capital punishment was strictly limited. The first hanging in Independent India was that of Nathuram Godse and Narayan Apte in the Mahatma Gandhi assassination case on November 1949.

Methods of Execution to Death:

There are various types of executions such as;

1. **Death by burning:** This type of execution was seen in the famous situation of Joan of Arc who was sentenced to death by burning, on the grounds that she was a witch.
2. **Wheel:** The process includes rolling a wheel full of spikes on top of a person or attaching a person to a wheel and rolling him down a hill.
3. **Execution by firing:** This was the most common form of execution during World War II where a firing squad is called and then the accused person is tied to a pole and fired upon.
4. **Hanging and the Garotte:** It includes two steps in execution depending on whether the sentence intended torture or not for certain crimes. A convict could be hanged with a noose and die of fracturing of the neck. If it were intended in the sentence, the next step, that is garotte was used. This step involved mechanical device such as a rack or gag to be tightened around the convict's neck, causing slow strangulation, stretching, and obstruction of blood vessels.

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<sup>2</sup> AIR 1979 SC 916.

5. **Lethal injection:** Death by lethal injection involves the continuous intravenous injection of a lethal quantity of three different drugs. This is the most common method used in the United States.
6. **Headman's Axe:** This is the method by which the head is placed on a wooden platform and the executioner chops off the head of the convict by the use of an axe.
7. **Guillotining:** Another common form of execution seen in the French Revolution. Dr. Joseph Guillotine was the person who invented this method whereby the accused person's head was placed in a round hole on a wooden block and a blade is dropped cutting the person's head.
8. **Gas chambers:** The most common form of execution seen in Nazi Germany whereby the enemies of Adolf Hitler were sent to concentration camps.

They were sent to chambers where toxic gas is to be released killing people.

In India, Hanging and Shooting are the methods of death penalty. According to the Criminal Procedure Code, hanging is the method of execution in the civilian court system.<sup>4</sup> The Army Act, 1950, however, lists both hanging and shooting as official methods of execution in the military court- martial system. Section 354(5) in The Code Of Criminal Procedure, 1973;

“When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.”

### **Supreme Court's Views on Hanging:**

In the case of Deena v. Union of India, 1983,<sup>5</sup> the Supreme Court laid down a test to carry out death sentence. It held that the execution of death punishment should satisfy the threefold test:

- The act of execution should be as quick and simple as possible and free from anything that unnecessarily sharpens the poignancy of prisoner's apprehension.
- The act of execution should produce immediate unconsciousness passing quickly into the death.
- It should be decent.
- It should not involve mutilation.

### **DEATH PENALTY IN INDIA:**

Punishment is the suffering in person or property, inflicted on the offender under the sanction of law. Punishment of the wrongdoer for the offence one has committed is that which makes criminal law awe-inspiring and deterrent.

The extreme punishment which can be imposed on any offender is death sentence.

It is also known as 'capital punishment'.

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4 Section 354(5) of the Code of Criminal Procedure, 1973

5 1983 AIR 1155B1984 SCR(1) 1 1983 SCC(4) 645 1983 SCALE(2) 340

Section 53 of the Indian Penal Code describes the punishment which includes the death sentence. Under this code offences which are punishable with death penalty are,

- Waging or attempting to wage war or abetting the waging of war against the Government of India [s.121].
- Abetment of mutiny actually committed [s.132].
- Giving or fabricating false evidence upon which an innocent person suffers death [s.194].
- Murder [s.302].
- Murder by a life convict [s.303].
- Abetment of suicide of a minor, insane or intoxicated person, if suicide is committed. [s.305].
- Attempt to murder by a person under sentence of imprisonment for life, if hurt is caused [s.307].
  
- Kidnapping for ransom [s.364-A].
- Dacoity accompanied with murder [s.396].

Offenders committing a rape, if the perpetrator inflicts injuries that result in the victim's death or incapacitation in a persistent vegetative state or is a repeated offender, are liable with death sentence

under section 376A, Criminal law amendment act,2013. A person who aids or abets an act of sati is liable with death penalty under Part II Section 4 of Prevention of Sati Act.

Also, drug trafficking in cases of repeated offences are punishable with death sentence under Section 31A of the Narcotic Drugs and Psychotropic Substances Act.

The law confers on the judge wide discretionary powers in the matter of passing a sentence. However, under Section 303 of the Indian Penal Code, the judge has no such discretionary power since Sec. 303 prescribes capital or death sentence compulsorily in case of life imprisonment convict, who is found guilty of committing murder, while undergoing the sentence of imprisonment for life.

Therefore, Section 303 was struck down as unconstitutional by the Supreme Court in *Mithu v. State of Punjab*.<sup>3</sup>

The Code of Criminal Procedure was re-enacted in 1973 and several changes were made, notably to section 354(3):

“When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.”

This was a significant modification from the situation following the 1955 amendment (where terms of imprisonment and death penalty were equal possibilities in a capital case), and a reversal of the position under 1898 actually law (where death sentence was the norm and reasons has to be recorded if any other punishment was imposed). Now, judges needed to provide special reasons for the imposition of death sentence.

### Constitutional Validity of Death Penalty:

The constitutional validity of a death sentence was first challenged in the United States of America which took the step for the abolition of death penalty. In India, every man has a right to live. Article 21 of the Indian Constitution provides to its citizens ‘protection of life and personal liberty’ - no person shall be deprived of his life and personal liberty except according to the procedure established by law. This exception to life has created a dilemma across the world. The Indian Supreme Court has stated that cases in which a murder is committed in its extreme state can be put under the purview of rarest of rare cases. In the case of *Mithu v. State of Punjab*<sup>7</sup>, the Supreme Court made the decision that mandatory death penalty is unconstitutional in nature. While, Although the consequent legislation for drug and criminal offenses prescribes a mandatory death penalty, the Supreme Court has not expressly struck down death penalty as unconstitutional. Similarly, in *Bachan Singh v. State*

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<sup>3</sup> AIR 1983 SC 473 7Ibid.

of Punjab (1980)<sup>4</sup>, The Supreme Court of India held that death penalty can only be said to be constitutional when it was applied as an exceptional penalty in the rarest of rare cases.

In a series of cases decided by the apex court, guidelines for imposition of death penalty were laid down, which could be summarized as follow:

Murder of six members of a family at night for money.<sup>5</sup> Murderer who raped and murdered a six-year old girl (act reaching the lowest level of humanity).<sup>6</sup>

Accused persons killing three adults and murdering two children in a property dispute in order to exterminate the entire property.<sup>7</sup>

Accused deliberately planned and executed his two innocent children, wife and brother-in-law.<sup>8</sup>

Murderer as a paying guest for a continuous period of four years brutally executing three defenceless children and attempted murder on their parents, who survived the attack with multiple injuries.<sup>9</sup>

### Clemency Process in India:

Under Article 72 and Article 161, the Constitution of India has created a provision for leniency of capital punishment. Under this Article, the President of India and the Governor of a respective state has the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted for any offences (1) by Court Martial; (2) an offence against any law relating to a matter to which the executive power of the Union extends; or (3) in all cases in which the sentence is one of death. The objective of conferring the “judicial” power on the President is to correct possible judicial errors, for no human system of judicial administration can be free from imperfections.<sup>10</sup> Grounds to seek mercy appeal range from physical fitness, age, law was too harsh, or the convict is the sole breadwinner of the family. For this, a request for pardon is filed before the President or Governor. They are not responsible to provide reasoning for their decision. Moreover, the judiciary has no right for reviewing the decision or rejecting the petition as held in *Kehar Singh v. Union of India*,<sup>15</sup> but in *Shatrughan chauthan v. Union of India*<sup>10</sup> it

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<sup>4</sup> AIR 1980 SC 1980.

<sup>5</sup> M. A. Antony v. State of Kerala (2009)6 SCJ. P 899.

<sup>6</sup> State of UP v. Sathish (2000)53 SCC P.114.

<sup>7</sup> Karan Singh v. State of UP (2005)6 SCC P. 342.

<sup>8</sup> State of Rajasthan v. Kheroj Ram (2003)8 SCC P. 224.

<sup>9</sup> Prajeeth Kumar Singh v. State of Bihar 2008(2) ALT(Crl) P. 452 (SC).

<sup>10</sup> Dr. J. N. Pandey, Constitutional Law of India, p. 520 (56 th Ed.). 15 AIR 1989 SC 653.

<sup>10</sup> AIR 2014 3 SCC1

was stated that courts may review whether all relevant materials were scrutinized by the executive or not. According to the information released by the Government under the RIT Act, of the 77 mercy pleas decided by the Presidents between 1991 and 2010, 69 were rejected.

### STATUS OF DEATH PENALTY AMONG DIFFERENT COUNTRIES:

More than two thirds of the world's countries have abolished death sentence in law or practice.<sup>11</sup> However, death penalty continues to exist in many parts of world (58 countries), especially in countries with large populations and those with authoritarian rule. There are 96 countries which have abolished it for all crimes. Most of these are in Western Europe and the United States of America. Seven countries, including Brazil, Chile and Kazakhstan have abolished it for ordinary crimes. In these countries, death penalty can only be given for exceptional crimes such as crimes committed under military law or under exceptional circumstances. Other 35 countries are categorized as abolitionist in practice. These retain the death penalty for ordinary crimes, but there have been no executions in the past ten years. Studies across the world have shown that in most cases the person sentenced to death is from an economically and socially backward section of society, indicating the inability to hire good lawyers to contest their cases. Executions worldwide have fallen to their lowest levels in a decade, according to a new report released on April 9, 2019 by Amnesty International.

### Current status in India:

The Law Commission of India recommends that the country moves towards abolishing the death penalty, except in terrorism cases to safeguard national security.<sup>12</sup> In India, executions in the recent past have been few, with significant time gaps. According to the leading Criminal Lawyers in India, people sentenced to death by Indian courts face long delays in trials and appeal. “ During this time, the prisoner on the death row suffers from extreme agony, anxiety, and fear arising out of an imminent yet uncertain execution,” the Law Commission said. The commission concluded that the death penalty does not serve the goal of deterrence any more than life imprisonment.

In Nirbhaya case, Former judges of the Delhi High Court awarded death sentence for the four convicts (Akshay, Pawan, Mukesh, Vinay) in the nirbhaya gang rape and murder case asserting that it was a rarest of rare case and the “brutality” committed by them on December 16, 2012 deserved the extreme punishment. While Justice(retd.) S. N. Dhingra stated that death penalty is justified to these four men saying that no mercy should be given to them who had no mercy in their hearts at the time of committing crime, Justice (retd.) R. S. Sodhi stated that those who don't value human rights of others, cannot except mercy. In this case six people including the four convicts and a juvenile,

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<sup>11</sup> Amnesty International Report, 2013.

<sup>12</sup> The Law Commission of India Report , 2015.

were convicted. Ram Singh, the sixth accused, allegedly committed suicide in Tihar jail days after the trial began in the case. The juvenile was released in 2015 after spending three years in a correctional home. The four convicts were hanged at 5.30 am on March 20, 2020. Before this execution only three convicts were executed over a period of 10 years, one each in West Bengal (2004), Maharashtra (2012), and Delhi (2013). In India there is a huge gap between 2004 and 2012, 2012 and 2020 for execution of death penalty. In 2013, Yakub Memon was hanged, the Court found him guilty of being behind a series of explosions in Mumbai in 1993, killing more than 250 people. On an average, the judiciary sentences 129 people to a death row in India every year, according to the National Crime Records Bureau. However, Data shows that there is a huge gap between the death sentences pronounced and actual executions. So the Supreme Court acknowledged that being on a death row in India amounts to “near torture” for the convict.

### **Conclusion:**

“I think life is scared whether it is abortion or death penalty- Tim Kaine.”

The legal maxim, “Lex Talionis” which means as eye for an eye, a tooth for a tooth, this principle comes under the retributive theory. This theory believes that it is an end in itself, apart from a gain to the society and the victim, the criminal should meet his reward in equivalent suffering. Salmond said that the deterrent aspect of punishment is extremely important. Under this theory, the object of punishment is not only to prevent the wrongdoer from committing the crime again but also to make him an example to other such persons who have similar criminal tendencies. But under the reformatory theory punishment should exist to reform the criminal. Even if an offender commits a crime, he does not cease to be a human being. Under the reformatory theory death penalty is not justified, while the other two theories mentioned above justify it. In so many cases, actual execution does not take place even though death penalty is awarded.

Because of delay in execution, the convicts are subject to an even greater suffering. The Supreme Court states that “Life imprisonment is the rule to which the death penalty is the exception.