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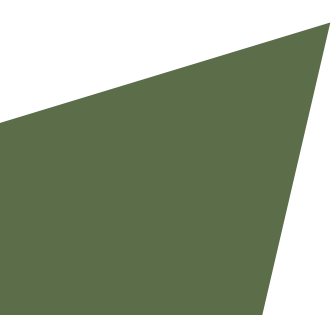
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## **Death Sentence and it's retention in India**

**Bhavya Agarwal**

## ABSTRACT

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*Death sentence has been a popular controversial topic since an eternity. It has been in practice since the ancient eras. Ancient history has witnessed many kinds of public executions that were earlier eagerly watched by the citizens. Since the worldwide introduction and acceptance of democracy and human rights, people have started criticizing the concept of the death sentence, due to which some countries have even abolished it. The United Nations has regularly urged all the nations to abolish death sentence completely. There have been numerous debates worldwide regarding it. Some countries have completely abolished it; some have abolished it with exceptions of major crimes while there are some countries where the citizens want to bring the concept back due to the increase in the number of cases of heinous crimes like rape, genocide, terrorism, etc. India has been witnessing death sentence since the ancient times, the law approved it, although it was later amended and restrained for heinous crimes.*

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## INTRODUCTION

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Death sentence also known as capital punishment is a punishment inflicted on the accused to be executed by the authorities. Each country has its own procedure for executing the criminals. Some of the ways presently adopted by some countries are hanging, shooting on the head, lethal injections, gas chambers, stone pelting, beheading, electrocution, firing squad, etc. This punishment is inflicted on commitment of a major crime like murder, rape, terrorism, genocide, military offences, war crimes and likewise. These heinous crimes are termed as capital offences.

## CONCEPT OF PUNISHMENT

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The three most popular theories of punishment are retribution, deterrence and reformation. The retributive theory suggests punishing one in the same proportion to the crime committed by them; the deterrent theory suggests that the threat of punishment would strike a fear in the mind of the person and would probably refrain him from repeating it while the reformatory theory suggests educating the person to reform him. All these theories are accepted universally and many of the countries have followed these theories while drafting their laws and have designated the punishments in regard with the graveness of the offences. The reformatory theory is especially applied in cases of juvenile offenders. Most of the countries have set up special institutions for their rehabilitation.

Capital punishment is a concept of retributive theory. As it is inflicted on people accused with serious offences, the authority punishes the offender in the same proportion to the graveness of their crime especially in case of a murder.

**दण्डः शास्ति प्रजाः सर्वा दण्ड एव-अभिरक्षति । दण्डः सुप्तेषु जागर्ति दण्डं धर्मं विदुर् बुधाः ॥ ७-१८**

This shloka 7.18 of Manusmriti means that punishment alone governs all created beings, punishment alone protects them, punishment watches over them while they sleep; the wise declare punishment (to be identical with) the law.<sup>1</sup> Manusmriti is a primitive legal volume. It was translated into English by the colonial British government for making Hindu laws.

In India Section 53 of IPC describes the types of punishment which can be imposed on the offender. The types are death, imprisonment for life, imprisonment- rigorous and simple, forfeiture of property and fine. Punishment for each offence is carefully set to ensure justice, fairness and discipline in the country.

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<sup>1</sup> <https://www.sacred-texts.com/hin/manu/manu07.htm>



## **HISTORY**

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In the early ages due to the non-existence of prisons, police personnel and human rights, the leaders or tribal or clan heads had only few kind of punishments which included compensation, death sentence, whipping, duel, walk of shame, trial by combat, stone pelting, banishment, etc. Death sentence was a common punishment as it enabled the leaders to demonstrate their powers on the citizens. The various methods of death sentence practiced in ancient times were blowing from a canon, drowning, throwing from a height, impalement, pouring molten metal, crucifixion, burning, burying alive, cattle herding, boiling to death, flaying, broken wheel, poisoning, slow slicing, starvation, crushing by heavy objects, etc. These methods were gruesome in nature due to which most of them have been banned by almost all the countries.

## **INDIAN HISTORY**

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In India especially since the rule of kings the tradition of granting a death sentence and public execution is being followed, although public execution has been abolished. In the ancient India there was a tradition followed mainly by hindus, which in a way was a death sentence for the recently widowed women. Hindus have a tradition of cremating the dead bodies, so when a male was cremated, his wife (if any) was forced to jump into the funeral pyre and left to burn alive. This tradition was known as Sati and was abolished in the whole country by an Act in 1988<sup>2</sup>.

Capital punishment was a frequent punishment ordered during the colonisation, and it remained in the law of the nation even post independence. The first capital punishment in the form of hanging was inflicted in the year of 1949 on Nathuram Godse, the man who had assassinated India's father of nation, Mahatma Gandhi.

In India people since the earliest decades have been differentiating each other on the basis of social classes. There was a trend prevalent wherein the minorities were fraudulently framed for serious crimes leading to that person's execution or conviction. To put a stop to these atrocities the government had passed an Act in 1989<sup>3</sup> especially to protect the scheduled tribes and castes from such atrocities.

## **INDIAN LAWS REGARDING DEATH SENTENCE**

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India falls under the category of countries which have abolished death sentence for minor crimes and is reserved for only majorly heinous crimes. It is supposed to be inflicted only in the rarest of

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<sup>2</sup> The Commission of Sati (Prevention) Act, 1987

<sup>3</sup> Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989

rare cases<sup>4</sup>. Being a vast nation with diversified cultures, there have been many occasions where the constitutional validity of passing a death sentence was challenged and people voiced their mixed views. Despite of the criticism, support or protests India has following laws regarding death sentence:

### **THE CONSTITUTION OF INDIA:**

India has a lengthy and well-written constitution. It was framed keeping in mind the protection and nourishment of every individual, be it a foreigner or a citizen. In spite of there being no clause directly declaring capital punishment to be illegal, there are some specific clauses which have been used to challenge the constitutional validity of it. These include Article 19, 21 and Directive Principles for the state policy. Articles 132, 134-A, 136 deal with the provisions of appeals available to the accused to ensure correctness of the sentence, while Articles 72 and 161 establishes the power with the President and Governor respectively to grant pardons, remission or to commute the sentence.

### **ARTICLE 21:**

According to this article every person has a fundamental right to life, which also includes right to life with dignity and no can be deprived of this right except under the procedure prescribed by law. This means that only the State in accordance with the proper procedure established by the law for the time being in force can denude someone from their right to life.

The first case challenging the death sentence based on constitutional validity was Jagmohan Singh vs. State of Uttar Pradesh<sup>5</sup>. In this landmark judgment, it was observed that the judges in accordance with the law are made to choose the most appropriate punishment between death sentence and life imprisonment depending on the facts, circumstances and nature of the crime committed. It was upheld that death sentence was in no way violative of Art 14, 19 and 21.

Another landmark case was Bachan Singh vs. State of Punjab<sup>6</sup>. The judgment made by the five judge bench was historic as there was a majority of four to one in favour of constitutional validity of death sentence, and it had a huge effect on the ordering of a death sentence. This case overruled the earlier decision made in the Rajendra Prasad<sup>7</sup> case. It was held that death sentence as an alternative punishment for murder, the primary punishment being life imprisonment was not at all

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<sup>4</sup> Bachan Singh vs. State of Punjab, AIR 1980 SC 898: 1982(1) SCALE 713: (1980) 2 SCC 684: (1983) 1 SCR 145

<sup>5</sup> Jagmohan Singh vs. State of Uttar Pradesh, A.I.R. 1973, S.C 947

<sup>6</sup> Bachan Singh vs. State of Punjab, AIR 1980 SC 898: 1982(1) SCALE 713: (1980) 2 SCC 684: (1983) 1 SCR 145

<sup>7</sup> Rajendra Prasad vs. State of Punjab, A.I.R. 1979, S.C.

unreasonable and unconstitutional. This case introduced the “rarest of rare cases” doctrine. The five judge bench observed:

“A real and abiding concern for the dignity of human life postulates resistance to taking a life through law instrumentally. That ought not to be done except in rarest of rare cases where the alternative opinion is unquestionably foreclosed.”<sup>8</sup>

In another landmark case of Machhi Singh<sup>9</sup>, the court laid down the broad perimeter regarding the “special reasons” in which a death sentence can be imposed. It observed that the sentence should be passed considering the following aspects: manner of commission of murder; motive; anti-social or socially abhorrent nature of the crime; magnitude of the crime and personality of victim of murder<sup>10</sup>.

Further in the case of Mithu Singh<sup>11</sup>, section 303 of the IPC was held unconstitutional as it violated article 21 and 14. The only punishment provided in this section was death sentence and it was held to be unjust.

### **INDIAN PENAL CODE, 1860:**

The IPC provides for the awarding of death sentence in various sections, those are:

Section 121: “Waging or attempt to wage war, against the Government of India”

Section 132: “Abetment of mutiny, if mutiny is committed in consequence thereof”

Section 194: “Giving or fabricating false evidence with intent to procure conviction of capital offence”

Section 302: “Punishment for murder”

Section 303: “Punishment for murder by life-convict”

Section 305: “Abetment of suicide of child or insane person”

Section 307: “Attempt to murder”

Section 364-A: “Kidnapping for ransom, etc”

Section 396: “Dacoity with murder”

Section 54 gives the power to the appropriate government to commute the death sentence of the offender, and it may be done without the offender’s consent.

### **Code of Criminal Procedure, 1973:**

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<sup>8</sup> <https://www.lawctopus.com/academike/death-penalty-an-overview-of-indian-cases/>

<sup>9</sup> Machhi Singh vs. State of Punjab, A.I.R. 1983, S.C 957

<sup>10</sup> <https://www.indianbarassociation.org/constitutionality-of-death-penalty/>

<sup>11</sup> Mithu vs. State of Punjab, (1983)2 SSC 277

Section 235(2): This section is based on natural principle of justice of right to be heard. It says that before ordering a death sentence, the accused should be heard on the question of the sentence.

Section 354: This section talks about the contents and the language of judgments. Its sub-section 3 directs the judges to specifically mention the “special reasons” for awarding a death sentence. This implies that the sentence should be awarded in extremely exceptional cases and that the exceptionality of the crime should be specified. This automatically gives primary preference to life imprisonment. In Machhi Singh case the court had provided with broad outlines for those special reasons.

Sub-section 5 states that “When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.” This section has fixated the method of death sentence as hanging. The words “till he is dead” are mentioned to make sure that the execution of the sentence does not get cancelled due to a technical error, for example: breaking of the rope. The mode of execution set by this has been challenged as inhumane, barbaric, unjust, degrading, etc in the Deena Dayal<sup>12</sup> case. The court upheld that in comparison with other methods of execution like electrocution, gas chamber; hanging by the rope was the most humane and least painful method.

Section 416: According to this section, if it is found that the woman to whom death sentence was ordered, is pregnant, the High court shall postpone the execution of that sentence and if it finds it to be appropriate, it can commute the sentence to imprisonment for life.

The sections related with the procedure after the imposition of the sentence are 363(4), 366, 367(1), 370, 374(2), 379. Sections 413, 414, 415 and 416 deal with the execution of the death sentence.

## **JUVENILE OFFENDERS**

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India has a separate Juvenile Justice Board, which conducts trials of juvenile offenders. Children below the age of 18 years are considered as juveniles. According to it no juvenile can be rewarded death sentence even in heinous cases like murder, gang rape, acid attack, etc. This topic had sparked many controversies as the nation was divided into two sects in regard to death sentence for the juvenile offender. During the trial, his age was declared as 17 years and six months old on the day of commitment of the crime, relying on his birth certificate. Many people had stood up for him and asked for him to be spared from death sentence, while the others strongly advocated that he should be hanged with the others as in spite of his age, he had actively taken part in the commitment of the crime. The JJB gave him the maximum punishment, i.e. three years imprisonment in a reform facility.

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<sup>12</sup> Deena vs. Union of India, (1983) 4 SSC 645

## EXECUTION OF DEATH SENTENCE IN INDIA

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The numbers of actual execution of death sentence in India varies from report to report by various sources. Although numerous sentences have been ordered, but only a handful of them have been executed. Most of them were commuted to life imprisonment by the courts themselves or by the President of India.

The first and the only woman to be executed by India was Rattan Bai Jain, in the year of 1955. She was charged with murder of three children. Since then, there are two other women Seema Gavit and Renuka Shinde, whose mercy plea has been rejected by the President.

Gowri Shankar (Auto Shankar) along with his two associates was hanged in 1995 for murders. Ajmal Kasab in 2012, Afzal Guru in 2013 and Yakub Memon in 2015 were hanged based on terrorism charges. In 2004, Dhananjay Chatterjee was hanged for murder and rape. Most recent hanging was carried out on 20<sup>th</sup> march 2020, four people Akshay Thakur, Vinay Sharma, Pawan Gupta and Mukesh Singh accused of gruesome gang rape and murder in the popular Nirbhaya case were hanged together at the Tihar Prison Complex, New Delhi.

## ABOLISHMENT WORLDWIDE

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Since most of the nations have adopted democracy and people get to enjoy their human rights, there have been numerous protests and debates arranged on international levels regarding the issue of death sentence. To be protected from the exploitation by the authorities, people have begun raising their voices and fight for their rights. The role played by United Nations in abolishing death sentence had a huge impact on many countries, resulting in ban on death sentence in those countries. It has time to time urged all the countries to abolish death sentence in a non-binding manner. Even the International Criminal Court does not have any power to impose a death sentence, as the highest level of punishment which it is authorized to give is life imprisonment.

On the basis of abolishment, the countries have been divided into four categories:

Abolitionist: countries which have completely abolished the use of death sentence.

Abolitionist except for crimes committed under exceptional circumstances: countries which have abolished death sentence for minor crimes but reserved it for exceptionally major crimes.

Abolitionist in practice: countries which have not abolished death sentence but have not used it for a really long time.

Retentionist: countries which retained death sentence and are practicing it.

According to Amnesty there are 106 abolitionist countries; 7 abolitionist countries except for crimes committed under exceptional circumstances; 29 abolitionist in practice countries and 56

retentionist countries.<sup>13</sup> Countries like China, Iran, Saudi Arabia, Iraq, U.S.A., Pakistan, etc have retained the use of death sentence and are practicing it.

Some of the abolitionist countries are Belarus, Portugal, Morocco, Sri Lanka, Mongolia, Myanmar, Zambia, etc.

## **CRITICISM**

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One of the major drawbacks of capital punishment is that once executed, it can never be rectified. It is argued that even after following the established procedure and taking every precaution, there can be a very small room for mistake. This does not mean that the Indian judicial system is not reliable but simply means that the judges being human beings are capable of committing a mistake. Once a person is executed, it is simply impossible to bring him back. There have been few general cases where the courts have accepted their mistakes and rectified it, even if the innocence was proved years later; this alludes that there is a possibility that the people who are supposed to be executed are innocent in reality. Due to this drawback people have protested against death sentence and have given their preference to life imprisonment.

Many people believe that capital punishment encourages the culture of violence. To execute a person charged with murder, means taking one more life, for a life, which has already been ended. It is said that no one has a right to end someone's life, and by executing people the state actually becomes a killer itself. According to sec 309 of IPC, the person who attempts suicide is liable to simple imprisonment or fine or both. This implies that it is illegal for the person himself to end his life. This raises an important question that if a person is himself not allowed to end his life then how can the state be given power to end someone else's life.

## **ACCLAMATION**

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The concept of death sentence has been in practice since the earliest eras. It has always been treated as a serious and strict mode of punishment, due to which many people believe it to be a medium of ensuring that law punishes its offenders. This was observed in the Nirbhaya gang rape case, when many people expressed their satisfaction and belief in the judicial system after the accused were jointly hanged. As a loss of life can never be truly compensated, people believe that death sentence provides the best compensation in case of victim's death. It is said that a person who snatches from someone their right to life, deserves to get their right snatched away as well. This theory is accepted as fair, reasonable and justified. An idiom to support this theory is "You reap what you sow".

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<sup>13</sup> <https://www.bbc.com/news/world-45835584>

It is believed that the execution of a death sentence creates a sense fear in the minds of people, which results in them abstaining from committing such offences, which may help in decreasing the occurrence of crimes. Citizens have always shown their support for death sentence awarded to terrorists, as it not only provides justice but also sends a strong message to the enemy countries that India will not quietly watch them exploiting our homeland.

## **CONCLUSION**

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Death sentence has been; is and will always be a controversial topic. Depending on the nature of crimes being committed, people will always have diversified opinions. India being a developing nation, has been witnessing an increase in the number of serious crimes like murder, rape, terrorism, acid attack, military crimes, etc. If the country does not create a stricter sense of discipline in its people, especially in regards of committing crimes, then it would just result in increase in number of crimes at an alarming rate. Courts order a capital punishment only when the accused have been proven guilty beyond any doubts. The retention of capital punishment in India is justified and only adopted in “rarest of rare cases”.