



## RETHINKING OF THE NEED OF CAPITAL PUNISHMENT IN INDIA

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### **Abstract**

Ever since the evolution of civilization, there have been shreds of evidence of methods of punishment used to inflict the pain in human body, but that pain is really reformatory is still in question, way back in 1981 in the case of **Bachan Singh Vs. State Of Punjab**, the apex court of India upheld the constitutionality of the death penalty, however it has to pass the test of "rarest of the rare case". Whether it is article 21 of the constitution of India or article 6 of the ICCPR should not be in favour of death penalty. This paper tries to testify the fact of entwines of need of capital punishment and social harmony and integrity. This paper brings out the effect of capital punishment and tries to critically analyse the concept of capital punishment in Indian context and globally as well.

### **KEY WORDS:**

Article 21 of the constitution of India, Article 6 of the ICCPR, social harmony and integrity, execution of capital punishment.

### **1. Introduction**

If we talk about the notion capital punishment so it hasn't been defined under Indian penal code, however IPC provides for some specific form of punishments. In general sense punishment means infliction of pain by judicial authority through due process of law

for anything wrong done by the offender. Capital punishment refers to the sentence of death for a serious crime and is often called the **Death Penalty**. All of these **Punishments** are imposed, by judicial authority, to try and deter individuals from committing crimes for the first time or for repeating them.<sup>1</sup> The notion of capital punishment is very old concept, it was also recognized in ancient India. Basically, there were four major kind of punishments prevailed in ancient India which were capital punishment, corporal punishment, social punishment and financial punishment. If we go through the execution methods of capital punishment (death penalty) so it was unlike modern method. Mainly there were four methods to execute death penalty, which are following: throw under the leg of elephants, construct into wall, pillory and stoning. It may be said that punishing offender with death penalty is not only purpose of capital punishment but also to maintain the peace and social harmony.<sup>2</sup>

According to the NCB report Acquittal rate with respect to death penalty in India is more than 93% and since last decade 1304 people were convicted for the offences punishable with death penalty, but only four have been executed. Now question arises whether the goal of eradicating heinous crime through imposition of death penalty is a unachievable goal, if it is then death penalty makes no sense. Sometimes, out of political pressure some major legislation are introduced to deal with heinous crime, but they never achieve the desired goal reason lack of rationality and strategy for its implementation for instance, POCSO Act, 2012, which couldn't be implemented in a expected manner. doesn't it

<sup>1</sup> Black law dictionary

<sup>2</sup> <https://shodhganga.inflibnet.ac.in/bitstream>



seem, for the state, imposing death penalty is easier than reforming a rapist because reformation is an exhaustive process requires time and patience. We are the part of a civilized society where punishment is designed to prevent the crime, and if they are failed to do so, should be ceased to function.

## 2. Legal provisions regarding capital punishment

Since we know that country like India packed with diversity, and still struggling for development in such developing phase; complete suppression on criminal activities are mandatory. In keeping mind such thing India has retained capital punishment for some heinous crime.<sup>3</sup> Under the Indian penal code, there are following offence in which death penalty may be awarded: -

- Under section 121, waging war against the government of India.
- Under the section 132, abetment of mutiny.
- Under the section 194, for giving or fabrication false evidence upon which an innocent person suffers death.
- Murder under section 302.
- If someone is murder convict under the section 303, which has been declared as unconstitutional in the case of Mithu v/s state of Punjab.<sup>4</sup>
- Under section 305 for abetment of suicide of a minor or an insane or an intoxicated person.
- If the hurt is caused under section 307, a person who is under sentence

of life imprisonment attempt to murder.

- Under section 364A for kidnapping for ransom etc.
- Under section 396, In the case of dacoity with murder.
- In the situation, where abettor or conspirator of any such offences punishable with death penalty and that offence is actually committed in consequences of that abetment.<sup>5</sup>

The criminal law (Amendment) Act, 2013 brought about the following offences under Indian penal code in which death penalty may be awarded by the court: -

- Under section 376A, punishment for rape resulting in death or permanent vegetative state.
- Under section 376E, punishment for repeat offenders of rape.

Apart from Indian penal code, there are some other special statute for instance Armed forces Act, NDPS Act, 1985, Arms Act, 1959, Commission of Sati Act, 1987 and under the Terrorist Acts, etc.<sup>6</sup>

If we talk about the number of people, who have been executed since independence seems to be matter of disputes; official government statics claiming that only 52 people have been executed, however, research by the people's union for civil liberties(PUCL) shows that actual execution is much higher, which near about 1422 in the decade from 1953 to 1963 alone.<sup>7</sup> A study submitted by national law university, Delhi on death row convicts since 2000 has found

<sup>3</sup> Majumder, Sanjoy. "India and the death penalty." BBC News 4 August 2005.

<sup>4</sup> AIR 1983 SC 473

<sup>5</sup> Indian Penal Code, 1860.

<sup>6</sup> Ibid 3.

<sup>7</sup> "Number of executions much higher than 52." *Times of India*. 10 March 2005.



that 1617 convicts sentenced for death penalty by the trial courts in India in which capital punishment was confirmed in only 71 cases.<sup>8</sup>

In December 2007, united nation general assembly calling for a moratorium on the capital punishment( death penalty), but India voted against the resolution. In November 2012, once again India voted against the draft resolution seeking ban on death penalty.<sup>9</sup>

### 3. Historical Relevance

If we go through the colonial era, death was recognised as the capital punishment in Indian penal code, 1860, which listed number of heinous crime. After independence in 1947, India retained death penalty. If we talk about the first hanging in independent India so it was of Nathuram Godse and Narayan Apte in the mahatma Gandhi assassination case on 15 November 1949.

Under the article 21 of the constitution of India, no person shall be deprived of his life expect procedure established by law.

### Bachan Singh Vs. State Of Punjab(1980)

In Bachan Singh Vs. State Of Punjab<sup>10</sup> the constitutional bench finding of supreme court of india made it very clear that death penalty can be imposed in **The Rarest Of Rare Case**. Judgment in this case was in row

with previous verdicts in **Jagmohan Singh Vs. State Of Uttar Pradesh(1973)**<sup>11</sup> and then in **Rajendra Prashad Vs. State Of Uttar Pradesh(1979)**.<sup>12</sup> The supreme court of India reached conclusion that death penalty should be imposed in the rarest of rare cases. while putting honour killing in the category of rarest of rare case, the court has suggested that death penalty extended to those found of committing crime of honour killing, which deserve to be a capital crime. The apex court also recommended death sentence to be imposed on police official, who commit cruelty in the name of encounter killing.<sup>13</sup>

### 4. Clemency In The Indian Constitution

Death sentence awarded by the session court must be confirmed by a high court to make it final. If it gets confirmed, the condemned convict has the option to appeal to the supreme court of India, and if the appeal petition is refused by the apex court then condemned person can submit mercy petition to the president of India and the governor of the state.<sup>14</sup>

### 5. Execution Of Death Sentence

The code of criminal procedure (1973) prescribe that the execution of death sentence is carried out by hanging by the neck till death or shooting under Arms Act.

<sup>8</sup> "'Number of executions much higher than 52.'" *Times of India*. 10 March 2005.

<sup>9</sup> "General Assembly GA/11331 , Sixty-seventh General Assembly Plenary 60th Meeting". 20 December 2012.

ANNEX XIII. Retrieved 30 July 2013.

<sup>10</sup> AIR 1980 SC 898, 1980 CriLJ 636, 1982 (1) SCALE 713, (1980) 2 SCC 684, 1983 1 SCR 145

<sup>11</sup> 1973 AIR 947, 1973 SCR (2) 541

<sup>12</sup> 1979 AIR 916, 1979 SCR (3) 78

<sup>13</sup> "Hang cops involved in fake encounters: Supreme Court".

NDTV.com. 8 August 2011. Retrieved 23 April 2013.

<sup>14</sup> Article 72 and 161 of the constitution of India



### 6. Critical Analysis

If we go through the India's history of death penalty in the last decade so we find Indian Judiciary sentenced 1303 people<sup>15</sup> to death, but only four have been executed till now, those were:

- **Dhananjay Chatterjee** (date of execution: august 14, 2014), was accused of raping and then murdering of 14 year old girl.
- **Mohammad Ajmal Amir Kasab** (date of execution: November 21, 2012), was accused of 26/11 attacks in Mumbai.
- **Afzal Guru** (date of execution: February 9, 2013), was responsible for the attack on Indian parliament.
- **Yakub Memon** (July 30, 2015), was responsible for 13 blasts in Mumbai in 1993.

#### 6.1 Why capital Punishment for rape should be abolished in India

Capital Punishment is one of the extreme forms of punishment which ultimately takes the life of offender. But when it comes to the case of rape, the scenario is different. Since the punishment to rape is very likely to be death sentence. Thus, it creates the distress to the life of victim in the following manner;

1. Firstly, the in India, in majority of the cases victims have to undergo the most brutal form of death. Whether it be **Nirbhaya case**, or be latest Unnao case where she was burnt alive, all the victims suffer to the extremist. This happens since the offender is aware that if they leave her, then she will complain, thus

leading to offender's death execution, so it does no good to the life and integrity of the women who is being raped. As even if the person who committed rape is given capital punishment cannot compels us to pretermitt the fact the victim is dead and any further will do no good to her anymore.

2. Secondly, India being a nation who follows the preventive and reformative theory of law offers multiple chances to the offender to run away from his dues by majorly giving him multiple chances to convert capital punishment to life time imprisonment. As according to the data in India nearly only minimum percent of convicts get executed to death punishment as supported in above mentioned data and others get it converted to life imprisonment. So, it actually appears like the black letter of law bracing the a mirage of hope to the victim's family for justice.
3. Thirdly, the punishment fails to serve the purpose of deterrence<sup>16</sup> and also deferred from the concept of retributive theory, which is also supported in 262rd Law commission report as;
 

***"the notion of 'an eye for an eye, tooth for a tooth' has no place in our constitutionally mediated criminal justice system. Capital punishment fails to achieve any constitutionally valid penological"***
4. Power of the State & Union government<sup>17</sup> further delays the process and in most of the cases are politicised<sup>18</sup> and thus making it a cold-blooded death of the criminal justice system in the nation.
5. As crime committed in India in most of the cases, the victims are being raped by their

<sup>15</sup> <https://www.indiatoday.in/education-today/gk-current-affairs/story/indias-history-of-capital-punishment-in-the-last-decade-285526-2015-07-30>, IndiaToday.in

<sup>16</sup> 262 Law Commission Report, supra note 35, at 169-170.

<sup>17</sup> Article 72 and Article 161 of the Constitution of India p

<sup>18</sup> 262 LCI Report, supra note 35, at 174.



known family member and in patriarchal society like India, it often provokes the accused to kill the victim since keeping her alive might leave him in distress with the societal pressure.<sup>19</sup>

So by the virtue of all the real life and practical problems faced by the victims, we would support the favour of discarding the concept of Capital Punishment in India.

### **6.2 Critical interpretation of theories of punishment:**

There are certain theories of punishment under which legitimacy of punishment is recognised, these theories are following:

- i. Retributive theory of punishment
- ii. Deterrent theory of punishment
- iii. Utility theory of punishment
- iv. Reformatory theory of punishment
- v. Preventive theory of punishment

However in India the following theories have been considered;

- Reformatory theory
- Preventive theory

### **REFORMATIVE THEORY**

As Gandhi said, "an eye for an eye turns the whole world blind." These words are the gist of reformatory theory of punishment. All theories of punishment are concerned with reformatory process of offender. The very objective of all these theories is nothing but the reformation of the convict through individual treatment. As the name suggests, reformatory theory is intended to reform or educate the culprit by himself/herself. A

culprit is punished for his own interest.<sup>20</sup> Various sides and approaches have supported this theory. In eyes of criminology, crime is seen as diseased. Reformatory theory tunes with the principle of criminology. Whether it is criminal anthropology or criminal sociology or psychoanalysis, they all support reformatory theory. This theory tends to change the criminal mentality and give an opportunity to the culprit to lead a life as civilized person. This theory throws critical light on all kinds of corporal punishment.<sup>21</sup>

### **PREVENTIVE THEORY**

As universally recognised, "prevention is always better than cure". This theory is interested in keeping the culprit away from a civilized society. According to this theory punishment is intended to send a message to the society at large that whatever has been done (a criminal act) should not be happened again. This theory also recognises death penalty and life imprisonment. This theory has been supported by many law thinkers and reformers because it has viewed penal law in humanized manner. Utilitarian mentality has also advocated the preventive remedies, which are intended to prevent crime.<sup>22</sup> Preventive methodology is suitable form of punishment reason being it has effective deterrent parameters. This theory supports the idea of capital punishment. In the context of India preventive theory is well recognised and under the operation as well.

### **7. Law Commission Of India And Death Penalty**

On 31<sup>st</sup> of August 2015, the law commission of India chaired by Justice A P Shah submitted

<sup>19</sup> Ibid 12.

<sup>20</sup> sue Rex & Michel Trony, "Reform and Punishment" Willan Publishing

<sup>21</sup> Bachan Singh v State Of Punjab; AIR 1980 SC 898

<sup>22</sup> Jeremy Bentham, op. cit., p 167.



its 262<sup>nd</sup> report on the issue of death penalty in India. The issue regarding death penalty was referred to the Law Commission by the apex court in **Santosh Kumar Satishbhushan Bariyar v. Maharashtra**,<sup>23</sup> and **Shankar Kisanrao Khade V. Maharashtra**<sup>24</sup>. The Commission recommended abolition of death penalty and concluded after studying the issue extensively that the death penalty does not serve the penological goal of deterrence any more than life imprisonment. In fact it fails to achieve any constitutionally valid penological goals.<sup>25</sup> However, it was law commission, in 1967 recommended that death penalty should be retained.<sup>26</sup>

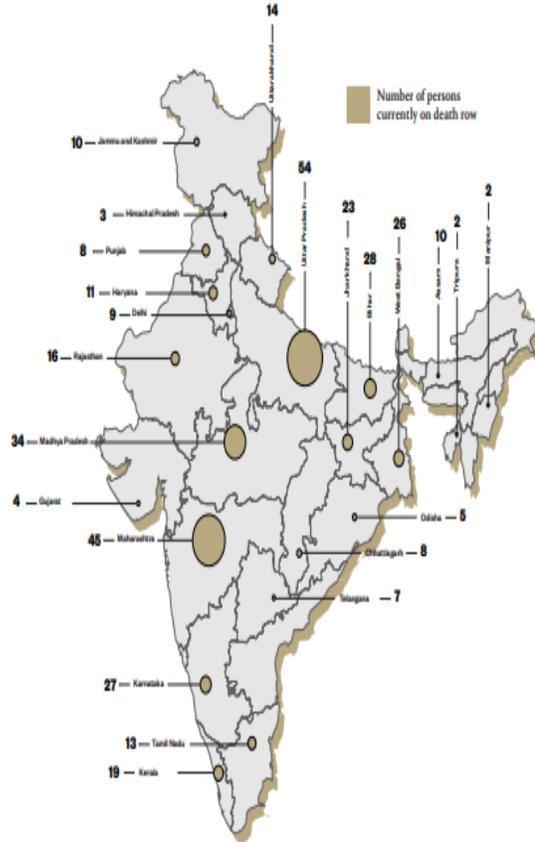
**8. Comprehensive 2019 Annual Statistics Report Regarding Capital Punishment In India Can Be Seen Here:**

As of 31<sup>st</sup> December, 2018 , total number of prisoners on death row were 426, and as on 31<sup>st</sup> December, 2019 they reduced to 378.<sup>27</sup>

STATE-WISE DISTRIBUTION OF PERSONS ON DEATH ROW

**378**

Total Persons on Death Row as on 31<sup>st</sup> December 2019



**Source: Project39A , NLU Delhi**

On the basis of this figure, it may be said that those who are on death row would go through lot of mental harassment because in India rarely convicted persons are executed. This fact may be justified by seeing the last year figure of death penalty:

<sup>23</sup> (2009) 6 SCC 498

<sup>24</sup> (2013) 5 SCC 546

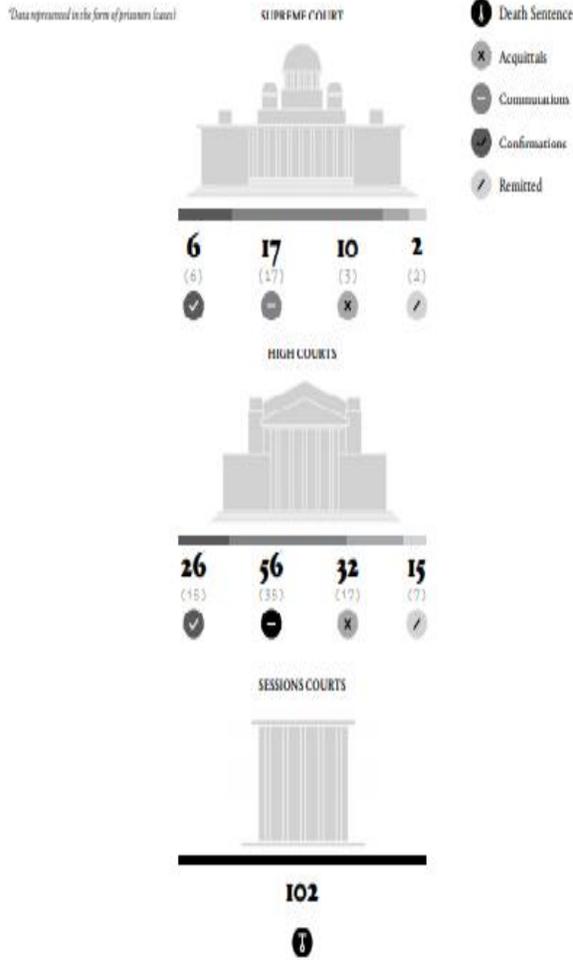
<sup>25</sup> <https://blog.sconline.com/post/2015/09/01/262-law-commission-report-on-death-penalty/>

<sup>26</sup> The 35<sup>th</sup> report of law commission on capital punishment, in 1967

<sup>27</sup> <https://www.project39a.com/annual-statistics>



**DEATH PENALTY CASES 2019**



12 death penalty case were heard in the supreme court in which 11 cases commuted to life imprisonment. In the case of **Channulal Verma Vs. State Of Chhattisgarh**, justice Kurian Joseph was of the opinion that death penalty should be reconsidered and he also shown the concern towards the constitutionality of the death penalty. Because of the high rate of crime, 2018 witnessed legislative expansion for instance, criminal law amendment Act, 2018 which came with the view that death sentence as possible punishment for rape of girls below 12 years and then amendment in the protection of children from sexual offence Act, 2012 in January 2019 which also came with death penalty in brutal manner with low the age of 18 years. There is following figure with respect to death penalty cases in 2018 given below:

**Figure 2.**

**Source of statistics : Project39A , NLU Delhi**

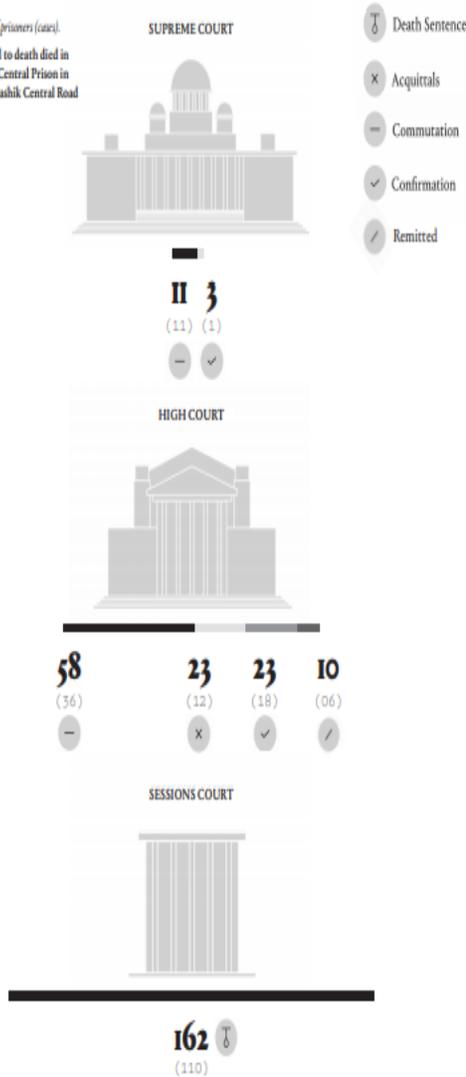
Previous statistics report of 2016, 2017 and 2018 regarding death penalty in India can be seen in figure given above.

If we go through the 2018 annual statistic report regarding death penalty in India so 2018 had seen the highest number of death sentence pronounced by trial courts of India.



# DEATH PENALTY CASES 2018

*"Data represented in form of prisoners (cases)."*  
 Two prisoners sentenced to death died in prison. One in Yerwada Central Prison in Pune and the other in Nashik Central Road Prison.



Source: Project39A , NLU Delhi

## 9. Imposition of death sentence by session courts under the criminal law amendment Act, 2018 in 2018:

Case Name	District, State	Provisions of Law under which death penalty has been imposed	Status in High Court
State of Madhya Pradesh v. Bhagirath alias Bhaggu	Sagar, Madhya Pradesh	Section 376AB IPC	Commuted (imprisonment for natural life)
State of Rajasthan v. Pintu	Alwar, Rajasthan	Section 376AB IPC	Commuted (20 years imprisonment)
State of Madhya Pradesh v. Jitendra Kushwaha	Gwalior, Madhya Pradesh	Section 376AB IPC and 302 IPC	Confirmed
State of Madhya Pradesh v. Rajkumar Kol	Katni, Madhya Pradesh	Section 376AB IPC	Commuted (20 years imprisonment)
State of Madhya Pradesh v. Mohammad Touhid	Chhatarpur, Madhya Pradesh	Section 376AB IPC	Commuted (imprisonment for natural life)
State of Madhya Pradesh v. Naresh	Sagar, Madhya Pradesh	Section 376AB IPC	Commuted (20 years imprisonment)
State of Madhya Pradesh v. Irfan & Asif	Mandsaur, Madhya Pradesh	Section 376DB IPC	Pending
State of Rajasthan v. Vinod Kumar	Jhunjhuna, Rajasthan	Section 376AB IPC	Commuted (20 years imprisonment)
State of Madhya Pradesh v. Mahendra Singh	Satna, Madhya Pradesh	Section 376AB IPC	Pending
State of Madhya Pradesh v. Jitendra Utikey	Raisen, Madhya Pradesh	Section 376AB IPC and 302 IPC	Pending
State of Madhya Pradesh v. Waris Khan	Jaora, Madhya Pradesh	Section 376AB IPC and 302 IPC	Pending
State of Madhya Pradesh v. Anand Kushwaha	Jabalpur, Madhya Pradesh	Section 376AB IPC and 302 IPC	Pending



Source of the statistics : Project39A , NLU Delhi

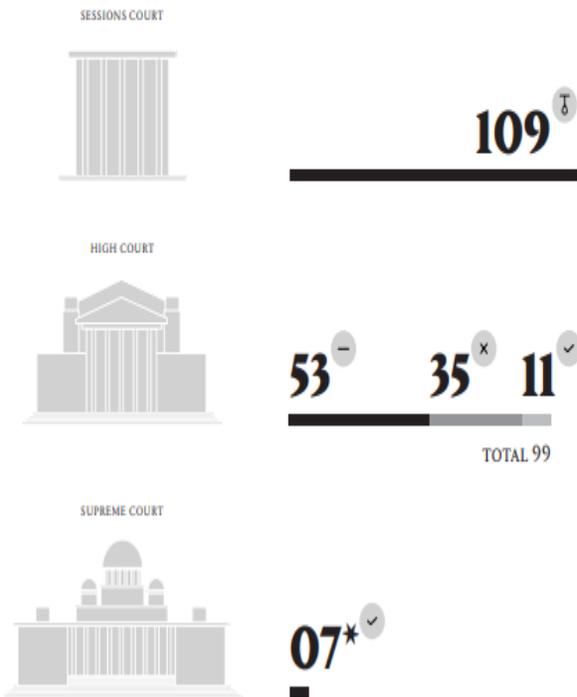
Source of the statistics : Project39A , NLU Delhi

**10.2017 Annual Statistics Report Of Death Penalty In India:**

**11. 2016 Annual Statistics Report Of Death Penalty In India:**

DEATH PENALTY CASES IN 2017

- Death Sentence
- Commutation
- Acquittals
- Confirmation



\*Out of the 7 confirmations, 1 was a criminal appeal with 4 prisoners and 2 were review petitions with 1 prisoner. Supreme Court did not commute or acquit any prisoners.

Statistics in 2016

The numbers below account for death sentences awarded by sessions courts, and acquittals and commutations by appellate courts. Each number in this Report represents a person and not a case, unless otherwise specified. Statistics for the Supreme Court pertain to criminal appeals only. A more detailed analysis of the Supreme Court's engagement with the death penalty in 2016 is reflected later in this Report.

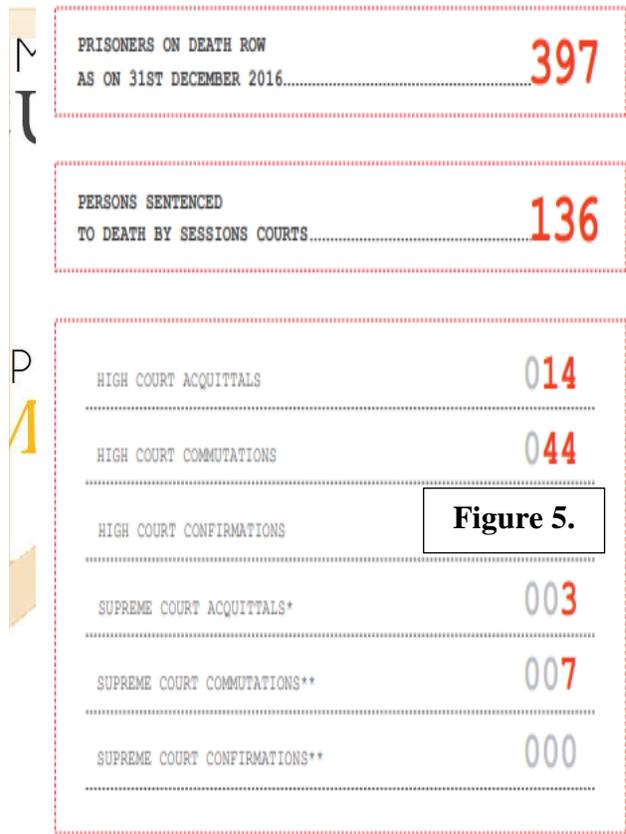


Figure 5.

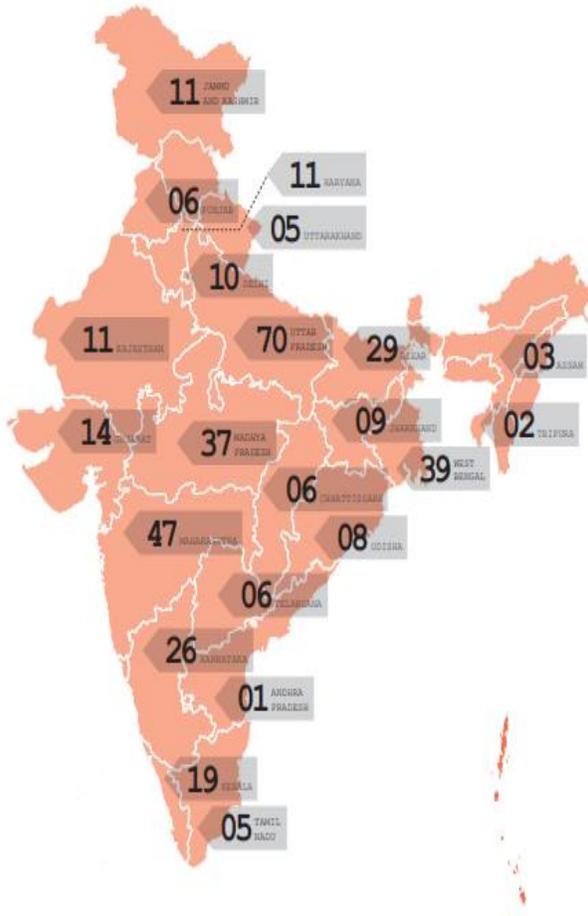
\*This refers to persons acquitted of charges attracting the death penalty. However, two of these appellants were convicted on other charges.

\*\*These pertain to criminal appeals only. While the Supreme Court did not confirm any death sentence at the criminal appeal stage, there was one confirmation (BA Umesh vs. State of Karnataka) at the review petition stage.



Source of the statistics: Project39A , NLU Delhi

11.1 State Wise Distribution Of Prisoners On Death Row As On 31 December 2016:



- ▶ 11 prisoners have not been classified state-wise as they were sentenced to death under the Army Act, 1950. The status of these cases are unknown.
- ▶ No information was forthcoming from the following states and union territories: Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Goa, Puducherry, Dadra & Nagar Haveli, Daman & Diu, Lakshadweep and Andaman & Nicobar Islands.

Source of the statistics : Project39A , NLU, Delhi

12. International Provisions

If we talk about the death penalty on international forum so it is not prohibited by the international covenant on civil and political rights (ICCPR), which has also been ratified by India or any other international treaty, however more than 140 nation have already abolished the practice of death penalty.<sup>28</sup> **Article 6 of ICCPR states:**<sup>29</sup>

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

**Figure 7.**

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

<sup>28</sup> 262<sup>nd</sup> Law commission report, 2015

<sup>29</sup> Article 6 of ICCPR



5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. **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.**

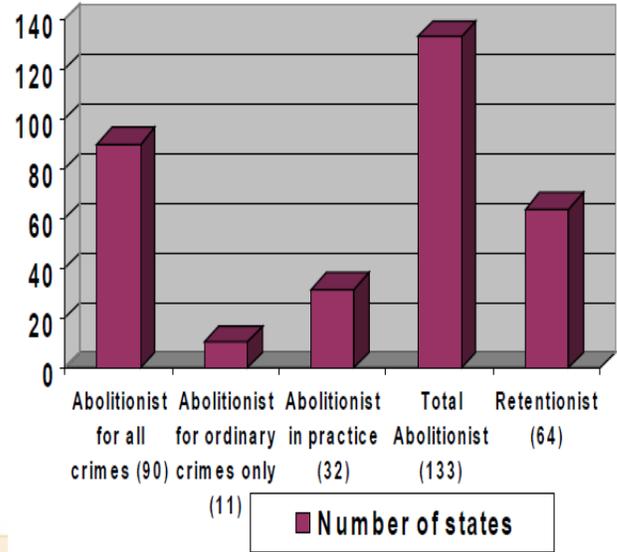
Even though Article 6 of the ICCPR permits the use of the death penalty some circumstances, but under article 6(6) of ICCPR it is directed that “nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”<sup>30</sup>

So it can be seen under the article that there are number of strict limitation on the process of imposition of death penalty, include the following:

- Right to fair trial.
- Death penalty is limited to only the most heinous crime.
- If ICCPR’s rights have been violated then there is prohibition on death penalty.
- No execution of pregnant women.
- No execution if convicted person was below the age 18 at the time of commencement of crime.

In the case of **Soering V United Kingdom And Germany**<sup>31</sup> the European court of human right had found that death row situation in the united state constituted cruel or inhuman and ill treatment.

**12.1 Statistical Data On Death Penalty By Country:**



Source Of The Statistics: Amnesty International

On the basis of above statistics, it is quite clear that the trend towards the death penalty or any other kind of capital punishment is becoming unacceptable in majority of the nations. The numbers show here that the abolition of death penalty is clear throughout the world. After viewing these data, it is clear that 67.5% of countries are abolitionist in which 45% are abolitionist for all crimes.<sup>32</sup>

**13. Comments And Suggestions:**

- If we go through the human history, whether it is ancient time or middle age or modern time, capital punishments have always been there, but the fundamental purpose of imposing capital punishment hasn’t been fulfilled yet, which is to deter people from committing crime. So it may be suggested that psychological

<sup>30</sup>

<https://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIIndex.aspx>

<sup>31</sup> 7 July 1989 Series A Vol 16111EHRR 439

<sup>32</sup> Amnesty international, report on death penalty.



and reformative methods should be used rather than imposing capital punishment.

- Since we know that execution is irrevocable punishment so it is very difficult to eliminate the risk of executing some innocent person. This reason also suggest that abolition of death penalty is in favour of humanity.
- Sometimes it is used to eliminate political opponents for instance, in **Iran and Sudan** the authorities use it for the same.
- We know that human rights are guaranteed for human beings not for demons or felony, so they should be punished, but death penalty can't be solution to any violence if it would have been then crime from society would have vanished till now.
- Capital punishment can't be permanent solution of controlling crime if it had been then the convicted person in "**Nirbhaya Rape Case**") would not have said that "A decent girl won't roam around at 9 o'clock at night".<sup>33</sup> So I am of the opinion that the reformation methods are far better than imposing capital punishment.

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<sup>33</sup> <https://www.washingtonpost.com/>, by Miriam Berger



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Article 6 of ICCPR

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- 1973 AIR 947, 1973 SCR (2) 541
- 1979 AIR 916, 1979 SCR (3) 78
- (2009) 6 SCC 498
- (2013) 5 SCC 546

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