



## An Abhorrent And Unjust Device

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(This editorial is based on the article "[An Abhorrent And Unjust Device](#)" which appeared in "The Hindu" on 15<sup>th</sup> March 2019. The article talks about the morality of retaining death penalty.)

Recently Supreme Court delivered verdicts in three different death penalty cases. In two of those the court entirely exonerated the suspects, while in the third it not only found the accused guilty of murder, but also deserving of capital punishment.

The judgments typify the deep confusion that pervades India's criminal justice system.

The cases demonstrate how arbitrary the death penalty is, how its application is mired by a belief in conflicting values, and how the fundamental requirement of precision in criminal law has been replaced by a rhetorical cry for avenging crime by invoking the "collective conscience" of society.

### Death Penalty in India

Death penalty or capital punishment is the highest degree of punishment that can be awarded to an individual under any penal law in force in any part of the world.

**The Indian Penal Code, 1860 provides for the provision of a death sentence for various offenses like criminal conspiracy, murder, waging war against the nation, dacoity etc. Various other legislations like Unlawful Activities Prevention Act, 1967 also provides for the death penalty.**

Under **Article 72, the Constitution has created a provision for clemency of capital punishment.** Under this Article, the President of India has the power to grant pardon or commute or remit the death sentence in certain cases.

**(Article 161 provides for powers of the Governor of the State to grant clemency, however he cannot grant pardon to the person who is assigned capital punishment)**

Also, when a Sessions Court awards the capital punishment, it must be confirmed by the High Court of the particular state, and only then the execution can be carried out.

India also has provision of assigning death punishment to anyone convicted of raping children under the age of 12.

## Loopholes in Judicial System

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While India follows the doctrine of death penalty in only rarest of rare cases it is often affected by rhetorical cry for avenging crime by invoking the “collective conscience” of society.

Judiciary is riddled with hundreds of cases where it has assigned the highest form of punishment possible in Indian Penal Code and backtracked from its verdict, reflecting the error in judgement, lack of reliable evidence and corruption prevalent in police department.

**Our criminal justice system has a very low rate of conviction.** And at the same time, nearly 75 per cent of our prison population is made of under trials that spend long periods in prison without ever being found guilty.

There remains tremendous pressure on the police and prosecutors to produce convictions using methods that are colonial relics creating context to manufacture torture-based evidence, plant evidence, engage in prosecutorial misconduct and to routinely suppress exculpatory evidence.

**If the quality of the investigation, trials, and the judgments in the recent cases are anything to go by, it is safe to assume that a large number of such death penalties have been awarded by the courts in cases with grievously faulty trials.**

**As the report by National Law University, lower judiciary is perversely enthusiastic about death penalties** despite the evident failings in the prosecution’s case or the ability of the defendant to mount a proper defence.

The torment suffered by convicts as a result of the endless delays and flawed decision-making in a broken criminal justice system is rarely remedied thereby creating more criminals.

## The Voices Supporting the Demise of Capital Punishment

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- The Law Commission of India has recommended that capital punishment should go citing multiple examples such as its futility in acting as a deterrent which has been proved by multiple researches. States that employ capital punishment have had drastically higher rates of homicide in comparison with those States where the death penalty is no longer engaged.

- There are no clear guidelines as to who shall be given capital punishment giving ample scope for arbitrary judgement; administration of capital punishment is also vulnerable to misapplication.
- Mercy powers have failed to act as the final safeguard against miscarriage of justice; long delays in trials and appeals and final execution is almost torture and does more harm by creating anti social thinking in the criminals.
- **According to a the Death Penalty India Report (DPIR), most of the prisoners on death row are economically vulnerable, from religious minorities, and are hardly literate, making them victims more of circumstances than of their acts.**
- Moreover India is in a minority on death penalty as 140 countries have abolished.

## Supporters of Capital Punishment

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- **Its constitutionality has not only been upheld in India but also in liberal democracies like that of the U.S.** Therefore, the retention of the death penalty is not a reflection of “uncivilized” polity in theocratic state.
- As noted by the Law Commission itself, cases of violent terror are constant reminders of the need to protect national stability by ensuring appropriate responses to such actions, and the death penalty forms part of the national response.
- Many people support capital punishment as punishment cannot be judged by its impact on criminals but by its impact on those who are still innocent.
- Those who defend the death penalty often do it on the basis of retributive justice. It determines that there are certain acts which the society so essentially detest that they justify the taking of the most crucial of rights – the right to life.

## Challenging the Ghost of Capital Punishment

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In assigning the highest punishment it is prudent to secure the input of the jail superintendent – whether he gives a clean chit of good behaviour to the death row inmate if so, courts should refrain from imposing the death penalty, in the interest of rehabilitative justice.

Another safeguard is to ensure that the prosecution meets its burden of proving that the convict is in fact irredeemable. There should also be a mandatory psychiatric evaluation of the convict.

Defence cases are often riddled with procedural and due process lapse. A retired justice of SC has suggested that the disadvantaged must not be further oppressed by procedural irregularities. He argues that a death penalty conviction should be set aside if such irregularities come to light..

The death penalty should be less about the victim of an incident and more about the social ramifications of the crime.

## Way Forward

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This has been established beyond doubt that irrational criteria are applied to arrive at dangerously irreversible decisions, the law's application is made all the more worse by invariably imposing these standards on the most vulnerable members of society.

It is therefore very important to reduce arbitrariness and in keeping view of the error proneness of the judiciary the step of capital punishment should be taken with highest degree of caution.

The Constitution promises to every person equality before the law. But as it appears capital punishment renders this pledge hollow. It legalises a form of violence, and confuses the distinction between justice and vengeance. Thus necessitating that justice does not become the moralised form of revenge.